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# INTERNATIONAL LAW, POLITICS, DIPLOMACY AND THE ABOLITION OF THE DEATH PENALTY

William A. Schabas\*

On June 10, 2003, L. Paul Bremer signed Coalition Provisional Authority Order Number 7 decreeing the suspension of capital punishment in Iraq.<sup>1</sup> After “recognising that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards,” the order declared bluntly: “Capital punishment is suspended.”<sup>2</sup> There is, to be sure, no shortage of evidence for the abusive use of capital punishment in Iraq under Saddam Hussein’s regime.<sup>3</sup> But then, there is also no shortage of similar abuse within the United States. In fact, for many years, Iraq and the United States have been among the world’s leaders in the field, reflecting some common values, a discussion of which is beyond the scope of this paper. The principal reason for the Bremer decree suspending the death penalty was concern in London that the United Kingdom would be accountable before the European Court of Human Rights for the practice of the death penalty in occupied Iraq, consistent with the settled jurisprudence of the Court.<sup>4</sup> It is no coincidence that a few days after the decree, the United Kingdom deposited its instrument of ratification of Protocol No. 13 to the European Convention on Human Rights, which abolished the death penalty in wartime as well as in peacetime.<sup>5</sup> If President Bush persists in his calls for the execution of Saddam Hussein, he is headed for a collision with his principal military and political ally.

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This Article is adapted from my introduction to: HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 1–24 (William A. Schabas ed., 2003).

<sup>1</sup> Coalition Provisional Order No. 7 (CPA/ORD/9 June 2003/07) § 3(1) (2003), available at <http://www.cpa-iraq.org>. On April 22, 2004, Iraq co-sponsored a resolution in the UN Commission on Human Rights calling for a moratorium on the death penalty.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary-General*, U.N. ESCOR Comm’n on Crime Prevention and Criminal Justice, 9th Sess. at paras. 86, 88, 103, 106, U.N. Doc. E/2000/3 (2000).

<sup>4</sup> *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) (1995), reprinted in 16 HUMAN RTS. L.J. 15.

<sup>5</sup> Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, Europ. T.S. No. 183 [hereinafter Protocol No. 13].

It is a direct and quite visible consequence of the increasing scope of the international human rights law norm that prohibits the death penalty.

It is often said that international law does not prohibit the death penalty.<sup>6</sup> This is an unfortunate and imprecise statement, however, because several international treaties, the most recent of them Protocol No. 13, now outlaw the death penalty. These treaties are, to be sure, still somewhat far from universally accepted. Nevertheless, approximately seventy states are now bound, as a question of international law and as a result of ratified treaties,<sup>7</sup> not to impose the death penalty.<sup>8</sup> In a recent decision, the European Court of Human Rights ruled that the practice of the Council of Europe's member states now means the death penalty is prohibited by the European Convention on Human Rights, despite the explicit recognition of capital punishment in Article 2(1) of the Convention.<sup>9</sup> In other words, at this stage in the

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<sup>6</sup> See, e.g., *Extrajudicial, Summary, or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR Comm'n on Human Rights, 56th Sess., Provisional Agenda Item 11(b), at para. 60, U.N. Doc. E/CN.4/2000/3 (2000) ("[C]apital punishment has not yet been prohibited under international law.").

<sup>7</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Europ. T.S. No. 114 [hereinafter Protocol No. 6]; G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/Res/44/128 (1989) [hereinafter International Covenant]; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, 29 I.L.M. 1447 [hereinafter American Convention]; Protocol No. 13, *supra* note 5. The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, art. 4, prohibits the death penalty in states that have previously abolished it. According to some members of the Human Rights Committee, the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, is also an abolitionist instrument for states that have already abolished the death penalty: *Ng v. Canada* (No. 469/1991), U.N. Doc. A/49/40, Vol. II, at 189, *reprinted in* 15 HUM. RTS. L.J. 149 (1994) (Aguilar Urbina, J., dissenting; Pocar, J., partially dissenting). The decision probably now reflects the views of the majority of the Committee, in light of *Judge v. Canada* (No. 829/1998), U.N. Doc. CCPR/C/78/D/829/1998 (2003).

<sup>8</sup> See, e.g., ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (3d ed. 2002) (listing countries that have signed or ratified Protocol No. 6 and the Additional Protocol to the American Convention). Albania, Andorra, Australia, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, Cyprus, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkmenistan, Ukraine, United Kingdom, Uruguay and Venezuela. *Id.* These states are abolitionist both *de jure* and *de facto*. *Id.* The Russian Federation and Sao Tome and Principe have signed one or another of the protocols but instruments of ratification have not yet been deposited. *Id.*

<sup>9</sup> *Öcalan v. Turkey*, App. No. 46221/99, 2003 Eur Ct. H.R. 125, at paras. 188–99. The judgment is currently being reconsidered by a Grand Chamber of the Court.

development of European law, Protocol No. 13 is largely symbolic and does no more than codify existing state practice and contemporary legal interpretation of the Convention itself. As for the suggestion that customary law prohibits capital punishment, such an affirmation is perhaps premature, although the growing trend towards abolition, and its reflection in international norms, would suggest that this is a probable development at some point in the not-too-distant future.

