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Terrorism, Extradition, and the Death Penalty

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TERRORISM, EXTRADITION, AND THE DEATH PENALTY

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Since the submission of this manuscript, the international climate surrounding extradition and the death penalty continues to change. For example, Mexico has asked the International Court of Justice (ICJ) at The Hague to stop the United States from executing dozens of Mexicans held on death row on the grounds that the Mexican citizens were not informed of their consular rights. BBC News, *Mexico Seeks to Block U.S. Executions,* (Jan. 21, 2003) *available at* http://news.bbc.co.uk/1/hi/world/americas/2678775.stm.

In addition, Germany recently told the United States it will withhold evidence against September 11 suspect Zacarias Moussaoui unless it receives assurances the information will not be used to secure a death penalty against him. BBC News, *Germany Withholds Moussaoui Evidence,* (Sept. 1, 2002) *available at* http://news.bbc.co.uk/1/hi/world/europe/2229231.stm. The author submits that these new developments further strengthen the thesis advanced herein.

I. INTRODUCTION

According to a recent poll, Americans favor military trials, without the right of appeal, for foreign terrorists, and agree that military courts should be able to sentence foreign terrorists to death.[1] Attorney General John Ashcroft responded to European critics (who are resisting extradition to the United States of death-eligible members of the al-Qaeda terrorist network) by saying: "I believe the law, which is clear in relation to capital punishment in the United States, is a law that we ought to be able to enforce."[2] President George Bush responded to Spanish criticism of military courts for al-Qaeda terrorists:

> It is the right decision to make and I will explain that to any leader who asks . . . . I look forward to explaining to my friend, the president of Spain, why I made the decision . . . . It makes eminent sense to have the military tribunal option available . . . . It makes sense for national security purposes. It makes sense for the protection of potential jurors, it makes sense for homeland security.[3]

Americans and their government are apparently in accord. They agree that foreign-born terrorists should be quickly tried in military courts, with no appeal, and there face the possibility of the death penalty. Many Americans, and apparently some in the Executive Branch of government, may be surprised to learn that much of the world disagrees with the U.S., and more importantly, will not cooperate—even on a matter as pressing as bringing members of al-Qaeda to justice—in extraditing such persons if they face the death penalty or military trials.[4]

1. National Public Radio (NPR) reported that 64% of respondents favored military tribunals for non-citizens suspected of terrorist activities and captured outside of the United States; 61% thought that there should be no appeal to civilian courts; and 68% felt that the court should have the power to sentence someone to death. At the same time, only 23% would have favored a military court for Timothy McVey for bombing the Oklahoma City Federal Building. *NPR/Kaiser/Kennedy School Poll on Civil Liberties: Military Tribunals* (Nov. 25, 2001), *at* http://www.npr.org/news/specials/civillibertiespoll/civilliberties_supplement.html (last visited Nov. 11, 2002).

2. Joe Murphy & David Wastell, *Britain Angers America on Terrorist Extradition Deal*, SUNDAY TELEGRAPH (London), October 7, 2001, at 01.

3. Duncan Campbell, *War in Afghanistan: Let UN Team in or Else, Bush Warns Iraq*, THE GUARDIAN (London), November 27, 2001, at 5.

4. As will be explained in Parts II & III, these countries usually only extradite after the requesting country provides assurances that the death penalty will not be imposed or executed.

This article will review international extradition law regarding the surrender of fugitives from countries that do not have capital punishment to countries that do (111 countries have abolished capital punishment[5]). While this issue is broader than al-Qaeda, and even broader than terrorism, the issue has increased significance after the September 11, 2001 attacks on the World Trade Center and the Pentagon.

II. THE PROBLEM UNDER INTERNATIONAL LAW

At least since the 1648 Treaty of Westphalia ended the Thirty Years War,[6] international law has dealt predominately with sovereign nation states rather than individual people. Under this concept, an individual had "no remedy of his own" and it was left to the states to take up the case of one of its citizens abroad.[7] Aside "from a few anomalous cases . . . individuals were not subject of rights and duties under international law."[8] World War II, beginning with the Nuremberg trials, and the creation of the United Nations, transformed attitudes about the Nation State and its obligations to individuals.[9] Nowhere is this remarkable change more evident than in the conjunction of extradition with the death penalty as a human rights issue. The push to bring terrorists to an

5. Death Penalty Information Center, *The Death Penalty: An International Perspective, available at* http://www.deathpenaltyinfo.org/dpicintl.html (noting that as of August 2002, 111 total nations are now abolitionist in law or in practice, 76 for all crimes, 15 for ordinary crimes, and 20 are abolitionist de facto).

6. J.L. BRIERLY, THE LAW OF NATIONS 5 (6th ed., 1963); R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 126-131 (Alfred A. Knopf ed., 3d ed. 1965).

7. BRIERLY, *supra* note 6, at 277.

8. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9 (1982).

9. *Id.* at 1. Sohn states:

> The modern rules of international law concerning human rights are the result of a silent revolution of the 1940's, a revolution that was almost unnoticed at the time. Its effects have now spread around the world, destroying idols to which humanity paid obeisance for centuries. Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states.

Id.

acquaintance with the United States' brand of justice, including the death penalty with military courts meeting that penalty out, coupled with the refusal of many countries to extradite under those conditions, gives the issue both currency and importance far beyond what it otherwise might have had if the issue had been limited to a few relatively obscure fugitives.

Extradition of people who face the death penalty now attracts worldwide attention and opposition[10] and threatens to interfere with U.S. foreign policy.[11] Even if the United States were to capture Osama bin Laden and his associates, trial in military courts,[12] or

10. On May 28, 2001 the South African Constitutional Court ruled that the deportation of a suspected al-Qaeda terrorist to the United States where he faced the death penalty violated the South African Constitution. Mohamed and Another v. President of the RSA and Others, [2001] (7) BCLR 685, 2001 SACLR LEXIS 37 (CC). South Africa is only one of many Nations that will not extradite even al-Qaeda terrorists to nations that might impose the death penalty. It seems highly unlikely that any of the 15 member states of the European Union would extradite anyone facing the death penalty without assurances that the death penalty would not be sought or imposed. *See, e.g.*, Julian Knowles, *More Haste, Less Justice*, THE TIMES (London), Oct. 9, 2001, at Law 5; Bill Glauber, *Europe Moves to Unify Efforts Against Terror*, BALT. SUN., Sept. 30, 2001, at A8; Stephen Romei, *Powers at Odds on Executions – War on Terror*, THE WEEKEND AUSTRALIAN, Oct. 6, 2001, at 13; Ellen Hale, *Death Penalty Could Affect Extradition*, USA TODAY, Oct. 3, 2001, at A6; Frances Gibb, *EU Extradition Deal Falters*, THE TIMES (London), Sept. 28, 2001, at 4M; *Spain Rules Out Extradition of Terror Suspects to US*, AGENCE FRANCE PRESSE, Nov. 23, 2001, available at 2001 WL 25069895; Ron Fournier, *Bush, Aznar Set Aside Differences*, ASSOCIATED PRESS, AP ONLINE, Nov. 28, 2001, at *1

