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William A. Schabas

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WILLIAM A. SCHABAS*

I. INTRODUCTION

During the negotiations for the adoption of the Rome Statute of the International Criminal Court,[1] a small but determined group of states, mainly from Arabic and Islamic countries and the Commonwealth Caribbean, argued that the new institution should impose capital punishment. Perhaps surprisingly, the United States voiced opposition to capital punishment, even though many of its internal jurisdictions support it. In a defining moment of the negotiations, U.S. Ambassador David Scheffer took the floor at the formal session of the Working Group on Penalties, and argued that the International Court, if empowered to impose the death penalty, would fail because a large number of states would simply refuse to transfer criminals to the Court.[2]

The exclusion of a death penalty provision in the Rome Statute reflects a growing consensus among states that capital punishment is cruel, inhuman, degrading, and incompatible with contemporary values and international human rights norms.[3] In

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* Professor of Human Rights Law, National University of Ireland, Galway; Director, Irish Centre for Human Rights. The author wishes to thank William Galvin for his assistance in researching this material.

1. The Rome Statute entered into force on July 1, 2002. It established the International Criminal Court, which has jurisdiction over genocide, crimes against humanity, and war crimes. The maximum penalty available under the Rome Statute is life imprisonment. For a general description of the Rome Statute and the Court, see WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001).

2. See William A. Schabas, *Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute*, 2 PUNISHMENT & SOC'Y 263 (2000) (providing a report based on personal observations at the session).

3. Mohamed v. President of S. Afr., 2001 (3) SALR 893, para. 40 (CC).

recent years, developments in international extradition practices reveal that capital punishment is incompatible with effective international cooperation in criminal law matters. Indeed, this also explains the exclusion of the death penalty from the statutes of two ad hoc tribunals for the former Yugoslavia and Rwanda, which the Security Council established in 1993 and 1994, respectively. At that time, three of the five permanent members, the United States, the Russian Federation, and China, were enthusiastic practitioners of capital punishment. Further, the former Yugoslavia and Rwanda could not be considered abolitionist at the time. Yet, capital punishment was simply out of the question.[4]

Although there is no international law prohibiting capital punishment, many international legal standards severely limit its application. For example, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) declares that the death penalty may only be imposed after a rigorously fair trial and a conviction for the most serious of crimes. Article 6 also does not allow a death sentence to be imposed on pregnant women or for juvenile offenses.[5] In addition, four international treaties go further than Article 6 by completely prohibiting capital punishment,[6] and the American Convention on Human Rights prohibits the death penalty in states where it has already been

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4. The Security Council did not discuss the death penalty during adoption of the Statute of the International Criminal Tribunal for the former Yugoslavia. However, many of the proposals submitted by States expressed opposition to the death penalty. In the case of the Statute of the International Criminal Tribunal for Rwanda, Rwanda argued strenuously for inclusion of the death penalty, and actually voted against adoption of the Statute partly for this reason. *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 249–50 (3d ed. 2002).

5. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174 [hereinafter ICCPR].

6. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, art. 1, Europ. T.S. No. 114; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at abolition of the death penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at art. 1, U.N. Doc. A/44/49 (1989); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *approved* June 8, 1990, art. 1, 29 I.L.M. 1447, 1448; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, *opened for signature* May 3, 2002, art. 1, Europ. T.S. No. 187.

abolished.[7] Together, these treaties apply to approximately seventy states. Moreover, the fourth Geneva Convention outlaws the use of capital punishment on citizens of occupied territories if their government had previously abolished the death penalty prior to the occupation.[8]

International law also promotes the abolition of the death penalty indirectly. Many states that have abolished capital punishment refuse to extradite individuals to states that still impose the death penalty. Abolitionist states may also refuse to participate in other forms of legal assistance that could facilitate the imposition of capital punishment in a retentionist state. Consequently, states retaining the death penalty are indirectly pressured into reducing or eliminating it entirely.

In recent years, the practice of indirect abolition has also entered the realm of international human rights law. International human rights tribunals have ruled that extradition in capital cases violates treaty norms that essentially prohibit cruel, inhuman, and degrading treatment or punishment. In support of this movement, Article 19 of the Charter of Fundamental Rights of the European Union declares, "No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[9]

Consequently, this Article discusses how the practice of capital punishment significantly conflicts with international extradition laws and norms. Part II provides background on how extradition treaties have addressed capital punishment, including the development of requiring requesting states' assurances that they will not impose the death penalty. Part III discusses a pivotal European Court of Human Rights extradition case, *Soering v. United Kingdom*, where the Court found that extreme conditions from a long waiting period on death row constituted inhuman and degrading treatment, and violated Article 3 of the European

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7. American Convention on Human Rights: Pact of San Jose, Costa Rica, *adopted* Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123, 145.

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, art. 68(2), 75 U.N.T.S. 285, 330.

9. Charter of Fundamental Rights, art. 19, 2000 O.J. (C 364) 1; *see also* Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, preamble, para. 13, 2002 O.J. (L 190) 1 (identical text).

Convention on Human Rights. Part III also examines *Soering*'s influence on subsequent international and domestic extradition cases. Through a focus on Canadian and Australian cases, Part IV describes how the United Nations Human Rights Committee handles extradition cases involving capital punishment. Part V explores approaches that national constitutional courts have taken in death penalty extradition cases, through examples from Italy, Canada, and South Africa. Part VI concludes with commentary on the effects of abolitionist states' refusals to extradite to countries where the death penalty may be imposed.

II. EXTRADITION TREATIES AND THE DEATH PENALTY

The practice of extraditing individuals on the condition that they not be subjected to the death penalty[10] originated in the mid-nineteenth century, when states began abolishing capital punishment in their domestic legal systems.[11] The 1872 extradition treaty between Spain and Brazil provided that if the requesting state did not guarantee that the suspect would not be subject to capital punishment, then the state could deny extradition. A similar provision appears in the 1873 treaty between Portugal and Switzerland, and in the 1892 extradition treaty between Portugal and England. The 1908 treaty between the United States and Portugal was accompanied by an exchange of notes to the same effect. Both the U.S. Senate resolution ratifying the treaty and U.S. President Theodore Roosevelt's proclamations expressed support for these provisions. The treaty between the United States and Costa Rica, negotiated in the early 1920s, took a similar approach.[12]

Several model multilateral extradition treaties also include similar references to restrictions on extradition in cases where the death penalty may be imposed. The first draft multilateral

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10. Usually, the extradition treaties including this limitation would stipulate that the death penalty be commuted to the next most serious punishment.