Few more dramatic examples of the spread and success of human rights law can be found. This constant progress towards abolition provides us with benchmarks for the more general triumph of what might be called the "human rights ideal," proclaimed in Franklin D. Roosevelt's "Four Freedoms" speech,<sup>10</sup> in the Atlantic Charter,<sup>11</sup> and in the preamble to the Universal Declaration of Human Rights (Universal Declaration):

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . . .<sup>12</sup>

This human rights ideal guided the establishment of the UN, and has animated regional organisations like the Council of Europe, the Organisation of American States, the African Union, the Organisation for Security and Cooperation in Europe and, increasingly, the European Union. Limitation and abolition of capital punishment has become a central theme in the standard-setting and monitoring by these key international organisations.

While we can trace abolitionist efforts back to Cesare Beccaria and the Enlightenment, and perhaps even before, the modern movement to abolish the death penalty really began in the late 1940s. Within Europe, several of the former dictatorships, including Germany, Austria, and Italy, abolished capital punishment as part of the "transitional justice" process by which they turned the page on the abuses of the previous decades. At the same time, human rights law emerged as the guiding normative regime for the newly-minted international organisations, the UN and the Council of Europe. Discussing the "right to life" provision of the Universal Declaration in 1948, the UN General Assembly contemplated calling for abolition, but then retreated cautiously, essentially because a majority of the world's states

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<sup>10</sup> Franklin D. Roosevelt, Address of the President of the United States Before a Joint Session of Congress (Jan. 6, 1941), in 87 CONG. REC. 44-47 (1941), available at <http://ourdocuments.gov/doc.php?flash=true&doc=70> (last visited Oct. 25, 2004).

<sup>11</sup> Atlantic Charter, Aug. 14, 1941, U.S.-U.K., available at <http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm> (last visited Oct. 25, 2004).

<sup>12</sup> G.A. Res. 217, U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948).

were not yet ready. In a sense, their minds were ahead of their practice. Indeed, hardly a voice was raised during the debate in the General Assembly to claim that capital punishment was legitimate, appropriate, or justified.<sup>13</sup> The death penalty was treated as an inevitable and necessary exception to the right to life, but also one whose validity was increasingly open to challenge. This was indeed the expectation of the drafters.

Full-fledged and complete respect for the right to life, something which necessarily involves the abolition of the death penalty, stands as the implied "common standard of achievement" in article 3 of the Universal Declaration. Half a century later, that "achievement" has made great strides, although it remains very much a work in progress in some parts of the world. But Europe has become, essentially, a death-penalty-free zone. In December 2000, the European Union adopted its Charter of Fundamental Rights, article 2 of which declares:

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.<sup>14</sup>

The Universal Declaration of December 10, 1948, provided the initial framework for the development of what is now a sophisticated and complex system of international human rights law. It has been argued occasionally that the death penalty is not even a human rights issue.<sup>15</sup> Countries hostile to the progressive development of international law on the subject the death penalty take the position that the death penalty is sheltered by a provision within the Charter of the UN deeming such matters to be "essentially within the domestic jurisdiction of any state."<sup>16</sup> The debate during adoption of article 3 of the Universal Declaration by the UN General Assembly shows that such an argument is unfounded. What the Declaration specifically has to say about capital punishment is something that has evolved since 1948 and will continue to evolve with the development of the law itself, in much the same way as the interpretation of the broad and general provisions in national constitutions adjust to changing times.

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<sup>13</sup> See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 27–39 (3d ed. 2002) (recounting discussions on capital punishment in the drafting of the Universal Declaration).

<sup>14</sup> Charter for Fundamental Rights of the European Union, art. 2 (2000).

<sup>15</sup> For a recent example, see the remarks of the Attorney General of Trinidad and Tobago, Lawrence Maharaj, who explains the death penalty as an issue of "national security and maintenance of public order" but not a human rights issue. Press Release, UN Human Rights Committee, Experts Regret Maintenance of Capital and Corporal Punishments (Oct. 17, 2000), <http://www.unhchr.ch/huricane/huricane.nsf/0/33F938EECA3ABBD7C125697C-002D2BBE?opendocument> (last visited Jan. 12, 2005).

<sup>16</sup> U.N. CHARTER art. 2, para. 7.

Slightly more than a decade ago, in 1989, Amnesty International published a seminal volume on the issue of capital punishment, entitled *When the State Kills*.<sup>17</sup> Amnesty International surveyed the international situation, distinguishing between countries that were abolitionist for all crimes (countries whose laws do not provide for the death penalty for any crime), countries that were abolitionist for ordinary crimes only (countries whose laws provide for the death penalty only for exceptional crimes under military law or crimes committed in exceptional circumstances such as wartime), countries that were abolitionist in practice (countries and territories that retain the death penalty for ordinary crimes but did not execute anyone during the preceding ten years or more), and retentionist countries (countries and territories that retain and use the death penalty for ordinary crimes).<sup>18</sup> The statistical portrait was as follows:

Abolitionist for all crimes: 35 countries  
Abolitionist for ordinary crimes only: 18 countries  
Abolitionist in practice: 27 countries  
Retentionist: 100 countries

Amnesty International also provided the relevant dates of abolition, where applicable. The dates indicated an unmistakable trend towards abolition, one that was constantly growing in momentum. For example, of the thirty-five countries that were abolitionist for all crimes, twenty-seven had abolished the death penalty since 1948. Moreover, with each decade subsequent to 1948, the number of states abolishing capital punishment increased. However, the figures also indicated that a majority of states continued to employ capital punishment.

