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Sarah E. Tilstra

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PROSECUTING INTERNATIONAL TERRORISTS: THE ABU SAYYAF ATTACKS AND THE BALI BOMBING

Sarah E. Tilstra[†]

Abstract: In May 2001, three Americans were kidnapped and held hostage by members of Abu Sayyaf, a guerrilla group attempting to establish an Islamic state in the southern Philippines. Two of those Americans were later killed. In October 2002, a nightclub on the Indonesian resort island of Bali was destroyed in an explosion, killing over 200 people, 88 of whom were Australians. Members of the Islamic group Jemaah Islamiyah are suspected of masterminding the attack. The Abu Sayyaf suspects have yet to be caught, but Indonesia is preparing to prosecute some of the Bali bombing suspects beginning in May 2003.

Using these two attacks as illustrations, this Comment explores the various options available for prosecution of individuals suspected of committing terrorist attacks: extradition, home prosecution, abduction or seizure, United Nations sanctions, the International Court of Justice, and the International Criminal Court. The viability of each option with respect to international terrorism situations depends on certain factors weighing in favor and against the use of each option. These factors create a multi-step balancing test to determine the best method of prosecution for suspects in future, similar attacks. The balancing test is then applied to the Abu Sayyaf and Bali situations.

This Comment concludes that in situations similar to the Abu Sayyaf attacks, home prosecution is best for several reasons: the relationship between the countries involved, the relative strength of the Philippine judiciary, and the relatively low global interest in the crime. However, the best forum for prosecution of suspects involved in attacks similar to the Bali bombing is the International Criminal Court. This conclusion is based on the high level of international interest, the apparent instability of the Indonesian justice system, and the fact that the attacks are systematically directed towards a specific group of people.

I. INTRODUCTION

In May 2001, members of Abu Sayyaf, an Islamic group fighting to establish an Islamic state on the southern Philippine island of Mindanao,¹ kidnapped seventeen Filipinos and three Americans from a resort in the Philippines.² One of the Americans, Guillermo Sobero, was beheaded by Abu Sayyaf members in June 2001.³ The other two Americans, missionaries

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¹ The International Policy Institute for Counter-Terrorism, *Abu Sayyaf Group (ASG)*, at http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=3 (last visited Apr. 29, 2003) [hereinafter Policy Institute for Counter-Terrorism].

² U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, 88 (2002), available at <http://www.state.gov/documents/organization/10319.pdf> (last visited Apr. 29, 2003) [hereinafter PATTERNS OF GLOBAL TERRORISM].

³ *Guerillas Confirm Death*, DAILY TELEGRAPH (Sydney), June 27, 2001, at 41, available at LEXIS, News and Business, Major World Publications File.

Martin and Gracia Burnham, were held hostage until June 2002, when Martin Burnham and others were killed in a military rescue operation.⁴ Only Gracia Burnham survived.⁵

On October 12, 2002, a nightclub on the Indonesian island of Bali was destroyed by a bomb, killing 202 people, 88 of whom were Australians.⁶ Jemaah Islamiyah, an Indonesian Islamist movement fighting to establish an Islamic state encompassing Indonesia, Malaysia, Singapore, and the southern Philippines,⁷ is suspected of planning and executing the attack.⁸

Since September 11, 2001, the United States and other western countries have strengthened security at home.⁹ However, as these two attacks indicate, citizens of western countries are also in danger of attacks leveled against them, and western interests,¹⁰ abroad. In the last several years, there have been many such attacks on western interests, making these attacks equally worthy of attention.¹¹

Terrorist attacks like these present jurisdictional issues regarding where and by whom suspects should be tried. The suspects are nationals of the states where the attacks occurred,¹² but the victims of the attacks are

⁴ For a newspaper article describing the event, see Richard C. Paddock & Al Jacinto, *U.S. Hostage Dies in Shootout: Philippine Troops Rescue Wife from Rebels*, CHI. TRIB., June 8, 2002, at 1, available at LEXIS, News and Business, Major World Publications File.

⁵ *Id.*

⁶ Darren Goodsir, *Bali Suspects May Face Separate Trials*, SYDNEY MORNING HERALD, Feb. 24, 2003, available at LEXIS, News and Business, Major World Publications File.

⁷ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 122.

⁸ See, e.g., *Jakarta Arrests 'Singapore JI Head'*, CNN ONLINE, Feb. 4, 2003, at <http://www.cnn.com/2003/WORLD/asiapcf/southeast/02/03/indonesia.singapore/index.html>.

⁹ On December 14, 2001, the United Kingdom enacted the Anti-Terrorism, Crime and Security Act 2001. Anti-Terrorism, Crime and Security Act 2001, c. 24 (Eng.), available at <http://www.hmso.gov.uk/acts/acts2001/20010024.htm> (last visited Apr. 29, 2003). The explanatory notes from the act indicate that it was passed in light of the events of September 11, 2001. Explanatory Notes to Anti-Terrorism, Crime and Security Act 2001, c. 24 (Eng.) (prepared Feb. 20, 2002), available at <http://www.hmso.gov.uk/acts/en/2001en24.htm> (last visited Apr. 29, 2003). Australia introduced a package of counter-terrorism legislation in March 2002, including the Security Legislation Amendment (Terrorism) Act 2002, No. 65, available at <http://scaletext.law.gov.au/html/comact/11/6499/top.htm> (last visited Apr. 29, 2003).

¹⁰ "Western interests" is used to mean westerners themselves, buildings or other fixtures built by or for westerners, places westerners tend to frequent, etc. Attacks on western interests can occur when westerners are the intended victims, regardless of whether they were the actual victims of the attack.

¹¹ Some examples of these attacks include: the al-Qaida attacks on the *U.S.S. Cole* in Yemen in 2000 and on the U.S. embassies in Kenya and Tanzania in 1998; the Islamic Movement of Uzbekistan's kidnapping of four U.S. citizens in 2000; the Revolutionary Organization 17 November's murder of a British official in 2000; the Revolutionary Nuclei's three bombings of U.S. interests in Greece in 1999 and 2000; the Revolutionary People's Liberation Party/Front attempted attack on a U.S. consulate in Turkey; the Al-Jihad attempted attack on the U.S. embassy in Albania in 1998; and the Al-Gama'a al-Islamiyya killings of fifty-eight foreign tourists in Egypt in 1997. See PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at app. B.

¹² Although some of the suspects of the Bali bombing are Malaysian, this Comment focuses solely on the Indonesian suspects.

individuals of another nationality. In these cases, more than one state has an interest in seeing suspects of such attacks brought to justice. Several different options are available for resolving potential conflicts: extradition, home prosecution,¹³ abduction or seizure, United Nations (“UN”) sanctions, the International Court of Justice (“ICJ”), or the International Criminal Court (“ICC”).

This Comment uses the Abu Sayyaf and Bali attacks as vehicles to examine the alternatives for prosecuting suspects of terrorist attacks who have victimized nationals of another state on the suspects’ home soil. Although the attacks have some similarities, there are significant differences between their circumstances and the relationships between the various countries involved. It is these differences that make such an analysis useful. Using these two attacks to assess the benefits and drawbacks of using each prosecution method yields some essential factors that must be considered. These factors include: strength and independence of the home country’s judiciary, global interest in the crime, the relationship between the countries involved, the interest of the requesting state, and the nature of the crime. These factors help articulate a test for determining under what circumstances different prosecution options should be applied to future attacks. This Comment concludes that home prosecution is the best option for attacks similar to the Abu Sayyaf attacks, while prosecution in the ICC is preferable for attacks similar to the Bali bombing.

Part II of this Comment gives a background of Abu Sayyaf and Jemaah Islamiyah, outlining the recent attacks and explaining why these two examples of international terrorism are useful to illustrate prospective options for prosecution. After briefly summarizing relevant extradition law, Part III examines the application of extradition to the two situations, and explores situations in which extradition would be a viable and desirable option. Part IV examines the option of home prosecution and assesses the factors that make home prosecution desirable. Part V examines abduction or seizure of the terrorist by the western country as a possible alternative and explores the desirability of choosing this route. Part VI looks at the possibility of intervention and/or trial by an independent body as a solution. Specifically, it addresses UN sanctions, the ICJ, and the ICC as possible options, and discusses when those options would be desirable. Part VII articulates a multi-factor test for analyzing how to prosecute suspects of similar crimes, and Part VIII applies that test to the Abu Sayyaf and Bali

¹³ Home prosecution occurs when a suspect is prosecuted in his home country, the place of the attacks.

situations. Application of this test to the Abu Sayyaf and Bali situations shows that home prosecution is the best option for attacks similar to the Abu Sayyaf attacks, while prosecution in the ICC is preferable for attacks similar to the Bali bombing.

II. INTERNATIONAL TERRORISM AND TWO RECENT ATTACKS

In order to properly frame the recent Abu Sayyaf and Bali attacks, it is necessary to define international terrorism. Such a definition is problematic because the term is broad and imprecise,¹⁴ leading to the cliché “one man’s terrorist is another man’s freedom fighter.”¹⁵ The United States Code attempts to define international terrorism. Furthermore, the two recent attacks by Abu Sayyaf and Jemaah Islamiyah represent examples.

A. *International Terrorism*

The United States Code defines international terrorism as:

activities that - (1) involve violent acts or acts dangerous to human life . . . ; (2) appear to be intended - (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States¹⁶

Abu Sayyaf and Jemaah Islamiyah are groups that fit into this definition. They represent examples of international terrorism where independent, usually religious, groups are targeting western interests in the group’s home country.¹⁷ As a result of these attacks, September 11, and other recent terrorist acts of a similar nature, international concern, particularly in western countries, is piqued. Because of this heightened concern, an exploration of the prosecutorial options in the Abu Sayyaf and Jemaah Islamiyah attacks is a useful exercise for potential future application.

¹⁴ See Louis Rene Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT’L L. 239, 239-40 (1995).

¹⁵ Brian M. Jenkins, *International Terrorism: The Other World War*, in INTERNATIONAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS 29 (Charles W. Kegley, Jr. ed., 1990).

¹⁶ 50 U.S.C. § 1801(c) (2003).

¹⁷ See *supra* note 11.

B. *The Abu Sayyaf Attack*

Abu Sayyaf is the most violent of the Islamic separatist groups in the southern Philippines.¹⁸ This group, whose name means “bearer of the sword” in Arabic,¹⁹ is involved in kidnapping for ransom, bombings, assassinations, and extortion,²⁰ and has been linked with al-Qaida.²¹ The group mainly operates in the southern Philippines, but has also kidnapped individuals from Malaysia.²² Abu Sayyaf has been committing terrorist attacks since 1991,²³ including an attack on a Christian town in 1995 that left fifty-three dead,²⁴ and two separate kidnappings in 2000 of over twenty-five individuals.²⁵ The U.S. Department of State has questioned Abu Sayyaf’s secessionist motives, claiming that the group seems to be using terrorism primarily for financial gain.²⁶ The State Department has also noted that the group appears to be mainly self-supporting through ransom and extortion.²⁷ Abu Sayyaf is made up of several hundred core members, but allegedly over 1000 individuals joined the group in 2000-01, motivated by the opportunity to receive ransom money.²⁸

The fact that some of the victims of the May 2001 Abu Sayyaf attack were U.S. citizens caused the U.S. government to take action. On July 23, 2002, soon after the rescue attempt, the U.S. Department of Justice issued an

¹⁸ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88. The group split from a larger Islamic separatist group, the Moro National Liberation Front (also called the Moro Islamic Liberation Front, or “MILF”) in the early 1990s. *Id.* MILF has also been active in attacks in the Philippines recently. *See, e.g.,* Friena P. Guerrero & Carmelito Q. Francisco, *Fears Over ‘State of Lawlessness’ Declaration Allayed*, BUSINESSWORLD, Apr. 4, 2003, at 12, available at LEXIS, News and Business, Major World Publications File (stating that police suspect MILF’s involvement in a recent bomb attack).