11. For a detailed exposition of how human rights differences with allied nations interferes with U.S. interests and policies, *see generally* Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecutions can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347 (1999). For post-September 11 commentary, *see* Joyelyn Noveck, *France's Anti-Terrorism Judge, Revered by Some and Resented By Others, Tracks Suspects Across the Globe*, ASSOCIATED PRESS NEWSWIRE, Dec. 4, 2001 at *1. Noveck relates the activities of Jean-Louis Bruguiere "France's hard-driving, antiterrorism judge," who worries that cooperation on counter terrorism efforts between the United States and France "will suffer if the Bush administration uses military tribunals to try foreigners. *Id.* Like other European countries, France will not extradite suspects who might face a military tribunal or the death penalty." *Id.*

12. William R. Slomanson, *Should We Try Bin Laden in Court?*, THE SAN DIEGO UNION-TRIBUNE, Nov. 7, 2001, at B9. Slomanson argues:

> If the United States tries bin Laden, then the United States stands in the shoes of Israel when it captured Adolf Eichmann, Hitler's prime planner of the Final Solution, for trial in Tel Aviv. Israel was thus criticized because its local judges could not be perceived as being impartial, given the heinousness of Eichmann's crimes.
>
> If the United States were to capture bin Laden or some key associates as this long-term war wages on, it is not hard to predict an international outcry to establish an incident-specific tribunal like the

imposition of the death penalty, would likely generate international furor.

III. EXTRADITION AND THE DEATH PENALTY

A. *Administrative Difficulties With the Death Penalty:* Soering v. U.K.[13]

Jens Soering's murderous rampage, killing his girlfriend's parents, might well have been just another vicious double homicide with little repercussion beyond the immediate parties.[14] Had he been caught, convicted and executed in the United States, his case might have merited only the odd passing footnote. Instead, Soering, a German national, fled to and was captured in Great Britain, setting off an international chain of events with continuing reverberations that now affect the war on terrorism. The *Soering* case provides the jurisprudential underpinning for many human rights obstacles to extradition under international law. It may well be one of the most cited[15] international cases and it is, in all likelihood, the most important international extradition case of the

> one in the Netherlands that tried Libya's Pan Am 103 bombers last year. Trial in the United States would amount to a preconceived result, accompanied by a mock trial. Egypt—which broke ranks with the rest of the Arab League in the 1978 Camp David Agreement with Israel—effectively split with the United States on this very point. It was the first country to suggest that the United States seek a resolution in an international judicial proceeding.

Id.

13. Soering v. U.K., 11 Eur. Ct. H.R. 439 (1989).

14. The murder rate in the United States has ranged from about 20,700 in 1988 to 16,900 in 1998. U.S. CENSUS BUREAU, STATISTICAL ABSTRACTS OF THE UNITED STATES §5, 203 (2000). Even among capital cases, Jens Soering's case was but one of many. As of December 4, 2001, there had been 746 executions in the United States since the reintroduction of capital punishment in 1977. DEATH PENALTY INFORMATION CENTER, EXECUTIONS IN THE U.S. 2001, *available at* http://www.deathpenaltyinfo.org/dpicexec01.html. By 2002 there were 3,718 persons on death row in the U.S. DEATH PENALTY INFORMATION CENTER, SIZE OF DEATH ROW BY YEAR, *available at* http://www.deathpenaltyinfo.org/DRowInfo.html#year (last visited Nov. 11, 2002).

15. A Lexis-Nexis search for cases citing *Soering* conducted on December 4, 2001 found two United States Supreme Court opinions citing *Soering*, one Australian case, twenty-one Canadian cases, forty-three United Kingdom cases, and the Commonwealth and Irish file folder under Lexis-Nexis (which overlaps the previous categories somewhat) contained fifty-seven citations.

Twentieth Century.[16]

Jens Soering, aged 18, suffered from a well-recognized psychiatric syndrome known as 'folie ˆ deux'[17] which lessened "mental responsibility for his acts."[18] According to the psychiatric evidence, Soering's personality became submerged into that of his profoundly disturbed and delusional girlfriend who persuaded him that "he might have to kill her parents for she and him to survive as a couple."[19]

Both the United States and Germany sought to extradite and try him for the double homicide occurring in Bedford County, Virginia. Germany's attempt appears to have been an effort to spare one of their nationals from the death penalty.[20] Although its request to extradite Soering was eventually denied,[21] the fact that Germany pursued such an uncommon strategy[22] against U.S. wishes can be seen as demonstrating an increasing European aversion towards extraditing persons who might be subject to the death penalty. It is likely that Germany would not have interfered in what was otherwise an inconsequential extradition matter between the United Kingdom and the United States but for the possibility of the imposition of the death penalty on one of its nationals. The case also demonstrates a heightened sensitivity towards consideration of international human rights norms in extradition matters, and a concomitant erosion[23] of the rule of non-inquiry.[24]

16. "The best known case brought before the European Court of Human Rights in the field of extradition is that of Soering v. United Kingdom." Peter Hodgkinson, *Europe-A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U.L. REV. 625, 629 (2000). Matthew W. Henning calls it "one of the most famous cases of international extradition law." Henning, *supra* note 11, at 355.

17. Also known as "shared psychotic disorder." Individuals affected by the disorder "usually have a close relationship with a dominant person . . . whose psychotic thinking they come to share." RONALD J. COMER, FUNDAMENTALS OF ABNORMAL PSYCHOLOGY 350 (1996).

18. Soering v. U.K., App. No. 14038/88, 11 Eur. H.R. Rep. 439, 446 (1989).

19. *Id.*

20. Unlike English courts which ordinarily do not exert extraterritorial jurisdiction over their citizens. *Id.* at 448, German courts can apply their own national criminal law to acts committed abroad by a German National, but in the case of murder would not impose the death penalty. *Id.* at 461-62.

21. *Id.* at 445.

22. *Id.* at 452 (noting that "[c]oncurrent requests for extradition in respect of the same crime from two different States are not a common occurrence").

23. Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. Int'l & Comp. L. Rev. 347, 356-57 (1999). Henning writes:

The combination of these two themes—the move in the direction of viewing the death penalty as a per se human rights violation and the increasing willingness to look behind extradition requests where human rights violations are alleged—is, in part, the focus of the present inquiry. However, *Soering* does not go so far as to make the death penalty a per se bar to extradition.[25] It was only the first step in a process that continues to this day.