In the mid-1990s, the majority shifted from one favoring capital punishment to one opposing it. According to the report of the Secretary-General of the UN, issued on March 31, 2000,<sup>19</sup> the result of research directed by Professor Roger Hood, the numbers stood as follows:

Abolitionist for all crimes: 74 countries  
Abolitionist for ordinary crimes only: 11 countries  
Abolitionist in practice: 38 countries  
Retentionist: 71 countries<sup>20</sup>

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<sup>17</sup> AMNESTY INT'L, *WHEN THE STATE KILLS: THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* (1989).

<sup>18</sup> *Id.* at 259–62.

<sup>19</sup> *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary-General*, *supra* note 3.

<sup>20</sup> HOOD, *supra* note 8.

The change throughout the 1990s, since the Amnesty International study, was most dramatic. Whereas in 1989, some forty-four percent of states were abolitionist in one form or another, by the year 2000, abolitionist states made up sixty-four percent of the total.

Those states that still retain the death penalty find themselves increasingly subject to international pressure in favor of abolition, for example, in the refusal by certain countries to grant extradition where a fugitive will be exposed to a capital sentence. In fact, most developed countries now refuse to extradite fugitives to the United States without assurances that capital punishment will not be imposed. 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 cases, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty. In other cases, it has been the contribution of the judiciary, judges applying constitutions that make no specific mention of the death penalty but that enshrine the right to life and prohibit cruel, inhuman, and degrading treatment or punishment.

### I. HUMAN RIGHTS TREATY LAW AND PRACTICE

One of the principal international human rights instruments, the International Covenant on Civil and Political Rights, adopted in 1966, transformed the laconic and in some sense equivocal "right to life" provision found in article 3 of the Universal Declaration<sup>21</sup> into a complex text that recognises capital punishment as an exception or limitation on the right to life.<sup>22</sup> Article 6 of the Covenant affirms the "inherent right to life," adding that it cannot be "arbitrarily deprived." But in a subsequent paragraph, the Covenant states:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.<sup>23</sup>

The provision goes on to state that anyone sentenced to death is entitled to seek amnesty, pardon or commutation of sentence, and that the death penalty is prohibited

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<sup>21</sup> *Supra* note 12, at art. 3.

<sup>22</sup> International Covenant, *supra* note 7, at art. 6.

<sup>23</sup> *Id.* at art. 6(2).

for persons under the age of eighteen at the time of commission of the crime<sup>24</sup> and for pregnant women. A final paragraph, really more programmatic than normative, declares: "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." The Covenant is currently ratified by approximately 150 states, and its principles are approaching near-universal acceptance.

The Convention on the Rights of the Child, adopted in 1989, states: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."<sup>25</sup> The Convention on the Rights of the Child has been ratified essentially by the whole world with the exception of the United States, which signed it without reservation in 1995. Even signatories to international treaties are required "to refrain from acts which would defeat the object and purpose of a treaty."<sup>26</sup> At the beginning of the 1990s, Amnesty International reported that several countries continued to execute persons for crimes committed while under the age of eighteen. Since then, both Pakistan and Yemen have abandoned the practice, explaining that this initiative is consistent with their obligations under the Convention on the Rights of the Child. It is now believed that only the United States and Iran continue to execute juvenile offenders. The Inter-American Commission on Human Rights has held that the prohibition of execution for individuals who commit their crime while under the age of eighteen is a norm of customary international law.<sup>27</sup>

In parallel to the UN instruments, regional human rights systems have also emerged in Europe, the Americas, Africa, and the Arab world. In each, there is a general international treaty similar to the International Covenant on Civil and Political Rights. All four instruments recognise the right to life. Three instruments resemble the Covenant because they treat the death penalty as a limitation or exception to the right to life, while the fourth is simply silent on the subject. The first of the regional treaties to be adopted, the European Convention on Human Rights, actually predates the International Covenant on Civil and Political Rights by several years. It was drafted in 1950 by a handful of Western European states, members of the Council of Europe at the time, although its reach has now extended to forty-one parties with the dramatic expansion of the organisation in the 1990s. Like the International Covenant, the European Convention allows capital punishment as an exception to the right to life.<sup>28</sup> The "right to life" provision in the American

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<sup>24</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 44 (prohibiting executions for crimes committed under the age of eighteen). The Convention has been ratified by 192 countries, and signed but not ratified by the United States.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, 336.

<sup>27</sup> Case 12.285, Inter-Am. C.H.R. 913, OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002).

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221, 224.