¹⁹ Council on Foreign Relations, *Terrorism: Questions & Answers—Abu Sayyaf Group*, <http://www.terrorismanswers.com/groups/abusayyaf.html> (last visited Apr. 29, 2003) [hereinafter Council on Foreign Relations—Abu Sayyaf].

²⁰ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

²¹ *See, e.g.,* Council on Foreign Relations—Abu Sayyaf, *supra* note 19.

²² PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

²³ *See* Policy Institute for Counter-Terrorism, *supra* note 1.

²⁴ *Id.*

²⁵ *See* PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88. Abu Sayyaf is also believed responsible for the series of bombings in the Christian town of Zamboanga in October 2002 that killed twelve people total, including a U.S. Green Beret. *Philippine Suspects Caught Building Bomb*, CNN ONLINE, Oct. 23, 2002,

at <http://www.cnn.com/2002/WORLD/asiapcf/southeast/10/23/philippine.blast/index.html>. The group has also claimed responsibility for the Davao airport blast on March 4, 2003 that killed over twenty people, including an American missionary. Bruce Cheesman, *US Troops More Likely in Philippines*, AUSTRALIAN FIN. REV., Mar. 6, 2003, at 12, available at LEXIS, News and Business, Major World Publications File.

²⁶ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

²⁷ *Id.* *See also* Richard C. Paddock, *Rebel Groups Could Unite Against U.S.; Philippine Insurgents Say a Deployment of American Combat Troops Against the Abu Sayyaf Could Unleash a Wider Conflict*, L.A. TIMES, Feb. 28, 2003, at 5, available at LEXIS, News and Business, Major World Publications File.

²⁸ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

indictment charging five leaders of Abu Sayyaf with conspiracy resulting in death, hostage-taking, and three counts of hostage-taking resulting in death.²⁹ To date, none of the five men charged has been apprehended, although one of the men, Aldam Tilao, the group's spokesperson, was believed killed in a military encounter in July 2002.³⁰

C. *The Bali Attack*

Jemaah Islamiyah, whose name means "Islamic group" in Indonesian,³¹ has cells operating throughout southeast Asia.³² The stated goal of the group is to create an Islamic state encompassing much of southeast Asia.³³ The number of Jemaah Islamiyah members is unknown, but the Malaysian cells probably consist of about 200 members.³⁴ Captured members have also revealed links with al-Qaida.³⁵ In 1997, Jemaah Islamiyah members began plans to target U.S. interests in Singapore,³⁶ and in 2001, Singapore officials captured fifteen Jemaah Islamiyah members who had planned to attack U.S., Israeli, British, and Australian diplomatic buildings in Singapore.³⁷ Jemaah Islamiyah members were also responsible for the Christmas Eve bombings of 2000, which targeted churches and priests in Indonesia, killing nineteen people.³⁸ Up until the Bali attack, Jemaah Islamiyah mainly targeted Indonesian Christians, as revenge for the massacre of Muslims by Christians in some areas of the country in 1999 and 2000.³⁹ Commentators have noted that the Bali attack may be indicative of a

²⁹ Press Release No. 419, U.S. Dept. of Justice, Five Leaders of the Abu Sayyaf Group Indicted for Hostage-Taking of Americans and Others in the Philippines (July 23, 2002), http://www.usdoj.gov/opa/pr/2002/July/02_crm_419.htm. A Philippine nurse was also killed in the rescue operation. *Id.* The crime of conspiracy is defined at 18 U.S.C. § 371 (2003), and the crime of hostage-taking is defined at 18 U.S.C. § 1203 (2003).

³⁰ *Philippines: Third Bomb Explodes in Central Mindanao*, BBC MONITORING ASIA PAC.—POL., Feb. 22, 2003, available at LEXIS, News and Business, Major World Publications File.

³¹ Council on Foreign Relations, *Terrorism: Questions and Answers—Jemaah Islamiyah*, <http://www.terrorismanswers.com/groups/jemaah.html> (last visited Apr. 29, 2003).

³² PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 122.

³³ Federation of American Scientists—Intelligence Resource Program, *Jemaah Islamiya (JI)*, <http://www.fas.org/irp/world/para/ji.htm> (updated Dec. 17, 2002) [hereinafter Federation of American Scientists].

³⁴ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 123.

³⁵ *Id.* at 122; THE INTERNATIONAL CRISIS GROUP, INDONESIA BACKGROUNDER: HOW THE JEMAAH ISLAMIYAH TERRORIST NETWORK OPERATES 1 (2002), available at http://www.intl-crisis-group.org/projects/asia/indonesia/reports/A400845_11122002.pdf (Dec. 11, 2002) [hereinafter INDONESIA BACKGROUNDER].

³⁶ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 123.

³⁷ *Id.*

³⁸ INDONESIA BACKGROUNDER, *supra* note 35, at 5.

³⁹ *Id.* at i-ii.

shift in Jemaah Islamiyah's attention away from Indonesian Christians and towards westerners, in response to the war on terror spearheaded by the United States.⁴⁰

After the attack, both Australia and Indonesia attempted to respond. In November 2002, Australia passed a bill in Parliament to make it easier for foreigners suspected of killing Australians abroad to be extradited to Australia for trial.⁴¹ However, to date Australia has not requested any extraditions. Australia and Indonesia successfully cooperated in the investigation into the Bali bombings,⁴² and as of late April 2003, twenty-nine Indonesian Bali bombing suspects had been captured.⁴³ The first trials for the suspects in custody will likely begin in May 2003 in Bali.⁴⁴

The two attacks at issue here, as well as the perpetrating groups, have critical similarities and differences. The Abu Sayyaf and Jemaah Islamiyah situations are similar in that both groups are Islamic separatists, using violence to try to establish a separate Muslim state in their respective areas.⁴⁵ Both groups have a history of targeting Christian nationals of their respective countries.⁴⁶ Both groups have also targeted foreigners as victims of their attacks.⁴⁷ However, the reasons foreigners are targeted differ between the two groups. Abu Sayyaf appears to target foreigners primarily for the purposes of ransom money⁴⁸—individuals from western countries are likely to be wealthier and therefore better targets for kidnapping. However, Jemaah Islamiyah targeted westerners in Bali specifically because they were western⁴⁹—it was the symbolic nature of attacking westerners that was

⁴⁰ *Id.* at ii.

⁴¹ Bills Digest No. 67 2002-03, Criminal Code Amendment (Offences Against Australians) Bill 2002, available at <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd067.htm> (last reviewed Nov. 26, 2002) [hereinafter Australian Bills Digest].

⁴² See, e.g., Andrew Burrell, *Australia Beefs Up Mission to Jakarta*, AUSTRALIAN FIN. REV., Mar. 3, 2003, at 9, available at LEXIS, News and Business, Major World Publications File.

⁴³ Tony Emmanuel, *Three Malaysian JI Suspects Nabbed by Indon Police*, NEW STRAITS TIMES (Malaysia), Apr. 24, 2003, at 1, available at LEXIS, News and Business, Major World Publications File.

⁴⁴ See Wayne Miller, *Bali Bomber's Brief Handed to Court*, AGE (Melbourne), May 1, 2003, at 7, available at LEXIS, News and Business, Major World Publications File.

⁴⁵ Policy Institute for Counter-Terrorism, *supra* note 1; Federation of American Scientists, *supra* note 33.

⁴⁶ See Policy Institute for Counter-Terrorism, *supra* note 1 (discussing Abu Sayyaf targets, including a bookstore staffed by Christian preachers, Catholic churches, a cathedral, nuns, a priest, and the Christian town of Zamboanga); INDONESIA BACKGROUNDER, *supra* note 35, at i-ii.

⁴⁷ The two specific attacks being examined in this Comment are examples.

⁴⁸ PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

⁴⁹ One of the suspects stated that the purpose of the bombing was to attack America and its allies. See, e.g., *Bali Bomb Suspect Apologizes*, CNN ONLINE, Feb. 11, 2003, at <http://www.cnn.com/2003/WORLD/asiapcf/auspac/02/11/bali.suspect/index.html>.

significant.⁵⁰ These similarities and differences guide the ensuing analysis, which uses these two situations as illustrations of how suspects of international terrorism can and should be tried. The prosecutorial techniques explored are extradition, home prosecution, abduction or seizure, UN sanctions, the ICJ, and the ICC.

III. EXTRADITION

Extradition is a process achieved mainly through treaty, and in accordance with the terms of the treaty. The extradition laws of the countries involved also dictate how and when extradition is achieved. In the Abu Sayyaf situation, extradition is an option because the terms of the United States-Philippines extradition treaty provide for it. In the Bali bombing situation, extradition is not an option, because Indonesia's own law prohibits the extradition of nationals. The terms of the relevant treaty and the interest of the requesting state are factors that point to the viability and desirability of extradition as an option.

A. *Extradition Defined*

Extradition is the official surrender of an alleged criminal (regardless of his consent) by the state where he is located to another state for either criminal prosecution or execution of a sentence in the latter state.⁵¹ Extradition by virtue of a treaty is the most common practice between states.⁵² In fact, in the absence of a treaty, no customary international duty to extradite exists.⁵³

⁵⁰ See, e.g., *Bali Bomb Suspect 'Admits' Militant Ties*, CNN ONLINE, Nov. 8, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/southeast/11/08/bali.bombings/> (including discussion of Jemaah Islamiyah meeting regarding the types of targets to attack); Paul Burton, *Behind the Bali Bombing*, Oct. 16, 2002, http://www.janes.com/security/international_security/news/sentinel/sent021016_1_n.shtml (including discussion of the symbolism of Bali as a target); Kara Lawrence & Damon Johnston, *Agent of Evil Behind the Atrocity—The Main Suspect in Bali Bombing—Hunt for the Killers*, THE DAILY TELEGRAPH (Sydney), Oct. 16, 2002, at 6, available at LEXIS, News and Business, Major World Publications File (stating that the Bali bombing was a symbolic attack against the West).

⁵¹ Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 AM. U. INT'L L. REV. 163, 172 (2002).

⁵² M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 36 (4th ed. 2002).

⁵³ Arzt, *supra* note 51, at 173. One commentator has noted that most states view the duty to extradite as arising from a treaty. BASSIOUNI, *supra* note 52, at 47.