The United Kingdom deemed the United States (which had made the earlier request for extradition,[26] and which was also the locus of the crime) to be the appropriate jurisdiction to which Soering should be extradited.[27] The matter of the death penalty, however, remained an obstacle.[28]

Article IV of the United Kingdom-United States Extradition Treaty provides in part: "extradition may be refused unless the requesting Party gives assurance satisfactory to the requested Party that the death penalty will not be carried out."[29] Responding to this provision in the extradition request, the Commonwealth's Attorney for Bedford County, Virginia certified that "a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."[30] The prosecutor gave no further assurances and stated that he intended to pursue the death penalty at trial "because the evidence . . . supported such action."[31] In the face of this less than ironclad representation,[32] the United Kingdom decided to allow the

> [T]he ECHR's decision presented the prospect that European courts could abandon the principle of non-inquiry and conduct their own examinations of the human rights record of requesting states. The decision also validated the practice of courts in civil law countries undertaking meaningful review of the requesting countries' extradition petitions and possibly expanding the review to include the requesting countries' human rights practices.

Id. (footnotes omitted).

24. "The 'rule of non-inquiry' usually requires extradition courts to refrain from undertaking inquiries into the justice systems of foreign countries." Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 n.5 (9th Cir. 2000).

25. *Soering*, 11 Eur. H.R. Rep. at 499.

26. *Id.* at 445.

27. *Id.*

28. *Id.* at 444.

29. *Id.* at 451.

30. *Id.* at 445.

31. *Id.* at 446.

32. The Divisional Court observed, "the assurance leaves something to be desired." *Id.* at 447.

extradition[33] and the case wound its way from the European Commission on Human Rights to the European Court of Human Rights.[34]

The European Convention for the Protection of Human Rights and Fundamental Freedoms (which came into force in 1953) did not abolish capital punishment.[35] Indeed, Article 2 of the Convention expressly reserved the ultimate punishment under certain narrowly defined circumstances.[36] As of the date of the *Soering* case, the United Kingdom had not ratified Optional Protocol No. 6 to the Convention (which obligated contracting nations to abolish capital punishment).[37] Thus, despite Amnesty International's efforts as Amicus Curiae,[38] *Soering* did not present a promising vehicle for a per se rule against extraditing a person facing a possible death sentence in the requesting country.

Nonetheless, *Soering* presented difficult issues involving the administration of the death penalty. Article 3 of the Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[39] While the death penalty might not be a per se violation of human rights under the Convention, it was open to question whether its administration in the United States constituted "inhuman or degrading treatment or punishment."[40]

33. *Id.* at 448 ("[O]n 3 August 1988 the Secretary of State signed a warrant ordering the applicant's surrender to the United States authorities").

34. *Id.* at 463.

35. *See* The European Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* http://www1.umn.edu/humanrts/instree/z17euroco.html.

36. Article 2 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The next section proceeds to exempt various legitimate law enforcement actions, *available at* http://www1.umn.edu/humanrts/instree/z17euroco.html.

37. Peter Hodgkinson, *Europe A-Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U. L. REV. 625, 661 (2000). The United Kingdom formally ratified Optional Protocol No. 6 on January 27, 1998. *Id.* at 661. The United Kingdom had abolished capital punishment in 1965 for murder but retained the penalty for cases of treason, piracy involving violence, and various offenses under military law. *Id.* at 638.

38. *Soering*, 11 Eur. H.R. Rep. 439, 457 (1989).

39. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* http://www1.umn.edu/humanrts/instree/z17euroco.html.

40. *Id.*

Jens Soering presented a particularly sympathetic case for this sort of analysis. He was young and highly suggestible.[41] He suffered from a mental disorder that likely would have provided a partial defense (short of the all-or-nothing insanity defense) in Great Britain[42] but not in Virginia.[43] If he were to be sentenced to death he realistically could expect to spend 6-8 years on death row.[44] Thus, it would give rise to the "death row phenomenon."[45] Most tellingly, contrary to the extradition treaty expectations, the assurances given (that the prosecutor would advise the judge of the United Kingdom's position while continuing to pursue a death verdict) left little doubt that the possibility of the imposition of the death penalty remained a realistic possibility.[46] Finally, there was no need for Soering to escape punishment entirely.[47] Germany was willing to prosecute him, and there he would not face the death penalty.[48] In retrospect, it seems obvious that U.S. interests would have to give way. It remained to be seen just how problematic for U.S. foreign policy this case ultimately would be.

The European Court of Human Rights held that extradition under these conditions would constitute inhuman or degrading treatment under Article 3 of the European Convention for the

41. *Soering*, 11 Eur. H.R. Rep. at 443.

42. *Id.* at 446.

43. Stamper v. Commonwealth, 324 S.E.2d 682, 688 (Va. 1985) ("[E]vidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt."); Jenkins v. Commonwealth, 423 S.E.2d 360, 368 (Va. 1992) (holding that the defense was not permitted to offer a manslaughter defense based on diminished capacity).

44. *Soering*, 11 Eur. H.R. Rep. at 457.

45. The death row phenomenon refers to the suffering of prisoners who await execution for long periods of time. The issue is whether the death row phenomenon constitutes "inhuman or degrading" treatment within the terms of the relevant human rights treaty. Perhaps the most extensive analysis of this phenomenon was undertaken by the Privy Council Office Judicial Committee in *Pratt v. Attorney General of Jamaica*, 2 A.C.1, 4 All E.R. 769 (P.C. 1993). Their Lordships wrote:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 29.

46. *Soering*, 11 Eur. H.R. Rep. at 445-47.

47. *Id.* at 444-45.

48. *Id.*

Protection of Human Rights and Fundamental Freedoms.[49] The death penalty, it held, was not an absolute bar to extradition, with or without adequate assurances, but the precedent had been set for human rights challenges to extradition requests carrying the possibility of the death penalty.[50]

Judge De Mayer's lone concurring opinion in *Soering* advanced the stronger position that the death penalty by itself, aside from any implementation or administrative problems, constitutes a bar to extradition unless the requesting state provides appropriate assurances.[51] In Judge De Mayer's view, "the most important issue in this case is not 'the likelihood of the feared exposure . . . to the death row phenomenon' but the very simple fact that his life would be put in jeopardy by the said extradition."[52] Judge De Mayer went on to argue that "[w]hen a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do."[53] This view has not received much scholarly attention.[54] This article, however, argues that it has become the basis for future international extradition cases involving the death penalty.[55] Moreover, it is indicative of an increasingly common judicial attitude that permits greater scope for consideration of human rights norms in extradition matters generally and a greater impatience with strict adherence to the rule on non-inquiry.

This article holds, contrary to earlier scholarly opinion[56] (but in line with Judge De Mayer), that this fact-based or "balancing" inquiry is, in part, because of the world-wide movement towards abolition of the death penalty.[57] This movement is veering towards

49. *Id.* at 448.

50. *See id.*

51. *Id. at* 483-85.

52. *Id.* 483-84 (De Mayer, J., concurring).

53. *Id.*

54. A Lexis-Nexis search revealed only two articles that referred to Judge De Mayer's concurring opinion in Soering v. United Kingdom.