11. In the eighteenth century, states such as Tuscany were inspired by the writing of Cesare Beccaria. The French revolutionaries unsuccessfully attempted to eliminate capital punishment from the *Code Pénal* adopted in 1791. The U.S. patriot, Thomas Paine, who had moved to France to assist in that country's revolution, was an uncompromising advocate of abolition. *See* Thomas Paine, *Reasons for Preserving the Life of Louis Capet, in* THOMAS PAINE READER 394–98 (Michael Foot & Isaac Kramnick eds., 1987) (where Paine insisted that even the King's life should not be taken).

12. J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 AM. J. INT'L L. 298 (1924).

extradition treaty of this sort was adopted in Montevideo in 1889. It served as a model for subsequent initiatives, such as the 1907 and 1923 extradition conventions of the Central American republics, and the 1912 draft convention of the International Commission of Jurists. More recently, Article 4 of the 1990 Model Treaty on Extradition, proposed by the Eighth U.N. Congress on the Prevention of Crime and Treatment of Offenders, states the following:

> Extradition may be refused in any of the following circumstances... [i]f the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.[13]

Article 11 of the European Convention on Extradition declares that, when an offense is punishable by death under the law of the requesting party, but the requested party has prohibited (or does not normally practice) capital punishment, "extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out."[14]

The practice of including conditions such as these in extradition treaties is now widespread. Even states that have not abolished the death penalty often require that the provision be contained in their bilateral instruments. For example, Article VI of the 1976 Extradition Treaty between Canada and the United States entitles the sending state to insist upon sufficient guarantees that the death penalty will not be imposed as a condition for extradition. The parties included the provision pursuant to the U.S. request.15 At the time, both the United States and Canada had legislation allowing capital punishment. Although Canadian courts had continued to sentence people to death,16 executions were systematically commuted, and capital punishment would be

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13. Model Treaty on Extradition, U.N. GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116 (1991).

14. European Convention on Extradition, *opened for signature* Dec. 13, 1957, art. 11, 359 U.N.T.S. 273, 282.

15. Extradition Treaty Between Canada and the United States of America, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 1976 Can. T.S. No. 3.

16. *See also* Miller v. The Queen, [1977] 2 S.C.R. 680, 684 (Can.) (affirming the lawfulness of an execution for a crime and the defendants' death sentences).

abolished within a few years of the treaty's adoption.17 Similarly, at the time, many U.S. jurisdictions had death penalty statutes, although the practice had been temporarily suspended while the U.S. Supreme Court deliberated constitutional issues.18

III. EXTRADITION FROM EUROPE: THE *SOERING* CASE

As early as 1983, the European Commission on Human Rights[19] held that a sending state would violate Article 3 of the European Convention on Human Rights[20] if it extradites a suspect to a country where torture might be threatened or inflicted.[21] Only a few years later, in *Kirkwood v. United Kingdom*, which involved extradition from the United Kingdom to California,[22] the Commission considered the possibility that the death penalty, although ostensibly permitted by Article 2(1) of the Convention,[23] might raise issues under Article 3.[24] Kirkwood's application was declared inadmissible, however, because he had not demonstrated

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17. *See, e.g.*, Criminal Law Amendment Act (No. 2), ch. 105 (1976) (Can.).

18. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (discussing when a death penalty statute is so discriminatory on its face that it violates the Fourteenth Amendment); *cf.* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that death penalty may stand where sentencing procedures are not arbitrary and capricious, and juries are circumscribed by legislative guidelines).

19. The European Commission on Human Rights was established by the European Convention on Human Rights to examine petitions from individuals alleging that their rights had been violated by their government. Under specific conditions, decisions of the Commission could be reviewed and reconsidered by the European Court of Human Rights, operating essentially as an appellate body. In 1998, amendments to the European Convention on Human Rights entered into force, abolishing the Commission and litigants to apply directly to the European Court of Human Rights.

20. Article 3 prohibits torture or other inhuman or degrading treatment or punishment. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224.

21. Altun v. Germany, App. No. 10308/83, 5 Eur. H.R. Rep. 611, 611–14 (1983).

22. *See* Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, June 8, 1972, art. IV, 28 U.S.T. 227, 229, 1049 U.N.T.S. 167, 169. "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out." *Id.*

23. Article 2(1) states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, art. 2(1).

24. *See* Kirkwood v. United Kingdom, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 184 (1984).

to the Commission's satisfaction that detention on "death row" was inhuman and degrading treatment, leaving the question for another day.[25]

A. Soering and the "Death Row Phenomenon"

A few years later, the issue of whether extradition in cases where the death penalty could be imposed violated Article 3 of the Convention returned to the Commission in *Soering v. United Kingdom*. Jens Soering was arrested in the United Kingdom under an extradition warrant, issued at the request of the United States. Soering, a German national, had lived in the United States since the age of eleven. In 1985, eighteen-year-old Soering and his girlfriend murdered her parents in Bedford, Virginia. After the killing, Soering fled to the United Kingdom, where he was arrested in 1986. In addition to the United States, the German government also requested Soering's rendition, because Germany's laws permit prosecution of nationals for certain crimes committed outside the territory. Germany had abolished the death penalty in 1949.[26] In Virginia, however, the death penalty was then—as it is now—very much in force.