Convention on Human Rights, adopted in 1969, rather closely resembles the text of article 6 of the International Covenant on Civil and Political Rights, but with two significant changes that limit the scope of capital punishment.<sup>29</sup> In addition to pregnant women and juveniles, capital punishment is also a prohibited sentence for persons over seventy years of age. Furthermore, the Convention explicitly specifies that "[t]he death penalty shall not be reestablished in states that have abolished it," something that is only implicit in the Covenant.<sup>30</sup> The African Charter of Human and Peoples' Rights, recognises the right to life but never explicitly mentions capital punishment. Most commentators conclude that capital punishment must be an implied limitation upon the right to life, given the still-widespread use of the death penalty within Africa.<sup>31</sup> However, under a dynamic interpretation informed by jurisprudential developments like the judgment of the South African Constitutional Court abolishing the death penalty,<sup>32</sup> it is now argued that the African Charter also mandates abolition.<sup>33</sup> The Arab Charter of Human Rights, adopted in 1994 by the League of Arab States, but not yet in force, allows the death penalty in cases of "serious crimes," but prohibits its use for political crimes, crimes committed while under the age of eighteen, and for both pregnant women and nursing mothers, for a period of up to two years following childbirth.<sup>34</sup>

Analysis of the capital punishment provisions in the International Covenant and the European and American conventions shows a definite trend towards limitation on the use of capital punishment. The instrument that is most tolerant of the death penalty, the European Convention, was adopted in 1950. The most recent regional conference, the American Convention, seems to flirt with outright abolition. By the time it was adopted in 1969, the idea that these instruments should be amended to take into account abolitionist trends was already making the rounds. At the 1969 San Jose Conference, which adopted the American Convention, the U.S. delegate

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<sup>29</sup> Compare International Covenant, *supra* note 7, with American Convention, *supra* note 7.

<sup>30</sup> American Convention, *supra* note 7, at art. 4.

<sup>31</sup> *African Charter of Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3/Rev. 5. It would be wrong to exaggerate the scope of capital punishment within Africa, however. Leaving aside the Arab states north of the Sahara, nearly half of African states have stopped using the death penalty and many have abolished it *de jure*. On capital punishment in Africa, see generally William A. Schabas, *Abolition of the Death Penalty in Africa*, in *THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT* 30–65 (William A. Schabas, ed., 1997).

<sup>32</sup> *State v. Makwanyane*, 1995 (3) SARL 391 (CC) (S. Afr.), *reprinted in* 16 HUM. RTS. L.J. 154 (1995).

<sup>33</sup> Manfred Nowak, *Is the Death Penalty an Inhuman Punishment?*, in *THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH* 42–43 (Theodore S. Orlin et al. eds., 2000).

<sup>34</sup> Arab Charter on Human Rights, Sept. 15, 1994, arts. 10–12, 4 I.H.R.R. 850, *reprinted in* 18 HUM. RTS. L.J. 151 (1997).

spoke of “the general trend, already apparent, for the gradual abolition of the death penalty.”<sup>35</sup> Fourteen of the nineteen states present at the negotiation of the Convention adopted a statement calling for preparation of a protocol abolishing the death penalty.<sup>36</sup>

European norms regarding the right to life are the most conservative, although practice on the continent has begun to change. The Council of Europe took the lead in 1983 by adopting a protocol to the European Convention abolishing capital punishment in peacetime.<sup>37</sup> Similar instruments for the other two systems, the Second Optional Protocol to the International Covenant and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, were adopted at the end of the 1980s and came into force shortly afterward.<sup>38</sup> Finally, in 2002, the result of efforts by abolitionists like Hans Göran Franck,<sup>39</sup> a second protocol to the European Convention dealing with capital punishment, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, was adopted.<sup>40</sup> All four instruments are “optional,” and do not amend the original texts as such; rather, they offer state parties to the original texts the possibility of enhancing their obligations. But their success is impressive, and more than fifty ratifications have already been deposited. The number continues to grow rapidly.

Setting aside the protocols, whose effects seem clear enough, international law may also prohibit capital punishment by implication, through the effect of other norms that do not explicitly call for abolition, and more specifically by the prohibition of cruel, inhuman, and degrading treatment or punishment, a norm found in all major human rights treaties and in most domestic constitutions. The concept

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<sup>35</sup> OAS Doc. OEA/Ser.K/XVI/1.1, doc. 10, at 9.

<sup>36</sup> The undersigned Delegations, participants in the Specialised Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering goal of making all possible efforts so that, in a short time, an additional protocol to the American Convention on Human Rights — Pact of San José, Costa Rica — may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man.

OAS Doc. OEA/Ser.K/XVI/1.2, at 467.

<sup>37</sup> Protocol No. 6, *supra* note 7.

<sup>38</sup> International Covenant, *supra* note 7; American Convention, *supra* note 7.

<sup>39</sup> HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* (William A. Schabas ed., 2003).

<sup>40</sup> Protocol No. 13, *supra* note 5.

of what is cruel, inhuman, or degrading ought to change over time to reflect contemporary thinking and values. There is no doctrine of original intent — the bugbear of so much constitutional interpretation within the United States — with respect to international human rights treaties. In fact, quite the opposite exists. It is now well-accepted that international human rights norms must receive a dynamic and “evolutive” construction.