55. *See infra* Part III.A.-D.

56. *See* John Dugard & Vanden Wyngert, *Reconciling Extradition With Human Rights*, 92 AM. J. INT'L L. 187, 197 (1998) ("As international law does not prohibit the death penalty, the fact that the fugitive will be executed if returned to the requested state cannot per se obstruct extradition. The manner of execution, however, may constitute cruel or inhuman punishment, in which case extradition should be refused.") (citations omitted). While their decision was clearly correct in 1998, subsequent decisions may have so undercut their thesis so as to warrant a stronger position.

57. *See, e.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN

a per se rule absolutely barring nations from extraditing from abolitionist countries to retentionist countries, unless adequate assurances are obtained. If true, this trend presents challenges for U.S. foreign policy in general, and specifically in the war against terrorism. It also has profound implications for other similar human rights issues such as the use of military courts in the formally undeclared war against terrorism. We take these issues up in the next sections.

IV. THE MOVEMENT TOWARD A PER SE RULE BARRING EXTRADITION ABSENT ASSURANCES THAT THE DEATH PENALTY WILL NOT BE IMPOSED

A. Consolidation and Expansion of the Soering *Rule*

The *Soering* case turned on Article 3 of the Convention (concerning inhuman or degrading treatment) in part because the United Kingdom had not as of the date of the case ratified the Optional Protocol No. 6 completely abolishing the death penalty.[58] The Court had no reason to consider whether a country that had fully abolished the death penalty and had ratified Protocol No. 6 could automatically refuse to extradite absent truly adequate assurances that the death penalty would not be imposed or executed.

Aylor-Davis v. France, involved a country that had ratified Optional Protocol No. 6, but the United States had, in that case, given adequate assurances that the death penalty would not be imposed. In that posture, the European Human Rights Commission ruled that the extradition would not violate either Article 3 or Protocol No. 6.[59]

Protocol 6's absolute wording,[60] combined with the fact that its

INTERNATIONAL LAW, 2d Ed. (Cambridge 1997); Ariane M. Schreiber, *States That Kill: Discretion and the Death Penalty - A Worldwide Perspective,* 29 CORNELL INT'L L.J. 263, 278-84 (1996) (outlining international efforts to abolish the death penalty); Hodgkinson, *supra* note 16, at 629 (outlining European efforts to abolish the death penalty); Ved P. Nanda, *Bases For Refusing International Extradition Requests - Capital Punishment and Torture*, 23 FORDHAM INT'L L.J. 1369, 1370-1394 (2000).

58. Hodgkinson, *supra* note 37, at 630.

59. *Id.*

60. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Mar. 1, 1985, art. 1, Europ.T.S. No. 114, *available at* http://conventions.coe.int/treaty/EN/cadreprincipal.htm ("The death penalty

commands are non-derogable[61] and that countries cannot make reservations[62] thereto, lends credence to the view that the duty to seek adequate assurances may well be absolute and not dependent on the receiving state's good or bad administration of its death penalty. Nonetheless, in *Netherlands v. Short*, the Dutch High Court "was not prepared to find that the Sixth Protocol took precedence" over other international obligations.[63] However, the court did refuse to extradite after balancing the interests of both parties.[64] While *Short* followed the *Soering* balancing of interests model and was not predicated on Protocol No. 6 as an absolute bar to extradition, the decision was clearly influenced by Protocol No. 6.

Short may be seen as a transitional case much like the many transitional cases that occurred in the United States with regard to the issue of the right to counsel. The United States Supreme Court's first, hesitant due process balancing analysis under *Powell v. Alabama*[65] was followed by several smaller steps[66] before the absolute rule requiring counsel in all felony cases was finally imposed by *Gideon v. Wainwright*.[67] It is not uncommon in the development of the law for a rule to begin as a fact-bound response to a shocking fact pattern and to be transformed into an absolute rule by later

shall be abolished. No one shall be condemned to such penalty or executed."). Article 2 provides the only exceptions, allowing the death penalty for "acts committed in time of war or of imminent threat of war." *Id.* at art. 2.

61. *Id.* at art. 3.

62. *Id.* at art. 4.

63. Dugard & Wyngert, *supra* note 56, at 193.

64. *Id.* ("On this basis, it held that Short's interest in not being handed over should prevail over the Government's interest in extraditing him to the United States.").

65. 287 U.S. 45 (1932). *Powell* involved seven young African Americans known as the "Scottsboro boys" who were sentenced to death in a trial without the aid of counsel. *Id.* at 50. The Supreme Court held that whether due process required counsel should be decided on a case-by-case basis and based on the egregious facts of the case, the court should have appointed counsel. *Id.* at 65. The case, and its jurisprudential implications, is described at some length in Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus*, 29 U. RICH. L. REV. 1327, 1335-44 (1995).

66. *See, e.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948) (circumstances peculiar to the case may render trial fundamentally unfair unless the defendant has the aid of counsel); Bute v. Illinois, 333 U.S. 640, 680 (1948) (counsel required as a matter of course in all capital cases); Betts v. Brady, 316 U.S. 455 (1942) (states not required to provide counsel in non-capital state proceedings unless on the totality of the facts one would be necessary for a fair trial); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (counsel required to be appointed in federal trials unless knowledgeably waived).

67. 372 U.S. 335 (1963) (overruling *Betts*, 316 U.S. 455).

somewhat less shocking, but nonetheless compelling, cases piled on one after the other. The process may not yet be complete in the extradition of death-eligible persons under international law but the trend is plain. While predictions about the law's likely development are hazardous, as will be demonstrated, the trend is in the direction of an absolute rule not dependent on delicate fact balancing.

Optional Protocol No. 6 only applies to nations within the Council of Europe that have ratified the accord.[68] Whatever its status as a Pan-European treaty, Protocol No. 6 cannot provide more than persuasive force to other non-European nations. Thus, the majority analysis in *Soering*, which encouraged fact balancing that at least sometimes allowed for the extradition of persons who were death-eligible in the receiving nation, continued to play an important role in forming international opinion. Indeed, until the trend towards a per se rule is absolutely established, *Soering's* equivocal rationale is likely to continue to play a role in international decision-making in at least some parts of the world. In addition, notwithstanding the status of a per se rule in death penalty matters, *Soering's* mode of analysis will continue to have force in other analogous matters such as the use of military trials where injection of human rights issues and balancing of facts will probably continue.

Soering's "death row phenomenon" analysis very quickly influenced cases around the world.[69] Treatment of *Reference re Ng*

68. Thirty-nine nations within the Council of Europe had ratified Protocol No. 6 as of August 12, 2001. Three nations had signed the Protocol but had not yet ratified it. Council of Europe, Legal Protocol No. 6 has been amended by eleven nations which in turn, has been ratified by forty-one nations, but two signatories have not yet ratified as of August 12, 2001. Council of Europe, Legal Affairs, Treaty Office *available at* http://conventions.coe.int/treaty/EN/cadreprincipal.htm. Protocol No. 11 restructures the control machinery including the European Court of Human Rights. Council of Europe, Legal Affairs, Treaty Office, *available at* http://conventions.coe.int/treaty/EN/cadreprincipal.htm. For a history of the abolition of the death penalty in Europe and a state by state analysis of the ratification of Protocol No. 6 *see* Hodgkinson, *supra* note 37.