In a celebrated judgment, the European Court of Human Rights ruled that Soering's extradition to the United States, without an assurance that capital punishment would not be imposed, constituted a violation of Article 3 of the European Convention on Human Rights.[27] An essentially unanimous Court

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25. *Id.* at 190–91. After *Kirkwood*, another U.K. case came before the Commission, involving extradition to Florida. N.E. v. United Kingdom, App. No. 12553/86 (Eur. Comm'n H.R., July 7, 1987, Hudoc reference REF0000291, *struck off list*) *available at* http://hudoc.echr.coe.int/Hudoc2doc/hedec/sift/291.txt (last visited Sept. 21, 2003). The applicant stated that the issues under Florida's jurisdiction could be distinguished from those in California, the state to which Kirkwood was extradited. Also, the applicant raised the intriguing issue of the compatibility of the electric chair—the method of execution used in Florida—with Article 3 of the European Convention. At the applicant's request, the case was discontinued. *Id.* The records of the Commission reveal yet another U.K. case involving extradition and capital punishment. Amekrane v. United Kingdom 1973 Y.B. Eur. Conv. on H.R. 356 (1973) (Eur. Comm'n H.R., App. No. 5961/72). Amekrane had fled to Gibraltar following an aborted *coup d'état* in his native Morocco. He was arrested by British authorities and returned to Morocco, where he was tried and executed. In 1974, the United Kingdom and Amekrane's widow reached a friendly settlement involving a payment of £35,000. *Id.*

26. *See* RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600–1987 861 (1996).

27. Soering v. United Kingdom, App. No. 14038/88, 11 Eur. Ct. H.R. 439, 502–03 (1989). The Court, however, did not respond favorably to Amnesty International's *amicus*

held that, even if the death penalty per se could not be deemed contrary to the Convention, extradition would violate Article 3's prohibition on inhuman or degrading treatment because Soering was threatened with the "death row phenomenon." Evidence had been tendered to show that those sentenced to death in Virginia typically spent six to eight years awaiting execution, under harsh conditions. The Court pointed out that, although Virginia's post-conviction procedures may be well intentioned and potentially beneficial, "the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death."[28] The Court concluded:

> [H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means, which would not involve suffering of such exceptional intensity or duration [i.e., extradition to Germany, where the death penalty would not be imposed].[29]

The *Soering* decision was submitted to the Committee of Ministers of the Council of Europe, which oversees implementation of Court rulings pursuant to Article 54 of the European Convention on Human Rights. The United Kingdom reported to the Committee that, on July 28, 1989, it had informed U.S. authorities that it would refuse extradition for an offense that

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curiae, which invited the Court to consider Article 3 of the Convention as having implicitly repealed the death penalty reference in Article 2(1). Only one judge on the Court agreed with such a bold and innovative interpretation. *Id.* at 473–74, 504–05. Recently, a similar view has been espoused by Hélio Bicudo of the Inter-American Commission of Human Rights. *See* Lamey et al. v. Jamaica, Case No. 11.826, Inter-Am. C.H.R. 89/98, OEA/ser.L/V/II.95, doc. 7 rev. 146 (1998), *available at* http://www.umn.edu/humanrts/cases/1998/jamaica89-98.html (last visited Sept. 21, 2003); *see also* Knights v. Grenada, Case 12.028, Inter-Am. C.H.R. 47/01, OEA/ser.L/V/II/111, doc. 20 rev. 841 (2000), *available at* http://www.umn.edu/humanrts/cases/S47-01.html (last visited Sept. 21, 2003).

28. *Soering*, 11 Eur. Ct. H.R. at 475–76, 493.

29. *Soering*, 11 Eur. Ct. H.R. at 478.

might impose the death penalty. Three days later, the United States answered that, "in the light of the applicable provisions of the 1972 extradition treaty, United States law would prohibit the applicant's prosecution in Virginia for the offence of capital murder."[30] The Committee then was satisfied that the United Kingdom had respected the judgment and exercised its functions under the Convention.[31] Soering was subsequently extradited to Virginia, where he pled guilty to two charges of murder, and for which he was sentenced to ninety-nine years in prison.

B. Soering's Impact upon Subsequent International Extradition Cases

The European Court returned to *Soering* in March 2003, when it considered an application from Kurdish leader Abdullah Öcalan, who had been arrested in Kenya and then flown to Turkey where he was subsequently sentenced to death for various terrorist offences. The Court said "the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided."32 In cautious language, the Court appeared to endorse the position of Judge de Meyer, in *Soering*, to the effect that the reference in article 2(1) of the Convention had been implicitly repealed by the practice of the Member States of the Council of Europe, including Turkey itself.33

The European Commission—prior to its abolition in 1998—was called upon to interpret and apply the *Soering* decision on several occasions. For example, in January 1994, it ruled inadmissible an application from Joy Aylor-Davis, who was subject to extradition to the United States for a capital offense. The Commission considered sufficient the Dallas County prosecutor's guarantees provided to the French government that if extradition were granted, Texas would not pursue the death penalty.[34] Aylor-Davis, however, claimed that the undertaking was "vague and imprecise." Furthermore, she argued that federal authorities had

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30. *See* Richard B. Lillich, *The Soering case*, 95 AM. J. INT'L L. 128, 141. – perhaps it will be a satisfactory reference for you.

31. *See id.*

32 Öcalan v. Turkey, App. No. 46221/99, (Eur. Ct. H.R., Mar. 12, 2003), *at* http://www.echr.coe.int/Eng/Judgments.htm (last visited Sept. 21, 2003), para. 195.

33 *Id.*, paras. 189-198.

34. Texas law stated that the death penalty could only be pronounced if the prosecution requested it.

furnished, through diplomatic channels, the assurances that prosecutors would not seek the death penalty and thus, such assurances did not bind executive or judicial authorities in Texas. The Commission compared Aylor-Davis' facts with those in *Soering*, where the prosecutor had clearly intended to seek the death penalty, and found the Texas prosecutor's attitude to be fundamentally different.[35] Thus, the Commission concurred with an earlier decision of the French *Conseil d'État*, holding the undertaking to be acceptable.[36]

The Commission made similar findings in several cases where applicants claimed their expulsion or extradition could possibly subject them to the death penalty. These cases all were dismissed due to sufficient assurances that the death penalty would not be imposed, the relatively minor nature of the offense in question,[37] or the unlikelihood of capital punishment actually being imposed in the receiving state.[38]

Since *Soering*, Member States of the Council of Europe no longer extradite to states where it is likely that capital punishment will be imposed.[39] Indeed, the *Soering* precedent almost immediately took on a significance that did not strictly correspond to the judgment's text. In practice, Council of Europe members would use *Soering* to prohibit extradition to states on the basis that the death penalty might be imposed, overlooking the "death row phenomenon" issue, which was central to *Soering's* holding. This popular or colloquial understanding of *Soering* is confirmed in the explanatory documents accompanying the draft of Article 19 of the Charter of Fundamental Rights, adopted in December 2000 by

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35. Aylor-Davis v. France, App. No. 22742/93, 76B Eur. Comm'n H.R. Dec. & Rep. 164, 167, 171 (1994).