Extradition has four substantive requirements: dual criminality, extraditable offenses, specialty, and non-inquiry.⁵⁴ First, dual criminality indicates that the offense for which the individual is being extradited must be a crime in both the requesting and the requested state.⁵⁵ Second, extraditable offenses are those offenses that have been deemed subject to extradition—these are generally listed in the treaty itself.⁵⁶ Third, specialty means that the requesting state can only prosecute the extradited individual for the crime for which he was extradited, or else obtain the permission of the requested state to prosecute on other charges.⁵⁷ Finally, the doctrine of non-inquiry gives deference to the sovereignty of the requesting state, and prohibits other states from judging its legal system.⁵⁸

In addition to substantive requirements, there are a number of common conditions states place on extradition. Many states, in both their own statutes and their extradition treaties, limit extradition to those offenses committed within the territory of the requesting state.⁵⁹ Crimes committed outside the requesting state that are intended to result, and do result in negative effects within that state also fall within this traditional understanding of extradition.⁶⁰ Extradition can also often be refused if authorities in the requested state have opted not to proceed against the individual in question,⁶¹ or if prosecution is pending against that individual.⁶²

Apart from the substantive requirements of extradition, some scholars have stated that non-extradition of nationals is a widely-accepted principle under international law.⁶³ If a state opts to refuse extradition on this ground,

⁵⁴ BASSIOUNI, *supra* note 52, at 463. This Comment will not discuss the procedural requirements for extradition.

⁵⁵ *Id.* at 466.

⁵⁶ *Id.* A recent trend has replaced listing of extraditable offenses with the requirement that the offense be punishable by at least one year of imprisonment. *Id.* at 481.

⁵⁷ *Id.* at 511.

⁵⁸ *Id.* at 569.

⁵⁹ SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 63 (1963).

⁶⁰ *Id.*

⁶¹ See, e.g., Model Treaty on Extradition, G.A. Res. 45/116, United Nations Office for Drug Control and Crime Prevention, 68th plenary mtg., art. 4(b), (1990), available at <http://www.un.org/documents/ga/res/45/a45r116.htm> [hereinafter Model Treaty on Extradition].

⁶² See *id.* art. 4(c).

⁶³ Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L LAW 222, 242 (1993). Many Pacific Rim countries have a provision allowing for the refusal of extradition of nationals in their bilateral extradition treaties. E.g., The Extradition Treaty Between the Republic of the Philippines and the Republic of Indonesia, art. 6 (date unknown), <http://www.chanrobles.com/rpindonesiaextraditiontreaty.htm> (last visited Apr. 29, 2003); The Treaty on Extradition Between the Republic of Indonesia and the Republic of South Korea, 2000, art. 7, <http://www.deplu.go.id/world/bilateral/asia/ekskoren-30nov00.htm> (last visited Apr. 29, 2003); The Treaty on Extradition Between the United States of America and Australia, May 14, 1974,

the principle of *aut dedere aut judicare* often comes into play. *Aut dedere aut judicare* refers to the obligation either to extradite or prosecute.⁶⁴ The obligation requires a state that holds someone who has committed a crime of international concern either to extradite the suspect to another state that can try him or else prosecute the suspect in its own courts.⁶⁵ This concept is incorporated into some extradition treaties, and mainly exists in response to the fact that many states will not extradite their own citizens.⁶⁶ In addition, at least one commentator has stated that *aut dedere aut judicare* is a customary international norm.⁶⁷

States may also be able to refuse extradition if the offense was committed outside the territory of either state and “the law of the requested state does not provide for jurisdiction over such an offense committed outside its territory in comparable circumstances.”⁶⁸ The UN has recognized that this is because “most States would not wish to extradite for an offence where the other State had asserted a ground of extraterritorial criminal jurisdiction that is clearly excessive under generally accepted standards of international law.”⁶⁹

B. *Applicability of Extradition to the Abu Sayyaf Situation*

Under the terms of the United States-Philippines Extradition Treaty, it is possible that the Abu Sayyaf suspects, if caught, could be extradited to the United States. The suspects could also be extradited under the terms of the International Convention Against the Taking of Hostages.⁷⁰ Extradition is a possibility in this situation because of the terms of these two treaties.

1974 U.S.T. LEXIS 130, art. 5, available at http://www.usextradition.com/australia_bi.htm; Treaty on Extradition Between Australia and the Republic of the Philippines, Jan. 18, 1991, Australian Treaty Series 1991, No. 5, art. 4(2)(a), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1991/5.html> (last visited Apr. 29, 2003).

⁶⁴ M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995).

⁶⁵ *Id.*

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 22.

⁶⁸ Model Treaty on Extradition, *supra* note 61, art. 4(e).

⁶⁹ UNITED NATIONS, *MANUAL ON THE MODEL TREATY ON EXTRADITION AND MANUAL ON THE MODEL TREATY ON MUTUAL CRIMINAL ASSISTANCE: AN IMPLEMENTATION GUIDE*, Manual on the Model Treaty on Extradition, at 10., U.N. Sales No. E.96-IV-2 (1995).

⁷⁰ G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. No. A/34/46 (1979), available at <http://untreaty.un.org/English/Terrorism/Conv5.pdf> [hereinafter Hostages Treaty] (discussed *infra* Part III.B.2).

1. *The United States-Philippines Treaty and Philippine Extradition Law*

The extradition treaty between the Philippines and the United States provides that the countries agree to extradite individuals whom the requesting state has charged or convicted of an extraditable offense.⁷¹ If the offense was committed outside the requesting state, there are two circumstances under which extradition shall be granted:

- (a) if the laws of the Requested State provide for punishment of an offense committed outside its territory in similar circumstances; or (b) if the executive authority of the Requested State, in its discretion, decides to submit the case to its courts for the purpose of extradition.⁷²

The treaty prohibits extradition “when the person sought has been tried and convicted or acquitted in the Requested State for the offense for which extradition is requested.”⁷³ The treaty does not preclude extradition if the authorities in the requested state have decided to discontinue criminal proceedings against the individual in question.⁷⁴ Also, there is no provision allowing the requested state to refuse extradition if the offense was committed within its own territory. Finally, extradition cannot be refused on the ground that the requested individual is a national of the requested state.⁷⁵

The Philippines also has its own extradition law that governs the procedure for extraditing individuals to other countries.⁷⁶ This law states that if the government receives an extradition request from a country with which it has an extradition treaty, the Secretary of Justice must refer the request to a Philippine court that has jurisdiction over the matter.⁷⁷ The court must then either grant the request for extradition, or dismiss the petition.⁷⁸

⁷¹ Extradition Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines, Nov. 13, 1994, art. 1, 1994 U.S.T. LEXIS 185, available at http://www.usextradition.com/phil_bi.htm [hereinafter U.S.-Philippines Treaty]. The treaty was signed on November 13, 1994, and entered into force on Nov. 22, 1996. *Id.*

⁷² *Id.* art. 2(4)(a)-(b).

⁷³ *Id.* art. 5(1).

⁷⁴ *Id.* art. 5(2).

⁷⁵ *Id.* art. 6.

⁷⁶ Philippine Extradition Law, Presidential Decree No. 1069 (1977), <http://www.chanrobles.com/presidentialdecreeno1069.htm> (last visited Apr. 29, 2003).

⁷⁷ *Id.* § 5.

⁷⁸ *Id.* § 10.

2. *The International Convention Against the Taking of Hostages*

The International Convention Against the Taking of Hostages, to which both the Philippines and the United States are parties, has 39 signatories and 118 parties.⁷⁹ The convention's provisions cover seizures or attempts at seizure and detainment of individuals with the threat to kill, injure, or further detain them unless a third party acts or abstains from acting in a particular way.⁸⁰ Participation as an accomplice is also covered by the convention.⁸¹

Because Abu Sayyaf members took American hostages in the 2001 incident, this convention is applicable. Under the convention, a state can establish jurisdiction over hostage-takers if the act is committed in its territory,⁸² or by any of its nationals.⁸³ A state can also establish jurisdiction if the act was done to compel that state to act or abstain from acting,⁸⁴ and if a hostage is a national of that state.⁸⁵ If an offender is present in a state party's territory and that state will not extradite him, the state must prosecute the offender.⁸⁶ The offenses listed in the convention are also considered extraditable offenses.⁸⁷

In the Abu Sayyaf situation, the convention does not add any new basis for jurisdiction because it only gives the requested state the option to extradite on its terms, subject to its own laws.⁸⁸ Therefore, if the Philippines decided not to extradite the suspects, based on its own laws and precedent, the convention does not provide any additional reasons to do so. It is therefore unlikely that the convention would be invoked.

3. *Extradition of the Abu Sayyaf Suspects Is a Possibility*

The United States has not sent the Philippines government an extradition request, perhaps because the indicted individuals have not been caught. However, if they are caught and a request is sent, it is possible that

⁷⁹ United Nations Treaty Collections, International Convention Against the Taking of Hostages—Status, http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty5.asp (last visited Apr. 29, 2003). The convention entered into force on June 3, 1983. *Id.*

⁸⁰ Hostages Treaty, *supra* note 70, art. 1.

⁸¹ *Id.* art. 1(2)(b).

⁸² *Id.* art. 5(1)(a).

⁸³ *Id.* art. 5(1)(b).

⁸⁴ *Id.* art. 5(1)(c).

⁸⁵ *Id.* art. 5(1)(d).

⁸⁶ *Id.* art. 8(1).

⁸⁷ *Id.* art. 10(1).

⁸⁸ *Id.* art. 10(2)-(3).

the suspects could be extradited to the United States. The acting Justice Secretary of the Philippines has stated that under the treaty, the government is bound to refer the extradition request to the proper court,⁸⁹ a statement that accurately reflects Philippine extradition law.⁹⁰ If a court decides that the suspects should be extradited, then they could be sent to the United States. It appears, then, that extradition could be a viable option for the Abu Sayyaf attacks, or situations with similar circumstances.

Although other individuals have been extradited to the United States from the Philippines, none of these cases is analogous to the Abu Sayyaf situation, in terms of both the nationality of the suspect and the place of the crime. In October 1997, a Philippine national wanted in the United States for a murder he allegedly committed there was extradited to the United States.⁹¹ Later requests for extradition of individuals to the United States also involved crimes committed in the United States.⁹² Because the crimes at issue here were committed in the Philippines, by Filipinos, it is possible that a Filipino court could decide not to extradite, although extradition in this type of situation is allowed by the bilateral treaty.⁹³

C. *Extradition Is an Unlikely Option for the Bali Bombing Suspects*

Extradition is an extremely unlikely option for the Indonesian Bali bombing suspects because of the narrow terms of the Indonesia-Australia Extradition Treaty.⁹⁴ The most significant provision of the treaty provides that each state has the right to refuse extradition of its nationals.⁹⁵ However,

⁸⁹ *U.S. Indicts Abu Sayyaf for Barbaric Acts*, MANILA STANDARD, July 25, 2002, available at LEXIS, News and Business, Major World Publications File.

⁹⁰ The Philippine law provides that Philippine courts have jurisdiction over matters concerning the handling of extradition requests. Philippine Extradition Law, Presidential Decree No. 1069, §5 (1977), <http://www.chanrobles.com/presidentialdecreeno1069.htm> (last visited Apr. 29, 2003).

⁹¹ Scott Hadly, *Oxnard Slaying Suspect Returned from Philippines*, L.A. TIMES, Oct. 23, 1997, at B1, available at LEXIS, News and Business, News, Major World Publications.

⁹² See, e.g., *U.S. Seeks Extradition of a Philippine Presidential Adviser*, DEUTSCHE PRESSE-AGENTUR, June 17, 1999, available at LEXIS, News and Business, News, Major World Publications; Jeffrey O. Valisno et al., *RP Sends Jimenez to United States*, BUSINESSWORLD, Dec. 27, 2002, at 12, available at LEXIS, News and Business, Major World Publications File (Philippine Congressperson extradited to United States on charges of fraud, tax evasion, and illegal campaign contributions to President Clinton's 1996 bid for re-election).