69. Not all of the influenced cases were extradition cases. One of the most famous death row phenomenon cases involved an appeal to the Privy Council alleging that the harsh death row conditions in Jamaica constituted cruel, inhuman and degrading punishment. Pratt v. Attorney General of Jamaica, [1994] 2 A.C.1, (P.C. 1993) (appeal taken from Jamaica). The Privy Council's unanimous recommendation to Her Majesty that the sentences be commuted, signified a reprieve for more than 200 death sentenced prisoners in the Caribbean. The Judicial Privy Council, of the United Kingdom remains the

Extradition[70] and *Kindler v. Canada (Minister of Justice)*[71] from the Canadian Supreme Court provide instructive examples. Both Ng and Kindler faced the death penalty if extradited to the United States. The extradition treaty with the United States allowed the Canadian Minister of Justice to seek assurances that the death penalty would not be imposed or executed. In both instances, the Minister ordered extradition without seeking such assurances.[72] In both cases the Canadian Supreme Court found that the Minister of Justice had not abused his discretion in extraditing death-eligible persons to the United States and that such extradition did not violate Canada's Charter of Rights.[73] Both men were extradited and in both cases an after-the-fact appeal was taken to the United Nations Human Rights Committee.[74] The Committee refused to hold that the death row phenomenon, by itself, constituted a human rights violation under the International Covenant of Civil and Political Rights.[75] It distinguished *Soering*, whose age and mental condition bolstered the claim that he would face inhuman and degrading treatment.[76] Thus, in *Kindler*, the Human Rights Committee affirmed Canada's decision to extradite.[77] The committee, however, ruled that Ng, (who faced death by cyanide asphyxiation, rather than lethal injection, as in Kindler's case) was improperly extradited.[78] *Ng* and *Kindler* made it clear that international law provides no per se bar to extraditing death eligible persons, and each case will have to be analyzed on a case by case basis.

B. Muddled Drift

One solution for extradition courts in abolitionist countries is to avoid international law altogether in coming to the conclusion

ultimate court of appeal for sixteen Commonwealth countries. Bertodano, *Fighting for Justice in Shadow of the Gallows*, Sun. Telegraph Ltd. 16, Nov. 7, 1993.

70. [1991] 84 D.L.R. (4th) 498.

71. [1991] 2 S.C.R. 779.

72. *Id.* at 780; Reference re Ng Extradition, [1991] 84 D.L.R. (4th) 498 at 501.

73. Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecution Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 358 (1999).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 359.

that there can be no extradition of anyone who potentially faces the death penalty. This may have been the approach of the Italian Constitutional Court in *Venezia v. Ministero di Grazia e Giustizia*.[79] The *Venezia* court refused to extradite a death-eligible U.S. citizen despite assurances from U.S. authorities that he would not receive the death penalty. Instead, Venezia was forced to face trial in Italy for crimes committed in the United States. The court reasoned that in Italy "the prohibition on the death penalty . . . is absolute and precludes extradition for a capital offense on the basis of an evaluation by government officials or the courts of the sufficiency of assurances[.]"[80]

The court relied entirely on Italian constitutional law without mention of international law. Professor Bianchi of the University of Sienna speculated that "[i]t is hard to tell whether the court deliberately avoided" mention of international law because of the apparent "conflict between different treaty requirements" or lack of familiarity with "the relevant international law instruments."[81] Professor Bianchi points out that the Constitutional court had often invoked international law principles and trends in the past.[82] In this case, the Italian Constitutional Court may have been struggling with a way to create a per se bar to extradition in a context of international law that did not quite reach the right result. It is overly facile in this context to accuse the court of "result oriented jurisprudence." Rather, this case properly may be viewed as a halting and somewhat anomalous step toward an international per se rule barring extradition of death-eligible persons. Of course, Italy's refusal to extradite at all and its decision requiring trial in Italy went further than anything required under any interpretation of international law. One does not know what the decision of that court might have been had there been clear international rules that absolutely guaranteed that there would be no possibility of capital punishment. In short, *Venezia* may be either a halting step in the trend or just a very peculiar case. Just which is not clear.

It should be clear from the foregoing that European countries

79. Andrea Bianchi, *International Decision: Venezia v. Ministero Di Grazia E Giustizia. Judgment No. 223. 79 Rivista di Diritto Internazionale 815 (1996). Italian Constitutional Court, June 27, 1996*, 91 A.J.I.L. 727 (1997).

80. *Id.* at 727.

81. *Id.* at 731.

82. *Id.*

that have ratified Optional Protocol No. 6 are not likely to extradite anyone who is death-eligible regardless of the circumstances. Europe is for all practical purposes a death penalty-free extradition zone.[83] It only remains for the rest of the world to sweep away fact-bound analysis in favor of a more efficient and less contentious per se rule. That event may depend in part upon intellectual support cases from around the world that creep toward a per se rule barring extradition in potentially capital cases. That is what is happening.

C. Transition to an Absolute Rule

1. Canada's Reversal: United States v. Burns

The most startling and perhaps clearest indicator of the direction of death penalty extradition law after *Soering* is unquestionably the Canadian Supreme Court's dramatic about-face in *United States v. Burns*.[84] Recall that in 1991 *Ng* and *Kindler* had held that a decision of the Minister of Justice to extradite death-eligible persons back to the United States did not violate the Canadian Charter of Rights. *Burns,* only ten years later and clearly influenced by the intervening trends in international law, reversed course.

Canadians Glenn Sebastian Burns and Atif Ahmad Rafay both faced capital murder charges in the United States. The Minister of Justice ordered extradition without seeking assurances.[85] A

83. This conclusion is strengthened by Protocol 13 (which opened for signature May 2002). Protocol 13 goes further than Protocol 6 and abolishes the death penalty under all circumstances including acts committed in time of war. Moreover, Protocol 13 prohibits derogations and reservations. Thirty-nine nations have signed Protocol 13 and five have ratified it. It becomes effective three months after ten member states have expressed their consent to be bound. With the advent of Protocol 13, extradition from Europe in capital cases without assurances as to the death penalty becomes almost unimaginable. Death Penalty Information Center, The Death Penalty: An International Perspective, *available at* http://www.deathpenaltyinfo.org/dpicintl.html.

84. [2001] D.L.R. (4th) 1.