36. *Les engagements d'un État étranger en matière d'extradition; Conclusions sur Counseil d'État, Assemblée, 15 octobre 1993, Mme Joy Davis-Aylor*, 9(6) REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1166 (1993) (conclusions C. Vigoreux).

37. *See, e.g.*, H. v. Sweden, App. No. 22408/93, 79A Eur. Comm'n H.R. Dec. & Rep. 85, 91, 94, 96 (1994).

38. *See* Çinar v. Turkey, App. No. 17864/91, 79A Eur. Comm'n H.R. Dec. & Rep. 5, 8–9 (1994).

39. At the time of the *Soering* decision, the Council of Europe consisted of about twenty members, mainly States of Western Europe, together with Greece, Turkey, and Cyprus. But since 1989, the Council's membership has expanded dramatically, and now encompasses most of Europe, including Russia and several former Soviet republics, with the notable exception of Belarus.

Member States of the European Union.[40] These documents cite *Soering* as authority for prohibiting extradition where there is merely a threat of capital punishment, although this is not the holding in *Soering*. Instead, *Soering* addressed conditions under which the "death row phenomenon" violated the European Convention prohibition against inhuman and degrading treatment.[41] Although the Charter is not a treaty and is without binding effect, Member States would likely agree that it codifies European human rights norms dealing with capital punishment.

The European Court's decision in *Soering* has since been discussed and interpreted by both domestic and international courts. Some courts have constructed the decision narrowly, by pointing to various extenuating factors identified by the *Soering* court (such as age and mental state) to assert that prolonged detention on death row per se does not constitute inhuman or degrading treatment or punishment. Following this reasoning, a majority of the U.N. Human Rights Committee has steadfastly insisted that delay on death row must be accompanied by other extenuating circumstances.[42] The majority's position, however, is met by a tide of dissent that ebbs and flows with the Committee's changing composition.[43] These dissenters have expressed the concern that the "death row phenomenon" argument may actually encourage states to execute offenders more rapidly, rather than be accused of inflicting inhuman treatment through lengthy stays on death row.

Several national courts have supported the minority viewpoint of the Human Rights Committee. In a 1993 ruling concerning death row prisoners in Zimbabwe, the Zimbabwe

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40. The Charter of Fundamental Rights reflects the basic rights guaranteed by the European Convention on Human Rights. These rights are also derived from constitutional traditions common to Member States and general principles of community law.

41. Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, Convent 49, art. 19, (Oct. 11, 2000) *available at* http://db.consilium.eu.int/df/default.asp?lang=en (last visited Sept. 21, 2003).

42. *See, e.g.*, Communication No. 558/1994: Jamaica 05/08/96 (Errol Johnson v. Jam.), U.N. GAOR, Hum. Rts. Comm., 56th Sess., Annex, at para. 8.2, U.N. Doc. CCPR/C/56/D/588/1994 (1996).

43. Communication No. 271/1988: Jamaica 06/04/92 (Barrett & Sutcliffe v. Jam.), U.N. GAOR, Hum. Rts. Comm., 44th Sess., Appendix, at 254. U.N. Doc. CCPR/C/44/D/271/1988, (*per* Christine Chanet); *see* Markus G. Schmidt, *The Death Row Phenomenon: A Comparative Analysis, in* THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH 47–72 (Theodore S. Orlin, et al., eds., 2000).

Supreme Court agreed with the position of the Committee's dissenters and endorsed *Soering*. The Court found that the minority's views were "more plausible and persuasive" than those of the Committee's majority.[44] Later that year, the Judicial Committee of the Privy Council, citing *Soering*, held that inordinate delay alone is sufficient to breach of the norm prohibiting inhuman or degrading treatment and that no extenuating circumstances, such as age or mental state, are necessary.[45]

In *Kindler v. Canada*, the Supreme Court of Canada's Justice Gerald La Forest dismissed an argument against extradition based on the length of detention on death row. Justice Forest, referring to *Soering*, observed that "there may be situations where the age or mental capacity of the fugitive may affect the matter, but . . . that is not this case."[46] In *United States v. Burns*, however, a case the Canadian Supreme Court decided a decade after *Kindler*, the Court noted that *Kindler* had not definitively settled the "death row phenomenon" issue. In a unanimous decision, the *Burns* Court moved away from the *Kindler* holding and recognized the relevance of the psychological trauma associated with prolonged detention while awaiting capital punishment.[47]

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44. Catholic Comm'n v. Attorney-Gen., Zimb., *reprinted in* 14 HUMAN RIGHTS L.J. 323.

45. Pratt v. Attorney Gen. , Jam., *reprinted in* 14 HUM. RTS. L.J. 338, 346 (1993).

46. Kindler v. Canada, [1991] 2 S.C.R. 779, 838. For more information on *Kindler*, see Sharon A. Williams, *Extradition and the Death Penalty Exception in Canada: Resolving the Ng and Kindler Cases*, 13 LOY. L.A. INT'L & COMP. L. J. 799 (1991); Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 28 CAN. YB INT'L L. 117 (1990); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition*, 62 INT'L REV. PENAL L. 259 (1991); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191 (1992); Donald K. Piragoff & Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, 3 CRIM. L.F. 225 (1992); William A. Schabas, *Extradition et la peine de mort: le Canada renvoie deux fugitifs au couloir de la mort*, 4 REVUE UNIVERSELLE DES DROITS DE L'HOMME 65 (1992); William A. Schabas, *Kindler and Ng: Our Supreme Magistrates take a Frightening Step into the Court of Public Opinion*, 51 REVUE DU BARREAU 673 (1991).

