



DATE DOWNLOADED: Sat Apr 20 01:11:50 2024

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998).

ALWD 7th ed.

William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 Wash. & Lee L. Rev. 797 (1998).

APA 7th ed.

Schabas, W. A. (1998). *International law and abolition of the death penalty*. *Washington and Lee Law Review*, 55(3), 797-848.

Chicago 17th ed.

William A. Schabas, "International Law and Abolition of the Death Penalty," *Washington and Lee Law Review* 55, no. 3 (Summer 1998): 797-848

McGill Guide 9th ed.

William A. Schabas, "International Law and Abolition of the Death Penalty" (1998) 55:3 Wash & Lee L Rev 797.

AGLC 4th ed.

William A. Schabas, 'International Law and Abolition of the Death Penalty' (1998) 55(3) *Washington and Lee Law Review* 797

MLA 9th ed.

Schabas, William A. "International Law and Abolition of the Death Penalty." *Washington and Lee Law Review*, vol. 55, no. 3, Summer 1998, pp. 797-848. HeinOnline.

OSCOLA 4th ed.

William A. Schabas, 'International Law and Abolition of the Death Penalty' (1998) 55 Wash & Lee L Rev 797 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

International Law and Abolition of the Death Penalty

William A. Schabas*

I. Introduction

The Universal Declaration of Human Rights (Universal Declaration), adopted December 10, 1948, proclaimed that "[e]veryone has the right to life" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹ The same approach was taken in the American Declaration of the Rights and Duties of Man, adopted May 4, 1948.² At the time, the vast majority of United Nations Member States still employed capital punishment. Moreover, the death penalty was also recognized as an appropriate penalty for major war criminals and was imposed by the postwar tribunals at Nuremberg and Tokyo.³ When the Universal Declaration's provisions were transformed into treaty law in universal and regional instruments, the death penalty was specifically mentioned as a form of exception to the right to life.⁴

Fifty years later, as we commemorate the anniversary of the adoption of the Universal Declaration of Human Rights, the compatibility of the death

* M.A. (Toronto), LL.D. (Montreal), Professor of Law and Chair, Département des sciences juridiques, Université du Québec à Montréal.

1. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948).

2. See American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Doc. OEA/ser.L./V./I.4 (1948).

3. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, art. 27, 82 U.N.T.S. 279, 300; Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, art. 16, 4 Bevens 20, 26, amended by International Military Tribunal for the Far East, Apr. 26, 1946, art. 16, 4 Bevens 27, 31 ("Charter of the Tokyo Tribunal"); *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, in NUREMBERG TRIALS FINAL REPORT, Appendix D, art. II(3)(a).

4. See American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123, 145 (entered into force July 18, 1978) (allowing death penalty); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (entered into force Mar. 23, 1976) (same); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2(1), 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953) (same).

penalty with international human rights norms seems less and less certain. The second generation of international criminal tribunals – the ad hoc tribunals for the former Yugoslavia and Rwanda and the nascent international criminal court – rule out the possibility of the death penalty, even for the most heinous crimes.⁵ The basic international human rights treaties have been completed with additional protocols that prohibit capital punishment.⁶ Fifty-one states are now bound by these international legal norms abolishing the death penalty,⁷ and the number should continue to grow rapidly.⁸

The importance of international standard-setting was evidenced by parallel developments in domestic legal systems. The list has grown steadily from a handful of abolitionist states in 1945 to considerably more than half the countries in the world having abolished the death penalty de facto or de jure. According to the United Nations Secretary General in his January 16, 1998

5. The Security Council has excluded use of the death penalty by the two international *ad hoc* tribunals created to deal with war crimes in the former Yugoslavia and Rwanda. See UNITED NATIONS, SECURITY COUNCIL, STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Annex, art. 24, § 1, U.N. Doc. S/RES/827 (1993); UNITED NATIONS, SECURITY COUNCIL, STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, Annex, art. 23, § 1, U.N. Doc. S/RES/955 (1994); UNITED NATIONS, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 17 JULY 1998, art. 77, U.N. Doc. A/CONF.183/9 (1998) <<http://www.un.org/icc>>.

6. See, e.g., *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, G.A. Res. 128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989) (entered into force July 7, 1991); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, art. 1, Europ. T.S. No. 114 (entered into force Mar. 30, 1985); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, art. 1, O.A.S.T.S. No. 73 (entered into force Oct. 6, 1993). The American Convention on Human Rights is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it. See American Convention on Human Rights, *supra* note 4, art. 4, at 145 (dealing with death penalty). Thus, a state that has abolished the death penalty at the time of ratification of the American Convention on Human Rights is abolitionist from the standpoint of international law.

7. See Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 18 HUM. RTS. L.J. 79, 84-86 (1997) (noting that Andorra, Australia, Austria, Bolivia, Brazil, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Moldova, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Surinam, Sweden, Switzerland, Uruguay, and Venezuela have ratified abolitionist treaties). These states are abolitionist either *de jure* or *de facto* and have either signed or ratified one or more of the abolitionist treaties. *Id.*

8. Albania, Belgium, Bosnia and Herzegovina, Cyprus, Estonia, Lithuania, Russia, and Ukraine have indicated their intention to be bound by international norms prohibiting the death penalty, either by signing an abolitionist instrument or by publicly declaring their intention to ratify.

report to the Commission on Human Rights, 102 states have abolished the death penalty and 90 retain it.⁹ Those that retain it find themselves increasingly subject to international pressure in favor of abolition. Sometimes, this pressure is quite direct, as evidenced by the refusal of certain countries to grant extradition when a fugitive will be exposed to a capital sentence. Abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression. In some countries, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty. In others, it has been the contribution of the judiciary that has brought about abolition of the death penalty. Judges have applied constitutions that make no specific mention of the death penalty but enshrine the right to life and prohibit cruel, inhuman, and degrading treatment or punishment.¹⁰

Thus, the question of abolition of the death penalty stands as one of the sharpest examples of both the evolution of human rights norms and the ongoing relevance of the broadly-worded texts in the Universal Declaration. In 1948, René Cassin and Eleanor Roosevelt rejected suggestions that the Universal Declaration contain a reference to capital punishment as an exception to the right to life. They did so not because international law had reached the stage of abolition, but because they saw such a trend emerging and wanted the Universal Declaration to retain its relevance for decades and perhaps centuries to come.¹¹ Half a century later, we must acknowledge their clairvoyance. While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal. The many signs of this development are the subject of this paper.¹²

9. See *Question of the Death Penalty: Report of the Secretary-General submitted pursuant to Commission resolution 1997/12*, U.N. ESCOR, Hum. Rts. Comm'n, 54th Sess., 82d mtg. ¶ 18, at 10, U.N. Doc. E/CN.4/1998/82 (1998).

10. See *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391, ¶¶ 144, 151 (CC); ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 17 (1996) (discussing Ruling 23/1990 (X.31) AB, Constitutional Court of Hungary, Judgment of Oct. 24, 1990, *Magyar Közlöny* (Official Gazette), Oct. 31, 1991); Tibor Horvath, *L'abolition de la peine de mort en Hongrie*, 2 REVUE INTERNATIONALE DE CRIMINOLOGIE ET DE POLICE TECHNIQUE 167 (1992) (same).

11. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 30-35 (2d ed. 1997).

12. Several recent works provide detailed overviews of international legal issues relating to abolition of the death penalty. See generally CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS (Peter Hodgkinson & Andrew Rutherford eds., 1996) (discussing death penalty throughout world); HOOD, *supra* note 10 (same); SCHABAS, *supra* note 11 (describing movement away from capital punishment in international community). For a discussion of the death penalty in the United States, see generally THE DEATH PENALTY IN AMERICA, CURRENT CON-

II. International Legal Norms Concerning the Death Penalty

The issue of the death penalty is associated with two fundamental human rights norms: the right to life and the protection against cruel, inhuman, and degrading punishments. Both norms can trace their roots to the great instruments of Anglo-American constitutional law. The guarantee against "cruel and unusual punishments" was set out in the English Bill of Rights of 1689.¹³ It was aimed at some of the more barbaric accompaniments of execution that characterized Stuart England, such as drawing and quartering, disemboweling while alive, and amputation. The "right to life" was immortalized by the words of Thomas Jefferson in the Declaration of Independence of 1776.¹⁴ The American revolutionaries sought to protect the right not to be deprived of life "without due process of law," a not-so-tacit recognition of the legitimacy of capital punishment.¹⁵ From a historical standpoint, then, neither of these norms could be considered to challenge capital punishment. Yet in their more modern formulation, both of these rights have served to restrict and in some cases to prohibit the death penalty.

A. The Right to Life

The drafters of the Universal Declaration of Human Rights¹⁶ of 1948 looked to domestic constitutions¹⁷ for inspiration in preparing a document that they termed "a common standard of achievement for all peoples and all nations."¹⁸ Most of these constitutions were inspired to a greater or lesser extent by the principles of the English Bill of Rights,¹⁹ the American Declaration of Independence²⁰ and Bill of Rights,²¹ and the French Declaration des

TROVERSIES (Hugo Adam Bedau ed., 1997).

13. See 1 W. & M. ch. 2 (1688) (Eng.); see also Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839, 839 (1969) (noting that English Bill of Rights of 1689 prohibits cruel and unusual punishments).

14. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. See *Callins v. Collins*, 510 U.S. 1141, 1141 (1994) (Blackmun, J., dissenting) (noting that Constitution allows capital punishment provided there is due process of law); *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (same).

16. See Universal Declaration of Human Rights, *supra* note 1; see also SCHABAS, *supra* note 11, at 23-45 (providing academic comment on article 3 of Universal Declaration); ALBERT VERDOODT, NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME 99-100 (1964) (same); Lilly E. Landerer, *Capital Punishment as a Human Rights Issue Before the United Nations*, 4 HUM. RTS. J. 511, 511-34 (1971) (same).

17. See SCHABAS, *supra* note 11, at 29 n.12.

18. Universal Declaration of Human Rights, *supra* note 1, preamble.

19. See 1 W. & M. ch. 2 (1688) (Eng.).

20. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

21. See U.S. CONST. amends. I - X.

droits de l'homme et du citoyen.²² High on the list of this new international catalogue of human rights was the "right to life."²³ However, the scope of this right had become considerably different, and broader, than it had been when it was first announced in the eighteenth century, as many participants in the drafting process took pains to point out.

As such, the Universal Declaration makes no mention of the death penalty. But distinct from the domestic constitutions from which it is derived, the Universal Declaration also does not explicitly refer to the death penalty as an exception to the right to life. Indeed, unlike the case of the American Bill of Rights, it cannot be said that the drafters of the Universal Declaration sought to preserve the death penalty as an implicit limitation on the right to life. The debates in the General Assembly's Third Committee during the autumn of 1948 make this quite clear.²⁴

The original draft of the Universal Declaration, prepared by John P. Humphrey in early 1947, recognized a right to life that "can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached."²⁵ But Eleanor Roosevelt, who chaired the Drafting Committee, cited movement underway in some states to abolish the death penalty and suggested that it might be better not to make any explicit mention of the matter.²⁶ Her views found support from the Soviet delegate, Koretsky, who argued that the United Nations should in no way signify approval of the death penalty.²⁷ René Cassin cautioned that even countries that had no death penalty must take into account the fact that some are in the process of abolishing it.²⁸ Cassin reworked Humphrey's draft and removed any reference to the death penalty.²⁹ His proposal found its way, virtually unchanged, into the final version of the Universal Declaration, despite some unsuccessful attempts to return to the original proposal.³⁰ It is clear from the *travaux préparatoires* that the death penalty was considered to be fundamen-

22. See DECLARATION DES DROITS DE L'HOMME ET DU CITOYEN (France 1789).

23. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. See SCHABAS, *supra* note 11, at 35-40.

25. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON HUMAN RIGHTS, 1ST SESS., REPORT OF THE DRAFTING COMMITTEE TO THE COMMISSION ON HUMAN RIGHTS, Annex A, art. 3, U.N. Doc. E/CN.4/21 (1947).

26. See SCHABAS, *supra* note 11, at 30 (citation omitted).

27. *Id.* (citation omitted). His views were supported by Santa Cruz of Chile, and Wilson of the United Kingdom. See PHILIPPE DE LA CHAPELLE, LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME ET LE CATHOLICISME 94 (1967).

28. See SCHABAS, *supra* note 11, at 30.

29. See *id.* at 31 (citations omitted).

30. See *id.*

tally incompatible with the protection of the right to life, and that its abolition, although not immediately realizable, should be the "common standard of achievement" of the Member States of the United Nations.³¹ Subsequent interpretation by General Assembly and Economic and Social Council resolutions supports this conclusion.³²

The Universal Declaration was not intended to establish binding treaty obligations. However, it provided the normative framework for the International Covenant on Civil and Political Rights and the three major regional human rights treaties. A chronological perspective on the adoption of these treaty provisions shows that although the death penalty was retained as an exception or limitation on the right to life, it has been progressively restricted in scope.

The European Convention of Human Rights (European Convention), adopted less than two years after the Universal Declaration, recognizes the right to life, "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."³³ It reflects the postwar context in Europe, when war crimes trials (and the resulting executions) were still fresh in the collective memory. The provision was almost immediately anachronistic. There have been only a handful of execu-

31. A Soviet amendment calling for addition of a paragraph providing for the abolition of the death penalty in time of peace (*Union of Soviet Socialist Republics: Amendment to Article 3*, U.N. GAOR 3d Comm., 3d Sess., Annex, at 14, U.N. Doc. A/C.3/265 (1948)) was deemed premature and was rejected by twenty-one votes to nine, with eighteen abstentions. See U.N. GAOR 3d Comm., 3d Sess., 107th mtg. at 185, U.N. Doc. A/C.3/SR.107 (1948). The vote, however, can in no way be interpreted as a gesture favorable to the death penalty.

32. G.A. Res. 2393, U.N. GAOR, 23d Sess., Supp. No. 18, at 41-42, U.N. Doc. A/7218 (1969); G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1972); G.A. Res. 61, U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1978); G.A. Res. 128, *supra* note 6, at 207; E.S.C. Res. 1745, U.N. ESCOR, 54th Sess., Supp. No. 1, at 4, U.N. Doc. E/5367 (1973); E.S.C. Res. 1930, U.N. ESCOR, 58th Sess., Supp. No. 1, at 35, U.N. Doc. E/5664 (1975); see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE SECRETARY GENERAL, CAPITAL PUNISHMENT, 44th Sess., Agenda Item 13, § 11, at 4, U.N. Doc. E/5242 (1973).