85. Apparently Ministers of Justice exercised their prerogative to seek assurances in death penalty cases rather sparingly. The *Ottawa Citizen* editorialized:

> [I]f it is an unjustified evil for the government to kill people in Canada, is it not a similar evil to participate in the killing of people in the United States?
>
> No easy answer. But the extradition treaty invites Canadian justice

unanimous Canadian Supreme Court held that while the Canadian Charter of Rights and Freedoms did not create a per se rule barring extradition of death-eligible persons in all cases, "such assurances [agreeing not to impose the death penalty] are constitutionally required in all but exceptional circumstances."[86] The Court declined to define or speculate on what might constitute "exceptional circumstances," saying, "in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are *always* constitutionally required."[87]

Plainly, the Canadian Supreme Court is moving very close to a per se rule. This is as close to a conclusive presumption as one can get without actually having it. Ministers of Justice in Canada no doubt will get the message and routinely seek assurances before extradition in potentially capital cases. Of course terrorists from al-Qaeda might constitute those "exceptional circumstances" reserved in the opinion. *Burns* did nominally approve the "balancing process" set out by *Ng* and *Kindler*.[88] Close analysis of the Court's rationale, however, demonstrates that *Burns* has jettisoned single-minded reliance on the "death row phenomenon" or any other remediable administrative deficiencies. It has moved to a rationale that is far more compatible with a per se rule than the equitable fact-balancing rule of *Soering*. As we will demonstrate, *Burns* is only nominally a balancing case dependent on the individual facts of the matter at hand.

The greatest part of the *Burns* opinion turns on "the factors that appear to weigh against extradition without assurances that the death penalty will not be imposed."[89] Any fair reading of this section will satisfy the reader that most of the reasons for refusing to extradite in this case revolve around matters that could not be fixed by any retentionist nation, and indeed, revolve around trends that are only likely to cut more and more against capital punishment. Moreover, the innocence argument, which the *Burns*

> ministers to avoid complicity in capital punishment, and they surely ought to try more often than once in 20 years.

Extradition Misgivings: Two accused killers have been extradited to the U.S. without Canada invoking a death-penalty safeguard, OTTAWA CITIZEN, July 17, 1996, at A10.

86. *Burns,* [2001] D.L.R. (4th) at ¶ 8.
87. *Id.* at ¶ 65 (emphasis added).
88. *Id.* at ¶ 67.
89. *Id.* at ¶ 75.

Court makes for the first time,[90] is fundamentally at odds with a cure for any capital punishment system.

The section analyzing factors that . . . weigh against extradition begins with Section (a) "Principles of Criminal Justice as Applied in Canada"[91] which focuses exclusively on Canada's abolition of the death penalty and the values implicated by that abolition. While general, abstract jurisprudential principles never can be dispositive of narrowly specific issues, the fact that this opening section is cast in absolute terms may be seen as a harbinger of the rationale to follow. The last part of the section is illustrative of the whole:

> It is, however, incontestable that capital punishment . . . engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering. It has been rejected by the Canadian Parliament for offences committed within Canada. Its potential imposition in this case is thus a factor that weighs against extradition without assurances.[92]

With the exception of the last sentence, every word presages a rationale that is virtually absolute. As we will see, this rationale goes far beyond the broad platitudes of the first section.

Section (b) focuses on Canadian and international initiatives to abolish the death penalty.[93] In page after carefully detailed page, the Court reports the worldwide trend toward abolition of the death penalty. Very little of this supports ad hoc determinations that would even occasionally permit the extradition of someone who faced the possibility of capital punishment. Indeed, the Court points out that:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998 . . . 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that

90. The author is unaware of any international extradition case before *Burns* that makes the innocence argument as forcefully and as well as the Court in *Burns*.

91. *Burns*, [2001] D.L.R. (4th) at ¶¶ 75-6.

92. *Id.* at ¶ 80.

93. *Id.* at ¶¶ 78-9.

> the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.[94]

The Court does acknowledge that "[t]his evidence does not establish an international law norm against . . . extradition to face the death penalty."[95] This language is certainly consistent with an ad hoc approach. But the rationale undergirding it is absolutist. In any event, no reasonable person would argue that *Burns* speaks with only one voice or that the case directly and unambiguously posits a per se rule against extradition of death-eligible persons. The claim herein is more modest—that *Burns* is a transitional case that speaks one way while moving in another. Such cases are not unheard of in the history of jurisprudence.[96]

Only Section (c)[97] treats issues that are unambiguously fact-bound and which would lead to an ad hoc balancing approach. Here the Court, in one lone paragraph, details the mitigating factors that international courts since *Soering* have looked to in denying extradition.

Section (d), which embraces "other factors weighing against extradition,"[98] may be the most telling part of the entire opinion. The largest and first part of this section deals not with the traditional "death row phenomenon" argument first raised in *Soering*, but rather with the fact that innocent people are being convicted of capital crimes, not just in countries like Iran and Iraq, but in the United States. Perhaps to ease some of the sting of the

94. *Id.* at ¶ 91.

95. *Id.* at ¶ 89.

96. The use of the word jurisdiction to describe the ambit of a writ of habeas corpus long after courts had gained the power to release persons for non-jurisdictional errors is another example of this process whereby jurisprudential language expands and expands until it is clear that the concept has been radically changed. *See, e.g.*, Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 402-23 (1998) (detailing historical development of the expansion of habeas corpus from a narrowly confined writ limited to jurisdictional error to one that reached many fundamental constitutional errors that lay beyond original conceptions of jurisdiction).

97. *Burns*, [2001] D.L.R. (4th) at ¶¶ 92-3.

98. *Id.* at ¶¶ 93-4.

charge the Court begins, not with innocent people on the U.S. death row, but rather with the Canadian experience with convicting innocent people of what would, before abolition, have been capital crimes. The Court spends ten full paragraphs on innocence issues in Canada.[99] This breast-beating is not without purpose. It allows the Court to pull no punches when it turns to the U.S. experience. In thirteen paragraphs it outlines the now well-known problems from the repeated calls for moratoria, to the Illinois experience where there were thirteen exonerations for every twelve executions and the recently disclosed two out of three error rate in the system.

The *Burns* Court expended more energy and ink analyzing the problems associated with miscarriages of justice in capital and potentially capital cases than it did with any other issue. This is important because, unlike other administrative critiques of the death penalty (for example, the death row phenomenon), innocence is not an issue that could likely be corrected by the receiving nation. When one looks at administrative issues in any judicial system, one generally looks at things that, at least in theory, can be corrected. If corrected, the objection predicated thereon disappears. If Due Process is being denied in a particular nation, and extradition is denied on that basis, that can be rectified. Presumably, the "death row phenomenon" can be rectified. Indeed, the Anti-Terrorist and Effective Death Penalty Act of 1996 (AEDPA)[100] is an attempt by the U.S. to do just that. It is, however, hard to see how any retentionist nation can rectify the problem of convicting the innocent in capital cases. While this seems on first impression like a factual matter susceptible of an administrative cure, the practical impediments make such a case only a thin theoretical possibility. It is hard to imagine a judicial system that did not convict the innocent, and in retentionist regimes, this means executing the innocent.[101] The efficiencies of speed generated by such laws as the AEDPA, by cutting out procedural protections, increase the probability of executing the innocent. Perversely, the attempt to repair the death row phenomenon works to increase the problem of the innocent at the gallows. It is not easy to see how this tension can be resolved. Moreover, hydraulic

99. *Id.* at ¶¶ 95-104.