47. United States v. Burns, [2001] 1 S.C.R. 183, paras. 122–23 (Can.). For more information on *Burns*, see William A. Schabas, *United States v. Burns*, 95 AM. J. INT'L L. 666 (2001); Daniel Givelber, *Innocence Abroad: The Extradition Cases and the Future of Capital Litigation*, 81 OR. L. REV. 161 (2002).

IV. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

The European Court of Human Rights' Soering decision prompted a string of cases before the U.N. Human Rights Committee, in which litigants challenged extradition because they could face the death penalty. The Committee, a so-called "expert body" resembling a tribunal, considers applications that allege a violation of the ICCPR involving states that have also ratified the first Optional Protocol to the Covenant.

A. Canadian Cases before the U.N. Human Rights Committee

In 1991, the Committee considered two Canadian cases, *Kindler* and *Ng*, in which the Supreme Court of Canada rejected the European Court's reasoning and held that extradition did not breach the Canadian constitution when there was a real threat of capital punishment.[48] In *Kindler*, the debate centered on Article 6 of the ICCPR, which explicitly allows capital punishment in states where the death penalty has not been abolished, subject to a number of constraints and restrictions. The Committee initially held that Kindler's application was admissible because Kindler's extradition to the United States might involve a breach of Article 6. On the merits of the case, however, the Committee found no such violation.[49] The Committee also addressed the death row phenomenon featured in *Soering,* and held that mere delay in imposing capital punishment could not be considered torture, cruel, inhuman, or degrading treatment as prohibited by Article 7 of the ICCPR.[50]

Some months later, however, the Committee held, in *Ng v. Canada*, that there had been a violation of the ICCPR because Charles Ng was threatened with execution in the California gas chamber. The Committee had previously deemed the gas chamber contrary to Article 7.[51] In yet another Canadian case, *Cox v. Canada*, the Committee said that execution by lethal injection was not contrary to the ICCPR's Article 7.[52] A fourth Canadian case, *Judge v. Minister of Citizenship and Immigration*, is currently

48. Kindler v. Canada, *reprinted in* 14 HUM. RTS. L.J. 307, 308 (1993); Ng v. Canada, *reprinted in* 14 HUM. RTS. L.J. 149 (1994).

49. *Kindler*, 14 HUM. RTS. L.J. 307, 309 at paras. 6.5, 16.

50. *Id.* para. 15.2.

51. *Ng*, 14 HUM. RTS. L.J. at 157.

52. Cox v. Canada, *reprinted in* 14 HUM. RTS. L.J. 410, 417 (1994).

pending before the Committee. Although *Judge* involves a fugitive's deportation rather than extradition, the issues are fundamentally the same. In 1998, the Quebec Superior Court ordered that Judge be sent back to Pennsylvania, where he had been sentenced to death before escaping and fleeing to Canada.[53] The Committee is expected to issue its ruling on *Judge* during one of its 2003 sessions.

B. Australian Cases before the U.N. Human Rights Committee

Recent Australian cases before the Human Rights Committee have also involved extradition to countries where capital punishment might be imposed. In *A.R.J. v. Australia*, the Committee dismissed, as unsubstantiated, a petition from an individual who claimed he might be sentenced to death on drug charges if deported to Iran.[54] It reached a similar conclusion in a case involving Malaysia, but this time some members of the Committee expressed their dissent.[55] Eckart Klein and David Kretzmer believed that expulsion from Australia to Malaysia, a country where a person is subject to the death penalty for possession of a relatively small quantity of heroin, constituted a breach of Article 6 of the ICCPR.[56] Their reasoning is unclear, which may imply that the violation of Article 6 consists of the death penalty itself. However, this claim appears to conflict with the text of Article 6(2).[57] Presumably, Klein and Kretzmer meant that the offense charged would not meet the "most serious crimes" requirement set out in the ICCPR. A third dissenter on the Committee, Martin Scheinin, said the death penalty violated Article 7 of the ICCPR because Article 7 prohibited torture, cruel,

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53. Judge v. Minister of Citizenship and Immigration et al., [1998] Q.J. No. 2322 (SC).

54. Communication No. 692/1996: Australia 11/08/97 (A.R.J. v. Australia), U.N. GAOR, Hum. Rts. Comm., 60th Sess., Annex, at para. 6.12, U.N. Doc. CCPR/C/60/D/692/1996 (1997).

55. Communication No. 706/1996: Australia 04/12/97 (T. v. Australia), U.N. GAOR, Hum. Rts. Comm., 61st Sess., Annex, U.N. Doc. CCPR/C/61/D/706/1996 (1997).

56. *Id.* (individual opinion by Committee members Eckart Klein and David Kretzmer (dissenting)).

57. Article 6(2) states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court." ICCPR, *supra* note 5, art. 6(2).

inhuman, and degrading treatment or punishment.[58] Using reasoning similar to the avant-garde argument rejected in *Soering*,[59] Scheinin suggested that Article 7 might neutralize the acceptability of the death penalty found in Article 6.

In contrast with the situation in Europe, where the European Court of Human Rights used the *Soering* decision to effectively put an end to all extraditions when there was a realistic prospect of capital punishment, the approach of the Human Rights Committee is more inconsistent. The Committee has agreed that extradition involving a punishment that infringes either Article 6 or 7 of the ICCPR would itself be a violation. Yet, the Committee has found that the death penalty did not infringe the ICCPR, with the exception of the *Ng* case, which involved the gas chamber. During presentation of periodic reports, however, the Committee expressed appreciation that some states refuse to extradite without assurances that the death penalty will not be implemented.[60]

C. The U.N. Convention Against Torture

Although the ICCPR says nothing explicitly about whether states may extradite, expel, or deport individuals who may face the threat of capital punishment, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that "no State Party shall expel, return ['*refouler*'] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[61] For the most part, the Committee Against Torture has steered clear of death penalty issues. It has certainly not shown itself to be a better forum than the Human Rights Committee for death penalty litigation, although some of the periodic reports to the Committee Against Torture refer to issues concerning extradition to other states for capital crimes.[62]

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58. *Id.* (individual opinion by Committee member Martin Scheinin (dissenting)).

59. *See supra* text accompanying note 28.