33. See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 2(1), at 224; see also SCHABAS, *supra* note 11, at 222-38 (discussing death penalty and European Convention on Human Rights); JACQUES VELU & RUSEN ERGEC, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 37-39, 169-71 (1990) (same); Gilbert Guillaume, *Article 2*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE 143-54 (L.E. Pettiti et al. eds., 1995) (same); B.G. Ramcharan, *The Drafting History of Article 2 of the European Convention on Human Rights*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 57-61 (B.G. Ramcharan ed., 1985) (same); Alphonse Spielmann, *La Convention européenne des droits de l'homme et la peine de mort*, in PRÉSENCE DU DROIT PUBLIC ET DES DROITS DE L'HOMME, MÉLANGES OFFERTS À JACQUES VELU 1503-27 (1992) (same).

tions within Member States of the Council of Europe since 1950. By the early 1970s, the Council of Europe had begun work on a protocol to the Convention, which was adopted in 1983,³⁴ that modifies article 2 by abolishing the death penalty in peacetime.³⁵ In 1989, the European Court of Human Rights observed that capital punishment has been abolished de facto in the Contracting States of the European Convention.³⁶

Negotiation of a human rights treaty took considerably more time in the United Nations than in the Council of Europe. Although drafting work was already underway as early as 1947, it was not until 1966 that the treaty intended to accompany the Universal Declaration, the International Covenant on Civil and Political Rights (International Covenant), was adopted.³⁷ It took yet another ten years before the instrument had obtained the necessary thirty-five ratifications for it to enter into force. The "right to life" provision, article 6, was drafted during the 1957 session of the Third Committee of the General Assembly.³⁸ Although only seven years younger than the corresponding text

34. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *supra* note 6, at 2-4 (abolishing death penalty).

35. See *id.* art. 2, at 2 (permitting death penalty in time of war); see also SCHABAS, *supra* note 11, at 238-56; A. Adinolfi, *Premier instrument international sur l'abolition de la peine de mort*, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 321-24 (1987); Gilbert Guillaume, *Protocole no 6 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales concernant l'abolition de la peine de mort*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE, *supra* note 33, at 1067-72; Erik Harremoës, *The Council of Europe and Its Efforts to Promote the Abolition of the Death Penalty*, 12-13 CRIME PREVENTION AND CRIM. JUST. NEWSL. 62 (1986); Peter Leuprecht, *The First International Instrument for the Abolition of the Death Penalty*, 2 FORUM 2 (1983).

36. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 40 (1989) (noting that *de facto* death penalty no longer exists); see also *Çinar v. Turkey*, 79-A Eur. Comm'n H.R. Dec. & Rep. 5, 9 (1994) (citing *Soering*, 161 Eur. Ct. H.R. (ser. A) at 40) (noting that death penalty no longer exists); *H. v. Sweden*, 79-A Eur. Comm'n H.R. Dec. & Rep. 85, 94 (1994) (mentioning death penalty). Nevertheless, in recent years it has been pronounced (although not imposed) in Turkey, Poland, and Belgium.

37. See International Covenant on Civil and Political Rights, *supra* note 4, at 171.

38. See *id.* at 174-75 (discussing right to life). Article 6 states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. 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 judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant

in the European Convention, it already shows the remarkable and rapid evolution of international law regarding the death penalty.³⁹ Article 6 of the International Covenant also includes the death penalty as an exception to the right to life, but it lists detailed safeguards and restrictions on its implementation.⁴⁰ The death penalty may only be imposed for the "most serious crimes," it cannot be pronounced unless rigorous procedural rules are respected, and it may not be applied to pregnant women or to individuals for crimes committed while under the age of eighteen.⁴¹ Furthermore, article 6 of the International Covenant clearly points to abolition of the death penalty as a human rights objective and implies that states that have already abolished the death penalty may not reintroduce it.⁴² It too has been amended by an additional protocol, which was adopted in 1989 and which proclaimed the death penalty abolished in time of peace and war.⁴³

The second major regional human rights treaty is the American Convention on Human Rights (American Convention), adopted in 1969 but in force only since 1978.⁴⁴ Here too, the progress is evident. Taking article 6 of the

to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Id. (footnote omitted).

39. *See id.*

40. *See id.*

41. *See id.* For further discussion of article 6 of the International Covenant, see SCHABAS, *supra* note 11, at 47-146 (discussing International Covenant); Marc J. Bossuyt, *The Death Penalty in the "travaux préparatoires" of the International Covenant on Civil and Political Rights*, in *ESSAIS SUR LE CONCEPT DE "DROIT DE VIVRE": EN MÉMOIRE DE YOUNGINDRA KHUSHALANI* 251-65 (Daniel Prémont ed., 1988) (discussing article 6 of International Covenant); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114-138 (Louis Henkin ed., 1981) (same); and see also *Report of the Human Rights Committee: General Comments under Article 40, paragraph 4 of the Covenant, General Comment 6(16)*, U.N. GAOR, 37th Sess., Supp. No. 40, at 93-94, U.N. Doc. A/37/40 (1982) (discussing right to life).

42. *See Report of the Human Rights Committee, Kindler v. Canada (No. 470/1991)*, U.N. GAOR, Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/470/1991 (1993) (Wennergren, dissenting) ("What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage.").

43. *See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, supra* note 6, art. 1, at 207.

44. *See American Convention on Human Rights, supra* note 4, at 123; SCHABAS, *supra*

International Covenant as a model, the American Convention tightens the restrictions on the use of the death penalty and affirms explicitly that states may not reintroduce capital punishment once they have abolished it.⁴⁵ This renders the American Convention an abolitionist instrument, to the extent that ratifying states that have already abolished the death penalty are now bound as a matter of international law not to use the death penalty. In 1990, an abolitionist protocol patterned generally on the Second Optional Protocol was adopted within the inter-American system.⁴⁶

The third major regional treaty is the African Charter of Human and Peoples' Rights (African Charter),⁴⁷ adopted in 1981 and in force since 1986. It too enshrines the right to life, but unlike the European, American and universal instruments, it makes no mention of capital punishment as an exception or limitation to this right.⁴⁸ There is little interpretative material to assist in construing the African Charter's right to life provision. Some scholars point to African practice, in which a majority of states still employs the death penalty, and conclude that the African Charter in no way forbids capital punishment.⁴⁹ Nevertheless, the African Charter is to be interpreted in light

note 11, at 273-90; Christina M. Cerna, *Universality of Human Rights: The Case of the Death Penalty*, 3 ILSA J. INT'L & COMP. L. 465, 472 (1997); J. Colon-Collazo, *A Legislative History of the Right to Life in the Inter-American Legal System*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 33-41 (B.G. Ramcharan ed., 1985).

45. The Inter-American Court of Human Rights has issued two advisory opinions that interpret this provision. See Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (1983), *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*; Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14 (1994), *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*. The Inter-American Commission of Human Rights has also issued several reports dealing with the death penalty and the right to life provision of the American Declaration of the Rights and Duties of Man. See *Celestine v. United States*, Resolution No. 23/89, Case 10,031, Inter-Am. C.H.R. 62, OEA/ser.L./V./II.77, doc. 7 rev. 1 (1990); *Roach and Pinkerton v. United States*, Case No. 9647, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987); see also Christina M. Cerna, *US Death Penalty Tested Before the Inter-American Commission on Human Rights*, 10 NETH. Q. HUM. RTS. 155, 155-65 (1992).

46. See Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 6, at 9-11 (abolishing death penalty).

47. African Charter on Human and Peoples' Rights, art. 4, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986). For a comment on the right to life provision in the African Charter, see JOHANNES G.C. VAN AGGELEN, *LE RÔLE DES ORGANISATIONS INTERNATIONALES DANS LA PROTECTION DU DROIT À LA VIE* 40-41 (1986).

48. See African Charter on Human and Peoples' Rights, *supra* note 47.

49. See Etienne-Richard Mbaya, *A la recherche du noyau intangible dans la Charte africaine*, in *LE NOYAU INTANGIBLE DES DROITS DE L'HOMME* 207-26 (Patrice Meyer-Bischoff ed., 1991); see also KEBE MBAYE, *LES DROITS DE L'HOMME EN AFRIQUE* 197 (1992).

of other international human rights instruments, including "the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations."⁵⁰ At the very least, then, the restrictions and limitations on the death penalty found in the International Covenant must apply. Several African states have already abolished the death penalty,⁵¹ the most recent being South Africa,⁵² and this will surely influence future interpretation of the African Charter.⁵³

The recent Arab Charter of Human Rights, adopted September 15, 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life.⁵⁴ Three distinct provisions, articles 10, 11, and 12, recognize the legitimacy of the death penalty in the case of "serious violations of general law," but prohibit the death penalty for political crimes⁵⁵ and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth.⁵⁶ In international fora such as the United Nations, Arab, and more generally, Islamic, nations have been among the most aggressive advo-

50. African Charter on Human and Peoples' Rights, *supra* note 47, art. 60.

51. See John Hatchard, *Capital Punishment in Southern Africa: Some Recent Developments*, 43 INT'L & COMP. L.Q. 923, 923 (1994) (noting that several states have now abolished death sentence); William A. Schabas, *African Perspectives on Abolition of the Death Penalty*, in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 30-33 (William A. Schabas ed., 1997) (same).

52. See *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391 (CC); see also William A. Schabas, *South Africa's New Constitutional Court Abolishes the Death Penalty*, 16 HUM. RTS. L.J. 133, 133 (1995) (noting that South Africa's Constitutional Court abolished death penalty). For a literary account of the South African Constitutional Court hearing, see NADINE GORDIMER, *THE HOUSE GUN* 131-39 (1998).

53. Recently, the Supreme Court of Nigeria heard an application contesting the legality of the death penalty based *inter alia* on article 5 of the African Charter. See *Nemi v. The State*, [1994] 1 L.R.C. 376, 388-89, 400 (S.C.N.). The court held that the application was inadmissible on procedural grounds, but noted that the matter was sure to return to the court in the near future. *Id.* According to Chief Justice Bello, the application has "alerted the court to appreciate the gravity and constitutional importance of the question. It is anticipated that the occasion for its determination is likely to be presented soon." *Id.*

54. See *Charte arabe des droits de l'homme*, REVUE UNIVERSELLE DES DROITS DE L'HOMME 212 (1995).

55. Reynaldo Galindo Pohl, special rapporteur of the Commission on Human Rights on Iran, has observed that "there are groups of Islamic legal scholars and practitioners who recommend the abolition of the death penalty for political crimes on the ground that it is contrary to Islamic law." See *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Comm'n on Human Rights, Mr. Reynaldo Galindo Pohl, pursuant to Commission Resolution 1988/69*, U.N. ESCOR, Hum. Rts. Comm'n, 45th Sess., 26th mtg. § 36, at 12, U.N. Doc. E/CN.4/1989/26 (1989).

56. See *Charte arabe des droits de l'homme*, *supra* note 54, at 212-14.

cates of retention of the death penalty, defending its use in the name of obedience to Islamic law and the strictures of the *chari'a*.⁵⁷

Observers sometimes cite the right to life provisions of the International Covenant on Civil and Political Rights and those of the regional treaties, which allow the death penalty as a limitation or exception to the right, in defense of the affirmation that abolition of the death penalty is not an international norm.⁵⁸ This is incorrect. Abolition can be deemed an international norm since at least as early as 1948, if a dynamic interpretation of articles 3 and 5 of the Universal Declaration of Human Rights is adopted.⁵⁹ By the time article 6 of the draft International Covenant on Civil and Political Rights was adopted in 1957, there could be no doubt that abolition of the death penalty had found its way into positive international human rights law. What would be an exaggeration at this stage in the development of international human rights law would be the affirmation that abolition is a universal norm or a customary norm.

The notion that fundamental rights are subject to limitations is well accepted in human rights law. Generally, such limits exist as a counterbalance to individual rights and express the collective rights concerns of the community as a whole. Thus, for example, prohibitions on hate propaganda constitute limits on freedom of expression that are not only authorized but required by international law.⁶⁰ As we have seen, in several instruments, the death penalty is expressed as a limitation to the right to life. But it is a unique

57. For example, during debate at the 1994 session of the General Assembly, the Sudanese delegate noted that "capital punishment was a divine right according to some religions, in particular Islam. . . . [C]apital punishment was enshrined in the Koran and millions of inhabitants of the Muslim world believed that it was a teaching of God." U.N. GAOR General Comm., 49th Sess., 5th mtg. § 13, at 4, U.N. Doc. A/BUR/49/SR.5 (1994); see FRÉDÉRIC SUDRE, *DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME* 85-87 (1989) (discussing capital punishment in Islamic law); N. Hosni, *La peine de mort en droit égyptien et en droit islamique*, 58 *REVUE INTERNATIONALE DE DROIT PÉNAL* 407-20 (1987) (same); *Tunis Conference Declaration on the Death Penalty in the Legislation of Arab States*, in *THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT*, *supra* note 51, at 233-36 (same); A. Wazir, *Quelques aspects de la peine de mort en droit pénal islamique*, 58 *REVUE INTERNATIONALE DE DROIT PÉNAL* 421-29 (1987) (same).

58. See, e.g., *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391, ¶ 36 (CC) (Chaskalson, President). According to President Chaskalson, "[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim constitution of South Africa]." *Id.*

59. See Universal Declaration of Human Rights, *supra* note 1, arts. 3, 5.

60. See International Covenant on Civil and Political Rights, *supra* note 4, art. 20, § 2, at 178 (noting prohibition on hate propaganda); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 4(a), 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969) (same).

limitation, born of political compromise rather than respect for collective rights, and couched in terms that express the desirability of its abolition.

B. *The Prohibition of Cruel, Inhuman, and Degrading Punishment*

The same international legal instruments that protect the right to life also affirm the prohibition of torture and cruel, inhuman, and degrading treatment or punishment.⁶¹ The *travaux préparatoires* of these instruments indicate that their drafters considered that the issue of the death penalty fell within the context of the right to life, rather than within the issues that are considered under the rubric of the prohibition of torture or cruel punishment. Yet a literal reading of the norm leads to the inescapable observation that capital punishment, in that it may be considered "cruel, inhuman or degrading," is a breach of international norms. While the two norms co-exist in human rights law, and to the extent that the formulation of the right to life appears to authorize the death penalty, there is an essential and inevitable tension with a norm that, at least potentially, may prohibit it. "Cruel" punishment is obviously not a static notion, as it reflects the "evolving standards of decency that mark the progress of a maturing society."⁶² International tribunals recognize that human rights norms must be interpreted in an evolutive or dynamic manner.⁶³ Therefore, even if the death penalty was not deemed "cruel" in 1948, 1957, or 1969, it may well be today or at some future date.

In 1989, a majority of the European Court of Human Rights stopped short of concluding that the death penalty constituted cruel, inhuman, and degrading punishment prohibited by article 3 of the European Convention in *Soering v. United Kingdom*.⁶⁴ Amnesty International, which intervened in the *Soering* case as an *amicus curiae*, argued that although article 2 § 1 of the European Convention authorized capital punishment as an exception to the right to life, the provision had become inoperative because of the progressively evolving content of article 3, which prohibits inhuman and degrading punishment.⁶⁵ The court looked to subsequent state practice for elements that would assist

61. See African Charter of Human and Peoples' Rights, *supra* note 47, art. 5; American Convention on Human Rights, *supra* note 4, art. 5, § 2, at 146; International Covenant on Civil and Political Rights, *supra* note 4, art. 7, at 175; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 3, at 224; Universal Declaration of Human Rights, *supra* note 1, art. 5.

62. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

63. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) §§ 71-72, at 26-27 (1995) (Preliminary objections).

64. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

65. See *id.* ¶ 8 at 10.

in interpretation.⁶⁶ As the court noted, during the 1980s, the members of the Council of Europe had chosen to address the issue of abolition of the death penalty in the form of an optional or additional protocol to the European Convention, and not a mandatory or amending protocol.⁶⁷ Therefore, the European Court of Human Rights concluded, it was going too far to suggest that the European Convention now prohibits the death penalty, despite the terms of article 2.⁶⁸ The Strasbourg bench reasoned that, had the Member States of the Council of Europe sought for the European Convention to evolve in such a way as to outlaw capital punishment as a form of inhuman and degrading punishment, contrary to article 3, they would not have proceeded by an optional protocol.⁶⁹ Judge Jan de Meyer was alone in adopting a more radical and dynamic view of the European Convention:

The second sentence of Article 2 § 1 of the Convention [which permits the death penalty as an exception to the right to life] was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.⁷⁰

Still, the court found a way to apply the prohibition of inhuman and degrading punishment to the death penalty. The *Soering* case involved the threat of extradition to the United States from the United Kingdom of an individual charged with murder and therefore subject to execution by lethal injection in the Commonwealth of Virginia.⁷¹ It was not the death penalty itself that the European Court of Human Rights found offensive to the European Convention, but rather the "death row phenomenon," or the years-long wait for the scaffold under gruesome conditions, both physical and psychological.⁷²

66. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340 (recognizing role of practice in interpretation).

67. See *Soering*, 161 Eur. Ct. H.R. at 40-41.

68. See *id.*

69. See *id.* at 41.

70. *Id.* at 51 (de Meyer, J., concurring).

71. See *id.* at 11-12.

72. *Id.* at 44-45. See generally John Andrews & Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990) (discussing *Soering*); Henri Labayle, *Droits de l'homme, traitement inhumain et peine capitale: Réflexions sur l'édification d'un ordre public européen en matière d'extradition par la Cour européenne des droits de l'homme*, 64 SEMAINE JURIDIQUE 3452-57 (1990) (same); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991) (same); Michael O'Boyle, *Extradition and Expulsion under the European Convention on Human Rights, Reflections on the Soering Case*, in HUMAN RIGHTS AND CONSTITUTIONAL

The "death row phenomenon" has been one of the most vexing issues to confront international human rights adjudicative bodies,⁷³ and some of them, such as the European Court, have been quick to condemn it, while others, such as the Human Rights Committee, have taken the contrary view.⁷⁴ The Human Rights Committee has held that delay in and of itself in implementation of the death penalty following sentence cannot be termed cruel, inhuman, and degrading treatment or punishment.⁷⁵ This view appears to be altering, perhaps

LAW, ESSAYS IN HONOUR OF BRIAN WALSH 93-107 (James O'Reilly ed., 1992) (same); John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?*, 30 VA. J. INT'L L. 241 (1989) (same); Christine van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990) (same); Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990) (same); Susan Marks, Comment, *Yes, Virginia, Extradition May Breach the European Convention on Human Rights*, 49 CAMBRIDGE L.J. 194 (1990) (same).

73. The issue of the "death row phenomenon" has also been litigated before many domestic courts. For case law on the subject, see *Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995); *Chambers v. Bowersox*, No. 97-3067WM, 1998 WL 647289, at *9 (8th Cir. Sept. 23, 1998); *Chessman v. Dickson*, 275 F.2d 604, 608 (9th Cir. 1960); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919 (1988); *People v. Anderson*, 493 P.2d 880, 894-95 (Cal. 1972), *cert. denied*, 406 U.S. 958 (1972); *Arsenault v. Commonwealth*, 233 N.E.2d 730, 735 (Mass. 1968), *rev'd*, 393 U.S. 5 (1968); *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465; *Rajendra Prasad v. State of Uttar Pradesh*, A.I.R. 1979 S.C. 916; *Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jamaica); *Riley v. Attorney-General of Jamaica*, [1983] App. Cas. 719 (P.C. 1983) (appeal taken from Jamaica); *Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General*, 1993 (4) SA 239 (Z.S.C.); *Dhlamini v. Carter N.O.*, 1968 (2) SA 445(A); *Abbott v. Attorney-General of Trinidad and Tobago*, [1979] 1 W.L.R. 1342 (P.C. 1979) (appeal taken from Trinidad and Tobago). Several works discuss the "death row phenomenon" in general. See generally STEPHEN M. GETTINGER, *SENTENCED TO DIE: THE PEOPLE, THE CRIMES, AND THE CONTROVERSY* (1979); BRUCE JACKSON & DIANE CHRISTIAN, *DEATH ROW* (1980); ROBERT JOHNSON, *CONDEMNED TO DIE, LIFE UNDER SENTENCE OF DEATH* (1981); HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993); WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* 96-156 (1996); Francis Alexis & Margaret De Merieux, *Inordinately Delayed Hanging: Whether an Inhuman Punishment*, 29 J. INDIAN L. INST. 356, 356-79 (1987); Johnnie L. Gallemore, Jr. & James H. Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 167-72 (1972); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 S. AFR. J. HUM. RTS. 183, 183-95 (1989); Nancy Holland, Comment, *Death Row Conditions: Progression Toward Constitutional Protections*, 19 AKRON L. REV. 293, 293-310 (1985).

74. See generally Markus G. Schmidt, *The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments*, in *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW* 629-59 (David Harris & Sarah Joseph eds., 1995).

75. See Report of the Human Rights Committee, *Pratt and Morgan v. Jamaica* (nos. 210/1986, 225/1987), U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 280, U.N.

because of the result of a growing weight of authority from domestic tribunals that have examined the same question,⁷⁶ as well as a consequence of the changing composition of the Committee.⁷⁷ As for the death penalty itself, the Committee shares the view of the European Court that the death penalty cannot be deemed "cruel" and therefore contrary to article 7 of the International Covenant, precisely because it is authorized as an exception to the right to life in article 6.⁷⁸

Methods of execution may themselves be cruel, inhuman, and degrading. The Human Rights Committee has affirmed that the use of the gas chamber in the State of California involves excessive and gratuitous suffering and that it is therefore contrary to article 7 of the International Covenant.⁷⁹ But this puts human rights bodies in the uncomfortable and inappropriate position of ruling on what is a more humane way to kill an individual.⁸⁰ The Committee has since concluded that execution by lethal injection is not cruel, inhuman, and degrading despite uncontested evidence tendered before it showing that

Doc. A/44/40 (1989); *Report of the Human Rights Committee, Reid v. Jamaica* (no. 250/1987), U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Vol. 2, at 92, U.N. Doc. A/45/40 (1990); *Report of the Human Rights Committee, Barrett and Sutcliffe v. Jamaica* (nos. 270/1988 and 271/1988), U.N. GAOR, Hum. Rts. Comm., 47th Sess., Supp. No. 40, at 250, U.N. Doc. A/47/40 (1994); *Howard Martin v. Jamaica Communication No. 317/1988* (U.N. Doc. CCPR/C/47/D/317/1988), 1 INT'L HUM. RTS. REP. 128, § 12.1, at 131 (1994); *Report of the Human Rights Committee, Kindler v. Canada* (No. 470/1991), *supra* note 42, § 15.2; *UN Human Rights Committee (UN-HRCee), Geneva/New York, Extradition to the United States to Face the Possible Imposition of the Death Penalty Not Considered to Violate the CCPR/Cox v. Canada*, 15 HUM. RTS. L.J. 410 (1994) [hereinafter *Cox v. Canada*].

76. *Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jamaica); Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General, 1993 (4) SA 239 (Z.S.C.). *But see* *Kindler v. Canada*, [1991] 2 S.C.R. 779.

77. *See Cox v. Canada*, *supra* note 75, § 17.2, at 417. *See also* the individual views of Committee members Herndl, Sadi, Tamar Ban and Wennergren. *Id.* at 417-21. In *Peart and Peart v. Jamaica*, the Committee considered assaults of death row inmates to constitute a breach of article 7. *See Peart and Peart v. Jamaica, Communications Nos. 464/1991 and 482/1991* (U.N. Doc. CCPR/C/54/D/464/1991 and CCPR/C/54/D/482/1991), 3 INT'L HUM. RTS. REP. 15, 15-22 (1996). But despite obvious division in its ranks, it has stopped short of endorsing the European Court's position on the death row phenomenon. *See Francis v. Jamaica, Communication No. 606/1994* (U.N. Doc. CCPR/C/54/D/606/1994), 3 INT'L HUM. RTS. REP. 43 (1996).

78. *See General Comment 20(44)*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., 1138th mtg. at 1-4, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

79. *See Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654-59 (1992) (Stevens, J., dissenting) (discussing view of United States courts on this question); *Report of the Human Rights Committee, Ng v. Canada*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Vol. 2, at 205, U.N. Doc. A/49/40 (1994) (noting that gas chamber is cruel and inhuman).

80. *See Report of the Human Rights Committee, Ng v. Canada*, *supra* note 79, at 220 (noting Christine Chanet's dissenting opinion).

this more modern and fashionable method of execution also may involve terrible suffering.⁸¹

Serious issues of cultural relativism arise in the interpretation of the norm prohibiting "cruel, inhuman and degrading punishment." The scope of the three adjectives obviously depends upon value judgments, and these will vary depending on social and cultural conditions. When Commission on Human Rights rapporteur Gaspar Biro suggested in February 1994 that the death penalty as imposed in the Sudan was contrary to articles 6 and 7 of the International Covenant,⁸² his "blasphemy" in attacking "Islamic punishments" was condemned.⁸³ In fact, however, enthusiasm for the death penalty appears to cut across cultural lines, as its most aggressive defenders on the international plane are the United States, China, Singapore, and the Sudan!

C. Customary Norms

Customary international law exists when there is evidence of state practice accompanied by unequivocal manifestations of policy or *opinio juris*.⁸⁴ With somewhat less than half of the world's states still employing the death penalty, it would be too ambitious to assert that abolition is a customary norm of international law. However, a strong argument can be made that some or all of the limitations on the use of the death penalty enumerated in article 6 of the International Covenant have attained the status of customary law.

The requirement that strict procedural safeguards accompany any capital trial undoubtedly has become customary international law. The universal condemnation of summary executions within the human rights bodies of the United Nations shows that there is unanimity on this point. Moreover, common article 3 of the Geneva Conventions, often cited as the lowest common denominator of humane behavior, proscribes "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are

81. *Cox v. Canada*, *supra* note 75, § 17.3, at 417.

82. U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, U.N. Doc. E/CN.4/1994/48 (1994).

83. See SCHABAS, *supra* note 73, at 160 (discussing statement by H.E. Mr. Abdelaziz Shiddo, Minister of Justice and Attorney-General of the Republic of the Sudan and Leader of Sudan Delegation to the 50th Session of the Commission on Human Rights, commenting on the report of Dr. Gaspar Biro, Special Rapporteur on Human Rights situation in the Sudan under agenda item 12, Geneva, Feb. 25, 1994); see also U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, §§ 58-64, at 18-19, U.N. Doc. E/CN.4/1994/122 (1994).

84. See Statute of the International Court of Justice, art. 38, 1989 I.C.J. Acts & Docs. 61, 77 (discussing which law ICJ may apply).

recognized as indispensable by civilized peoples."⁸⁵ The International Court of Justice has held that common article 3 codifies a customary rule.⁸⁶

Another customary principle is the prohibition on executions for crimes committed by young persons. This rule respects an undisputed principle of criminal law, namely that children have diminished criminal liability due to their immaturity. The Inter-American Commission on Human Rights has stated that there is a customary norm prohibiting executions for juvenile offenses, although it has stopped short of fixing the minimum age at eighteen.⁸⁷ The Commission was only prepared to conclude that a norm setting the minimum age at eighteen was "emerging."⁸⁸ More recently, the Human Rights Committee has suggested a corresponding hesitation in its recent General Comment on reservations, which affirmed that the execution of "children" and pregnant women was contrary to customary norms, but did not specify the precise minimum age.⁸⁹ Both the International Covenant⁹⁰ and the American Convention on Human Rights,⁹¹ as well as the Convention on the Rights of the Child,⁹² the fourth Geneva Convention, and its two additional protocols, however, specify eighteen as the minimum age.⁹³

85. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Aug. 12, 1949, art. 3, 75 U.N.T.S. 135, 136 (entered into force Oct. 21, 1950).

86. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 113-14, 129-30, 148 (June 27) (discussing article 3 and violations thereof); see also *Prosecutor v. Tadic Case No. IT-94-1-AR72*, Int'l Crim. Tribunal for the Former Yugoslavia, Appeals Chamber Decision, § 98 (Oct. 2, 1995).

87. See Resolution No. 3/87, Case 9647 (United States) (1987), Inter-Am. C.H.R. 147, 172, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987).

88. See *id.*

89. See *General Comment No. 24 (52)*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. § 3, at 2, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

90. See International Covenant on Civil and Political Rights, *supra* note 4, art. 6(5), at 175.

91. See American Convention on Human Rights, *supra* note 4, art. 4(5), at 146.

92. See Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37, at 171, U.N. Doc. A/44/49 (1989) (noting age limit). But see African Charter of the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (1990). However, article 46 states that the African Charter is to be interpreted with an eye to the universal Convention on the Rights of the Child. See Convention on the Rights of the Child, *supra*, art. 46.

93. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Aug. 12, 1949, art. 68, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) (noting minimum age of eighteen); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 77, § 5, 1125 U.N.T.S. 3, 39 (entered into force Dec. 7, 1978) (same); Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 6,

When the United States of America ratified the International Covenant in 1992, it included a reservation to article 6 § 5, which is the provision concerning juvenile executions.⁹⁴ Several European states objected that the reservation was incompatible with the object and purpose of the International Covenant and therefore invalid.⁹⁵ The Human Rights Committee, in its consideration of the initial report by the United States pursuant to article 40 of the International Covenant in March and April 1995, has also concluded that the reservation is inadmissible.⁹⁶ This is a strong argument for the position that there is a customary norm prohibiting executions for crimes committed while under eighteen.

D. The Death Penalty in Wartime

Most domestic legislation establishes distinct rules concerning the death penalty in time of war, when it is employed more frequently and with less concern for procedural safeguards. This distinction has been carried over into the abolitionist protocols. In the case of Protocol No. 6 to the European

§ 4, 1125 U.N.T.S. 609, 614 (entered into force Dec. 7, 1978) (same); see also William A. Schabas, *The Death Penalty for Crimes Committed by Persons Under Eighteen Years of Age*, in *MONITORING CHILDREN'S RIGHTS* 603-19 (Eugeen Verhellen ed., 1996).

94. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 132, U.N. Doc. ST/LEG/SER.E/11 (1993).

95. *Id.* Several works discuss the debate concerning the United States's reservation. See M.S. Christian Green, *The "Matrioshka" Strategy: US Evasion of the Spirit of the International Covenant on Civil and Political Rights*, 10 S. AFR. J. HUM. RTS. 357, 357-71 (1994) (discussing United States's reservations); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341-50 (1995) (same); Ved. P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 131, 131-391 (1993) (same); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 59-86 (1993) (same); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 277-325 (1995) (same); William A. Schabas, *Les réserves des États-Unis d'Amérique aux articles 6 et 7 du Pacte international relatif aux droits civils et politiques*, 6 REVUE UNIVERSELLE DES DROITS DE L'HOMME 137, 137-50 (1994) (same); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 77-83 (1993) (same); Edward F. Sherman, Jr., Comment, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 69-93 (1994) (same).