Many human rights treaties, like many national constitutions, acknowledge the death penalty as an exception to the right to life, but prohibit cruel, inhuman, and degrading treatment or punishment. For example, the Fifth Amendment to the United States Constitution grants the right to due process for a person charged with “a capital or otherwise infamous crime,” yet the Eighth Amendment prohibits “cruel and unusual punishment.” Does the reference to capital punishment in constitutions and treaties effectively foreclose any consideration of the death penalty as an intrinsically cruel, inhuman, or degrading punishment? Or is it conceivable that present or future interpreters will consider the capital punishment exception to the right to life to be neutralised or trumped by new conceptions of what is cruel, inhuman, or degrading? In constitutions where there is no exception to the right to life, some courts have concluded that capital punishment is prohibited by the cruel, inhuman, or degrading clause. But the argument by which it is implicitly repealed, despite some more explicit recognition, was rejected by the European Court of Human Rights (with a lone dissenter),<sup>41</sup> much as it had been dismissed nearly two decades earlier by the majority of the United States Supreme Court in the Eighth Amendment case of *Furman v. Georgia*.<sup>42</sup>

Still, the argument that capital punishment is contrary to the prohibition of cruel, inhuman, and degrading (or “cruel and unusual”) punishment is a judicial time bomb, ticking away inexorably as international abolition gains momentum. In 2001, the Supreme Court of Canada, clearly impressed with developments in international human rights law and state practice, reassessed its position on capital punishment, denying extradition to the United States for a capital offence as a violation of the constitution when a decade earlier it had balked at such a conclusion.<sup>43</sup>

The argument has also returned to the European Court in an application filed by convicted Kurdish terrorist Abdullah Öcalan. Condemned to death by a Turkish court in early 1999, Öcalan’s request for provisional measures was granted by the European Court of Human Rights in November of 1999.<sup>44</sup> In its judgment of March

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<sup>41</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at para. 8 (1989).

<sup>42</sup> *See, e.g., Furman v. Georgia*, 408 U.S. 238, 360–69 (1972).

<sup>43</sup> *United States v. Burns*, [2001] S.C.R. 183 (reversing *Kindler v. Canada*, [1991] S.C.R. 779).

<sup>44</sup> *Öcalan v. Turkey*, App. No. 46221/99, 2003 Eur Ct. H.R. 125, at para. 5 (The Court granted the request for provisional measures on Nov. 30, 1999, directing the State “to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant’s complaints under the Convention.”).

12, 2003, the European Court quoted the opinion adopted by the Parliamentary Assembly of the Council of Europe in conjunction with Protocol No. 13:

The second sentence of Article 2 of the European Convention on Human Rights still provides for the death penalty. It has long been in the interest of the Assembly to delete this sentence, thus matching theory with reality. This interest is strengthened by the fact that more modern national constitutional documents and international treaties no longer include such provisions.<sup>45</sup>

The European Court revised the position it took in *Soering*, holding that the practice of member states of the Council of Europe has had the effect of implied repeal of article 2(1) of the European Convention, to the extent that it authorises the death penalty. Necessarily, then, capital punishment is a form of “inhuman or degrading treatment or punishment” incompatible with article 3 of the Convention.

Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States — most recently in the respondent State — and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned

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<sup>45</sup> *Id.* at para. 57.

whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2.

In expressing this view, the Court is aware of the opening for signature of Protocol No. 13 which provides an indication that the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. However this Protocol seeks to extend the prohibition by providing for the abolition of the death penalty in all circumstances — that is to say both in time of peace and in times of war. This final step toward complete abolition of the death penalty can be seen as a confirmation of the abolitionist trend established by the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

In the Court's view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.<sup>46</sup>

The judgment is cautiously worded and seemingly equivocal. But in the final analysis, the European Court clearly rules that the death penalty in peacetime is contrary to article 3, and thus it is not sheltered by article 2(1), because that provision has been implicitly amended by state practice.<sup>47</sup> This is confirmed by statements in the partially dissenting opinion of the Turkish judge.<sup>48</sup>

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<sup>46</sup> *Id.* at paras. 195–98.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (Türmen, J., partially dissenting).

There is now considerable case law on the interpretation of the human rights treaty provisions dealing with capital punishment. The Human Rights Committee, which is the organ established by the International Covenant on Civil and Political Rights to study periodic reports from states and to consider petitions from aggrieved individuals and states, has examined capital punishment issues regarding many of the states that are parties to the Covenant. Accordingly, it has been held that the exception allowing capital punishment in countries "which have not abolished the death penalty" means that a country that has already eliminated capital punishment cannot reinstate it.<sup>49</sup> The restriction on capital punishment to "the most serious crimes" has led to criticism of states that impose it for economic crimes and other offences with non-lethal consequences.<sup>50</sup> The prohibition on executions for juvenile offenders is a norm so fundamental that even a reservation formulated at the time of ratification is ineffective.<sup>51</sup> Methods of execution that inflict superfluous or prolonged suffering on the condemned person, such as the gas chamber, constitute cruel, inhuman, and degrading punishment, in breach of article 7 of the Covenant.<sup>52</sup> An enormous number of cases before the Human Rights Committee has dealt with capital punishment in Jamaica and elsewhere in the English-speaking Caribbean. Most of these cases have involved procedural flaws at trial or appeal. The Committee holds to the view that the strictest respect for procedural due process guarantees must be ensured if the death penalty is to be imposed.<sup>53</sup> Many death penalty applications are also granted because conditions on death row have been held to breach international standards.<sup>54</sup> Practically, this has meant that in approximately eighty-five percent of capital punishment cases to be heard by the Committee

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<sup>49</sup> *Piandiong v. Philippines*, Case 869/1999, U.N. Hum. Rts. Comm'n, U.N. Doc. CCPR/C/70/D/869/1999, para. 7.4 (2000).