60. Report of the Human Rights Committee (Vol. I), U.N. GAOR, 52d Sess., Supp. No. 40, at 51, para 313, U.N. Doc. A/52/40 (1997) (discussing Portugal/Macau).

61. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 9, 1975, art. 3, 1465 U.N.T.S. 113, 114.

62. Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 29h, U.N. Doc. CAT/C/34/Add.7 (1997) (Third report of Panama); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 24, U.N. Doc. CAT/C/9/Add.9 (1992) (Initial report of Italy); Consideration

V. NATIONAL CONSTITUTIONAL COURTS AND EXTRADITION

Although international human rights organs such as the European Court of Human Rights have done much pioneering work in the area of extradition and the death penalty, in recent years the initiative has shifted to national constitutional courts. The relevant tribunals of Italy, Canada, and South Africa have set standards through important judgments that even the international bodies have hesitated to impose.

A. Italy's Venezia Extradition Case

In June 1996, Italy's Constitutional Court denied extradition of Pietro Venezia to the United States, despite assurances by U.S. prosecutors that the death penalty would not be sought or imposed. Article IX of the Treaty of Extradition of October 13, 1983, between Italy and the United States, entitles the sending state to request that extradition be conditional upon an undertaking that the death penalty not be imposed. The U.S. government gave such assurances in the form of a *note verbale* on

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of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 23, U.N. Doc. CAT/C/17/Add.2 (1992) (Initial report of Argentina); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 41, U.N. Doc. CAT/C/21/Add.2 (1994) (Initial report of the Czech Republic); Summary Record of the Public part of the 335th Meeting, U.N. GAOR, Comm. Against Torture, 20th Sess., 335th mtg., paras. 5, 9, U.N. Doc. CAT/C/SR.335/Add.1 (1998) (Initial report of Kuwait); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, 17th Sess., 276th mtg., para. 8, U.N. Doc. CAT/C/SR.276 (1996) (Second periodic report of Poland); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 11, U.N. Doc. CAT/C/28/Add.2 (1997) (Initial report of the Namibia); Summary Record of the Public Part of the 373rd Meeting, U.N. GAOR, Comm. Against Torture, 22d Sess., 373rd mtg., para. 8, U.N. Doc. CAT/C/SR.373 (1999) (Initial report of the former Yugoslav Republic of Macedonia); Summary Record of the First Part of the 306th Meeting, U.N. GAOR, Comm. Against Torture, 19th Sess., 306th mtg., para. 14, U.N. Doc. CAT/C/SR.306 (1998) (Second report of Portugal); Summary Record of the 123d Meeting, U.N. GAOR, Comm. Against Torture, 9th Sess., 123d mtg., para. 11, U.N. Doc. CAT/C/SR.123 (1993) (Initial report of Norway); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. GAOR, Comm. Against Torture, para. 41, U.N. Doc. CAT/C/21/Add. 2 (1994) (Initial report of the Czech Republic); Summary Record of the First Part of the 140th Meeting, U.N. GAOR, Comm. Against Torture, 10th Sess., 140th mtg., para. 36, U.N. Doc. CAT/C/SR.140 (1993) (when Canada was questioned about the extradition of Kindler and Ng, Canada hoped that the Committee would appreciate the *impropriety* of further discussion since the matter was pending before the Human Rights Committee).

three separate occasions. The Constitutional Court, however, was not satisfied.

In its decision, the Constitutional Court noted that the prohibition against the death penalty took on special significance in the constitution, as did all punishments that involved humanitarian principles. The Italian Constitution enshrines the right to life as the first of the inviolable human rights identified in Article 2. The Court found that "[t]he absolute character of this constitutional guarantee is of significance to the exercise of powers attributed to all public authorities under the republican system, and specifically with respect to international judicial co-operation for the purposes of mutual judicial assistance."[63] The Court reiterated that Italy's participation in punishments that cannot be imposed within Italy in peacetime constitutes a breach of the Constitution.

Referring to the mechanism by which the Italian authorities consider the sufficiency of the U.S. authorities' assurances not to impose capital punishment, the Court stated:

> Such a solution has the advantage of providing a flexible solution for the requested State, and allows for policy to be developed over time based on considerations of criminal law policy; but in our system, where the prohibition of the death penalty is enshrined in the Constitution, the formula of 'sufficient assurances'—for the purpose of granting extradition for crimes for which the death penalty is provided in the legislation of the requesting State—is not admissible from the standpoint of the Constitution. The prohibition set out in paragraph 4 of Article 27 of the Constitution and the values that it expresses—foremost among them being life itself–impose an absolute guarantee.[64]

As a result, the Italian Constitutional Court declared certain provisions of the Code of penal procedure designed to give effect to the extradition treaty between Italy and the United States to be contrary to the Constitution. It also declared that the portion of Law 225, which implemented Article IX of the extradition treaty, was unconstitutional. It noted, however, that Italian law allowed for Venezia to be prosecuted by Italian courts for crimes

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63. Venezia v. Ministero di Grazia e Giustizia, Corte cost., 27 June 1996, n.223, 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (1996).

64. *Id.*

committed abroad.[65] Venezia had also filed an application with the European Commission of Human Rights. The Commission, however, decided to strike the case from its docket, due to the Italian Constitutional Court's judgment.[66]

B. The Changing Position in Canada

Even prior to *Venezia*, Italy manifested its opposition to capital punishment by systematically refusing extradition without assurances that the death penalty would not be imposed. Canada, on the other hand, had been extraditing individuals to the United States without assurances against the use of capital punishment for many years. The two constitutional challenges to this practice, by Joseph Kindler and Charles Ng, were dismissed by the Supreme Court of Canada in 1991.[67] Canada was so sufficiently sensitive on this point that, in 1999, it broke ranks with the majority of the Commission on Human Rights. Traditionally one of the leading elements on the Commission, Canada temporarily obstructed the annual resolution on capital punishment because the European States attempted to introduce a paragraph calling upon states to explicitly reserve the right to refuse extradition in the absence of effective assurances the death penalty would not be carried out.[68] Compromise language, affirming the principle of non-extradition to states where capital punishment might be imposed, was ultimately developed that managed to persuade Canada to support the resolution.[69]

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65. *See id.*; *see also* Andrea Bianchi, *Venezia v. Ministero di Grazia e Giustizia*, 91 AM. J. INT'L L. 727, 731 (1997).

