International Law and Abolition of the Death Penalty

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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." The same approach was taken in the American Declaration of the Rights and Duties of Man, adopted May 4, 1948. 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. 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.

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

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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 dejure. According to the United Nations Secretary General in his January 16, 1998

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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. 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.

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. 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.

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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
droits de l’homme et du citoyen. High on the list of this new international catalogue of human rights was the "right to life." 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.

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." 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. 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. 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. Cassin reworked Humphrey’s draft and removed any reference to the death penalty. 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. It is clear from the travaux préparatoires that the death penalty was considered to be fundamen-

22. See Déclaration des droits de l’homme et du citoyen (France 1789).
23. See The Declaration of Independence para. 2 (U.S. 1776).
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).
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. Subsequent interpretation by General Assembly and Economic and Social Council resolutions supports this conclusion.

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." 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-


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, that modifies article 2 by abolishing the death penalty in peacetime. 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.

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. 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. 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 PENAL 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 Harremoes, 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 9 (1983).


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.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{44} Here too, the progress is evident. Taking article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide.

\begin{enumerate}
\item 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.
\item 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.
\item 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.
\end{enumerate}


\footnote{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.

\footnote{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. 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.

The third major regional treaty is the African Charter of Human and Peoples' Rights (African Charter), 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. 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. Nevertheless, the African Charter is to be interpreted in light

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of other international human rights instruments, including "the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations." 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, the most recent being South Africa, and this will surely influence future interpretation of the African Charter.

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. 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 crimes 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. 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.


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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{59}. See Universal Declaration of Human Rights, supra note 1, arts. 3, 5.

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. 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." International tribunals recognize that human rights norms must be interpreted in an evolutive or dynamic manner. 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. 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. 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.


65. See id. ¶ 8 at 10.
in interpretation. 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. 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. 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. 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.

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. 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.

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68. See id.
69. See id. at 41.
70. Id. at 51 (de Meyer, J., concurring).
71. Id. at 11-12.
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


because of the result of a growing weight of authority from domestic tribunals that have examined the same question, as well as a consequence of the changing composition of the Committee. 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.

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. 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. The Committee has since concluded that execution by lethal injection is not cruel, inhuman, and degrading despite uncontested evidence tendered before it showing that


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

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." The International Court of Justice has held that common article 3 codifies a customary rule.

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. The Commission was only prepared to conclude that a norm setting the minimum age at eighteen was "emerging." 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. Both the International Covenant and the American Convention on Human Rights, as well as the Convention on the Rights of the Child, the fourth Geneva Convention, and its two additional protocols, however, specify eighteen as the minimum age.

88. See id.
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.
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. Several European states objected that the reservation was incompatible with the object and purpose of the International Covenant and therefore invalid. 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. 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


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." 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. 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. 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. Only one state party to the Protocol, Spain, has formulated such a reservation.

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). 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. 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

98. See Gilbert Guillaume, supra note 35, at 1067-72.
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.
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. These provisions are a more extensive version of an article in the 1929 Geneva Convention that protected prisoners of war facing the death penalty. Civilians in the hands of a belligerent were slower to receive comprehensive protection in the international humanitarian conventions, 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). 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. 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. 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. The death penalty provisions in Protocol Additional II, 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. 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.
108. See id.
109. See id. art. 68.
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

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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.  

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." 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. In the General Assembly, many retentionist states even supported the draft resolution, noting that it confined itself to the "humanitarian" aspect of the question, although more militant abolitionist states criticized its timidity, saying it would not "induce Governments to abolish the death penalty."


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


Commission's resolution, with some minor amendments, was then adopted by the General Assembly. 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." 

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 organizations to raise the issue of capital punishment at its Geneva session because the issue was not on the agenda. 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. 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." 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." But faced with some stiff opposition and inadequate time to complete the discussions, the sponsors withdrew the revised draft resolution. At the 1990 Congress held in Havana, a resolution on


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


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 ANNALES 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." 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.

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) at its March 1984 session. 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." 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. 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." The safeguards were later endorsed in resolutions by the Economic and Social Council, the General Assembly, and the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985. In 1988, the safeguards were themselves strengthened.


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.


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.  

In 1994, at the forty-ninth session, a General Assembly draft resolution called for a moratorium on the death penalty. 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. 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. 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. 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.


142. See E.S.C. Res. 1989/64, supra note 141.
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. However, Singapore was able to obtain the support of several retentionist states and, with a procedural gambit, succeeded in blocking adoption of the resolution.

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." 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 Prisoners in order to keep the suffering of prisoners under sentence of death to a minimum and to avoid any exacerbation of such suffering. The resolution was subsequently endorsed by the Economic and Social Council.