⁹³ See U.S.-Philippines Treaty, *supra* note 71, art. 6, which allows for the extradition of nationals.

⁹⁴ Extradition Treaty Between Australia and the Republic of Indonesia, Apr. 22, 1992, Australian Treaty Series 1995 No. 7, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1995/7.html> (last visited Apr. 29, 2003) [hereinafter Indonesia-Australia Treaty]. The treaty was signed on April 22, 1992, and entered into force on January 21, 1995. *Id.*

⁹⁵ *Id.* art. 5(1).

a requested state must, if the requesting state asks, prosecute the suspects itself if it refuses to extradite its nationals.⁹⁶

In addition, Indonesia also has its own extradition law that prohibits extradition of nationals, except in certain circumstances. The law states that:

(1) A request for the extradition of a national of the Republic of Indonesia shall be refused.

(2) A deviation from the provision of paragraph (1) mentioned above may be made if in the view of the circumstances it would be better if the person concerned be tried at the place of the commission of the crime.⁹⁷

Since the crime in question was committed in Indonesia, there is no discretion for Indonesia to extradite any of its nationals. Australia has not sent any extradition requests to Indonesia for any of the bombing suspects,⁹⁸ and it is unlikely that extradition will be an option for Indonesia or for situations similar to the Bali bombing.

D. *Factors Pointing to Extradition as the Best Option*

Since no duty to extradite exists in the absence of a treaty,⁹⁹ the existence of a bilateral or multilateral treaty that addresses extradition is the primary factor in considering whether extradition can and should be used as a prosecution method. Many countries have bilateral extradition treaties,¹⁰⁰ and if the terms of the bilateral treaty allow for extradition of nationals of the requested state, extradition may be an option. If no bilateral treaty exists, states can use multilateral treaties, such as the International Convention Against the Taking of Hostages¹⁰¹ or the International Convention for the Suppression of Terrorist Bombings,¹⁰² if they are parties to these

⁹⁶ *Id.* art. 5(2).

⁹⁷ Law of the Republic of Indonesia, No. 1, art. 7(1)-(2) (1979) (Indon.), *cited in* Australian Bills Digest, *supra* note 41.

⁹⁸ This is probably because Australia recognizes that Indonesia's laws do not allow it to extradite any of its own nationals. *See* Australian Bills Digest, *supra* note 41 (stating that "any Indonesian nationals involved in the Bali bombings cannot be extradited and tried in Australia").

⁹⁹ *Arzt, supra* note 51, at 173.

¹⁰⁰ It is estimated that there are approximately 1500 bilateral extradition treaties. Torsten Stein, *Extradition Treaties*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 336 (1992).

¹⁰¹ Hostages Treaty, *supra* note 70.

¹⁰² G.A. Res. A/RES/52/164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1997), *available at* <http://untreaty.un.org/English/Terrorism/Conv11.pdf> [hereinafter Terrorist Bombing Treaty].

conventions. Both of these international conventions have provisions requiring states to extradite or prosecute suspected offenders.¹⁰³ However, these multilateral treaties allow states to extradite on their own terms, subject to their own laws.¹⁰⁴ These treaties would therefore seem only to help facilitate extradition in situations where there is no bilateral extradition treaty and the offender is present in a party state that will not try him. Therefore, whether the bilateral treaty and the home state's extradition laws allow for the extradition of nationals is an essential factor.

Extradition in these types of situations should also require that the requesting state have a greater interest in prosecuting the suspects than the home state,¹⁰⁵ because it is universally accepted that a state can regulate acts committed within its borders.¹⁰⁶ The balancing of interests between the requesting state and the home state¹⁰⁷ will affect whether the extradition request is granted or denied,¹⁰⁸ and is, therefore, a factor in determining whether extradition is a preferable method of prosecution.

IV. HOME PROSECUTION

If individuals suspected of international terrorist acts are not extradited to the victims' home country for prosecution, another option is home prosecution. Home prosecution appears to be an option in the Abu Sayyaf situation, and it is already being used in the Bali bombing case. There are several major advantages to home prosecution over extradition in these types of cases. The relationship between the two countries involved as

¹⁰³ Hostages Treaty, *supra* note 70, art. 8(1); Terrorist Bombing Treaty, *supra* note 102, art. 8(1).

¹⁰⁴ Hostages Treaty, *supra* note 70, art. 10(2)-(3); Terrorist Bombing Treaty, *supra* note 102, art. 9(2)-(3).

¹⁰⁵ At least one scholar has recognized that whether or not the home state's interest in the suspect is greater than that of the requesting state is a factor in deciding whether to extradite. BASSIOUNI, *supra* note 52, at 313.

¹⁰⁶ *Id.* at 314.

¹⁰⁷ One way to determine a state's interest in prosecuting a suspect itself is to decide which theories of international jurisdiction give it authority over that suspect, since those theories give rule-making and rule-enforcing power. BASSIOUNI, *supra* note 52, at 315. In situations similar to the Abu Sayyaf and Bali attacks, two theories of international jurisdiction can support extradition: passive personality jurisdiction and protective jurisdiction. Passive personality jurisdiction is based on the nationality of the victim of the crime, and protective jurisdiction (also called the "effects principle") is based on the national interest affected by a crime. For a discussion of these two types of jurisdiction, see RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmts. d & g (1987) [hereinafter RESTATEMENT]; BASSIOUNI, *supra* note 52, at 370-77. When a state can assert these bases of jurisdiction, as the United States and Australia can here, the theories can lend support to a request for extradition, as they indicate the state's interest in the suspect. However, in these two examples, the Philippines and Indonesia can also claim passive personality and protective jurisdiction, since Philippine and Indonesian nationals were killed in the attacks, and because there is a national interest in stopping separatist groups.

¹⁰⁸ BASSIOUNI, *supra* note 52, at 313.

well as the strength of the home state's judiciary are factors to examine in determining whether home prosecution is the best option.

A. *Home Prosecution Defined*

Home prosecution occurs when the suspects are tried in the country where they are nationals, and where the attack occurred.

B. *Home Prosecution Is Possible in the Abu Sayyaf Situation*

The Philippine government appears to be ready and willing to prosecute the Abu Sayyaf suspects if they are caught.¹⁰⁹ The government has previously prosecuted Abu Sayyaf suspects charged with similar crimes.¹¹⁰ The Philippine judicial system is similar in some respects to the judicial branch of the United States,¹¹¹ and has been recognized by the U.S. State Department as independent.¹¹² However, the State Department has also said the Philippine judiciary is inefficient and corrupt,¹¹³ which could indicate that the United States is uncomfortable with the prospect of Abu Sayyaf suspects being tried in the Philippines. However, this discomfort

¹⁰⁹ See, e.g., *U.S. Indicts Abu Sayyaf for Barbaric Acts*, *supra* note 89; Felipe F. Salvos II et al., *U.S. Issues Indictments vs. Abu Sayyaf Leaders*, BUSINESSWORLD, July 25, 2002, at 12, available at LEXIS, News and Business, Major World Publications File.

¹¹⁰ See, e.g., *Court to Expedite Trial of Captured ASG Chief*, BUSINESSWORLD, Apr. 9, 2002, at 11, available at LEXIS, News and Business, Major World Publications File (discussing a trial of an Abu Sayyaf leader charged with kidnapping); *Juvenile Court for 75 Abu Suspects*, MANILA STANDARD, May 31, 2002, available at LEXIS, News and Business, Major World Publications File (discussing plans to move some Abu Sayyaf suspects to juvenile court).

¹¹¹ There are lower municipal and city courts, regional trial courts, a Court of Appeals, and a Supreme Court, as well as several special courts. See *The Philippine Court System*, <http://www.supremecourt.gov.ph/hierarchy.htm> (last visited Apr. 29, 2003). The Philippines' system of government is a representative democracy, modeled after the United States. *Philippines: Constitution, Government & Legislation*, Jurist, at <http://jurist.law.pitt.edu/world/philippines.htm> (last visited Apr. 29, 2003).

¹¹² BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, UNITED STATES DEPT. OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2001, PHILIPPINES (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8371.htm> (Mar. 4, 2002) [hereinafter PHILIPPINES HUMAN RIGHTS REPORT]. The nonprofit group Freedom House, which rates countries based on political rights and civil liberties, has also given the Philippines a rating of "free" in their most recent survey in 2001-02. FREEDOM HOUSE, FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES, 2001-2002 (2002), available at <http://www.freedomhouse.org/research/freeworld/2002/countryratings/philippines.htm> (last updated July 15, 2002) [hereinafter FREEDOM HOUSE—PHILIPPINES REPORT].

¹¹³ PHILIPPINES HUMAN RIGHTS REPORT, *supra* note 112.

may be alleviated by the continued involvement of U.S. troops in the Philippines in a training role.¹¹⁴

C. Home Prosecution is Occurring in the Bali Bombing Situation

The Indonesian government has already captured some of the Bali bombing suspects and will begin trying them in May 2003.¹¹⁵ Indonesia has complied with the Indonesia-Australia Extradition Treaty requirement of *aut dedere aut judicare*¹¹⁶ by indicating that it will try the suspects within its territory.

However, there are some potential problems with home prosecution in the Bali bombing situation. Indonesia's legal system has been recognized by many as corrupt¹¹⁷ and subordinated by the executive branch.¹¹⁸ One recent example of this is the prosecution of Indonesian officers accused of human rights violations during East Timor's independence struggle in 1999.¹¹⁹ In 2000, the UN Security Council agreed to postpone international inquiry into these crimes to allow Indonesia to prosecute the alleged offenders.¹²⁰ The Indonesian government created the Indonesian Human Rights Tribunal,

¹¹⁴ Joint exercises have been planned involving the Philippine army and U.S. forces in the Philippines. See Felipe F. Salvosa II, *Discussion on Balikatan Shifts to 'Semantics,'* BUSINESSWORLD, Apr. 14, 2003, at 12, available at LEXIS, News and Business, Major World Publications File. In addition, the U.S. government has also stated that it considers the Philippines a partner in the war on terror, and that it plans to aid the Philippines in eradicating terrorism there, suggesting an acceptance of a purely assisting role. See Mercedes Tira Andrei, *Bush Gov't Offers to Help Blast Victims Seek Justice,* BUSINESSWORLD, Mar. 6, 2003, at 11, available at LEXIS, News and Business, Major World Publications File.

¹¹⁵ Miller, *supra* note 44.

¹¹⁶ Indonesia-Australia Treaty, *supra* note 94, art. 5(2).

¹¹⁷ See, e.g., Jared Levinson, *Indonesia's Odyssey: A Nation's Long, Perilous Journey to the Rule of Law and Democracy*, 18 ARIZ. J. INT'L & COMP. L. 103, 114-15 (2001); BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, UNITED STATES DEPT. OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2001, INDONESIA (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/earp/8314.htm> (Mar. 4, 2002) [hereinafter INDONESIA HUMAN RIGHTS REPORT]; Stuart J. Barnett, *Death Carries a Risk*, COURIER MAIL, Mar. 4, 2003, at 11, available at LEXIS, News and Business, Major World Publications File. In addition, Freedom House has only given Indonesia a rating of "partly free." FREEDOM HOUSE, FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES, 2001-2002 (2002), available at <http://www.freedomhouse.org/research/freeworld/2002/countryratings/indonesia.htm> (last updated July 25, 2002).