<sup>50</sup> *E.g.*, U.N. Doc. CCPR/C/SR.1065-67, U.N. Doc. A/46/40, para. 509; U.N. Doc. CCPR/C/SR.365, paras. 7-8; U.N. Doc. CCPR/C/SR.870-71, 874-75; U.N. Doc. A/44/40, para. 259; U.N. Doc. CCPR/C/SR.928-32; U.N. Doc. A/45/40, para. 93; U.N. Doc. CCPR/C/SR.119, § 14; U.N. Doc. CCPR/C/79/Add.50, para. 16 (1995).

<sup>51</sup> When the United States ratified the Covenant in 1992, it formulated a controversial reservation to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." The reservation was condemned in objections filed by eleven European states, including Sweden, and declared invalid by the Human Rights Committee. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Comments of the Human Rights Committee, United States—Initial Report, U.N. Doc. CCPR/C/79/Add.50, para. 14.

<sup>52</sup> *Ng v. Canada*, 149 HUMAN RIGHTS L.J. at 157.

<sup>53</sup> *See, e.g.*, *Yasseen & Thomas v. Guyana* (No. 676/1996), U.N. Doc. CCPR/C/62/D/676/1996; *LaVende v. Trinidad and Tobago* (No. 554/1993), U.N. Doc. CCPR/C/61/D/554/1993.

<sup>54</sup> *See, e.g.*, *Henry v. Trinidad and Tobago* (No. 752/1997), U.N. Doc. CCPR/C/64/D/752/1997; *Lewis v. Jamaica* (No. 527/1993), U.N. Doc. CCPR/C/57/D/527/1993.

there is a finding of a violation of the Covenant. Some members of the Committee have never dismissed a death penalty petition, and there is certainly a constituency among Committee members for total abolition.

Trinidad and Tobago was so incensed by the Committee's findings in death penalty applications that it withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights, the treaty that provides for a right of individual petition. Immediately afterward, Trinidad and Tobago ratified the Protocol for the second time, but on this occasion it appended a reservation excluding all death penalty applications. In a subsequent application from Trinidad and Tobago that raised a death penalty issue, the Committee held that the subterfuge of denouncing the Protocol and then ratifying it with a reservation was invalid.<sup>55</sup>

States that are parties to the International Covenant are required to submit periodic reports on compliance with provisions of the Covenant. This provides the Human Rights Committee with an opportunity to question states in public session about death penalty issues and to recommend changes to legislation or practices to ensure that there are no violations. The United States ratified the Covenant in 1992 and presented its initial report to the Human Rights Committee in March 1995. The Committee made the following comment:

The Committee is concerned about the excessive number of offences punishable by the death penalty in a number of States, the number of death sentences handed down by court, and the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain States. It also deplores provisions in the legislation of a number of States which allow the death penalty to be pronounced for crimes committed by persons under eighteen and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.<sup>56</sup>

The Committee recommended the following:

The Committee urges the State party to revise the federal and State legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a

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<sup>55</sup> Kennedy v. Trinidad and Tobago (No. 845/1999), U.N. Doc. CCPR/C/67/D/845/1999.

<sup>56</sup> U.N. Doc. CCPR/C/79/Add.47, para. 16.

view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were eighteen.<sup>57</sup>

In June 2002, the Inter-American Court of Human Rights ruled that criminal laws providing for capital punishment as a mandatory sentence for specific crimes were contrary to the American Convention on Human Rights.

The Court finds that the Offences Against the Person Act of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention.<sup>58</sup>

Imposition of the death penalty has been challenged somewhat indirectly in cases where foreign nationals are threatened with execution. Under article 36(1)(b) of the Vienna Convention on Consular Relations,<sup>59</sup> foreign nationals have a right to be informed of their right to consular assistance in the event of arrest. It has become clear that many if not most foreign nationals condemned to death within the United States have not been given this information, which is essentially a due process guarantee akin to the "Miranda warning" given by police officers as a result of a constitutional requirement that suspects be informed of their right to counsel. Three cases brought against the United States by Paraguay, Germany, and Mexico have been taken before the International Court of Justice. Provisional measures requests to suspend, at least temporarily, the planned executions were issued by the Court, but these were defied by authorities in the United States.<sup>60</sup> Paraguay eventually

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<sup>57</sup> *Id.* at para. 31.

<sup>58</sup> Case 11.816, Inter-Am. C.H.R. 237, OEA/Ser.L/V/II.102, doc. 6 rev., at para 103 (1998).

<sup>59</sup> 596 U.N.T.S. 261 (1963).