66. Venezia v. Italy, App. No. 29966/96, 87A Eur. Comm'n H.R. Dec. & Rep. 140 (1996).

67. Kinder v. Canada, [1991] 2 S.C.R. 779; Ng v. Canada, [1991] 2 S.C.R. 858.

68. *See* Summary Record of the 58th Meeting, U.N. ESCOR, Hum. Rts. Comm'n, 55th Sess., 58th mtg. at para. 40, U.N. Doc. E/CN.4/1999/SR.58 (1999); *see also* Daniel LeBlanc, *Canada Wants UN to Soften Extradition Proposal*, GLOBE & MAIL, Apr. 19, 1999, at A3; Daniel LeBlanc, *EU Won't Yield to Canadian Bid to Soften Extradition Resolution*, GLOBE & MAIL, Apr. 20 1999, at A2; Ilias Bantekas & Peter Hodgkinson, *Capital Punishment at the United Nations: Recent Developments*, 11 CRIM. L. F. 23, 31 (2000).

69. *See* Report on the 55th Session, U.N. ESCOR, Hum. Rts. Comm'n, 55th Sess., 58th mtg., Supp. No. 3, at 204, U.N. Doc. E/CN.4/RES/1999/61, (1999). "Requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out." *Id.*

The skirmish at the Commission on Human Rights took place during litigation before the Canadian Supreme Court directed at reversing the *Kindler* and *Ng* holdings. In *United States v. Burns*, Glen Burns and Atif Rafay were subject to extradition to Washington to stand trial for the murder of Rafay's parents. The pair had confessed to the crime to an *agent provocateur*, but this was later repudiated. The British Colombia Court of Appeal refused Washington's extradition request on the grounds that extraditing Burns and Rafay would violate their constitutional right, as Canadian citizens, to return to their country. The 1991 *Kindler* and *Ng* decisions bound the Court of Appeal and limited it from finding further grounds to refuse extradition. The Canadian Supreme Court did not endorse the Court of Appeal's citizenship argument, which it found to be far-fetched. Instead, the Supreme Court effectively overturned the decade-old *Kindler* and *Ng* precedents, and held that extradition to a state where the death penalty might be imposed was unconstitutional, excluding exceptional cases. It declined to speculate on what may constitute an exceptional case, but asserted that such a situation certainly was not present in Burns and Rafay's cases.[70] The *Burns* Court stated:

> The arguments against extradition without assurances have grown stronger since this Court decided Kindler and Ng in 1991. Canada is now abolitionist for all crimes, even those in the military field. The international trend against the death penalty has become clearer. The death penalty controversies in the requesting State—the United States—are based on pragmatic, hard-headed concerns about wrongful convictions.71

The *Burns* Court was particularly impressed with arguments and evidence concerning the danger of executing the innocent. This issue was not addressed in *Kindler* and, to be fair, only within the past decade has it emerged as a central theme in the death penalty debate. Technological advances, principally the emergence of DNA testing, have led to revelations about miscarriages of justice. Within the United States, there is now substantial literature on the subject.[72] Additionally, several

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70. United States v. Burns, [2001] 1 S.C.R. 283, 284–86, 290, 295–97, 303.

71. *Id.*. at 356.

72. *See, e.g.*, MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992); James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

erstwhile enthusiasts for capital punishment in the political sphere have "blinked" on this issue. Perhaps the most celebrated development in this area is the moratorium Governor Ryan of Illinois ordered in late 1999, a move followed in January 2003 by his systematic commutation of death row prisoners.

C. South Africa's Mohamed Extradition Case

Only a few months after the *Burns* ruling by the Canadian Supreme Court, the Constitutional Court of South Africa tackled a quite similar issue. In 1995, the South African Court issued a landmark ruling, holding capital punishment to be inconsistent with the post-apartheid interim constitution's protection of the right to life and prohibition of cruel, inhuman, and degrading treatment or punishment.[73] In June 2001, the Court granted a petition by Khalfan Khamis Mohamed, a participant in the Al Qaeda bombing of the U.S. embassy in Dar es Salaam. After being arrested in South Africa, Mohamed was summarily turned over to the U.S. Federal Bureau of Investigations in what the authorities called a deportation. The Court, however, saw no reason to view the hand over as anything but a disguised extradition.[74] According to the Court, by turning Mohamed over to the United States without assurances that he would not face the death penalty, "the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment."[75]

At the time of the Constitutional Court's ruling against the "extradition," Mohamed was already on trial in New York. He was tried jointly with an accomplice, Mahmoud Mahmud Salim, who had been extradited to the United States from Germany. The United States had made a commitment to Germany that capital punishment would not be imposed on Salim. The South African Court, however, noted the unfairness of the situation, and refuted suggestions that the United States might have provided the assurance against imposing the death penalty against Mohamed,

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73. State v. Makwanyane 1995 (3) SALR 391 (CC) (S. Afr.). The Court reaffirmed the validity of *Makwanyane* in light of the new constitution, in *Mohamed v. President of S. Afr.*, 2001 (3) SALR 893, para. 39 (CC).

74. *See, e.g.*, *Mohamed*, 2001 (3) SALR paras. 40, 60.

75. *Id.* para. 49.

had it been sought.[76] As a remedy for the constitutional violation, the South African Constitutional Court ordered a copy of their decision to be delivered immediately to the New York federal district court trying Mohamed's case.[77] The Court additionally noted:

> Not only is the learned judge presiding aware of these proceedings, but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding. On the papers there is a conflict of opinion as between one of the defense lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal proceedings of any finding we might make. It is for the presiding judge to determine such issues. For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial judge is enabled to exercise his judicial powers in relation to the proceedings in this Court. . . .[78]

Within days of the Constitutional Court's ruling, the New York jury found Mohamed guilty of murder. Under federal law, the jury again deliberated as to whether the convicted man should be sentenced to death. Judge Sand, who presided over the trial, took an extraordinary step and informed the jury of the South African Constitutional Court's views. Additionally, the jury was aware that Salim, who also had been found guilty, could not be sentenced to death, as this had been a condition of his extradition from Germany. On June 10, 2001, eleven of the twelve jurors concluded that "others of equal or greater culpability in the murders [would] not be sentenced to death," which was a mitigating factor under the applicable federal statute. Mohamed received a sentence of life imprisonment.[79]

VI. COMMENTS AND CONCLUSION

The number of countries that have abolished the death penalty has grown more or less constantly since the end of the

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76. *Id.* paras. 44, 55.
77. *Id.* para. 74.
78. *Id.* para. 71 (reference omitted).
79. United States v. Bin Laden, 156 F. Supp. 2d 359 (S.D.N.Y. 2001).