¹¹⁸ INDONESIA HUMAN RIGHTS REPORT, *supra* note 117.

¹¹⁹ For an overview of the problems relating to these prosecutions, see Ellen Nakashima, *Rights Groups Fault Indonesian Tribunal; Most Acquitted So Far for East Timor Atrocities; Higher-Ups Avoid Prosecution*, WASH. POST, Apr. 6, 2003, at A16, available at LEXIS, News and Business, Major World Publications File.

¹²⁰ See Ian Martin, *No Justice in Jakarta*, WASH. POST, Aug. 27, 2002, at A15, available at LEXIS, News and Business, Major World Publications File.

which is trying eighteen suspects with charges of human rights abuses.¹²¹ As of January 7, 2003, the tribunal had dismissed charges against ten of the officers for lack of evidence,¹²² even though UN investigators and an Indonesian human rights commission found that the violence in East Timor had been planned and supported by the Indonesian military.¹²³ Only two officers have been convicted to date.¹²⁴ International groups have criticized the rulings of the tribunal and described the court as “a sham.”¹²⁵

Although the East Timor prosecutions and the Bali bombing prosecutions are not necessarily analogous, the East Timor situation does demonstrate international discomfort with the Indonesian justice system. The Indonesian government has pursued prosecution of the Bali bombing suspects intensely,¹²⁶ which may assuage worries that the suspects will be treated similar to the East Timor officers. However, the lengthening delays of the trials and the torture claims of some suspects raise questions about the Bali proceedings.¹²⁷ Although the Indonesian government is pursuing prosecution intensely, it does not necessarily follow that home state prosecution is the ideal solution for situations similar to the Bali bombing.

D. *Advantages of Home Prosecution and Factors Pointing to Home Prosecution as the Best Option*

A primary advantage to home prosecution in situations similar to the Abu Sayyaf and Bali bombing situations is that evidence and witnesses necessary to effectively try the case will most likely be found in the

¹²¹ See *Indonesian Court Jails Officer for 5 Years in Timor Atrocities*, N.Y. TIMES, Dec. 28, 2002, at A7, available at LEXIS, News and Business, Major World Publications File [hereinafter *Indonesian Court*].

¹²² See James Dunn, *Crimes in East Timor Unpunished; James Dunn Decries the Failure of an Indonesian Tribunal to Convict Those Responsible for Murder and Destruction*, CANBERRA TIMES, Jan. 7, 2003, at A11, available at LEXIS, News and Business, Major World Publications File.

¹²³ See *Indonesian Court*, supra note 121.

¹²⁴ In December 2002 Lt. Col. Soedjarwo received a five-year sentence, after prosecutors had asked for ten years. See *Indonesian Court*, supra note 121. In March 2003, Brig. Gen. Noer Muis received a five-year sentence for failing to prevent two massacres. *General Guilty Over Timor Killings*, CNN ONLINE, Mar. 12, 2003,

<http://www.cnn.com/2003/WORLD/asiapcf/southeast/03/12/timor.general/index.html>.

¹²⁵ See *Army Colonel Sentenced Over East Timor Killings*, WEEKEND AUSTRALIAN, Dec. 28, 2002, at 9, available at LEXIS, News and Business, Major World Publications File (“International rights groups have strongly criticised the previous acquittals and described the Indonesian court as a sham.”).

¹²⁶ At least one of the bombers, if convicted, may face the death penalty. *I Was Only Guilty of Shopping, Says Bali Accused*, THE ADVERTISER, Mar. 8, 2003, at 60, available at LEXIS, News and Business, Major World Publications File.

¹²⁷ Darren Goodsir, *Evidence for the Prosecution*, SYDNEY MORNING HERALD, Mar. 1, 2003, at 37, available at LEXIS, News and Business, Major World Publications File.

countries where the crime was committed.¹²⁸ When suspects are extradited to the requesting state or tried by an independent body in another location, gathering of evidence and bringing forth witnesses is more time-consuming, inefficient, and costly.¹²⁹

The international recognition that each state can regulate conduct within its borders¹³⁰ is also an advantage to home prosecution in these types of situations. This concept is called the territorial principle.¹³¹ Although less widely recognized than the territorial principle,¹³² the theory of active personality/nationality jurisdiction, which is based on the nationality of the accused,¹³³ also supports home prosecution in these types of situations.¹³⁴

While the location of evidence and the place of commission of the crime are advantages pointing towards home prosecution that will exist in every attack similar to the Abu Sayyaf and Bali attacks, there are also factors that may or may not be present that will bear on whether home prosecution is a good option. One of these factors is the requesting state's confidence in the ability and methods of the home state regarding prosecution of the suspects. Home prosecution will be indicated in situations where the state whose nationals were the primary targets has confidence in the consistency and competency of the home state's judicial system. However, home prosecution will not be indicated if the requesting state has reason to believe that the suspects will not receive a fair trial, perhaps due to the non-independence of that country's judiciary, political connections the suspect may have, or other factors that may allow the suspect to evade justice.¹³⁵

¹²⁸ See, e.g., BEDI, *supra* note 59, at 97 (stating that common law countries generally allow for the extradition of nationals to the country where the crime was committed, since they believe the crime can be most thoroughly investigated where the evidence exists).

¹²⁹ See, e.g., *id.* (noting that common law countries believe that the evidence can be most easily and inexpensively obtained in the country where the crime was committed).

¹³⁰ BASSIOUNI, *supra* note 52, at 314. This principle, called the territorial principle, is the most common basis for exercising jurisdiction. RESTATEMENT, *supra* note 107, cmt. c. For a discussion of this theory of jurisdiction, see BASSIOUNI, *supra* note 52, at 316-66.

¹³¹ RESTATEMENT, *supra* note 107, cmt. c; BASSIOUNI, *supra* note 52, at 316.

¹³² Territoriality is considered the normal method for exercising jurisdiction, while nationality is generally an exceptional basis for jurisdiction. RESTATEMENT, *supra* note 107, cmt. b. The United States does not generally rely on the active personality/nationality theory of jurisdiction. BASSIOUNI, *supra* note 52, at 367.

¹³³ RESTATEMENT, *supra* note 107, § 402(2); BASSIOUNI, *supra* note 52, at 315. For a discussion of the active personality/nationality theory of jurisdiction, see BASSIOUNI, *supra* note 52, at 366-69.

¹³⁴ Other than the principles of territorial jurisdiction and active personality/nationality jurisdiction listed in this section, the principles of protective jurisdiction and passive personality jurisdiction also can weigh in favor of home prosecution in these types of scenarios—see discussion in Part III.D.

¹³⁵ See Lockerbie discussion, *infra* Part VI.A; see also Steven W. Krohne, Comment, *The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT'L & COMP. L. REV. 159, 180 (1997) (discussing Colombia's inability to try drug suspects in its own courts "due to risks of adverse political consequences or violent repercussions at home"); Molly

V. ABDUCTION AND SEIZURE

If extradition or home state prosecution are not viable options, requesting states may resort to either abduction or seizure as a method for rendering the suspect to them. The United States has resorted to these methods before, so it is possible that they could be used in the Abu Sayyaf situation. It is also possible that Australia could resort to these methods in addressing the Bali bombing. Since abduction and seizure violate international norms, they should be used sparingly, when all other options have been exhausted.

A. *Abduction and Seizure Defined*

When undertaken to obtain jurisdiction, abduction is done by agents of one state acting under a state's authority who unlawfully seize a person from another state and deliver that person to the state in which he is sought.¹³⁶ Abduction is carried out because the physical presence of a suspect in a court is enough to establish jurisdiction.¹³⁷ Abduction can only occur when the state from which the individual is seized is not involved in the seizure.¹³⁸

Seizure and subsequent rendition is another option. This occurs when officials of the state where the individual is found act with the help of agents of another state outside the legal process to deliver the individual to the state in which he is sought.¹³⁹

B. *Abduction and Seizure Is Possible in the Abu Sayyaf Situation*

The United States has a history of using abduction and seizure as methods for obtaining jurisdiction over suspects not in its territory, and courts have often upheld these methods. In an 1886 case involving the abduction of an individual wanted in the United States from Peru, the U.S. Supreme Court found that "forcible abduction is no sufficient reason why

Moore & Douglas Farah, *Prisoners of the Drug War: U.S. Desire to Extradite Brothers Tests Relations With Mexico*, WASH. POST, Oct. 23, 1998, at A20, available at LEXIS, News and Business, Major World Publications File (stating that Mexico's attempts to try drug traffickers, rather than extraditing them, have been thwarted by corruption in the country's legal system).

¹³⁶ BASSIOUNI, *supra* note 52, at 252.

¹³⁷ *Id.* at 253-54.

¹³⁸ *Id.* at 256.

¹³⁹ *Id.* at 256-57.

the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence."¹⁴⁰

The United States has been involved in an abduction of a person from another state. In 1990, individuals hired by the U.S. Drug Enforcement Agency ("DEA") kidnapped a Mexican national from his home and brought him to the United States, where he was then arrested and prosecuted.¹⁴¹ The Mexican citizen, Dr. Humberto Alvarez-Machain, was suspected of being involved in the murder of an undercover DEA agent in Mexico.¹⁴² Alvarez-Machain appealed on grounds of due process and violation of the United States-Mexico extradition treaty.¹⁴³ The case finally came before to the U.S. Supreme Court for review.¹⁴⁴ The Court examined the United States-Mexico treaty literally, but found no language prohibiting either country from abducting individuals from the other's territory,¹⁴⁵ and therefore held that the treaty did not bar prosecution in this case. This case would seem to make abduction a viable option for the United States, should extradition of the Abu Sayyaf suspects prove difficult, because there is nothing specifically in the United States-Philippines Treaty that appears to bar abduction.

U.S. courts have also upheld seizure as a valid means of obtaining jurisdiction. Relying on the principle stated in *Ker*, the Second Circuit upheld the conviction of a man who claimed he had been abducted from Mexico and sent to the United States by Mexican police acting as agents of the United States.¹⁴⁶ This case would seem to make seizure a possible way for the United States to obtain jurisdiction, if extradition of the Abu Sayyaf nationals via the United States-Philippines Extradition Treaty could not be realized.

C. *Abduction and Seizure Is Possible in the Bali Bombing Situation*

Abduction or seizure might be options for Australia as well, although there has been no Australian case law upholding jurisdiction obtained through abduction. However, Australian Prime Minister John Howard said in December 2002 that he would be willing to launch a pre-emptive strike

¹⁴⁰ *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

¹⁴¹ See, e.g., William Branigin, *Kidnapping of Doctor Riles Mexico: Thornburgh, on Visit, Will Face Questions*, WASH. POST, Apr. 18, 1990, at A29, available at LEXIS, News and Business, Major World Publications File.

¹⁴² See, e.g., *id.*

¹⁴³ *United States v. Caro-Quintero*, 745 F. Supp. 599, 601, 606 (C.D. Cal. 1990).

¹⁴⁴ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

¹⁴⁵ *Id.* at 663.