100. Pub. L. No. 104-132, 110 Stat. 1214 (1999) (effective April 24, 1996).

101. *See* Laurie Anne Whitt, Alan W. Clarke & Eric Lambert, *Innocence Matters: How Innocence Recasts the Death Penalty Debate*, 38 CRIM. LAW BULL. 670 (2002).

pressure within the capital punishment system probably insures that the U.S. capital punishment regime increases the likelihood of convicting and ultimately executing the innocent.[102]

By focusing on innocence, *Burns* presents a conundrum. It speaks in language that purports to require the Minister of Justice (and lower courts) to engage in fact-bound analysis in the face of a strong presumption against extradition in potentially capital cases. But it provides criteria in its rationale that are virtually impossible to satisfy. The criteria cut against each other such that if you satisfy one, you are forced to violate the other—repair the length of stays on death row at the expense of increasing the probability of executing the innocent. Thomas Hobson could not have improved on this.[103]

If the Canadian Supreme Court remains faithful to its rationale in *Burns*, extradition of death-eligibles to the U.S. absent assurances has ended. *Burns,* while nominally a balancing case like *Soering*, rests on principles fundamentally at odds with that precept. Thus, *Burns* is a key transitional case from a balancing fact-bound approach to a per se approach. Given the trends elsewhere *Burns* presages, but does not announce, a new, stronger, international rule in death penalty extradition cases.

2. *South Africa:* Mohamed & Others v. RSA & Others

In an as yet little-noticed case, the South African Constitutional Court dropped a potential bombshell. *Mohamed & Another v. President of the RSA & Others*[104] announced a per se rule against either extradition or deportation in lieu of extradition. While the decision was predicated on South African Constitutional law, the court's extensive discussion of international law placed the case a step closer to an international rule absolutely barring extradition of death-eligibles absent adequate assurances that the death penalty will not be imposed or executed. The fact that this

102. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases,* 44 BUFF. L. REV. 469, 475-96 (1996) (discussing the "production of errors" that occurs throughout the whole criminal justice process leading up to capital punishment).

103. Thomas Hobson was a 17th-century horse trader who owned a stable and gave customers the option to look at all of his horses, but would only allow customers to purchase the horse nearest the door. The term "Hobson's choice" usually refers to the necessity of accepting one of two equally objectionable things. WEBSTER'S DICTIONARY 1076 (3d ed. 1993).

104. 2001 (7) BCLR 685 (CC).

case came out of Africa is significant in that it demonstrates that courts in abolitionist countries from all over the world are refusing extradition under these circumstances.

The case also closes the door to immigration authorities using deportation procedures to circumvent the extradition requirements, thus making extrajudicial political deals more difficult. If followed internationally (and this case seems to be well within the mainstream trend) this could be one of the more significant extradition cases.

Mohamed, a suspected member of al-Qaeda and a Tanzanian national, was sought by the United States in connection with his role in the embassy bombings in Nairobi and Dar es Salaam.[105] Found in Cape Town, South Africa, he was detained and ultimately deported to the United States.[106] Because immigration authorities treated the matter as a deportation, no assurances of any kind with respect to the death penalty were sought or given.[107] A co-defendant, Mr. Mahmoud Mahmud Salim was extradited to the United States from Germany, which did seek and receive assurances that the death penalty would neither be imposed nor executed.[108] South Africa, like Germany, has abolished the death penalty.[109] The Constitutional Court held that "[t]he handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful."[110] Since Mohamed had already been extradited to the United States and was in fact in the middle of his capital murder trial,[111] the South African Constitutional Court's options were quite limited; it ordered that "the full text of this judgment to be drawn to the attention of . . . the Federal Court . . . as a matter of urgency."[112] The U.S. District Judge ruled that the defendant had the right to present the South African Court's ruling to the jury at the penalty phase of trial.[113] Although the decision was otherwise irrelevant to the defendant's

105. *Mohamed*, 2001 (7) BCLR 685 at ¶¶ 7-10.
106. *Id.* at ¶ 11.
107. *Id.* at ¶ 25.
108. *Mohamed*, 2001 (7) BCLR 685 at ¶ 44.
109. S v. Makwanyane and Another, 1995 (6) BCLR 665 (CC).
110. *Mohamed*, 2001 (7) BCLR 685 at ¶ 67.
111. *Jury to Hear South Africa Constitutional Court Ruling as a Mitigating Factor in Penalty Phase*, N.Y.L.J., Aug. 9, 2001, at 17.
112. *Mohamed*, 2001 (7) BCLR 685 at. ¶73 § (5).
113. *See, e.g.*, Alan W. Clarke, *Virginia's Capital Murder Sentencing Proceeding: A Defense Perspective*, 18 U. RICH. L. REV. 341 (1984) for a discussion of the sentencing or penalty phase of a capital murder trial.

character, it was nonetheless a mitigating factor under federal law, which permits juries to consider the fact that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."[114] The jury ultimately hung on the life or death issue at the penalty phase and thus, Mohamed was sentenced to life imprisonment.[115]

While the *Mohamed* Court ultimately relied on the South African Constitution, it analyzed international extradition law in potentially capital cases at great length, repeatedly citing *inter alia Burns* and *Soering*. Despite *Burns* and *Soering's* less than absolutist approaches, the South African Constitutional Court nonetheless laid down an absolute rule not dependent on any fact balancing or other ad hoc determination. While this decision is not binding on other nations or any of the International Human Rights tribunals, its reasoning is likely to be highly influential, particularly in Commonwealth nations.[116] While no court has yet plainly stated that extradition of a person facing the death penalty is absolutely barred under international law under all circumstances, absent satisfactory assurances, this case is another unmistakable step in that direction.

D. Other Evidence For a Per Se Rule

There are a variety of international treaties beyond the European Convention on Human Rights and Fundamental Freedoms that speak to the issue of extraditing death-eligible people to retentionist countries, including the Second Optional Protocol to the International Covenant on Civil and Political Rights, the Aiming at Abolition of the Death Penalty,[117] and the

114. 18 U.S.C. § 3592(a)(4) (2002).

115. Benjamin Weiser, *Embassy Bombers Sentenced*, N.Y. TIMES, Oct. 21, 2001, § 4, at 2.

116. *See* Bruce Zagaris *S. African Constitutional Court Rules Deporting Alleged Terrorist to U.S. Violated Rights*, INT'L ENFORCEMENT LAW REP., Section: International Terrorism (Dec. 2001) Vol. 17, No. 12.