Italy recovered from the frustration of the 1994 General Assembly and presented a resolution to the 1997 session of the Commission on Human Rights.
calling for, *inter alia*, a moratorium on the death penalty. 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. 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. 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.”

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. 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. It requests states to consider suspending executions and imposing a moratorium on the death penalty. The resolution was passed by a roll-call vote, twenty-seven in favor and eleven opposed, with fourteen abstaining.

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


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.\textsuperscript{167}

In his report, he also stated that:

\begin{quote}
[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.\textsuperscript{168}
\end{quote}

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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{173} In October 1997, Special Rapporteur Ndiaye conducted a two

\begin{footnotes}
\item \textsuperscript{168} Id. § 551, at 130.
\item \textsuperscript{169} Id. § 544, at 127-28.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. § 546, at 129.
\item \textsuperscript{172} Id. §§ 547, 548, at 129.
\item \textsuperscript{173} Id. § 549, at 130.
\end{footnotes}
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." 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?" 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."

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. 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. 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.

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

175. Id.
176. Id.
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. It also affirmed that willingness to ratify Protocol No. 6 be made a prerequisite for membership of the Council of Europe. 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.

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. 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." 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. 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. A moratorium would be declared on all executions while the commissions fulfill their tasks. 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. Any country that had sched-

180. See id. § 8.
181. See id. § 5.
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 recommenda-
tion 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 pen-
alty.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 vio-
lating 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 undertak-
ings 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/erecl302.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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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:

\begin{quote}
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 treaty . . . .
\end{quote}

It appears that the Russian Federation has, in effect, respected the moratorium and that executions have stopped.\textsuperscript{202} 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.\textsuperscript{203} 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,\textsuperscript{204} Jean-Claude Juncker

\begin{itemize}
\item \textsuperscript{199} Id. § 2.
\item \textsuperscript{200} See AMNESTY INTERNATIONAL, The Death Penalty World-Wide: Developments in 1996, AI Index: ACT/50/05/97, June 1997.
\item \textsuperscript{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. HR/4326 (1997).
\item \textsuperscript{204} See Council of Europe, Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Final Declaration [hereinafter Final Declaration].
\item \textsuperscript{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/eprod.html>.
\end{itemize}
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-
nounced that he had forwarded a motion for a resolution on abolition of the death penalty in the United States.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{219}

It urged the United Nations to adopt a "binding decision imposing a general moratorium on the death penalty."\textsuperscript{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.\textsuperscript{221}

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

\textsuperscript{215} See id. (discussing abolition of death penalty in European Union) (footnote omitted).
\textsuperscript{216} See id. (discussing abolition of death penalty in European Union).
\textsuperscript{217} See id. (discussing abolition of death penalty in European Union).
\textsuperscript{218} See id. (discussing abolition of death penalty in European Union).
\textsuperscript{219} See id. (discussing abolition of death penalty in European Union).
\textsuperscript{220} See id. (discussing abolition of death penalty in European Union).
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 Con-
ference 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.\footnote{See Declaration on the Abolition of the Death Penalty, in The Treaty of Amster-
dam: Text and Commentary, supra note 222, at 309.}

\textit{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.\footnote{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").} 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."\footnote{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.} 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 G"oring, who committed suicide hours before the time fixed for
sentence.\footnote{See In re Goering and Others, 13 I.L.R. 203-22 (Int'l Mil. Trib. 1946); see also Les prodès de Nuremberg et de Tokyo (Annette Wieviorka ed., 1996); Telford Taylor, The
Anatomy of the Nuremberg Trials, A Personal Memoir (1992).} A series of successor trials were held in Nuremberg pursuant to
Control Council Law No. 10.\footnote{Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes
Against Peace and Against Humanity, supra note 3.} Again, large numbers of defendants were
sentenced to death or to various lesser punishments, including life imprison-
ment or lengthy terms of detention. At the Tokyo Trial, seven defendants
were sentenced to death and fifteen defendants were sentenced to life impris-

\textit{222.} See Declaration on the Abolition of the Death Penalty, in The Treaty of Amster-
dam: Text and Commentary, supra note 222, at 309.

\textit{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").

\textit{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.