¹⁴⁶ *United States v. Sobell*, 244 F.2d 520, 524-25 (2d Cir. 1957), cert. denied, 355 U.S. 873, reh'g denied, 355 U.S. 920 (1958).

against terrorists in another country who were preparing to attack Australians.¹⁴⁷ Although this is not necessarily akin to using abduction or seizure as methods to obtain jurisdiction over suspects, it does demonstrate a willingness to step outside the bounds of international norms in order to achieve the goals of the state.¹⁴⁸ It remains to be seen whether an Australian court would uphold the use of these methods to obtain jurisdiction, but the statement may be an indication of a change in the philosophy of Australia's government.¹⁴⁹

D. Advantages of Abduction and Seizure and Factors Pointing to Abduction or Seizure as the Best Option

Although an advantage of using abduction or seizure in a situation similar to the Abu Sayyaf and Bali situations would be obtaining personal jurisdiction, there are many policy reasons weighing against these options. One commentator has noted that “[s]elf-help endangers lives and violates the sovereignty of independent nations, thereby increasing international tensions. Thus, while self-help may bring criminals to justice, it does so at considerable cost to international comity.”¹⁵⁰ Another scholar has stated that abduction, specifically, involves disruption of public order, infringement on the sovereignty of another state, and violation of the rights of the person seized.¹⁵¹ If nations resort to abduction or seizure rather than going through

¹⁴⁷ Mark Metherell & Cosima Marriner, *PM's Invasion Threat Angers Asia*, SYDNEY MORNING HERALD, Dec. 2, 2002, at 2, available at LEXIS, News and Business, Major World Publications File.

¹⁴⁸ Many have remarked that pre-emptive strikes are a violation of international law. See, e.g., Firdaus Abdullah, *Dr M Blasts Howard (HL)*, NEW STRAITS TIMES (Malaysia), Dec. 3, 2002, at 1, available at LEXIS, News and Business, Major World Publications File (listing Asian leaders who stated that pre-emptive strikes violated international law, as well as a statement by Howard that the U.N. Charter and international laws should be changed to allow for pre-emptive strikes).

¹⁴⁹ Another example that could be indicative of a change is the *Tampa* incident, wherein Australia detained and then relocated to other countries hundreds of primarily Afghan refugees who were seeking to enter its borders. Some have stated that these actions were in violation of international law. See, e.g., Human Rights Watch Backgrounder, *No Safe Refuge: The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and World Wide*, Oct. 18, 2001, at 11, <http://www.hrw.org/backgrounder/refugees/refugee-bck1017.pdf>; Alexander J. Wood, *The "Pacific Solution": Refugees Unwelcome in Australia*, 9 HUM. RTS. BR. 22, 25 (2002); Irene Khan, *Trading in Human Misery: A Human Rights Perspective on the Tampa Incident*, 12 PAC. RIM L. & POL'Y J. 9, 18 (2003). For more information on the *Tampa* incident, see Symposium: *Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim*, 12 PAC. RIM L. & POL'Y J. vii-177 (2003).

¹⁵⁰ Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13. CONN. J. INT'L L. 1, 22 (1998).

¹⁵¹ BASSIOUNI, *supra* note 52, at 252. Abduction also violates customary human rights norms. See, e.g., John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 NOTRE DAME L. REV. 723, 745 (1993) (stating that “[a]bduction violates freedoms protected under the conventional and customary law of human rights”).

formal extradition proceedings, this will likely reduce confidence in extradition treaties and could damage international relationships.¹⁵²

However, abduction and seizure may be effective alternatives if the state in which the suspects are found refuses to extradite the individuals in accordance with an extradition treaty, and either will not prosecute the suspects or will not do so effectively. Since abduction violates customary human rights law,¹⁵³ it should be used sparingly, if at all. Therefore, one factor that may point to the use of abduction or seizure is whether the requesting state has exhausted all of its other options with respect to making sure the suspect is tried satisfactorily.

VI. INTERVENTION OR TRIAL BY AN INDEPENDENT BODY

If a requested state does not cooperate with the terms of an extradition treaty, or a requesting state is otherwise unhappy with a situation in which it is trying to obtain jurisdiction over a terrorist suspect, the requesting state could ask that the UN compel extradition or the handing over of the suspect to some type of international court with sanctions. The seriousness of the crime and whether other options have failed are factors to examine in determining whether UN sanctions are appropriate. Two states involved in a dispute over the terms of an extradition treaty could bring the dispute to the ICJ for resolution. Whether the situation involves treaty interpretation and the willingness of the two states to cooperate are factors to determine whether the ICJ is a viable option. Finally, once the ICC is fully functioning, it can also operate as an option for state parties. The nature of the crime, the willingness and ability of the home state to prosecute the suspects, and the party status of the home state are factors to consider in determining whether the ICC is appropriate.

A. *United Nations Sanctions*

The UN Charter addresses sanctions, stating that the Security Council:

¹⁵² In their *amicus curiae* briefs for *Alvarez-Machain*, both Mexico and Canada stated that the case could cause problems in international relations. Brief for United Mexican States as Amicus Curiae in Support of Affirmance, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712) (intimating that the U.S.-Mexico cooperation on the prevention of drug trafficking could be affected); Brief of the Government of Canada as Amicus Curiae in Support of Respondent, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712) (stating that the case could have a strong effect on the U.S.-Canada relationship).

¹⁵³ Quigley, *supra* note 151, at 745.

may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.¹⁵⁴

Sanctions typically take an economic form, preventing the state on which they are imposed from buying or selling goods globally.¹⁵⁵

First, it is important to note that UN sanctions are not a method of prosecution themselves, but rather a means of coercion; a requesting state may use them to ensure that an uncooperative home state turn suspects over to it, another state, or an independent court such as an ad-hoc tribunal or the ICC. The UN response to the government of Libya's refusal to extradite two Libyan intelligence officers suspected of involvement in the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988 is an example of such a situation. No extradition treaty existed between Libya and the United States or Libya and the United Kingdom,¹⁵⁶ and Libya refused to hand over the two suspects, stating that they would not receive a fair trial in either the United States or the United Kingdom.¹⁵⁷ Libya instead wanted to try the suspects itself.¹⁵⁸ In response, the UN Security Council issued two resolutions: one urging the Libyan government to cooperate with the investigation,¹⁵⁹ and one imposing economic sanctions if the Libyan government failed to comply.¹⁶⁰ This was the first time that the Security Council had demanded extradition of nationals of a requested state to stand trial in another state.¹⁶¹ Libya refused, the sanctions were imposed, and in 1999, after years of

¹⁵⁴ U.N. CHARTER art. 41, available at <http://www.un.org/aboutun/charter/chapter7.htm> (last visited Apr. 29, 2003).

¹⁵⁵ James A. Paul & Senwan Akhtar, GLOBAL POLICY FORUM, *Sanctions: An Analysis*, Aug. 1998, <http://www.globalpolicy.org/security/sanction/analysis2.htm> (last visited Apr. 29, 2003).

¹⁵⁶ Arzt, *supra* note 51, at 166.

¹⁵⁷ Thomas W. Lippman, U.S., *Britain Announce Plans for Pan-Am Trial; Libya Challenged to Deliver Bomb Suspects*, WASH. POST, Aug. 25, 1998, at A01, available at LEXIS, News and Business, Major World Publications File.

¹⁵⁸ Arzt, *supra* note 51, at 175.

¹⁵⁹ S.C. Res. 731, U.N. SCOR, 3033rd mtg., U.N. Doc. S/23574 (1992), available at <http://www.un.org/documents/sc/res/1992/scres92.htm>.

¹⁶⁰ S.C. Res. 748, U.N. SCOR, 3063rd mtg., U.N. Doc. S/RES/748 (1992), available at <http://www.un.org/documents/sc/res/1992/scres92.htm>.

¹⁶¹ Paul Lewis, *Libya Unyielding Despite U.N. Demand*, N.Y. TIMES, Jan. 22, 1992, at A8, available at LEXIS, News and Business, News, Major World Publications.

negotiations, the Libyan government finally turned over the two suspects to Scottish authorities in the Netherlands.¹⁶²

UN sanctions seem an unlikely option in the Philippine or Indonesian situations. If the Philippine government captured but refused to extradite the Abu Sayyaf suspects, the United States could lobby the UN to impose sanctions on the Philippines. This seems improbable, given the historically close and favorable relationship between the United States and the Philippines.¹⁶³ Similarly, the Australian government could lobby the UN to compel Indonesia to extradite the Bali bombing suspects by imposing sanctions.¹⁶⁴ Australia has taken no steps in this direction, and since Indonesia has already begun prosecuting the suspects, it appears that UN sanctions will not be used.

Since the length of time that it could potentially take to resolve an issue is a major drawback to using UN sanctions,¹⁶⁵ one factor to be considered when assessing whether to use this option is the seriousness of the terrorist attack at issue. A state would likely need to have a very high interest in a suspect to make such a potentially lengthy wait worthwhile. In addition, if the sanctions were not harsh enough, the country might be able to weather them and the suspects would not be turned over. Because of the unpredictability of the effect of sanctions, they would only be the best option in cases involving more serious crimes, where the UN was motivated to act quickly and forcefully, and where other alternatives had failed.¹⁶⁶

B. *The International Court of Justice*

Like UN sanctions, the ICJ also presents a solution to extradition disputes. One of the ICJ's roles is "to settle in accordance with international

¹⁶² Anne Swardson, *Lockerbie Suspects Delivered for Trial; Sanctions on Libya Suspended by U.N.*, WASH. POST, Apr. 6, 1999, at A01, available at LEXIS, News and Business, Major World Publications File.

¹⁶³ See, e.g., M. Victoria Bayoneto, Note, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L.J. 111, 116 (1994).

¹⁶⁴ Unlike the relationship between the United States and the Philippines, there is evidence that the relationship between Indonesia and Australia is problematic. See, e.g., *War Complicates an Uneasy Relationship*, AUSTRALIAN FIN. REV., Mar. 15, 2003, at 48, available at LEXIS, News and Business, Major World Publications File.

¹⁶⁵ In the Lockerbie situation, the sanctions were imposed for seven years before Colonel Qadhafi handed over the suspects. See, e.g., Arzt, *supra* note 51, at 165.

¹⁶⁶ The fact that the Lockerbie incident was the only situation in which the Security Council demanded extradition of nationals to stand trial in another state points to the extreme circumstances required of the situation.

law the legal disputes submitted to it by States.”¹⁶⁷ The ICJ is composed of fifteen judges of different nationalities, elected by the UN General Assembly and the Security Council.¹⁶⁸ Only UN member states can appear before the ICJ as parties, and one or both of the states must have agreed to submit the dispute to the ICJ, or be submitting the dispute by virtue of a provision agreed upon by them in a treaty.¹⁶⁹ To decide the cases that come before it, the ICJ considers international conventions, international custom, general principles of law, and teachings of qualified publicists.¹⁷⁰ Since the ICJ cannot try a terrorist suspect itself,¹⁷¹ its role in a situation similar to the Abu Sayyaf or Bali situations would likely be to decide an extradition treaty dispute.¹⁷²

Although neither the United States-Philippines Treaty nor the Indonesia-Australia Treaty has a provision for resolution of any disputes by the ICJ, it is possible that any of the countries could submit an extradition dispute to the ICJ.¹⁷³ Australia has taken no steps towards submission of the issue to the ICJ, and since Indonesia has already begun to prosecute some of the Bali bombing suspects, it seems unlikely that the ICJ would be used here.¹⁷⁴

The ICJ, however, is a good alternative when a bilateral extradition treaty or a relevant multilateral treaty lists the ICJ as an arbiter in the case of a dispute. This option is best if the two countries involved are cooperative, since both parties must voluntarily submit the case to the ICJ.¹⁷⁵ Many of the ICJ's cases involve interpretation of treaties,¹⁷⁶ so a situation that

¹⁶⁷ International Court of Justice, *General Information—The Court at a Glance*, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (Feb. 10, 2003) [hereinafter *ICJ General Information*].