> On the one hand, the ruling has limited solace for Mohamed since he has been deported, tried and convicted by the U.S. On the other hand, his case has importance for future situations in South Africa and the Commonwealth of countries, since the decision will be noted and may be precedent in other cases, especially at a time when countries are requesting custody of many persons accused of transnational terrorism.

Id.

117. Second Optional Protocol to the International Covenant on Civil and

American Convention on Human Rights.[118] It is beyond the scope of this paper to canvass all treaties having an impact on this subject. However, a few brief notes about trends in extradition law as it affects the death penalty are in order.

From the foregoing sections it may seem that only Europe and perhaps Canada and South Africa strongly oppose extradition in capital cases unless assurances are given. This misperception is an artifact of the cases that the author has chosen to highlight revolving around a very limited theme concerning the strength and posture of the international rule in question. But the implication of these cases is greater than that which might be supposed. One must look at the actual situation in other regions of the world which may not have quite so developed a jurisprudence on the subject to understand how this issue is likely to play out in other regions of the world.

For example, the Organization of American States ("OAS") involves all thirty-five nations of the Americas. Of these nations only the United States, Guyana, Guatemala, and Belize retain the death penalty.[119] The American Convention on Human Rights contains language protecting against "cruel, inhuman, or degrading punishment,"[120] and is similar to European Covenant Article 3, the subject of the *Soering* case. Moreover, Article 9 of the 1981 Inter-American Convention on Extradition mandates that member States "not grant extradition when the offense in question is punishable . . . by the death penalty" absent assurances that the death penalty will not be imposed.[121]

The attitude of our OAS neighbors concerning the United States' use of the death penalty is decidedly negative. The Inter-American Commission on Human Rights in 1987 "found that the United States' practice of executing juveniles violated the American Declaration" of the Rights and Duties of Man.[122] How likely is it

Political Rights, *opened for signature* Dec. 15, 1989, 1991 U.N.T.S. 414 (entered into force July 11, 1991).

118. Organization of American States: American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

119. Michelle McKee, *Tinkering With the Machinery of Death: Understanding Why the United States Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 159 (2000).

120. American Convention on Human Rights, *supra* note 118, Art. 5 § 2.

121. Organization of American States: Inter-American Convention on Extradition, Feb. 25, 1981, 20 I.L.M. 723, art. 9.

122. Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation*

that the OAS would sanction extradition on conditions less stringent than their European counterparts? Moreover, Mexico consistently seeks assurances in capital cases before extraditing to the United States.[123] Thus, the United States is, for all practical purposes, sandwiched between two nations that will not extradite in capital cases absent assurances.

In addition, the rule of non-inquiry is undergoing significant erosion in human rights extradition cases lying beyond the death penalty arena. This trend makes it ever more unlikely that an international court would, under any circumstances, allow extradition in a potential capital case without ironclad assurances that the death penalty would not be imposed. It likely will affect the Bush administration's attempt to use military courts.

V. CONCLUSION

One hundred and eleven nations of the world have now abolished the death penalty.[124] Most are unlikely to extradite anyone, even members of al-Qaeda, if they realistically face a possibility of receiving the death penalty in the United States. As more and more nations abolish capital punishment, first de facto and then de jure, and as the rule against extradition to retentionist nations becomes stronger, the likelihood of increasing tension in U.S. foreign policy becomes evident.

Following September 11, America's need to question al-Qaeda suspects in Spain may be a difficult task in light of Spain's refusal to extradite unless the United States hewes to European trends regarding both the death penalty and the use of military courts.[125] Meanwhile, Great Britain has been tying itself in knots over the

of an Emerging Rule of Customary International Law, 32 WM. & MARY L. REV. 161, 181 (1990) (citations omitted). Justice Brennan, in his dissent in *Stanford v. Kentucky*, outlines the various human rights treaties either signed or ratified by the U.S. which "explicitly prohibit juvenile death penalties." 492 U.S. 361, 390 (1989).

123. The extradition treaty between Mexico and the United States "clearly prohibits the extradition of criminals when the fugitive awaits capital punishment in the requesting State and the laws of the requested State do not permit capital punishment for the specific offense." Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers - 150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U.J. INT'L L. & POL'Y 519, 539 (1997).

124. *See supra* note 5.

125. Bob Kemper, *U.S.-Spain Pledge Anti-Terror Cooperation; Leaders Downplay Extradition of 8 Al Qaeda Suspects*, CHICAGO TRIB., Nov. 29, 2001 at N4.

same problem of extradition to the United States.[126] The French Justice Minister, Marylise Lebranchu, warned that France will oppose the death penalty for French citizen and alleged al Qaeda member Zacarias Moussaoui, and that a death sentence will create "diplomatic difficulties."[127] Moussaoui, who was apprehended in Minnesota, presents no extradition problems, but France's strong opposition in his case makes it even clearer (if more clarity were needed) that no terrorist, whatever his or her crime, will be extradited from France without ironclad assurances on the death penalty.[128] Germany is also refusing to extradite Islamic militants to countries where they face the possibility of the death penalty.[129] U.S. Defense Secretary Donald H. Rumsfeld is quoted as saying that the U.S. military will "try to prevent enemy leaders from falling into the hands of peacekeeping troops from allied nations that might oppose capital punishment."[130] One wonders to what extent U.S. soldiers might interfere with British or French troops to accomplish that end, or what the diplomatic consequences might be if there was an armed showdown?

Plainly, this issue will continue to nettle U.S. foreign policy experts with repercussions that are wide ranging and difficult to predict. Given that "the hunt for fresh targets in pursuing al-Qaeda has now spread to Africa, South America and the Balkans,"[131] the problems for U.S. foreign policy can only increase. Thus, the question becomes: will U.S. policy and public opinion change to conform to international norms, or will the United States continue to pay an increasingly heavy price for its love affair with capital punishment?

126. Philip Johnston, *Britain Could Face Dilemma Over bin Laden Death Penalty*, THE DAILY TELEGRAPH (London) Dec. 11, 2001, at 14.

127. *Minister Warns of Rift Over Death Penalty For Sept. 11 Suspect*, AGENCE FRANCE PRESSE, Dec. 12, 2001, at *1.

128. *Id.*

129. Interior Minister Otto Schily ordered raids that captured persons having alleged ties to Osama bin Laden. Turkey has demanded the extradition of one, but Germany has refused because of the possibility of the death penalty under Turkish law. *Germany Targets Muslim Groups*, (Dec. 12, 2001) *at* http://news.bbc.co.uk/1/hi/world/europe/1705606.stm.

130. Paul Richter, *U.S. Leaders Begin to Plan Ways to Bring Prisoners to Justice*, MILWAUKEE JOURNAL SENTINEL, Dec. 12, 2001 at A13.

131. Ed Vulliamy et al., *US Launches Hunt for Terror Camps in Somalia,* THE OBSERVER, Dec. 9, 2001, at 1.