<sup>60</sup> Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, Order of Apr. 9, 1998; LaGrand Case (F.R.G. v. U.S.), Provisional Measures, Order of Mar. 3, 1999, [1999] ICJ Reports 1; Case of Avena and Other Mexican Nationals (Mex. v. U.S.), Provisional Measures, Order of Feb. 5, 2003.



dropped its application. But Germany proceeded, and in June 2001 the United States was found liable for a breach of international law for the execution of the LaGrand brothers, and for failure to honour a request from the International Court of Justice to stay the proceedings until judgment was rendered.<sup>61</sup> The Mexican case was argued on the merits in December 2003, and at the time of this writing a decision has not been reached.<sup>62</sup>

Similar issues were also debated before the Inter-American Court of Human Rights in the context of a request for an advisory opinion filed by Mexico. The Inter-American Court concluded that in a death penalty case, violation of the right to be informed of consular assistance was not only in breach of the Vienna Convention, but also of the due process provisions of major human rights treaties as well as the right not be deprived of life "arbitrarily," which is protected by article 4 of the American Convention on Human Rights and article 6 of the International Covenant on Civil and Political Rights.<sup>63</sup>

## II. INTERNATIONAL POLITICAL INITIATIVES

Parallel with the drafting of international legal norms found in the Universal Declaration and the International Covenant on Civil and Political Rights, the political bodies of the UN and of other international organisations have been involved in a variety of initiatives aimed at limiting and eventually abolishing the death penalty. Although the death penalty issue has been addressed within those specialised bodies of the UN that concern criminal law,<sup>64</sup> the core of the debate has taken place in the Commission on Human Rights. The Commission is a specialised body, comprised of fifty-three states elected by the Economic and Social Council. Its membership broadly reflects the geographic and political orientations of the entire UN membership. Although its interventions may be less robust than those of tribunals and similar bodies, like the Human Rights Committee, it has the advantage

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<sup>61</sup> LaGrand Case (F.R.G. v. U.S.), June 27, 2001.

<sup>62</sup> Press Release, International Court of Justice (Dec. 23, 2003).

<sup>63</sup> *The Right to Information on Consular Assistance in the Context of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of Oct. 1, 1999, available at <http://www.icj-cij.org>.

<sup>64</sup> Notably, the UN Committee and Commission on Crime Prevention and Control has been considering the subject of capital punishment since the 1950s. See ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION 58-62 (1994); Roger S. Clark, *The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, August 27-September 7, 1990, 1 CRIM. L.F. 513 (1990); Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 ANNALS AM. ASSOC. POL. & SOC. SCI. 68 (1989).

of being able to address violations of fundamental rights in all UN member states, even those that have not fully ratified the relevant treaties.

Much of the monitoring and fact finding work of the Commission on Human Rights is carried out by special rapporteurs. The special rapporteur on extrajudicial, summary, or arbitrary executions from 1992 to 1999, Bacre Waly Ndiaye, took the view that international human rights law seeks the abolition of the death penalty. He has 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." According to Ndiaye, "where there is a fundamental right to life, there is no right to capital punishment." In 1996 alone, he sent urgent appeals to the United States concerning death sentences imposed on the mentally retarded, in cases following trial in which the right to an adequate defence had allegedly not been fully ensured, where individuals had been sentenced to death without resorting to their right to a legal or clemency appeal, and where they had been sentenced to death despite strong indications casting doubt on their guilt. 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, "has 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." Despite an international campaign, O'Dell was executed in July 1997. The special rapporteur also noted that in response to his urgent appeals, the U.S. 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.<sup>65</sup>

In his 1997 report to the Commission on Human Rights, special rapporteur Ndiaye noted:

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 and racial bias continue to be the main concerns.<sup>66</sup>

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<sup>65</sup> See *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, at paras. 544–46, U.N. Doc. E/CN.4/1997/60 (1997); see also *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, at paras. 507–17, 540–57, U.N. Doc. E/CN.4/1996/614 (1996).

<sup>66</sup> *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, at para. 543, U.N. Doc. E/CN.4/1997/60 (1997).

Ndiaye also stated that he,

remains deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the appeals procedure after conviction in capital cases in some states.<sup>67</sup>

As a result of repeated initiatives, the U.S. government extended a formal invitation to Ndiaye to visit the country and conduct an investigation.<sup>68</sup> In October 1997, he undertook a two-week mission to the United States, and 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, the conservative chair of the Senate Foreign Relations Committee, who in a letter to William Richardson, U.S. Permanent Representative to the UN, described the mission as "an absurd UN charade." 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."<sup>69</sup>

Ndiaye's successor as special rapporteur, Pakistani lawyer Asma Jahangir, has continued to pursue capital punishment issues. In her 1999 report, she stated:

The Special Rapporteur's concerns as they relate to the United States are limited to issues pertaining to the death penalty. The increasing use of the death penalty is a matter of serious concern and particularly worrisome are the continued executions of mentally-ill and mentally-handicapped persons as well as foreigners who were denied their international right to

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<sup>67</sup> *Id.* at para. 551.

<sup>68</sup> *Id.* at para. 549.