96. See UNITED NATIONS, GENERAL ASSEMBLY, HUMAN RIGHTS COMMITTEE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT, COMMENTS OF THE HUMAN RIGHTS COMMITTEE, § 14, at 3, U.N. Doc. CCPR/C/79/Add.50 (1995).

Convention of Human Rights, execution in wartime is simply excluded from its scope. The Protocol prohibits the death penalty only in time of peace, allowing that "[a] State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war."⁹⁷ This compromise in the drafting process of the first abolitionist treaty reflected the fact that many European states had abolished capital punishment only in time of peace.⁹⁸ Increasingly, however, European states have abolished the death penalty altogether. The Steering Committee for Human Rights of the Council of Europe is studying the possibility of a draft protocol to the European Convention that would abolish the death penalty in war as well as in peace.⁹⁹ The protocol to the International Covenant takes a different approach, outlawing capital punishment in all circumstances, but allowing states to make a reservation if they seek to preserve the possibility of imposing the death penalty in wartime for serious crimes of a military nature.¹⁰⁰ Only one state party to the Protocol, Spain, has formulated such a reservation.¹⁰¹

The humanitarian law treaties provide specific rules concerning the death penalty in wartime. Two groups of individuals are contemplated by the legal rules concerning the death penalty in time of war – combatants taken prisoner and noncombatant civilians in the hands of a belligerent. The protection of prisoners of war is governed principally by the third Geneva Convention of 1949 (third Convention).¹⁰² According to the third Convention, prisoners of war are subject to the laws, regulations, and orders in effect in the armed forces of the detaining power.¹⁰³ If the death penalty is applicable in the laws of the detaining power, then a prisoner of war may be exposed to the threat of capital punishment. The third Convention specifically envisions this possibility in two articles whose aim is to mitigate the rigors of the death penalty and

97. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *supra* note 6, art. 2, at 2.

98. See Gilbert Guillaume, *supra* note 35, at 1067-72.

99. See EUR. PARL. ASS. REC. 1246, 25th Sitting (Oct. 4, 1994) <<http://stars.coe.fr/ta/ta94/erec1246.html>>.

100. See *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, *supra* note 6, art. 2, at 207. The Protocol to the American Convention adopts the same approach. See Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 6, art. 2, at 9.

101. See UNITED NATIONS, GENERAL ASSEMBLY, HUMAN RIGHTS COMMITTEE, RESERVATIONS, DECLARATIONS, NOTIFICATIONS AND OBJECTIONS RELATING TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE OPTIONAL PROTOCOLS THERETO, at 101, U.N. Doc. CCPR/C/2/Rev.3 (1992).

102. See Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *supra* note 85, at 135.

103. *Id.* art. 82, at 200.

encourage commutation or even exchange of prisoners.¹⁰⁴ These provisions are a more extensive version of an article in the 1929 Geneva Convention that protected prisoners of war facing the death penalty.¹⁰⁵ Civilians in the hands of a belligerent were slower to receive comprehensive protection in the international humanitarian conventions,¹⁰⁶ but the grave abuses of capital punishment, mainly by the Nazi occupying forces during World War II, compelled the elaboration of specific norms in the fourth Geneva Convention (fourth Convention).¹⁰⁷ The fourth Convention limits the nature of capital crimes *ratione materiae*, prohibits the execution of persons for crimes committed while under the age of eighteen, and establishes a six month moratorium on execution after sentencing.¹⁰⁸ It also provides that an occupying power may never impose the death penalty if it has been abolished under the laws of the occupied state prior to the hostilities.¹⁰⁹ The norms in the fourth Convention have been expanded somewhat by Protocol Additional I, which prohibits the death penalty for offenses related to armed conflict in the case of pregnant women or mothers having dependent infants and for offenders under the age of eighteen at the time of the crime.¹¹⁰ The death penalty provisions in Protocol Additional II,¹¹¹ which deals with noninternational armed conflicts, largely repeat the norms found in article 6 of the International Covenant and reflect the human rights scope of that instrument. Serious violations of Protocol Additional II may be prosecuted by the International Criminal Tribunal for Rwanda.¹¹² Arguably, the pronouncement of the death penalty on persons under the age of eighteen years at the time of the crime constitutes such an infraction. How ironic it is, then, that the Rwanda Statute was adopted with the support of the United States, which continues to allow

104. *Id.* arts. 100, 101, at 210-12.

105. *See* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 66, 118 L.N.T.S. 343, 383 (entered into force June 19, 1931).

106. Some norms protecting civilians appear in the *Hague Regulations*, although none address the death penalty. *See* *Convention Regulating the Laws and Customs of Land Warfare*, Oct. 18, 1907, 2 AM. J. INT'L L. 90, arts. 23, 25, 27, 28, 42-56, at 107-17 (Supp. 1908).

107. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *supra* note 93, arts. 68, 75, at 330, 334-36 (dealing with death penalty).

108. *See id.*

109. *See id.* art. 68.

110. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 93, arts. 76, 77, at 38-39 (discussing protection for women and children).

111. *See* Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 93, art. 6, § 4, at 614 (discussing death penalty).

112. *See* STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, *supra* note 5, art. 4.

sentencing and execution of juvenile offenders.

E. International Law and Domestic Courts

The classic weakness of international human rights law is in its means of implementation. Increasingly, however, international human rights law is being applied by domestic courts, and this contributes immensely to its effectiveness. In some countries, it is given primacy over incompatible domestic legislation. In others, it has been used by courts to assist in interpreting the scope of constitutional norms that have usually been inspired by the international instruments. Death penalty jurisprudence provides one of the most dramatic examples of this synergy between international and domestic human rights law.

Courts of several states, including South Africa,¹¹³ Zimbabwe,¹¹⁴ Canada,¹¹⁵ Tanzania,¹¹⁶ and the United Kingdom,¹¹⁷ have found international law to be particularly helpful in the interpretation of such notions as the right to life and the prohibition of cruel, inhuman, and degrading punishment. In a recent judgment of the South African Constitutional Court, which found capital punishment to be incompatible with the right to life and the protection against cruel, inhuman, and degrading punishment, President Arthur Chaskalson wrote: "The international and foreign authorities are of value because they analyze arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention."¹¹⁸ In writing the decision, he provided a detailed analysis of the international instruments as well as the case law of such bodies as the Human Rights Committee and the European Court of Human Rights.

III. International Organizations

As an important human rights issue, the death penalty has been the object of initiatives within several international organizations, including the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe, and the European Union. Although this activity has not

113. See *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391 (CC).

114. See *Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General*, 1993 (4) SA 239 (Z.S.C.).

115. See *Kindler v. Canada*, [1991] 2 S.C.R. 779, 779-82.

116. See *Republic v. Mbushuu*, [1994] 2 L.R.C. 335 (High Court of Tanzania).

117. See *Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jamaica).

118. *Makwanyane and Mchunu*, 1995 (3) SA 391, § 34.

always resulted in the creation of positive legal norms, it is a source of "soft law" and an important reference in the evolution of international custom.

A. *The United Nations*

In parallel with the drafting of international legal norms found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, different bodies of the United Nations have been involved in a variety of initiatives aimed at limiting and eventually abolishing the death penalty. As a general rule, these have originated in the Commission on Human Rights and its Sub-Commission and, when there was sufficient unanimity, resulted in resolutions in the Economic and Social Council and the General Assembly.¹¹⁹

An early resolution, presented at the 1968 session of the Commission on Human Rights, observed that "the major trend among experts and practitioners in the field is towards the abolition of capital punishment."¹²⁰ It cited a series of safeguards respecting appeal, pardon, and reprieve and mandated delay of execution until the exhaustion of such procedures. It invited governments to provide for a six month moratorium before implementing the death penalty.¹²¹ In the General Assembly, many retentionist states even supported the draft resolution, noting that it confined itself to the "humanitarian" aspect of the question,¹²² although more militant abolitionist states criticized its timidity, saying it would not "induce Governments to abolish the death penalty."¹²³ The

119. See, e.g., G.A. Res. 1396, U.N. GAOR, 14th Sess., Supp. No. 16, at 23, U.N. Doc. A/4354 (1960); G.A. Res. 2392, U.N. GAOR, 23d Sess., Supp. No. 18, at 41, U.N. Doc. A/7218 (1968); G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1972); G.A. Res. 3011, U.N. GAOR, 27th Sess., Supp. No. 30, at 67, U.N. Doc. A/8730 (1973); G.A. Res. 61, U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1978); G.A. Res. 59, U.N. GAOR 3d Comm., 36th Sess., Supp. No. 51, at 174, U.N. Doc. A/36/51 (1981); G.A. Res. 192, U.N. GAOR 3d Comm., 37th Sess., Supp. No. 51, at 209-10, U.N. Doc. A/37/51 (1982); G.A. Res. 137, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 226, U.N. Doc. A/39/51 (1984); E.S.C. Res. 934, U.N. ESCOR, 35th Sess., Supp. No. 1, at 5, U.N. Doc. E/3753 (1963); E.S.C. Res. 1574, U.N. ESCOR, 50th Sess., Supp. No. 1, at 7, U.N. Doc. E/5044 (1971); E.S.C. Res. 1656, U.N. ESCOR, 52d Sess., Supp. No. 1, at 1, U.N. Doc. E/5183 (1972); E.S.C. Res. 1745, U.N. ESCOR, 54th Sess., Supp. No. 1, at 4, U.N. Doc. E/5367 (1973); E.S.C. Res. 1930, U.N. ESCOR, 58th Sess., Supp. No. 1, at 35, U.N. Doc. E/5683 (1975).

120. Cf. U.N. ESCOR, 44th Sess., Supp. No. 4, U.N. Doc. E/CN.4/972 (1968).

121. See *id.* at 134-36, 162-64.

122. See U.N. GAOR 3d Comm., 23d Sess., 1557th mtg. § 17, at 3, U.N. Doc. A/C.3/SR.1557 (1968) (China); U.N. GAOR 3d Comm., 23d Sess., 1558th mtg. § 10, at 2, U.N. Doc. A/C.3/SR.1558 (1968) (France).

123. U.N. GAOR 3d Comm., 23d Sess., 1558th mtg. § 2, at 1, U.N. Doc. A/C.3/SR.1558 (1968) (Austria).

Commission's resolution, with some minor amendments, was then adopted by the General Assembly.¹²⁴ A few years later, an Assembly resolution declared that "the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing the punishment in all countries."¹²⁵

The United Nations Congress on Crime Prevention and Control, held every five years, has also provided a forum for debate on the death penalty. In 1975, the Congress successfully resisted attempts by nongovernmental organizations¹²⁶ to raise the issue of capital punishment at its Geneva session because the issue was not on the agenda.¹²⁷ At the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1980 in Caracas, more time was devoted to the issue of capital punishment than to any other question.¹²⁸ A draft resolution called for restriction and eventual abolition of the death penalty and added that abolition would be "a significant contribution to the strengthening of human rights, in particular the right to life."¹²⁹ A controversial provision urged states that had not abolished capital punishment to "consider establishing a moratorium in its application, or creating other conditions under which capital punishment is not imposed or is not executed, so as to permit those states to study the effects of abolition on a provisional basis."¹³⁰ But faced with some stiff opposition and inadequate time to complete the discussions, the sponsors withdrew the revised draft resolution.¹³¹ At the 1990 Congress held in Havana, a resolution on

124. See G.A. Res. 2393, U.N. GAOR, 23d Sess., Supp. No. 18, at 41-42, U.N. Doc. A/7218 (1968); U.N. GAOR, 23d Sess., 1727th plen. mtg. at 15, U.N. Doc. A/PV.1727 (1968) (adopted by ninety-four votes to zero, with three abstentions); U.N. GAOR 3d Comm., 23d Sess., 1559th mtg. § 34, at 3-4, U.N. Doc. A/C.3/SR.1559 (1968) (adoption in Third Committee).

125. G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1972).

126. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT: THE DEATH PENALTY 33 n.7 (1979).

127. See UNITED NATIONS, GENERAL ASSEMBLY, FIFTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, PROVISIONAL AGENDA AND ORGANIZATION OF WORK, U.N. Doc. A/CONF.56/1/Rev.1 (1975).

128. See U.N. GAOR 3d Comm., 35th Sess., 73d mtg. § 40, U.N. Doc. A/C.3/35/SR.74 (1980) (recording comments of Chief, Crime Prevention and Criminal Justice Branch).

129. See UNITED NATIONS, GENERAL ASSEMBLY, SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, DRAFT RESOLUTION SUBMITTED BY AUSTRIA, ECUADOR, THE FEDERAL REPUBLIC OF GERMANY AND SWEDEN, at 58-60, U.N. Doc. A/CONF.87/14/Rev.1 (1980).

130. See *id.* at 59.

131. See *id.* at 51-52; see also Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 68, 75 (1989) (noting

capital punishment was proposed that returned to the idea of a moratorium on the death penalty, "at least on a three year basis."¹³² The resolution was adopted in Committee by forty votes to twenty-one, with sixteen abstentions, but was rejected in plenary session because it failed to obtain a two-thirds majority.¹³³

The Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty were drafted by the Committee on Crime Prevention and Control (the Commission)¹³⁴ at its March 1984 session.¹³⁵ The safeguards expand upon the restrictions on use of the death penalty found in article 6 of the International Covenant. They specify that use of capital punishment must be confined to "intentional crimes, with lethal or other extremely grave consequences."¹³⁶ With respect to categories of persons excluded from the death penalty, they add "new mothers" and "persons who have become insane" to juvenile offenders and pregnant women, who were already expressly protected by article 6 § 5 of the International Covenant.¹³⁷ The death penalty can only be imposed "when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."¹³⁸ The safeguards were later endorsed in resolutions by the Economic and Social Council,¹³⁹ the General Assembly,¹⁴⁰ and the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985.¹⁴¹ In 1988, the safeguards were themselves strength-

lack of consensus).

132. See Roger S. Clark, *The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990*, 1 CRIM. L.F. 513, 518 (1990) (citation omitted).

133. See UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE EIGHTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, §§ 350, 358, U.N. Doc. A/CONF.144/28/Rev.1 (1990); see also Clark, *supra* note 132, at 513-48.

134. ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION 58-62 (1994) (discussing the Commission).

135. See *Draft resolution VII: Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, U.N. ESCOR, 8th Sess., Supp. No. 6, at 19-21, U.N. Doc. E/1984/16 (1984) (outlining safeguards).

136. *Id.* at 21.

137. *Id.*

138. *Id.*

139. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY, E.S.C. Res. 1984/50 (1984). This resolution was adopted without a vote.

140. See G.A. Res. 118, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, § 79, at 211, U.N. Doc. A/39/51 (1984) (endorsing safeguards).