¹⁶⁸ Statute of the International Court of Justice, ch. I, arts. 3-4 (1945), available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm> (last visited Apr. 29, 2003) [hereinafter *ICJ Statute*].

¹⁶⁹ *Id.* ch. I, arts. 36-37.

¹⁷⁰ *Id.* ch. II, art. 38(1).

¹⁷¹ Only states can be parties before the ICJ. *Id.* ch. II, art. 34(1).

¹⁷² The ICJ has jurisdiction to hear disputes concerning treaty interpretation, international law, and international obligations. *Id.* ch. I, art. 36(2).

¹⁷³ Article 16(1) of the Hostages Treaty, *supra* note 70, allows for one state to refer a dispute under the treaty to the ICJ if arbitration cannot be agreed upon within six months. Otherwise, both the United States and the Philippines would have to submit to the ICJ's jurisdiction if an extradition request were outside of the Hostages Treaty. International Court of Justice, *Basis of the Court's Jurisdiction*, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasic_basisjurisdiction.html (last visited Apr. 29, 2003).

¹⁷⁴ In addition, Indonesia is not a party to the Terrorist Bombing Treaty, so art. 20(1) of that treaty, addressing ICJ jurisdiction, is not applicable.

¹⁷⁵ *ICJ General Information*, *supra* note 167.

¹⁷⁶ Many of the cases currently pending in the ICJ concern treaty interpretation. See, e.g., *Oil Platforms (Iran v. U.S.)*, Application Instituting Proceedings (Nov. 2, 1992), <http://www.icj-cij.org/icjwww/iodocket/iop/iopframe.htm> (last visited Apr. 29, 2003) (involving the interpretation of a

involves strict interpretation of an extradition treaty or other relevant treaty would be a better option for the ICJ. In addition, the length of time between an application by a country and a decision by the ICJ is usually significant,¹⁷⁷ making the ICJ a better option if time is not an issue.

C. *The International Criminal Court*

The Rome Statute of the ICC was promulgated on July 17, 1998, and entered into force on July 1, 2002.¹⁷⁸ The ICC has yet to become operational, as judges¹⁷⁹ and the prosecutor¹⁸⁰ have only recently been elected.¹⁸¹ Based solely on the fact that the ICC is not currently operational, the Abu Sayyaf and Jemaah Islamiyah cases will likely not be heard by the ICC.¹⁸² However, even when the ICC becomes operational, neither the Abu Sayyaf and Bali attacks could come under ICC jurisdiction unless the Philippines or Indonesia became a party to the statute.¹⁸³

treaty between Iran and the United States); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), Application Instituting Proceedings (Mar. 20, 1993), <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (last visited Apr. 29, 2003) (involving the interpretation of the Genocide Convention); Territorial and Maritime Dispute (Nicar. v. Colom.), Application of the Republic of Nicaragua (Dec. 6, 2001), http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_application_20011206.html (last visited Apr. 29, 2003) (involving interpretation of a multilateral treaty to which both states are parties).

¹⁷⁷ For example, the *Oil Platforms* case was instituted in 1992 and is only just now being heard by the ICJ. See International Court of Justice, *Current Docket of the Court*, <http://www.icj-cij.org/icjwww/idocket.htm> (last visited Apr. 29, 2003).

¹⁷⁸ Rome Statute of the International Criminal Court, A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/romeffa.htm> (last visited Apr. 29, 2003).

¹⁷⁹ The judges were elected in early February 2003. Rome Statute of the International Criminal Court, *Nominations for judges of the International Criminal Court*, at http://www.un.org/law/icc/elections/results/judges_results.htm (last updated Feb. 12, 2003).

¹⁸⁰ The Prosecutor of the ICC was elected on April 21, 2003. Rome Statute of the International Criminal Court, *Nominations for the Prosecutor of the International Criminal Court*, at http://www.un.org/law/icc/elections/prosecutor/prosecutor_nominations.htm (last visited Apr. 29, 2003).

¹⁸¹ See *supra* notes 179 and 180.

¹⁸² It is also possible that the cases could be heard by an ad hoc tribunal, such as those that were set up for trying crimes associated with the conflicts in Rwanda and in the former Yugoslavia. However, this is very unlikely, as one of the main purposes of both of these tribunals was to restore peace to a war-torn region through justice and the promotion of reconciliation. See The International Criminal Tribunal for the Former Yugoslavia, *The ICTY At A Glance—General Information*, at <http://www.un.org/icty/glance/index.htm> (updated Apr. 8, 2003); The International Criminal Tribunal for Rwanda, *About the Tribunal—General Information—Introduction*, at <http://www.icttr.org/wwwroot/default.htm> (last visited Apr. 29, 2003). This is not an aspect of the situation in either the Philippines or Indonesia.

¹⁸³ The Philippines has signed the statute, and ratification has been approved by the Department of Foreign Affairs and now must go through the President and the Senate. Coalition for the International Criminal Court, *Country Information: Philippines*, at <http://www.iccnw.org/countryinfo/asia/philippines.html> (last updated Apr. 29, 2003). Indonesia has neither signed nor ratified the Rome Statute. Coalition for the International Criminal Court, *Country Information: Indonesia*, at <http://www.iccnw.org/countryinfo/asia/indonesia.html> (last updated Sept. 30,

There are several requirements that must be met in order for a case to be heard by the ICC. First, the state where the crime occurred or whose national allegedly committed the crime must be a party to the statute.¹⁸⁴ In addition, the ICC only has jurisdiction over certain types of crimes, one of which is crimes against humanity.¹⁸⁵ This includes murder “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁸⁶ In order for murders or other crimes to fall under ICC jurisdiction, they need to be widespread or systematic—isolated incidents are not likely to suffice. The crimes would also have to be directed towards a specific population, so crimes that appear to be mainly driven by opportunity or money do not rise to that level.

In addition, the Rome Statute states that a case is inadmissible where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or the prosecution.”¹⁸⁷ The Rome Statute also deems a case inadmissible when a state with jurisdiction over it has investigated and decided not to prosecute the individual in question, unless that decision reflected an inability or unwillingness to prosecute.¹⁸⁸ However, the Rome Statute also allows a non-party state where the attack occurred, or where the alleged perpetrator is a national, to accept the exercise of jurisdiction by the ICC with respect to the crime in question.¹⁸⁹

There are many arguments that commentators have posited both for and against the use of the ICC, and many of these arguments apply to the use of the ICC in situations similar to the two attacks focused on in this Comment. One major advantage is that the ICC is a neutral forum with uniform laws, reducing the concern of the requested state that the individual would not be tried fairly in the requesting state.¹⁹⁰ This is an advantage in situations where the laws or the judicial system in either the home country or the victims’ country are questionable. The ICC could also greatly reduce the

2002). Australia is currently a party to the statute. Coalition for the International Criminal Court, *Country Information: Australia*, at <http://www.iccnw.org/countryinfo/oceania/australia.html> (last updated Sept. 30, 2002). The United States signed the statute, but has since declared it does not intend to ratify it. Coalition for the International Criminal Court, *Country Information: United States of America*, at <http://www.iccnw.org/countryinfo/theamericas/unitedstates.html> (last updated Oct. 14, 2002).

¹⁸⁴ Rome Statute of the International Criminal Court, pt. 2, art. 12(2), A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Apr. 29, 2003).

¹⁸⁵ *Id.* art. 7.

¹⁸⁶ *Id.* art. 7(1).

¹⁸⁷ *Id.* art. 17(1)(a).

¹⁸⁸ *Id.* art. 17(1)(b).

¹⁸⁹ *Id.* art. 12(3).

¹⁹⁰ Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73, 97 (1995).

incidence of abduction and seizure as methods of obtaining jurisdiction, operating to “ease tensions and inefficiencies caused by the aggressive unilateral pursuit of foreign suspects by providing an established, internationally legitimate forum for cooperation and action.”¹⁹¹ In situations where the tension between the two countries involved is high, this approach can be particularly helpful. One commentator has argued that the ICC’s establishment of uniform laws and deterrent effect on abductions would act to safeguard individual human rights,¹⁹² which is important when suspects are alleged to have been tortured or otherwise treated inhumanely.

Naturally, there are characteristics of the ICC that make its application to future situations like the two being examined here problematic. In particular, some have argued that states that do not extradite particular individuals under existing laws are not likely to extradite them to the ICC.¹⁹³ This is a valid concern, particularly with respect to countries like Indonesia, who do not extradite their own nationals,¹⁹⁴ and it is unlikely that a state with such a restriction would consent to ICC jurisdiction, even if it did ratify the Rome Statute. If a state has not ratified the statute, however, it has no obligation to submit the case to review by the ICC,¹⁹⁵ so the advantages of the ICC would be irrelevant.

Whether or not a case similar to the Abu Sayyaf and Bali situations can be tried by the ICC will, as a threshold matter, generally depend on whether the home state is a party to the statute. There are also two other main factors that inform this decision. The first is whether the attack can be characterized as a crime against humanity, as defined in the Rome Statute. The statute requires that a crime fall under this or one of its other categories in order to exercise jurisdiction.¹⁹⁶ Second, since the ICC is complementary to state jurisdiction,¹⁹⁷ the home state must either be unwilling to prosecute the crime, or that state’s judicial system must be weak or corrupt enough to consider the home state unable to effectively prosecute the crime.

¹⁹¹ *Id.* at 141-42.

¹⁹² Kai I. Rebane, Note, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 *FORDHAM INT’L L.J.* 1636, 1683 (1996).

¹⁹³ *Report of the Task Force on an International Criminal Court of the American Bar Association*, 1994 *A.B.A. SEC. INT’L L. & PRAC.* 46.

¹⁹⁴ Law of the Republic of Indonesia, No. 1, art. 7(1)-(2) (1979) (Indon.), cited in Australian Bills Digest, *supra* note 41.

¹⁹⁵ Rome Statute of the International Criminal Court, pt. 2, art. 12(2), A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Apr. 29, 2003).

¹⁹⁶ *Id.* pt. 2, art. 7.

¹⁹⁷ *Id.* art. 17(1)(a).

VII. THE TEST FOR DECIDING THE BEST METHOD OF PROSECUTION

To create a useful formula for analyzing what should be done for the prosecution of future terrorist attacks like Abu Sayyaf and Bali, an analysis of the application of relevant factors is necessary. These factors have been explored throughout the body of this Comment and will be combined to create a series of steps to determine how terrorist suspects in future situations should be prosecuted.

A. *Extradition and Home Prosecution Balancing Test*

1. *First Step: Deciding Between Home Prosecution or Extradition and an Alternate Method*

The first set of factors to analyze indicate whether a suspect should be tried through home prosecution or extradition, or through some alternative method. The first factor is whether the home state has a strong, independent, and trustworthy judicial system. The second factor is whether the actual or potential global interest in the crime is high. Neither one of these factors is dispositive, but together they constitute a balancing test. If the home state's judicial system falls more on the side of being strong and independent, and the crime falls less on the side of being of international importance, then the suspect should either be tried through home prosecution or extradition. If the home state's legal system is less satisfactory and the crime is of greater interest to the global community, then the suspect should be tried through an alternative method.