\textit{226.} See In re Goering and Others, 13 I.L.R. 203-22 (Int'l Mil. Trib. 1946); see also Les prodès de Nuremberg et de Tokyo (Annette Wieviorka ed., 1996); Telford Taylor, The

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

In answer to arguments that these sentences breached the rule *nulla poena sine lege*, it was said that "international law lays down that a war criminal may be punished with death whatever crimes he may have committed." 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." 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. 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. 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
provided for capital punishment for serious international crimes.\textsuperscript{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."\textsuperscript{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."\textsuperscript{236} Moreover, the General Assembly committee even stated that the statute might exclude certain forms of punishment, such as the death penalty.\textsuperscript{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.\textsuperscript{238} Although a few members of the Commission argued that capital punishment should not be abandoned,\textsuperscript{239} the vast majority disagreed, given the international trend in

\begin{itemize}
\item \textsuperscript{237} \textit{Id.} § 111.
\item \textsuperscript{239} See \textit{Summary Records of the 2211th Meeting}, [1991] 1 Y.B. Int'l L. Comm'n § 15,
\end{itemize}
favor of abolition of the death penalty. Several members also expressed their reservations about sentences of life imprisonment, which they said were also a form of cruel, inhuman, and degrading punishment. 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. 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.


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, 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. KOMMER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 314-20 (1989) (discussing Life Imprisonment Case (1977) 45 BVerGE 187).


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. 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.

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." He also stated, "[t]hat situation is not conducive to national reconciliation in

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246. Id.
Rwanda.\textsuperscript{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."\textsuperscript{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.\textsuperscript{249} In fact, Rwanda has not imposed capital punishment since 1982, and in 1992, President Habyarimana systematically commuted all outstanding death sentences.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Code pénal}.\textsuperscript{253}

\section*{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

\textsuperscript{247} Id.

\textsuperscript{248} Id. at 5.


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


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

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. 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. 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, 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. 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. In a judgment issued on July 7, 1989, the European Court of Human Rights confirmed that circum-


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).

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. 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.

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." 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.

The Commission compared the facts with those in Soering, in which the prosecutor had made a clear intention to seek the death penalty. The Commission found the Texas prosecutor's attitude to be fundamentally different and concurred with an earlier decision of the French Conseil d'État holding the undertaking to be satisfactory.

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. 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.

261. Id. at 167.
262. Id. at 171.
263. Id.
264. Id.
265. Id. at 172.
However, Portugal's constitution says that extradition is forbidden for crimes for which the death penalty is provided in the receiving state's legislation.\textsuperscript{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.\textsuperscript{270} In the meantime, Lei had registered an application with the European Commission, which issued provisional measures pursuant to article 36 of its Regulations.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{274} The Supreme Court of the Netherlands took a similar view, invoking the Protocol in refusing to return a United States serviceman,\textsuperscript{275} although required to do so by the NATO Status of Forces Agreement.\textsuperscript{276} The court considered that the European Convention and its Protocol

\begin{itemize}
\item \textsuperscript{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 \textit{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.\(^ {284}\)

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\(^{279}\) See \textit{id.} art. IX.

\(^{280}\) See Bianchi, \textit{supra} note 276, at 728.

\(^{281}\) See \textit{id.} at 727.

\(^{282}\) See \textit{id.} at 728.

\(^{283}\) See \textit{id.}

\(^{284}\) See \textit{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.\textsuperscript{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.\textsuperscript{286} It also declared that the portion of Law 225 of March 26, 1984, implementing article IX of the extradition treaty, was unconstitutional.\textsuperscript{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.\textsuperscript{288}

Canadian courts have been reluctant to follow the European precedents,\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{292}

\textsuperscript{285} See id.
\textsuperscript{286} See id.
\textsuperscript{287} See id.
Burns and Rafay were both eighteen at the time of the crime, a brutal murder of Rafay's parents. They were charged by the State of Washington with aggravated first degree murder, punishable by sentence of death. Canada abolished the death penalty for common law crimes in 1976. 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, or section 7 of the Charter, which enshrines the right to life, given the 1991 judgment of the Supreme Court of Canada in Kindler v. Canada. 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." 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." Following an analytical approach developed by the European Court of Human Rights in the application of similar provisions, Canadian courts consider whether the legal rule that violates the Charter right has a legitimate purpose.

294. Id. at 530-31.
295. Id. at 531.
297. Id. § 7.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 countries—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.\textsuperscript{306}

He cited the reasons of Supreme Court Justice Peter Cory, who dissented in \textit{Kindler}, referring to the fact that Canada's Parliament rejected the death penalty in two separate free votes.\textsuperscript{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


\textsuperscript{303.} \textit{Burns and Rafay, [1997] 116 C.C.C.3d at 534-35.}

\textsuperscript{304.} \textit{Id.} at 534.


\textsuperscript{307.} \textit{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.\footnote{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.}

\emph{VI. Conclusion}

In his 1995 report to the Economic and Social Council,\footnote{In his 1995 report to the Economic and Social Council, 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. 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." Over the same period, the death penalty was reintroduced in four states. 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." 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." 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\

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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?
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