141. See UNITED NATIONS, GENERAL ASSEMBLY, SEVENTH UNITED NATIONS CONGRESS

ened by a new resolution of the Committee on Crime Prevention and Control, which addressed additional matters, such as the prohibition of execution of the mentally handicapped.¹⁴²

In 1994, at the forty-ninth session, a General Assembly draft resolution called for a moratorium on the death penalty.¹⁴³ The resolution originated from a newly-formed nongovernmental organization, "Hands Off Cain – the International League for Abolition of the Death Penalty Before the Year 2000," which had obtained the support of the Italian Parliament for the draft resolution. A series of preambular paragraphs referred to earlier General Assembly resolutions on the death penalty, the 1984 safeguards, relevant provisions in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, the statutes of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, and the draft statute of the proposed International Criminal Court.¹⁴⁴ The first of three dispositive paragraphs invited states that still maintain the death penalty to comply with their obligations under the International Covenant and the Convention on the Rights of the Child and, in particular, to exclude pregnant women and juveniles from execution.¹⁴⁵ The second paragraph invited states that had not abolished the death penalty to consider the progressive restriction of the number of offences for which the death penalty may be imposed and to exclude the insane from capital punishment.¹⁴⁶ The final paragraph

encourage[d] all States that have not yet abolished the death penalty to consider the opportunity of instituting a moratorium on pending executions with a view to ensuring that the principle that no State should dispose of the life of any human being be affirmed in every part of the world by the year 2000.¹⁴⁷

ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, MILAN, ITALY, 26 AUGUST-6 SEPTEMBER 1985, REPORT BY THE SECRETARIAT, at 83-84, 131-32, U.N. Doc. A/CONF.121/22/Rev.1 (1986); *see also* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, IMPLEMENTATION OF THE SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY, E.S.C. Res. 1989/64 (1989) (providing follow-up on the "Safeguards"). This resolution was adopted without a vote. *Id.*

142. *See* E.S.C. Res. 1989/64, *supra* note 141.

143. *See* U.N. GAOR, 49th Sess., at 1-4, U.N. Doc. A/49/234 (1994), A/49/234/Add.1, A/49/234/Add.2, *amended by* U.N. GAOR 3d Comm., 49th Sess., at 1-2, U.N. Doc. A/C.3/49/L.32/Rev.1 (1994).

144. *See id.* at 1-2.

145. *See id.* at 2.

146. *See id.*

147. *See id.*

Italy eventually obtained forty-nine cosponsors for the resolution.¹⁴⁸ However, Singapore was able to obtain the support of several retentionist states and, with a procedural gambit, succeeded in blocking adoption of the resolution.¹⁴⁹

Capital punishment returned to the United Nations agenda at the 1996 session of the Commission on Crime Prevention and Criminal Justice, which considered a draft resolution entitled "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty."¹⁵⁰ The 1996 resolution calls upon Member States in which the death penalty has not been abolished to apply effectively the safeguards guaranteeing protection of the rights of those facing the death penalty, to ensure that each defendant facing a possible death penalty is given all guarantees to ensure a fair trial, to ensure that defendants who do not sufficiently understand the language used in court are fully informed by way of interpretation or translation of all the charges against them and the content of the relevant evidence deliberated in court, to allow adequate time for the preparation of appeals and for the completion of appeals proceedings as well as for petitions for clemency, to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question, and to effectively apply the Standard Minimum Rules for the Treatment of Prisoners¹⁵¹ in order to keep the suffering of prisoners under sentence of death to a minimum and to avoid any exacerbation of such suffering.¹⁵² The resolution was subsequently endorsed by the Economic and Social Council.¹⁵³

Italy recovered from the frustration of the 1994 General Assembly and presented a resolution to the 1997 session of the Commission on Human Rights

148. See SCHABAS, *supra* note 11, at 187 n.314 (listing Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Marshall Islands, Micronesia, Monaco, New Zealand, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, San Marino, Sao Tomé and Príncipe, Slovak Republic, Solomon Islands, Spain, Sweden, Uruguay, Vanuatu, and Venezuela as co-sponsors for resolution).

149. See U.N. GAOR 3d Comm., 49th Sess., 61st mtg. at 13, U.N. Doc. A/C.3/49/SR.61 (1994).

150. Cf. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, SAFEGUARDS GUARANTEEING PROTECTION OF RIGHTS OF THOSE FACING THE DEATH PENALTY, E.S.C. Res. 1996/15 (1996).

151. E.S.C. Res. 663(C), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1, at 35, U.N. Doc. E/5988 (1977); see CLARK, *supra* note 134, at 145-79 (discussing *Standard Minimum Rules*).

152. Cf. SAFEGUARDS GUARANTEEING PROTECTION OF RIGHTS OF THOSE FACING THE DEATH PENALTY, *supra* note 150.

153. See *id.*

calling for, *inter alia*, a moratorium on the death penalty.¹⁵⁴ The preamble refers to the right to life provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, as well as relevant resolutions of the General Assembly and the Economic and Social Council.¹⁵⁵ It notes deep concern that several countries impose the death penalty in disregard of the limitations provided for in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, as well as the safeguards promoted to guarantee the protection of the rights of those facing the death penalty.¹⁵⁶ The resolution states the Commission's conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."¹⁵⁷

In its operative paragraphs, it calls for accession or ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.¹⁵⁸ States that still maintain the death penalty are urged to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably, not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment, and to ensure the right to seek pardon or commutation of sentence.¹⁵⁹ It requests states to consider suspending executions and imposing a moratorium on the death penalty.¹⁶⁰ The resolution was passed by a roll-call vote, twenty-seven in favor and eleven opposed, with fourteen abstaining.¹⁶¹ The

154. See U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., Agenda Item 14, U.N. Doc. E/CN.4/1997/L.20 (1997).

155. *Id.* at 1.

156. *Id.* at 2.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See UNITED NATIONS, COMMISSION ON HUMAN RIGHTS APPROVES MEASURES ON ABOLITION OF DEATH PENALTY, PROTECTION OF MIGRANT WORKERS, MINORITIES, at 3, U.N. Doc. HR/CN/789 (1997). The resolution is recorded as 1997/12. The following countries were in favor of the resolution: Angola, Argentina, Austria, Belarus, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Czech Republic, Denmark, Ecuador, France, Germany, Ireland, Italy, Mexico, Mozambique, Nepal, Netherlands, Nicaragua, Russian Federation, South Africa, Ukraine, and Uruguay. *Id.* at 4. The following countries were against the resolution: Algeria, Bangladesh, Bhutan, China, Egypt, Indonesia, Japan, Malaysia, Pakistan, Republic of Korea, and United States of America. *Id.* The following countries abstained from the vote on the resolution: Benin, Cuba, El Salvador, Ethiopia, Gabon, Guinea, India, Madagascar, Philippines, Sri Lanka, Uganda, United Kingdom, Zaire, and Zimbabwe. *Id.*

terms of the 1997 resolution require that the matter return to the Commission agenda in 1998.

Although the Commission on Human Rights has not designated a special rapporteur with specific responsibility for capital punishment, its special rapporteur on extrajudicial, summary, or arbitrary executions, Senegalese lawyer Bacre Waly Ndiaye, has taken a considerable interest in the subject and clearly views it as part of his mandate. In his 1997 annual report to the Commission on Human Rights, Ndiaye set forth his views on the desirability of abolishing the death penalty. He stated that "given that the loss of life is irreparable . . . the abolition of capital punishment is most desirable in order fully to respect the right to life."¹⁶² He added that when "there is a fundamental right to life, there is no right to capital punishment."¹⁶³

In his report, Ndiaye noted such positive developments as the abolition of the death penalty by Belgium in July 1996.¹⁶⁴ He expressed concern about the expansion of the scope of the death penalty in Estonia and Libya and regretted the fact that some states resumed executions after a lull of many years, notably Bahrain, Comoros, Guatemala, Thailand, and Zimbabwe.¹⁶⁵ The special rapporteur referred to the importance of maintaining the highest procedural standards in capital trials, including public hearings.¹⁶⁶ Ndiaye was disturbed by reports that the death penalty was imposed in secrecy in some countries, such as Belarus, China, Kazakhstan, and Ukraine. Ndiaye noted that:

As in previous years, the Special Rapporteur received numerous reports indicating that in some cases the practice of capital punishment in the United States does not conform to a number of safeguards and guarantees contained in international instruments relating to the rights of those facing the death penalty. The imposition of the death penalty on mentally retarded persons, the lack of adequate defence, the absence of obligatory appeals

162. *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., Agenda Item 10, § 79, at 22, U.N. Doc. E/CN.4/1997/60 (1996).

163. *See id.* § 73, at 20; *see also* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMM'N ON HUMAN RIGHTS, 52ND SESS., ITEM 10 OF THE PROVISIONAL AGENDA, QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES, EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, REPORT BY THE SPECIAL RAPPORTEUR, MR. BACRE WALY NDIAYE, SUBMITTED PURSUANT TO COMMISSION ON HUMAN RIGHTS RESOLUTION 1995/73, §§ 507-17, 540-57, U.N. Doc. E/CN.4/1996/4 (1996) <<http://www.unhchr.ch/html/menu4/chrrep/496.htm>>.

164. *See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, *supra* note 162, at 22.

165. *See id.* at 21.

166. *See id.* at 22.

and racial bias continue to be the main concerns.¹⁶⁷

In his report, he also stated that:

[He] remains deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the appeals procedure after conviction in capital cases in some states.¹⁶⁸

Throughout 1996, the special rapporteur sent urgent appeals to the United States of America concerning death sentences imposed on the mentally retarded in cases following trial in which the right to an adequate defense had allegedly not been fully ensured, in which individuals had been sentenced to death without resorting to their right to lodge any legal or clemency appeal, and in which they had been sentenced to death despite strong indications casting doubt on their guilt.¹⁶⁹ Ndiaye sent a special appeal to the United States in the case of Joseph Roger O'Dell who, according to his report to the Commission on Human Rights, "ha[d] reportedly extraordinary proof of innocence which could not be considered because the law of the State of Virginia does not allow new evidence into court 21 days after conviction."¹⁷⁰ Despite an international campaign, O'Dell was executed in July 1997. Ndiaye also noted that, in response to his urgent appeals, the United States government provided nothing more than a reply in the form of a description of the legal safeguards provided to defendants in the United States in criminal cases.¹⁷¹

Ndiaye had inquired on several occasions as to whether the United States would "consider extending him an invitation to carry out an on-site visit."¹⁷² As a result of repeated initiatives, on October 17, 1996, he received a written invitation from the government to visit the United States and conduct his investigation.¹⁷³ In October 1997, Special Rapporteur Ndiaye conducted a two

167. *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 53rd Sess., Agenda Item 10, § 543, at 127, U.N. Doc. E/CN.4/1997/60/Add.1 (1996).

168. *Id.* § 551, at 130.

169. *Id.* § 544, at 127-28.

170. *Id.*

171. *Id.* § 546, at 129.

172. *Id.* §§ 547, 548, at 129.

173. *Id.* § 549, at 130.

week mission to the United States, where he attempted to visit death row prisoners in Florida, Texas, and California. At California's San Quentin Penitentiary, he was refused permission by authorities to meet with designated prisoners. Ndiaye's visit provoked the ire of Senator Jesse Helms, chair of the Senate Foreign Relations Committee, who in a letter to William Richardson, United States Permanent Representative to the United Nations, described the mission as an "an absurd U.N. charade."¹⁷⁴ Senator Helms asked, "Bill, is this man confusing the United States with some other country or is this an intentional insult to the United States and to our nation's legal system?"¹⁷⁵ Ndiaye replied: "I am very surprised that a country that is usually so open and has been helpful to me on other missions, such as my attempts to investigate human rights abuses in the Congo, should consider my visit an insult."¹⁷⁶

B. Council of Europe

The Council of Europe, now composed of forty Member States covering virtually all of the European continent as well as much of northern Asia, was the first regional system to incorporate a fully abolitionist international norm when, in 1983, it adopted Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.¹⁷⁷ In 1994, the Parliamentary Assembly of the Council of Europe adopted a resolution calling upon Member States that had not yet done so to ratify Protocol No. 6.¹⁷⁸ The resolution praised Greece, which in 1993 had abolished the death penalty for crimes committed in wartime as well as in peacetime. It stated:

In view of the irrefutable arguments against the imposition of capital punishment, it calls on the parliaments of all member states of the Council of Europe, and of all states whose legislative assemblies enjoy special guest status at the Assembly, which retain capital punishment for crimes committed in peacetime and/or in wartime, to strike it from their statute books completely.¹⁷⁹

It urged all heads of state and all parliaments in whose countries death sen-

174. John M. Goshko, *Helms Calls Death Row Probe "Absurd U.N. Charade"; Senate Foreign Affairs Chief Demands Explanation of Rights Investigation From U.S. Envoy*, WASH. POST, Oct. 8, 1997, at A07.

175. *Id.*

176. *Id.*

177. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *supra* note 6.

178. See EUR. PARL. ASS. RES. 1044, 25th Sitting (Oct. 4, 1994) <<http://stars.coe.fr/ta/ta94/eres1044.html>>; see also *Report of the Comm. on Legal Affairs and Human Rights*, EUR. PARL. ASS., 25th Sitting, Doc. No. 7154 (1994).

179. See EUR. PARL. ASS. RES. 1044, *supra* note 178, § 3.

tences are passed to grant clemency to those convicted and subject to the death penalty.¹⁸⁰ It also affirmed that willingness to ratify Protocol No. 6 be made a prerequisite for membership of the Council of Europe.¹⁸¹ Significantly, in the Dayton Peace Agreement, signed at Paris on December 14, 1995, the new state of Bosnia and Herzegovina was held to the highest standard of compliance with contemporary human rights norms, including ratification of Protocol No. 6 and the incorporation of its terms as the fundamental law of the new republic.¹⁸²

The Parliamentary Assembly also adopted a "recommendation" that deplored the fact that the death penalty was still provided by law in eleven Council of Europe Member States and seven states whose legislative assemblies have special status with respect to the organization.¹⁸³ An indication that the death penalty is far from a theoretical issue in Europe, it expressed shock that 59 people were legally put to death in those states in 1993 and that at least 575 prisoners were known currently to be awaiting their execution. The Assembly said that application of the death penalty "may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of article 3 of the European Convention on Human Rights."¹⁸⁴ It recommended that the Committee of Ministers draft an additional protocol to the European Convention on Human Rights, abolishing the death penalty both in peace and wartime, and obliging the parties not to reintroduce it under any circumstances.¹⁸⁵ The recommendation also proposed establishing a control mechanism that would oblige states in which the death penalty is still provided by law to set up commissions with a view to abolishing capital punishment.¹⁸⁶ A moratorium would be declared on all executions while the commissions fulfill their tasks.¹⁸⁷ The commissions would be required to notify the Secretary General of the Council of Europe of any death sentences passed and any executions scheduled without delay.¹⁸⁸ Any country that had sched-

180. *See id.* § 8.

181. *See id.* § 5.

182. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina, art. II, § 2 <<http://www.state.gov/www/regions/eur/bosnia/dayann4.html>>; General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6: Agreement on Human Rights, art. 1 <<http://www.state.gov/www/regions/eur/bosnia/dayann6.html>>.

183. *See* EUR. PARL. ASS. REC. 1246, *supra* note 99, § 1.

184. *Id.* § 3.

185. *Id.* § 6(i).

186. *Id.* § 6(ii).

187. *Id.* § 6(ii)(c).