Second World War. Approximately two-thirds of the world's states no longer impose the death penalty. Not only do these states prohibit capital punishment on their own territories, but they also indirectly extend this abolition by refusing to extradite until the receiving state provides assurances that the death penalty will not be imposed. Many extradition treaties enshrine a state's right to deny extradition, subject to such assurances.

States sometimes argue before international human rights bodies that, if such assurances become a *sine qua non* for extradition, this may create situations of impunity, where an offender cannot be brought to trial. However, other bars to extradition have been common for many years, such as the "political offense exception," and cases where the accused would be denied a fair trial or subjected to torture. Recent Canadian and South African constitutional court decisions have summarily rejected, with good reason, the argument that requesting states would not provide such assurances.[80] In *Burns*, the Canadian government argued that the United States would not cooperate with Canada's request for assurances that the death penalty would not be imposed. Yet, immediately following the Supreme Court decision, Canada's Justice Minister Anne McLellan said she "expect[ed] no hitches in obtaining the assurances demanded by the court" from the U.S. Department of State.[81] As expected, the United States provided no resistance in offering assurances.

Similarly, recent constitutional court cases have also discounted the *in terrorem* claim that abolitionist states risk being inundated with fugitives from death penalty jurisdictions. In *Burns*, the Canadian Supreme Court found this "safe haven" argument to be unsubstantiated and unreasonable, stating:

> [T]here is no evidence whatsoever that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a "safe haven" than the death penalty, or even that fugitives approach their choice of refuge with such an informed appreciation of tactics. If Canada suffers the prospect of being a haven from time to time for fugitives from the United

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80. *See, e.g., id.* at 364.

81. Kirk Makin, *Supreme Court Decision: Top Court Speaks Out Against Extradition*, GLOBE & MAIL, Feb. 16, 2001, at A1.

> States, it likely has more to do with geographic proximity than the Minister's policy on treaty assurances.[82]

The refusal of abolitionist states to cooperate in imposing capital punishment is increasingly manifesting itself in another related manner, namely, in denying other forms of mutual legal assistance. For example, after receiving assurances that the United States would not use the information to seek or impose the death penalty, French and German authorities agreed to provide evidence to prosecute French national Zacarias Moussaoui for his involvement in the September 11, 2001 attacks on the United States.[83] German documents apparently provide information about a transfer of money to Moussaoui from Ramzi Binalshibh, a man alleged to have belonged to al Qaeda in Germany. French documents depict the childhood and early adulthood of Moussaoui in France, and apparently assist in establishing his connections with Muslim radicals. The Germany Embassy in Washington issued a statement on its website:

> The German government will meet the request for legal assistance by the U.S. government in the case of French citizen Zaccharias Moussaoui. The United States of America has assured, that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty .... The German constitution (Art.2, par.1; Art.102), which prohibits the imposition of the death penalty or any submittance [*sic*] of material that might lead to the capital punishment. The U.S. government has acknowledged this legal position with the aforementioned assurance.[84]

In December 2002, the European Union reached a deal allowing the United States to obtain personal data from Europol law enforcement agency on suspects. Journalists described the agreement as a "breakthrough" that resulted when the United States accepted the European Union's condition that its members

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82. United States v. Burns, [2001] 1 S.C.R. 283, para. 141 (Can.).

83. *See* Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, WASH. POST, Nov. 28, 2002, at A19; Christopher Marquis, *Germany Agrees to Share Evidence Against 9/11 Defendant*, N.Y. TIMES, Nov. 28, 2002, at A18.; Bruce Zagaris, *Germans and French Agree to Give Evidence in Moussaoui Case*, 19 INT'L ENFORCEMENT L. REP. 21 (2003).

84. German Embassy in Washington, D.C., *Germany gives legal assistance in the Moussaoui case* (undated), *at* http://www.germany-info.org/relaunch/politics/new/pol_terror_trial3.html (last visited Sept. 21, 2003).

would not be expected to surrender suspects if they could face the death penalty.[85]

The United States finds itself increasingly cornered by its stubborn insistence upon retaining the death penalty. In this aspect, the country virtually stands alone among developed nations and is ranked with Iraq, Iran, and China in what might be called an international axis of state-sanctioned killing. Inevitably, most extradition practice involves those states with which there is a land border. As a general rule, neither Mexico nor Canada will extradite to the United States in capital cases. Mexico even refuses extradition in cases where life sentences with no possibility of parole could be imposed. The vast majority of U.S. extradition practices must now involve assurances that capital punishment will not be imposed.

Those who are genuinely concerned about effective law enforcement, even if they may favor capital punishment for serious crimes, must understand that the death penalty is an unnecessary—and costly—complication. This is true internally because it burdens the justice system with onerous appeals and post-conviction review. But, as this brief survey demonstrates, this is also increasingly the case in extraditions and other forms of mutual legal assistance. U.S. Ambassador David Scheffer's frank recognition at the Rome Conference that an international criminal jurisdiction is unworkable if it imposes capital punishment also seems to be particularly valid for national justice systems in an era of globalization. Abolition by jurisdictions within the United States would certainly simplify prosecutions that involve international cooperation and make justice in the country fairer, more equitable, and, above all, more efficient.

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85. *See* Ian Black, *EU agrees to pass on intelleigence to FBI*, GUARDIAN, Dec. 20, 2002, at 12; Press Release, USA and Europol sign a full co-operation agreement, Dec. 20, 2002, *at* http://www.europol.eu.int/index.asp?page=news&news=pr021220.htm (last visited Sept. 21, 2003).