2. *Second Step: Deciding Between Extradition and Home Prosecution*

If the balancing test indicates that a suspect should be tried through either home prosecution or extradition, a second set of factors determine which choice should be made. The first factor is whether there is a positive relationship between the countries involved. This factor requires one to determine whether the requesting state trusts the government and methods of the home state.¹⁹⁸ The second factor is whether the requesting state has a prosecution interest superior to the interest of the home state. This may be the case if many individuals from the requesting state were killed or injured,

¹⁹⁸ If the requesting state trusts the methods and judicial system of the home state, it will likely feel more comfortable with allowing the home state to prosecute it has an interest in as well.

but no individuals from the home state were hurt.¹⁹⁹ These two factors comprise the home prosecution and extradition balancing test. If the relationship between the countries is good and the requesting state's interest is not superior to the home state, then home prosecution is the preferred method. If the relationship between the countries is problematic and the requesting state's interest is very high, then extradition is preferred.

It is also important to note how treaties play into this part of the analysis. If a bilateral extradition treaty allows for the refusal of extradition of nationals, and the home state's laws prohibit it, then it will not matter how much distrust there is of the home state's judiciary or how high the home state's interest is in prosecution—the suspect will be tried in his home state.²⁰⁰ However, in situations where extradition of nationals is discretionary, this sort of analysis may be helpful in determining whether extradition should occur. In addition, if either state disputes how the other is applying the terms of the relevant bilateral or multilateral treaty, the ICJ is an option for the resolution of that dispute.²⁰¹

B. *Alternate Means of Prosecution*

If the first balancing test indicates that the home state's judicial system is weak and there is high global interest in the crime, the suspect should then be tried through alternate means. At this point in the analysis, another balancing test of two factors is helpful. The first factor is whether the terrorist attack at issue can be considered a crime against humanity, as articulated in the Rome Statute.²⁰² The second factor is whether the home state's legal and police system is weak or corrupt enough to consider the home state unable to prosecute such a crime, as defined under the Rome Statute.²⁰³ If the attack can be considered a crime against humanity and the judicial system of the home state is very weak, then the ICC should exercise jurisdiction. If the attack cannot be defined in that way, and the home state's judiciary is strong enough to effectively try the case, the requesting state

¹⁹⁹ This would give the victims' state exclusive passive personality jurisdiction, strengthening its interest in the suspect. See discussion *supra* note 107.

²⁰⁰ Indonesia is one example of a country that has laws prohibiting extradition of nationals, and where suspects are therefore being tried in their home state.

²⁰¹ The ICJ has jurisdiction over disputes concerning treaty interpretation, international law, and international obligations. ICJ Statute, *supra* note 168, ch. I, art. 36(2).

²⁰² Rome Statute of the International Criminal Court, pt. 2, art. 7(1), A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Apr. 29, 2003).

²⁰³ *Id.* art. 17(1)(a).

should accept the jurisdiction of the home state and allow that state to handle the case as it wishes.

Again, if the home state is not actually a party to the ICC, then it is not required to submit to the jurisdiction of the ICC,²⁰⁴ no matter how egregious the crime or how ineffectual the judiciary. In this situation, the requesting state has two options. The requesting state can first attempt to lobby the UN to use sanctions to coerce the home state into submitting the suspect to ICC jurisdiction.²⁰⁵ If this is not effective, the requesting state must then determine how important it is that the suspect be tried satisfactorily. If the state decides that it cannot accept the situation, then it may be justified in using either abduction or seizure as an option for gaining jurisdiction over the suspect. Since this is a violation of international norms,²⁰⁶ a state should weigh the advantages and disadvantages of this option carefully.

VIII. THE TEST ILLUSTRATED

Application of the test to the Abu Sayyaf and Bali situations shows that home prosecution is the best option for attacks similar to the Abu Sayyaf attacks, while prosecution in the ICC is preferable for attacks similar to the Bali bombing.

A. *The Test Applied to the Abu Sayyaf Situation*

In the Abu Sayyaf situation, and in future situations with similar fact patterns, the test indicates that home prosecution is the preferable option. An application of the first balancing test shows that while the Philippine judicial system has some problems, the system is relatively strong overall.²⁰⁷ In addition, the fact that Abu Sayyaf targets mainly Filipinos,²⁰⁸ and that foreign victims appear to be chosen only for their ransom potential,²⁰⁹ results

²⁰⁴ The court may exercise its powers over the territory of any state party, but can only exercise powers over the territory of a non-party state by special agreement. *Id.* pt. 1, art. 4(2).

²⁰⁵ Sanctions similar to those imposed on Libya in the Lockerbie situation could be used. See discussion *supra* Part VI.A.

²⁰⁶ Quigley, *supra* note 151, at 745.

²⁰⁷ See FREEDOM HOUSE—PHILIPPINES REPORT, *supra* note 112.

²⁰⁸ For example, seventeen Filipinos were kidnapped along with the three Americans in May 2001. See Jess Liwanag, *Philippines Arrest al-Qaeda-Linked Bomber*, CNN ONLINE, Nov. 14, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/southeast/11/14/phil.bomb.suspect/index.html>.

²⁰⁹ The U.S. State Department has noted that Abu Sayyaf seems to be using terrorism mainly for financial gain. See PATTERNS OF GLOBAL TERRORISM, *supra* note 2, at 88.

in limited international interest in the crime. Therefore, the suspects should either be tried through home prosecution or extradition.

The second balancing test points to home prosecution in the Abu Sayyaf situation. Examination of the first factor reveals that the United States and the Philippines have a historically close relationship,²¹⁰ and that the United States considers the Philippines a partner in the war on terror.²¹¹ While it is unclear how confident the United States is that the Philippine judicial system can adequately try Abu Sayyaf suspects, the United States is cooperating with the Philippine government in the pursuit of the guerillas,²¹² which indicates some amount of faith in the Philippine system.²¹³ In addition, the Philippine interest in prosecuting the Abu Sayyaf suspects is high, as the majority of Abu Sayyaf's victims have been Filipino.²¹⁴ The result of the second balancing test indicates that even though extradition to the United States may be possible under the treaty,²¹⁵ home prosecution is the best method.

B. *The Test Applied to the Bali Bombing Situation*

In the Bali bombing situation, home prosecution is already occurring and it appears that the suspects will be tried in Indonesia.²¹⁶ However, an application of the test to the Bali situation shows that for Bali, and in future situations with similar fact patterns, the suspects should be tried by the ICC. The first balancing test illustrates serious problems with the Indonesian judiciary,²¹⁷ as well as problems regarding trial delays and the treatment of the Bali suspects.²¹⁸ There is also a high level of international interest in the crime, due to the number of individuals killed, the different nationalities of the victims, and the apparent intent of Jemaah Islamiyah to specifically

²¹⁰ See, e.g., Bayoneto, *supra* note 163, at 116.

²¹¹ See, e.g., Andrei, *supra* note 114.

²¹² See Karen L. Lema & Hannah Ira V. Alcosoba, *Sulu Just One of Sites for RP-US War Games (Balikatan 03-1 to Cover Several Venues in Western Mindanao)*, BUSINESSWORLD, April 10, 2003, at 12, available at LEXIS, News and Business, Major World Publications File.

²¹³ The U.S. State Department has also recognized the Philippine judiciary as independent. PHILIPPINES HUMAN RIGHTS REPORT, *supra* note 112.

²¹⁴ See, e.g., Liwanag, *supra* note 208.

²¹⁵ The U.S.-Philippines Treaty allows for the extradition of nationals. U.S.-Philippines Treaty, *supra* note 71, art. 6.

²¹⁶ *Bali Trials Could Begin in April*, CNN ONLINE, Mar. 7, 2003, <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/03/07/bali.trial.reut/index.html> [hereinafter *Bali Trials Could Begin in April*].

²¹⁷ See discussion on the corruption in the Indonesian judiciary, *supra* note 117.

²¹⁸ Goodsir, *supra* note 127.

target westerners for religious and political reasons.²¹⁹ Therefore, the suspects should be tried by an alternate method.

The next balancing test shows that the ICC is the best option for trying the Bali suspects. The crime can be considered a crime against humanity,²²⁰ due to the large number of people killed and the intent to target a specific group of people—westerners and those with western interests and beliefs.²²¹ In addition, the problems with Indonesia's judicial system are such that it can be considered unable to effectively prosecute the Bali bombers itself.²²² Therefore, the ICC is the preferred method of prosecution. Although Indonesia will likely go ahead with the prosecutions,²²³ in future, similar situations party states should submit those cases to the ICC. UN pressure or sanctions may make uncooperative or nonparty states submit to ICC jurisdiction.²²⁴

One commentator has noted, with respect to national courts, that “[t]rials of international crimes . . . may challenge even the most advanced legal systems. No judicial system, even one that prides itself on assuring the fullest respect for human rights, is immune from human biases and prejudices.”²²⁵ The ICC may solve this problem, as it is intended to be a venue for the resolution of serious crimes that affect and are of interest to the entire globe. Although the Bali bombing suspects will not be tried by the ICC,²²⁶ the court exists for that purpose, and there should be an attempt to bring suspects of future, similar attacks under the scope of the ICC.

IX. CONCLUSION

Because of the intricate analysis required to determine whether extradition, home prosecution, or an alternate method is best for trying individuals suspected of committing attacks similar to the Abu Sayyaf

²¹⁹ See discussion of Jemaah Islamiyah's intent to attack westerners, *supra* note 50.

²²⁰ Crimes against humanity are defined in the Rome Statute. Rome Statute of the International Criminal Court, pt. 2, art. 7(1), A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/romefra.htm> (last visited Apr. 29, 2003).

²²¹ One of the suspects stated that the purpose of the bombing was to attack America and its allies. See, e.g., *Bali Bomb Suspect Apologizes*, *supra* note 49.

²²² See discussion on the corruption in the Indonesian judiciary, *supra* note 117. The problems with respect to the East Timor prosecutions also indicate problems with the ability of the Indonesian legal system to effectively try cases. See *supra* Part IV.C.

²²³ *Bali Trials Could Begin in April*, *supra* note 216.

²²⁴ Sanctions similar to those imposed on Libya in the Lockerbie situation could be used. See discussion *supra* Part VI.A.

²²⁵ MacPherson, *supra* note 150, at 18.

²²⁶ Indonesia is not a party to the ICC. See discussion *supra* note 183. In addition, the Bali trials are already slated to begin in Indonesia in May 2003. See Miller, *supra* note 44.

kidnappings and the Bali bombing, a bright line rule is not appropriate. However, an examination of the enumerated factors creates a series of balancing tests that are useful analytic tools for determining when actions should be taken: strength of the home state's judiciary and police force, global interest in the crime, relationship between the states involved, interest of the requesting state, and the nature of the crime. Examining the Abu Sayyaf and Bali bombing situations illustrates that home prosecution is preferable for situations similar to the Abu Sayyaf case, where there is low global interest in the crime, the relationship between the countries involved is strong, the requesting state's interest is relatively low, and the home state's judiciary is independent. The examination shows that the ICC is ideal for situations similar to the Bali bombing situation, where there is high global interest in the crime, the relationship between the countries involved is tenuous, the home state's judiciary is weak, and the crime can be defined as a crime against humanity.