188. *Id.* § 6(ii)(d).

uled an execution would be required to halt it for a period of six months from the time of notification of the Secretary General.¹⁸⁹ During this time the Secretary General would be empowered to send a delegation to conduct an investigation and make a recommendation to the country concerned.¹⁹⁰ Finally, all states would be bound not to allow the extradition of any person to a country in which the person risked being sentenced to death and subjected to the extreme conditions on "death row."¹⁹¹

The Committee of Ministers of the Council of Europe, in a January 1996 interim reply, indicated that the proposals of the Parliamentary Assembly were being examined. The Parliamentary Assembly adopted a new recommendation on June 28, 1996 calling for the Committee of Ministers to follow up on the 1994 proposals without delay.¹⁹² On June 28, 1996, the Parliamentary Assembly adopted a resolution reaffirming its opposition to the death penalty.¹⁹³ The Assembly declared that all states joining the Council of Europe must impose a moratorium on executions, without delay, and indicate their willingness to ratify Protocol No. 6.¹⁹⁴ The resolution added that

the Assembly reminds applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 of the European Convention on Human Rights and to introduce a moratorium upon accession has become a prerequisite for membership of the Council of Europe on the part of the Assembly.¹⁹⁵

Resolution 1097 was also an answer to reports that the Russian Federation and Ukraine, which had recently joined the Council of Europe, were not honoring their commitments. The Resolution condemned Ukraine "for apparently violating its commitments to introduce a moratorium on executions of the death penalty upon its accession to the Council of Europe."¹⁹⁶ As for Russia, the Parliamentary Assembly demanded that it respect the Assembly's undertakings to stop all executions.¹⁹⁷ The resolution stated that further executions could imperil the continued membership of the two states in the Council of Europe.¹⁹⁸ The Assembly extended its warning to Latvia, where apparently

189. *Id.* § 6(ii)(e).

190. *Id.*

191. *Id.*

192. See EUR. PARL. ASS. REC. 1302, § 3, 24th Sitting (June 28, 1996) <<http://stars.coe.fr/ta/ta96/erec1302.html>>.

193. See EUR. PARL. ASS. RES. 1097, 24th Sitting (June 28, 1996) <<http://stars.coe.fr/ta/ta96/eres1097.html>>.

194. See *id.* § 6.

195. *Id.*

196. *Id.* § 2.

197. *Id.* § 3.

198. *Id.* § 4.

two executions had been carried out since it joined the Council.¹⁹⁹ Amnesty International has reported that in 1996 Ukraine carried out 167 executions and Russia carried out 140 executions, putting the two states at the top of the list for executions world-wide, with the exception of China, whose title to first place in the standings has been undisputed for many years.²⁰⁰ In order to advance the debate within Ukraine, the Parliamentary Assembly of the Council of Europe held a seminar on the abolition of the death penalty in Kiev on November 28-29, 1996 at which international experts debated the issues with members of the Ukrainian judicial community.²⁰¹

Since then, Russia and Ukraine signed Protocol No. 6, on April 17, 1997 and May 5, 1997, respectively. These states must still ratify the instrument, although pursuant to the Vienna Convention on the Law of Treaties:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty²⁰²

It appears that the Russian Federation has, in effect, respected the moratorium and that executions have stopped.²⁰³ The evidence from Ukraine is more ambiguous.

On October 11, 1997, at the Second Summit of the Council of Europe, the Heads of State and Government of the Council of Europe adopted a series of declarations, including one dealing with capital punishment.²⁰⁴ In their declarations to the Summit, several of the leaders insisted upon the importance of abolition of the death penalty as one of the central human rights goals of the Council. These included Romano Prodi of Italy,²⁰⁵ Jean-Claude Juncker

199. *Id.* § 2.

200. See AMNESTY INTERNATIONAL, *The Death Penalty World-Wide: Developments in 1996*, AI Index: ACT/50/05/97, June 1997.

201. *Seminar on the Abolition of the Death Penalty, The Cruelty of the Death Penalty: Capital Punishment and Human Rights*, EUR. PARL. ASS., Doc. No. AS/Jur 72 (1996).

202. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331, 336 (entered into force Jan. 27, 1980).

203. The Committee Against Torture recently urged Ukraine to make its moratorium on the death penalty permanent. See UNITED NATIONS, COMMITTEE AGAINST TORTURE CONCLUDES EIGHTEENTH SESSION IN GENEVA, 28 APRIL-9 MAY, at 2, U.N. Doc. HRJ4326 (1997).

204. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Final Declaration* <<http://www.coe.fr/summit/edeclplan.htm>> [hereinafter *Final Declaration*].

205. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Romano Prodi, President of the Council of Ministers of Italy* <<http://www.coe.fr/summit/discours/eprodi.htm>>.

of Luxembourg,²⁰⁶ Alfred Sant of Malta,²⁰⁷ and Poul Nyrup Rasmussen of Denmark.²⁰⁸ Russian president Boris Yeltsin announced: "Russia has introduced a moratorium on capital punishment and we are strictly complying with this undertaking. I know that the European public opinion was shocked by public executions in Chechnya. Russia's leadership is taking all necessary measures to contain such manifestations of medieval barbarity."²⁰⁹ The President of Latvia, Guntis Ulmanis, explained that a year earlier, he had imposed a moratorium on executions, and that it is still in force.²¹⁰ In the Final Declaration of the Summit, the heads of state and government "call[ed] for the universal abolition of the death penalty and insist[ed] on the maintenance, in the meantime, of existing moratoria on executions in Europe."²¹¹

C. European Union

Death penalty issues have frequently been raised within the European Parliament, which has adopted a number of resolutions on the subject over the years. As early as 1981, a resolution called for abolition of the death penalty in the European Community.²¹² Following the coming into force of Protocol No. 6, the European Parliament urged Member States to ratify that abolitionist instrument.²¹³ In 1989, the European Parliament adopted the "Declaration of Fundamental Rights and Freedoms," which proclaims the abolition of the death penalty.²¹⁴ In 1990, the president of the European Parliament an-

206. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Jean-Claude Juncker, Prime Minister of Luxembourg* <<http://www.coe.fr/summit/discours/elux.htm>>.

207. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Alfred Sant, Prime Minister of Malta* <<http://www.coe.fr/summit/discours/emalta.htm>>.

208. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Poul Nyrup Rasmussen, Prime Minister of Denmark* <<http://www.coe.fr/summit/discours/edk.htm>>.

209. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Boris Yeltsin, President of the Russian Federation* <<http://www.coe.fr/summit/discours/erussia.htm>>.

210. See Council of Europe, *Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Guntis Ulmanis, President of the Republic of Latvia* <<http://www.coe.fr/summit/discours/elatvia.htm>>.

211. See *Final Declaration*, *supra* note 204.

212. See SCHABAS, *supra* note 11, at 258 (discussing abolition of death penalty in European Union) (footnote omitted).

213. See E.C. Doc. A2-167/85; 1986 O.J. (C36) 214-15.

214. See SCHABAS, *supra* note 11, at 259 (discussing abolition of death penalty in European Union) (footnote omitted).

nounced that he had forwarded a motion for a resolution on abolition of the death penalty in the United States.²¹⁵ Subsequently, the Political Affairs Committee decided to prepare a report on the death penalty and appointed Maria Adelaide Aglietta as rapporteur. In 1992, a motion for a resolution was prepared that named those European Union states, namely Greece, Belgium, Italy, Spain, and the United Kingdom, whose legislation still provided for the death penalty in the case of exceptional crimes, to abolish it altogether.²¹⁶ It also urged all member states that had not yet done so to ratify Protocol No. 6 as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights.²¹⁷ The resolution also called upon member states to refuse extradition to states where capital punishment still exists, unless sufficient guarantees that it will not be imposed were obtained.²¹⁸ The resolution stated that:

[The European Parliament h]opes that those countries which are members of the Council of Europe, and have not done so, will undertake to abolish the death penalty (in the case of exceptional crimes, this applies to Cyprus, Malta and Switzerland, and in the case of both ordinary and exceptional crimes, to Turkey and Poland), together with those countries which are members of the CSCE, in which the death penalty still exists (Bulgaria, United States of America, Commonwealth of Independent States, Yugoslavia, Lithuania, Estonia, Latvia, and Albania).²¹⁹

It urged the United Nations to adopt a "binding decision imposing a general moratorium on the death penalty."²²⁰

Death penalty practice has also been a factor in assessing human rights within states whose recognition is being considered by the European Union. In its opinion on the recognition of Slovenia, the Arbitration Commission presided by French judge Robert Badinter took note of the abolition of the death penalty in the Constitution of Slovenia.²²¹

In October 1997, the European Union adopted the Treaty of Amsterdam,²²² which amends the various conventions concerning the body and its

215. See *id.* (discussing abolition of death penalty in European Union) (footnote omitted).

216. See *id.* (discussing abolition of death penalty in European Union).

217. See *id.* (discussing abolition of death penalty in European Union).

218. See *id.* (discussing abolition of death penalty in European Union).

219. See *id.* (discussing abolition of death penalty in European Union).

220. See *id.* (discussing abolition of death penalty in European Union).

221. See *Opinion No. 7, On International Recognition of the Republic of Slovenia by the European Community and Its Member States*, 31 I.L.M. 1512, 1516, § 3(a)(i) (1992) (noting prohibition on death penalty in Slovenian Constitution).

222. See *Treaty of Amsterdam*, in *THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY* 209-322 (Andrew Duff ed., 1997).

components. The instrument was completed with a series of declarations, the first of which concerns the death penalty. It states:

With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty.

In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them.²²³

IV. *International Criminal Law*

The first truly international trials were held in the aftermath of World War II and led, in many cases, to capital executions.²²⁴ The Charter of the International Military Tribunal authorized the Nuremberg court to impose upon a convicted war criminal "death or such other punishment as shall be determined by it to be just."²²⁵ Many of the Nazi defendants were condemned to death, although a few received lengthy prison terms and some were acquitted. The Soviet judge expressed, as an individual opinion, the minority view that all of those convicted should also have been sentenced to death. Those condemned to death were subsequently executed within a few weeks, with the exception of Göring, who committed suicide hours before the time fixed for sentence.²²⁶ A series of successor trials were held in Nuremberg pursuant to Control Council Law No. 10.²²⁷ Again, large numbers of defendants were sentenced to death or to various lesser punishments, including life imprisonment or lengthy terms of detention. At the Tokyo Trial, seven defendants were sentenced to death and fifteen defendants were sentenced to life impris-

223. See *Declaration on the Abolition of the Death Penalty*, in THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY, *supra* note 222, at 309.

224. See William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 733 (1997) (noting that "the first international war crimes tribunals, created in the aftermath of the Second World War, made widespread use of the death penalty").

225. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, *supra* note 3, art. 27, at 300.

226. See *In re Goering and Others*, 13 I.L.R. 203-22 (Int'l Mil. Trib. 1946); see also LES PROCÈS DE NUREMBERG ET DE TOKYO (Annette Wieviorka ed., 1996); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, A PERSONAL MEMOIR (1992).

227. *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, *supra* note 3.

onment.²²⁸ The president of the Tokyo Tribunal penned a separate opinion that seemed to favor sentences other than death:

It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan – the usual conditions in such cases – would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before a firing squad.²²⁹

In answer to arguments that these sentences breached the rule *nulla poena sine lege*, it was said that "[i]nternational law lays down that a war criminal may be punished with death whatever crimes he may have committed."²³⁰ The 1940 United States Army Manual *Rules of Land Warfare* declared that "[a]ll war crimes are subject to the death penalty, although a lesser penalty may be imposed."²³¹ A postwar Norwegian court answered a defendant's plea that the death penalty did not apply to the offense as charged by finding that violations of the laws and customs of war had always been punishable by death at international law.²³² Early efforts to establish an international criminal justice system considered the appropriateness of the death penalty. A preliminary draft of the Convention for the Prevention and Punishment of the Crime of Genocide suggested that the maximum penalty for genocide be capital punishment.²³³ A group of three experts involved in drafting the Genocide Convention, Donnadieu de Vabres, Pella, and Lemkin, revived provisions from a 1937 treaty that had never come into force that

228. *United States v. Araki*, in 20 THE TOKYO WAR CRIMES TRIAL 49,854 to 49,858 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

229. *The Separate Opinion of the President of the Tribunal, Sir William Flood Webb*, in 21 THE TOKYO WAR CRIMES TRIAL, *supra* note 228, at 17; see B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND (1993).

230. 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 200 (1949).

231. UNITED STATES OF AMERICA WAR OFFICE, FM 27-10: BASIC FIELD MANUAL, RULES OF LAND WARFARE, ¶ 357, at 89 (1940).

232. See *Public Prosecutor v. Klinge*, 13 I.L.R. 262, 263-64 (Nor. Sup. Ct. 1946) (discussing war crimes and international law).

233. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, 5TH SESS., DRAFT CONVENTION FOR THE PREVENTION AND PUNISHMENT OF GENOCIDE, ANNEX I, ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE, art. 38, U.N. Doc. E/447 (1947) [hereinafter ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE]; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, 5TH SESS., DRAFT CONVENTION FOR THE PREVENTION AND PUNISHMENT OF GENOCIDE, ANNEX II, ESTABLISHMENT OF AN AD HOC INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE, art. 32, U.N. Doc. E/447 (1947) [hereinafter ESTABLISHMENT OF AN AD HOC INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE].

provided for capital punishment for serious international crimes.²³⁴ But only a few years later, a draft provision proposed by the International Law Commission for its Draft Code of Offences Against The Peace and Security of Mankind avoided any categorical reference to capital punishment: "The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence."²³⁵

A General Assembly committee subsequently recommended that the statute of the proposed international criminal court contain only the most general of provisions dealing with sentencing and suggested the phrase "the court shall impose such penalties as it may determine."²³⁶ Moreover, the General Assembly committee even stated that the statute might exclude certain forms of punishment, such as the death penalty.²³⁷

The Cold War intervened to arrest further developments in international justice, and only in 1989 did the General Assembly revive the proposal to establish an international court. In the interim, as we have already discussed, international human rights law progressed from a somewhat benign tolerance of capital punishment to direct and outright opposition. When the issue of sentencing came before the International Law Commission in 1991, special rapporteur Doudou Thiam formally prescribed that capital punishment be excluded from the Code of Crimes Against the Peace and Security of Mankind and that a maximum sentence of life imprisonment be provided.²³⁸ Although a few members of the Commission argued that capital punishment should not be abandoned,²³⁹ the vast majority disagreed, given the international trend in

234. See ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE, *supra* note 233, art. 38; ESTABLISHMENT OF AN AD HOC INTERNATIONAL CRIMINAL COURT FOR THE PUNISHMENT OF ACTS OF GENOCIDE, *supra* note 233, art. 32.

235. *Draft Code of Offences Against the Peace and Security of Mankind*, art. 5, [1951] 2 Y.B. Int'l L. Comm'n 133, 137, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

236. See *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 11, §§ 110-11, at 113, U.N. Doc. A/2136 (1952). "The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court." *Id.* Annex I, art. 32, at 23.

237. *Id.* § 111.

238. See *Draft Code of Crimes Against the Peace and Security*, [1991] 2 Y.B. Int'l L. Comm'n, pt. 1, § 29, 37, 40, U.N. Doc. A/CN.4/435 and Add.1 (1991). For a discussion of this proposal by the International Law Commission, see *Summary Records of the 2207th-2214th Meetings*, [1991] 1 Y.B. Int'l L. Comm'n 4-52, U.N. Doc. A/CN.4/SER.A/1991 (1991); *Document A/46/10: Report of the International Law Commission on the Work of Its Forty-Third Session (29 April-19 July 1991)*, [1991] 2 Y.B. Int'l L. Comm'n 1, pt. 2, §§ 70-105, 80-85, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (1991) [hereinafter *Document A/46/10*].

239. See *Summary Records of the 2211th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n § 15,

favor of abolition of the death penalty.²⁴⁰ Several members also expressed their reservations about sentences of life imprisonment, which they said were also a form of cruel, inhuman, and degrading punishment.²⁴¹ The draft statute for an international criminal court, adopted by the Commission in 1994, stated that a person convicted under the statute would be subject to imprisonment, up to and including life imprisonment, but capital punishment was not envisioned.²⁴² During subsequent debates on the statute in the Preparatory Committee and the Sixth Committee of the General Assembly, there have been occasional, isolated attempts to revive capital punishment, but these now seem clearly condemned to rejection.²⁴³

28, U.N. Doc. A/CN.4/SER.A/1991 (1991); *Summary Records of the 2212th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n §§ 19, 28, 33, U.N. Doc. A/CN.4/SER. A/1991 (1991); *Summary Records of the 2213th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n § 55, 40, U.N. Doc. A/CN.4/SER.A/1991 (1991). Special rapporteur Thiam promised that the Commission's report would state that "two or three of its members had expressed reservations" about exclusion of the death penalty. *Id.* § 59, 40, U.N. Doc. A/CN.4/SER.A/1991 (1991). The report eventually stated that "many members of the Commission supported" excluding the death penalty and "[s]ome other members opposed" excluding the death penalty. *Id.*; see *Document A/46/10*, *supra* note 238, §§ 84-85.

240. See *Summary Records of the 2207th Meeting*, *supra* note 238, §§ 23-24; *Summary Records of the 2208th Meeting*, *supra* note 238, §§ 2, 21, 30; *Summary Records of the 2209th Meeting*, *supra* note 238, §§ 5, 29; *Summary Records of the 2210th Meeting*, *supra* note 238, §§ 25, 33, 46; *Summary Records of the 2212th Meeting*, *supra* note 239, § 4; *Summary Records of the 2213th Meeting*, *supra* note 239, §§ 12, 23, 33.

241. *Summary Records of the 2208th Meeting*, *supra* note 238, §§ 10 (Graefrath), 21 (Calero Rodriguez); *Summary Records of the 2209th Meeting*, *supra* note 238, § 19 (Barboza); *Summary Records of the 2210th Meeting*, *supra* note 238, § 47 (Njenga); *Summary Records of the 2212th Meeting*, *supra* note 239, § 4 (Solari Tudela); see *Document A/46/10*, *supra* note 238, § 88. The German Constitutional Court has suggested that life imprisonment without possibility of parole constitutes cruel, inhuman and degrading punishment. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 314-20 (1989) (discussing Life Imprisonment Case (1977) 45 BVerGE 187).

242. See *Report of the International Law Commission on the Work of Its Forty-sixth Session, 3 May-23 July 1994*, U.N. GAOR, 49th Sess., Supp. No. 10, at 123-25, U.N. Doc. A/49/10 (1994); see also *Report of the International Law Commission on the Work of Its Forty-seventh Session*, U.N. GAOR, 50th Sess., Supp. No. 10, at 63-64, U.N. Doc. A/50/10 (1995).

243. See UNITED NATIONS, DISCUSSION TURNS TO RANGE AND DEFINITION OF PENALTIES IN DRAFT STATUTE IN PREPARATORY COMMITTEE ON INTERNATIONAL CRIMINAL COURT, U.N. Doc. L/2805 (1996); UNITED NATIONS, PREPARATORY COMMITTEE FOR INTERNATIONAL CRIMINAL COURT DISCUSSES DEFINITION OF CRIMES; POTENTIAL USE OF CAPITAL PUNISHMENT, U.N. Doc. L/2806 (1996); UNITED NATIONS, PREPARATORY COMMITTEE FOR INTERNATIONAL CRIMINAL COURT CONCLUDES SECOND SESSION, U.N. Doc. L/2813 (1996); UNITED NATIONS, INTERNATIONAL CRIMINAL COURT SHOULD BE INDEPENDENT BODY, AND NOT SUBSIDIARY OF SECURITY COUNCIL, SPEAKERS TELL LEGAL COMMITTEE, U.N. Doc. GA/L/3044 (1997); UNITED NATIONS, UNITED STATES REPRESENTATIVE TELLS LEGAL COMMITTEE INTERNATIONAL CRIMINAL COURT SHOULD NOT BE DIRECT PART OF UNITED NATIONS, U.N. Doc. GA/L/3046 (1997);

While the debate had been underway in the International Law Commission and the Preparatory Committee, the Security Council had also addressed the issue of sentencing when it set up the ad hoc tribunals for the former Yugoslavia and Rwanda. The statutes of the two ad hoc tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and that they be established while taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda.²⁴⁴ The exclusion of the death penalty by the International Tribunal is a particularly sore point with Rwanda. In the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts to execution if those tried by the international tribunal – presumably the masterminds of the genocide – would only be subject to life imprisonment.²⁴⁵ Rwanda's representative stated that "[s]ince it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence."²⁴⁶ He also stated, "[t]hat situation is not conducive to national reconciliation in

UNITED NATIONS, DELEGATES DIFFER ON WHETHER STATUTE OF PROPOSED INTERNATIONAL CRIMINAL COURT SHOULD COVER CRIME OF "AGGRESSION," U.N. Doc. GA/L/3047 (1997); UNITED NATIONS, SPEAKERS IN LEGAL COMMITTEE CALL FOR REVIEW OF STATUTES OF UN ADMINISTRATIVE TRIBUNAL, U.N. Doc. GA/L/3048 (1997).

244. See STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 5, art. 24; STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, *supra* note 5, art. 23. Several works discuss the *ad hoc* tribunals generally. See generally M. CHERIF BASSIOUNI & PETER MANKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); DAI TRIBUNALI PENALI INTERNAZIONALI AD HOC A UNA CORTE PERMANENTE (Flavia Lattanzi & Elena Sciso eds., 1996); KARINE LESCURE, *LE TRIBUNAL PÉNAL INTERNATIONAL POUR L'EX-YOUGOSLAVIE* (1994); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995); Morten Bergsmo, *The Establishment of the International Tribunal on War Crimes*, 14 HUM. RTS. L.J. 371, 371-73 (1993); Eric David, *Le tribunal international pénal pour l'ex-Yugoslavie*, 25 REV. BELGE DROIT INT'L 565, 565-98 (1992); Jules Deschênes, *Toward International Criminal Justice*, 5 CRIM. L.F. 249, 249-77 (1994); David Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401, 401-22 (1994); Melissa Gordon, *Justice on Trial: The Efficacy of the International Tribunal for Rwanda*, 1 ILSA J. INT'L COMP. L. 217, 217-42 (1995); Christopher Greenwood, *The International Tribunal for Former Yugoslavia*, 69 INT'L AFF. 641, 641-55 (1993); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 78-87 (1994); Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 360-80 (1994).

245. See UNITED NATIONS, SECURITY COUNCIL, *THE SITUATION CONCERNING RWANDA*, at 16, U.N. Doc. S/PV.3453 (1984).

246. *Id.*

Rwanda.²⁴⁷ But to counter this argument, the representative of New Zealand reminded Rwanda that "[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable – and a dreadful step backwards – to introduce it here."²⁴⁸ Since domestic trials began in Rwanda in December 1996, more than one hundred persons have been sentenced to death, although these sentences have not yet been carried out.²⁴⁹ In fact, Rwanda has not imposed capital punishment since 1982, and in 1992, President Habyarimana systematically commuted all outstanding death sentences.²⁵⁰ According to the United Nations Secretary-General, Rwanda is now considered a de facto abolitionist state because it has not conducted executions for more than ten years.²⁵¹ Even the program of the Rwandese Patriotic Front calls for abolition of the death penalty. Furthermore, in the 1993 Arusha peace accords, which have constitutional force in Rwanda, the government undertook to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at Abolition of the Death Penalty, although it has not yet formally taken this step.²⁵² Recent legislation adopted by Rwanda in order to expedite trials of genocide suspects abolishes the death penalty for the vast majority of offenders, who would otherwise be subject to capital punishment under the country's *Code pénal*.²⁵³

V. Extradition

Extradition has become an important indirect way in which international law promotes the abolition of the death penalty. Since the late nineteenth century, extradition treaties have contained clauses by which states parties may refuse extradition for capital offenses in the requesting state unless a satisfactory assurance will be given that the death penalty not be imposed. Such

247. *Id.*

248. *Id.* at 5.

249. See William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 8 CRIM. L.F. 523, 560 (1997).

250. *Arrêté présidentiel No. 103/105, Mesure de grâce du 13 Mars 1992*, in 1 CODE ET LOIS DUE RWANDA 432 (Filip Reyntjens & Jan Gorus eds., 2d ed. 1995).

251. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, CAPITAL PUNISHMENT AND IMPLEMENTATION OF THE SAFEGUARDS GUARANTEEING THE PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY: REPORT OF THE SECRETARY-GENERAL, § 36, U.N. Doc. E/1995/78 (1995); see also AMNESTY INTERNATIONAL, *The Death Penalty: List of Abolitionist and Retentionist Countries (Sept., 1985)*, AI Index: ACT 50/06/95, Sept. 1985.

252. *Protocole sur les Questions Diverses et Dispositions Finales*, art. 15, in 1 CODE ET LOIS DUE RWANDA, *supra* note 250, at 18, 20.

253. See WILLIAM A. SCHABAS & MARTIN IMBLEAU, INTRODUCTION TO RWANDAN LAW 44, 59-60 (1997) (discussing death penalty).

provisions can be found as early as 1889, in the South American Convention, in the 1892 extradition treaty between the United Kingdom and Portugal, in the 1908 extradition treaty between the United States and Portugal, and in the 1912 treaty prepared by the International Commission of Jurists.²⁵⁴ These clauses have now become a form of "boilerplate" international law and are contained in model extradition treaties adopted within international organizations including the United Nations.²⁵⁵ Several important cases have been heard by courts in Europe and Canada concerning extradition to the United States. As a result of the case law of the European Court of Human Rights, extradition to the United States from Europe is now virtually contingent on such assurances, while in Canada, the position is not nearly as clear.

The European Commission of Human Rights first addressed the question of extradition to the death rows on the other side of the Atlantic in *Kirkwood v. United Kingdom*,²⁵⁶ a case originating in California. Kirkwood's application was declared inadmissible, not because the argument itself was flawed, but because he had failed to demonstrate that detention on "death row" was inhuman and degrading treatment within the meaning of article 3.²⁵⁷ The issue returned to the Strasbourg organs several years later in the case of Jens Soering, who had been arrested in the United Kingdom under an extradition warrant issued at the request of the United States.²⁵⁸ In a judgment issued on July 7, 1989,²⁵⁹ the European Court of Human Rights confirmed that circum-

254. See GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 99-100 (1991); *American Institute of International Law, Project No. 17*, 20 AM. J. INT'L L. 331, 331-35 (Supp. 1926); *Draft Convention on Extradition*, 29 AM. J. INT'L L. 15, 228 (Supp. 1935); P. Leboucq, *Influence en matière d'extradition de la peine applicable dans le pays requérant*, 38 J. DU DROIT INT'L 437 (1911); J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 AM. J. INT'L L. 298, 298-300 (1924); Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 1990 CAN. Y.B. INT'L L. 117, 117-68; Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191, 191-224 (1992); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition*, 62 INT'L REV. PENAL L. 259, 259-80 (1991).

255. See UNITED NATIONS, EIGHTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIMES AND THE TREATMENT OF OFFENDERS, MODEL TREATY ON EXTRADITION, art. 4, at 75, U.N. Doc. A/CONF.144/28 (1990); Inter-American Convention on Extradition, art. 9, 20 I.L.M. 723, 724 (1981); European Convention on Extradition, Dec. 13, 1957, art. 11, 359 U.N.T.S. 273, 282. The Italian Constitutional Court has ruled that article 11 of the European Convention on Extradition does not codify a customary rule of international law. See *Re Cuillier, Ciamborani and Vallon*, 78 I.L.R. 93, 94 (1988) (Italy, Constitutional Court).

256. 37 Eur. Comm'n H.R. Dec. & Rep. 158.

257. See *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 184 (1984).

258. See 2 VINCENT BERGER, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 118-23 (1992) (discussing *Soering*); Warbrick, *supra* note 72, at 1085-95 (same).

259. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 8 (1989).

stances relating to a death sentence could give rise to issues respecting the prohibition of inhuman and degrading treatment or punishment and concluded that if the United Kingdom were to extradite Soering to Virginia, this would constitute a breach of the European Convention.

Although the court has not revisited the question since *Soering*, the European Commission on Human Rights has been called upon to interpret the *Soering* judgment. In January 1994, it ruled an application from an individual subject to extradition to the United States for a capital offense to be inadmissible.²⁶⁰ The Commission considered the guarantees that had been provided by the Dallas County prosecutor to the French government, stating that if extradition were granted, "the State of Texas [would] not seek the death penalty," to be sufficient.²⁶¹ Texas law stated that the death penalty could only be pronounced if requested by the prosecution. The fugitive had claimed that the undertaking was "vague and imprecise."²⁶² Furthermore, she argued that it had been furnished by the federal authorities through diplomatic channels and did not bind the executive or judicial authorities of the State of Texas.²⁶³ The Commission compared the facts with those in *Soering*, in which the prosecutor had made a clear intention to seek the death penalty.²⁶⁴ The Commission found the Texas prosecutor's attitude to be fundamentally different²⁶⁵ and concurred with an earlier decision of the French Conseil d'État holding the undertaking to be satisfactory.²⁶⁶

Still more recently, the Commission considered the case of Lei Ch'an Wa, threatened with extradition from Macao to China for a capital crime, trafficking in narcotics.²⁶⁷ The representative of the Chinese news agency Xinhua, which unofficially represented China's interests in Macao, had stated that the death penalty would not be imposed in the event of extradition, which was allowed by the Portuguese extradition legislation in force in Macao.²⁶⁸

260. See *Aylor-Davis v. France*, 76-B Eur. Comm'n H.R. Dec. & Rep. 164, 173 (1994).

261. *Id.* at 167.

262. *Id.* at 171.

263. *Id.*

264. *Id.*

265. *Id.* at 172.

266. See *Dame Joy Davis-Aylor*, Conseil d'Etat, Oct. 15, 1993, D. 1993 inf. rap. 238; Christian Vigouroux, *Les engagements d'un État étranger en matière d'extradition*, in REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1166 (1993).

267. *Lei Ch'an Wa v. Portugal*, Eur. Comm'n H.R. App. No. 25410/94 (Nov. 27, 1995) (unreported decision on file with Washington & Lee Law Review); *Yuk Leung v. Portugal*, Eur. Comm'n H.R. App. 24464/94 (Nov. 27, 1995) (unreported decision on file with Washington & Lee Law Review).

268. *Lei Ch'an Wa*, Eur. Comm'n H.R. App. No. 25410/94; *Yuk Leung*, Eur. Comm'n H.R. App. 24464/94.

However, Portugal's constitution says that extradition is forbidden for crimes for which the death penalty is provided in the receiving state's legislation.²⁶⁹ In other words, extradition was forbidden by the constitution, despite the existence of an assurance from the representative of China. The Constitutional Court held that under the circumstances, extradition was prohibited.²⁷⁰ In the meantime, Lei had registered an application with the European Commission, which issued provisional measures pursuant to article 36 of its Regulations.²⁷¹ However, once the Constitutional Court had settled the matter, the problem was resolved, and the Commission decided that it was unnecessary to examine further the application.²⁷² In another case, involving extradition from Austria to the Russian Federation to stand trial for murder, the Commission noted a maximum sentence of ten years in the Penal Code of the Russian Federation, observed that the two accomplices had been sentenced to nine years, and concluded that "there are no substantial grounds for believing that the applicant faces a real risk of being subjected to the death penalty in the Russian Federation."²⁷³

Protocol No. 6 has also been cited in domestic law in cases concerning extradition of fugitives to states imposing the death penalty. On two occasions, the French Conseil d'État has refused to extradite, expressing the view that Protocol No. 6 establishes a European *ordre public* that prohibits extradition in capital cases.²⁷⁴ The Supreme Court of the Netherlands took a similar view, invoking the Protocol in refusing to return a United States serviceman,²⁷⁵ although required to do so by the NATO Status of Forces Agreement.²⁷⁶ The court considered that the European Convention and its Protocol

269. *Lei Ch'an Wa*, Eur. Comm'n H.R. App. No. 25410/94; *Yuk Leung*, Eur. Comm'n H.R. App. 24464/94.

270. *Lei Ch'an Wa*, Eur. Comm'n H.R. App. No. 25410/94; *Yuk Leung*, Eur. Comm'n H.R. App. 24464/94.

271. *Lei Ch'an Wa*, Eur. Comm'n H.R. App. No. 25410/94; *Yuk Leung*, Eur. Comm'n H.R. App. 24464/94.

272. *Lei Ch'an Wa*, Eur. Comm'n H.R. App. No. 25410/94; *Yuk Leung*, Eur. Comm'n H.R. App. 24464/94; *Meng v. Portugal*, 83-A Eur. Comm'n H.R. Dec. & Rep. 88, 90 (1995).

273. *Raidl v. Austria*, 82-A Eur. Comm'n H.R. Dec. & Rep. 134, 144-45 (1995).

274. See *Fidan*, Conseil d'État, Feb. 27, 1987, D. 1987, II, 305, concl. M. Bonichot; *Gacem*, Conseil d'État, Dec. 14, 1987, I *Semaine juridique* IV-86. *Fidan* was cited by Judge De Meyer in his concurring opinion in *Soering v. United Kingdom*. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 52 n.2 (1989).

275. See *Short v. Netherlands*, 29 I.L.M. 1375 (1990); see also Steven J. Lepper, *Short v. The Kingdom of the Netherlands: Is It Time to Renegotiate the NATO Status of Forces Agreement?*, 24 VAND. J. TRANSNAT'L L. 867, 874 (1991); Major John E. Parkerson, Jr. & Major Steven J. Lepper, *Commentary on Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698, 698-702 (1991).

276. Agreement Between the Parties to the 1949 North Atlantic Treaty Regarding the

No. 6 took precedence over the other treaty.

In June 1996, Italy's Constitutional Court took judicial opposition to extradition for capital crimes one step further when it refused to send Pietro Venezia to the United States despite assurances from American prosecutors that the death penalty would not be sought or imposed.²⁷⁷ Venezia's extradition to Dade County, Florida had been requested by the United States, pursuant to the Treaty of Extradition dated October 13, 1983.²⁷⁸ Article IX of the treaty entitles Italy to request that extradition be conditional upon an undertaking by the United States that the death penalty not be imposed.²⁷⁹ The United States government gave assurances in the form of a *note verbale* on July 28, 1994, August 24, 1995, and January 12, 1996.²⁸⁰ But this was not enough for the Italian Constitutional Court.

According to the judgment of the court, the prohibition of capital punishment is of special importance, like all sentences that violate humanitarian principles, in the first part of the Constitution.²⁸¹ The right to life is the first of the inviolable human rights, enshrined in article 2.²⁸² The judgment also stated that the 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 cooperation for the purposes of mutual judicial assistance.²⁸³ The court noted that it had already stated that the participation of Italy in punishments that cannot be imposed within Italy in peacetime constitutes a breach of the Constitution.²⁸⁴

Status of Their Forces, June 19, 1951, 199 U.N.T.S. 67.

Note that on 19 June 1995, the States parties to the NATO treaty finalized the *Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces* together with an *Additional Protocol*. Article 1 of the *Additional Protocol* states: "Insofar as it has jurisdiction according to the provisions of the agreement, each State party to the present additional protocol shall not carry out a death sentence with regard to any member of a force and its civilian component, and their dependants from any other state party to the present additional protocol."

SCHABAS, *supra* note 11, at 254 n.174.

277. See Andrea Bianchi, *Venezia v. Ministero di Grazia e Giustizia*, 91 AM. J. INT'L L. 727, 727 (1997) (discussing *Venezia*).

278. See *Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy*, Oct. 1983, U.S.-Italy, 35 U.S.T. 3026.

279. See *id.* art. IX.

280. See Bianchi, *supra* note 276, at 728.

281. See *id.* at 727.

282. See *id.* at 728.

283. See *id.*

284. See *id.*

Referring to the mechanism by which the Italian authorities consider the sufficiency of the undertaking by the United States authorities not to impose capital punishment, the Italian Constitutional Court held that:

The extradition of a fugitive indicted for a crime for which capital punishment is provided by the law of the requesting state would violate Articles 2 and 27 of the Italian Constitution, regardless of the sufficiency of the assurances provided by the requesting state that the death penalty would not be imposed or, if imposed, would not be executed.²⁸⁵

As a result, the court declared 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.²⁸⁶ It also declared that the portion of Law 225 of March 26, 1984, implementing article IX of the extradition treaty, was unconstitutional.²⁸⁷ Venezia had also filed an application with the European Commission of Human Rights. The Commission decided to strike the case from its docket as a result of the judgment of the Italian Constitutional Court.²⁸⁸

Canadian courts have been reluctant to follow the European precedents,²⁸⁹ although a recent judgment suggests that they will be increasingly severe in granting extradition in capital cases. In *United States of America v. Burns and Rafay*,²⁹⁰ issued on June 30, 1997, the British Columbia Court of Appeal overruled the decision of the Canadian Minister of Justice to allow extradition in a capital offense without seeking an assurance that the death penalty would be imposed.²⁹¹ Article VI of the Extradition Treaty between Canada and the United States declares:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.²⁹²

285. *See id.*

286. *See id.*

287. *See id.*

288. *See Venezia v. Italy*, 87-A Eur. Comm'n H.R. Dec. & Rep. 140, 150 (1996) (striking case from docket).

289. *See, e.g., Kindler v. Canada*, [1991] 2 S.C.R. 779.

290. [1997] 116 C.C.C.3d 524 (B.C.C.A.).

291. *United States of America v. Burns and Rafay*, [1997] 116 C.C.C.3d 524, 542-43 (B.C.C.A.).

292. Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, U.S.-Can., art. 6, 27 U.S.T. 983, 989.

Burns and Rafay were both eighteen at the time of the crime, a brutal murder of Rafay's parents.²⁹³ They were charged by the State of Washington with aggravated first degree murder, punishable by sentence of death.²⁹⁴ Canada abolished the death penalty for common law crimes in 1976.²⁹⁵ Although the death penalty still exists under military law, it has not been imposed for more than fifty years, and a pending revision of the National Defense Act plans to eliminate capital punishment from the Canadian statute books altogether.

Justice Donald, writing for the majority of the British Columbia Court of Appeal, admitted that he could not refuse extradition on the basis of section 12 of the Canadian Charter of Rights of Freedoms, which prohibits cruel and unusual punishment,²⁹⁶ or section 7 of the Charter, which enshrines the right to life,²⁹⁷ given the 1991 judgment of the Supreme Court of Canada in *Kindler v. Canada*.²⁹⁸ However, he concluded that because Burns and Rafay were Canadian citizens, their extradition would violate § 6(1) of the Charter, which declares that "[e]very citizen of Canada has the right to enter, remain in and leave Canada."²⁹⁹ As dissenting Justice McEachern noted, § 6(1) is subject to the limitation clause of § 1, which instructs the courts to subject Charter rights to the test of "reasonable limits in a free and democratic society."³⁰⁰ Following an analytical approach developed by the European Court of Human Rights in the application of similar provisions,³⁰¹ Canadian courts consider whether the legal rule that violates the Charter right has a legitimate purpose

293. *Burns and Rafay*, [1997] 116 C.C.C.3d at 530.

294. *Id.* at 530-31.

295. *Id.* at 531.

296. Constitution Act, 1982, R.S.C., App. II, No. 44, § 12 (1985) (Can.).

297. *Id.* § 7.

298. *United States of America v. Burns and Rafay*, [1997] 116 C.C.C.3d 524, 536 (B.C.C.A.); see *Kindler v. Canada*, [1991] 2 S.C.R. 779. For further discussion of the *Kindler* decision, see 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, 225-70 (1992); William A. Schabas, *Extradition et peine de mort: le Canada renvoie deux fugitifs au couloir de la mort*, 4 REVUE UNIVERSELLE DES DROITS DEL'HOMME 65, 65-70 (1992); William A. Schabas, *Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion*, 51 REVUE BARREAU 673, 673-91 (1991); William A. Schabas, *Kindler v. Canada*, 87 AM. J. INT'L L. 128, 128-33 (1993); 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, 799-839 (1991).

299. *United States of America v. Burns and Rafay*, [1997] 116 C.C.C.3d 524, 533, 536 (B.C.C.A.); Constitution Act, 1982, R.S.C., App. II, No. 44, § 6(1) (1985) (Can.).

300. See *Burns and Rafay*, [1997] 116 C.C.C.3d at 543 (McEachern, J., dissenting) (quoting Constitution Act, 1982, R.S.C., App. II, No. 44, § 6(1) (1985) (Can.)).

301. See generally WILLIAM A. SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER* (2d ed. 1996).

and whether it constitutes a minimal infringement upon the right in question. The Supreme Court of Canada had already determined that extradition constitutes an acceptable limit on the right of Canadians to remain in Canada.³⁰² But according to Justice Donald, execution of Burns and Rafay would violate their right to return to Canada upon completion of their sentence, something that extradition for noncapital offenses would not.³⁰³ Given alternatives, specifically a sentence of life imprisonment, it was clear that extradition without an assurance that the death penalty would not be imposed failed the minimal impairment test. He wrote:

The simple point taken by the applicants in the present case, with which I am in full agreement, is that their return to Canada is impossible if they are put to death. . . . By handing over the applicants to the American authorities without an assurance, the Minister will maximally, not minimally, impair the applicants' rights of citizenship.³⁰⁴

Although bound by precedent of the Supreme Court of Canada that allows the extradition of noncitizens for capital offenses – case law that, incidentally, has been criticized by other courts in other countries³⁰⁵ – Justice Donald's reasons suggest that he is opposed to extradition for capital offenses in general. He wrote:

With respect, the Minister appears to have given only lip service to a fundamentally important aspect of Canadian policy, namely, that we have decided through our elected representatives that we will not put our killers to death [on the reflected] will of the majority and their concern for the sanctity of life and the dignity of the person.³⁰⁶

He cited the reasons of Supreme Court Justice Peter Cory, who dissented in *Kindler*, referring to the fact that Canada's Parliament rejected the death penalty in two separate free votes.³⁰⁷ Criticizing the executive decision to extradite Burns and Rafay without the assurance that capital punishment would not be imposed, he stated:

The Minister confesses his support for abolition but then fails to act on his conviction. Apart from trying to have it both ways, the problem with the

302. *United States of America v. Cotroni, United States of America v. El Zein*, [1989] 1 S.C.R. 1469, 1470.

303. *Burns and Rafay*, [1997] 116 C.C.C.3d at 534-35.

304. *Id.* at 534.

305. *See Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jamaica).

306. *United States of America v. Burns and Rafay*, [1997] 116 C.C.C.3d 524, 541-42 (B.C.C.A.).

307. *Id.*

Minister's thinking is that he treats the policy question about the death penalty in Canada as undecided and at large. This approach led him to give effect to the minority view on the death penalty as far as these applicants are concerned.³⁰⁸

Burns and Rafay is being appealed to the Supreme Court of Canada. That court, in a four to three decision, authorized the extradition of Joseph Kindler in 1991. Yet even the *Kindler* decision suggests the court's discomfort with the death penalty, as six of the seven justices indicated that capital punishment, were it to be imposed in Canada, would violate the right to life and the prohibition of cruel and unusual punishment.

VI. Conclusion

In his 1995 report to the Economic and Social Council,³⁰⁹ English criminologist Roger Hood concluded that "there has been a considerable shift towards the abolition of the death penalty both de jure and in practice" in the years 1989 through 1993.³¹⁰ After consulting other sources, Professor Hood observed that "it appears that since 1989 24 countries have abolished capital punishment, 22 of them for all crimes in peacetime or in wartime."³¹¹ Over the same period, the death penalty was reintroduced in four states.³¹² Professor Hood stated that "the picture that emerges is that an unprecedented number of countries have abolished or suspended the use of the death penalty."³¹³ Amnesty International issued revised figures in July 1997 that declared that ninety-nine states have abolished the death penalty in law or in practice, whereas ninety-four retain the death penalty. Amnesty International adds that "the number of countries which actually execute prisoners in any one year is much smaller."³¹⁴

Capital punishment remains in force in many countries, and while the situation continues to evolve, quite convincingly, in favor of abolition, it is too early to speak of customary or universal norms. There is nothing unusual

308. *Id.* at 542.

309. Pursuant to E.S.C. Res. 206, U.N. ESCOR, Supp. No. 1, at 65, U.N. Doc. E/1994/94 (1994).

310. CAPITAL PUNISHMENT AND IMPLEMENTATION OF THE SAFEGUARDS GUARANTEEING THE PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY: REPORT OF THE SECRETARY-GENERAL, *supra* note 251, § 32.

311. *Id.* § 34.

312. *Id.* § 38.

313. *Id.* § 87.

314. AMNESTY INTERNATIONAL, *Facts and Figures on the Death Penalty*, AI Index: ACT 50/08/97, July 1997. For an even more optimistic assessment, see generally THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT, *supra* note 51.

here. One need only think of the emergence of other fundamental rights, such as the prohibition of slavery and torture, sometimes qualified, with little debate, as peremptory or *jus cogens* norms. Yet not so long ago – barely a century, in the case of slavery – it was impossible to speak of any international consensus on these matters. With that comparison in mind, can it be unrealistic to look to the universal abolition of the death penalty, the consequence of its international prohibition by human rights law, at some point in coming decades?

ARTICLE