<sup>69</sup> John M. Goshko, *Helms Calls Death Row Probe "Absurd U.N. Charade": Senate Foreign Affairs Chief Demands Explanations of Rights Investigation from U.S. Envoy*, WASH. POST, Oct. 8, 1997, at A7.

consular assistance. The Special Rapporteur views the persistent application of the death penalty and subsequent executions of persons who committed crimes as minors as a very serious and disturbing practice that inherently conflicts with the prevailing international consensus.<sup>70</sup>

In 1997, the Commission on Human Rights began adopting a series of annual resolutions on the subject of capital punishment. The resolution affirmed 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."<sup>71</sup> It requested 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 favour and eleven opposed, with fourteen abstaining from the vote.<sup>72</sup> Similar resolutions, with progressively sharper language, were adopted by the Commission on Human Rights in subsequent years. The resolution adopted at the Commission's 2000 session called upon states that retained the death penalty to restrict progressively the number of offences for which it may be imposed, to establish a moratorium on executions with a view to completely abolishing the death penalty, and to make available to the public information with regard to capital punishment. All states were required to reserve the right to refuse extradition in the absence of assurances that the death penalty would not be imposed.<sup>73</sup> With the changing composition of the Commission, there were great concerns in 2003 that the annual resolution would not pass. Nevertheless, the resolution was once again adopted, by twenty-three votes to eighteen.<sup>74</sup>

The Sub-Commission on the Promotion and Protection of Human Rights, an expert body subordinate to the Commission on Human Rights, debated death penalty issues at its 1999 session. In August 1999, it adopted a resolution condemning the imposition of the death penalty for crimes committed by persons under the age of eighteen.<sup>75</sup> A preamble to the resolution referred to six countries that had applied capital punishment in such circumstances over the past decade: Iran,

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<sup>70</sup> *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, 55th Sess., at para. 257, U.N. Doc. E/CN.4/1999/39/Add.1 (1999).

<sup>71</sup> Question of the Death Penalty, C.H.R. Res. 1998/8, U.N. ESCOR Supp. No. 3, at 56, U.N. Doc. E/CN.4/1998/8 (1998).

<sup>72</sup> Question of the Death Penalty, C.H.R. Res. 1997/12, U.N. ESCOR, 37th mtg., Supp. No. 3, at 69, U.N. Doc. E/CN.4/1997/12 (1997).

<sup>73</sup> Question of the Death Penalty, C.H.R. Res. 2000/65, 66th mtg., U.N. Doc. E/CN.4/RES/2000/65 (2000).

<sup>74</sup> Question of the Death Penalty, C.H.R. Res. 2003/67, 61st mtg., U.N. Doc. E/CN.4/RES/2003/67 (2003).

<sup>75</sup> See The Death Penalty, particularly in relation to Juvenile Offenders, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 51st Sess., Res. 1999/4, U.N. Doc. E/CN.4/Sub.2/RES/1999/4.

Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen.<sup>76</sup> The resolution also called upon states not to apply the death penalty for refusal to serve in or desertion from the military, and to commute all death sentences to at least life imprisonment by December 31, 1999, to mark the millennium.<sup>77</sup>

Use of the death penalty throughout the world, including the United States, has also been regularly denounced by the High Commissioner for Human Rights, Mary Robinson. On February 4, 1998, Mrs. Robinson stated that she was "saddened to learn of the death by lethal injection last night of Karla Faye Tucker who was put to death for murders she committed fifteen years ago." Mrs. Robinson also said that the "increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international community's expressed desire for the abolition of the death penalty."<sup>78</sup>

The death penalty has also been debated within the UN General Assembly. Initially encouraged by the Commission on Human Rights that had been proposed by Sweden and Austria, the General Assembly took up the issue of capital punishment for the first time in 1968, with a resolution observing that "there is a strong trend in most countries towards the abolition of capital punishment."<sup>79</sup> The resolution cited a series of safeguards respecting appeal, pardon and reprieve, and mandated delay of execution until the exhaustion of such procedures, inviting governments to provide a six-month moratorium before implementing the death penalty.<sup>80</sup> Many member states favourable to capital punishment actually supported the resolution, noting that it confined itself to the "humanitarian" aspect of the question,<sup>81</sup> while some abolitionist states criticised the resolution's timidity, saying it would not "induce Governments to abolish the death penalty."<sup>82</sup> The 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 this punishment in all countries."<sup>83</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*; see also *The Death Penalty in Relation to Juvenile Offenders*, U.N. Doc. E/CN.4/Sub.2/RES/2000/17.

<sup>78</sup> Statement by Mary Robinson, UN High Commissioner for Human Rights, U.N. Doc. HR/98/6 (1998).

<sup>79</sup> Capital Punishment, G.A. Res. 2393, U.N. GAOR, 23d Sess., U.N. Doc. A/Res./2393 (XXIII) (1968); see also Capital Punishment, U.N. GAOR, 23d Sess., 1727th plen. mtg. at 15, U.N. Doc. A/PV.1727 (1968) (adopting resolution by ninety-four votes to zero, with three abstentions).

<sup>80</sup> U.N. Doc. E/4475 (1968), U.N. Doc. E/CN.4/972 (1968), at 134-36, 162-64.

<sup>81</sup> U.N. GAOR 3d Comm., 23d Sess., 1557th mtg., UN Doc. A/C.3/SR.1557, para. 17 (1968) (China); U.N. GAOR 3d Comm., 23d Sess., 1558th mtg., U.N. Doc. A/C.3/SR.1558, para. 10 (1968) (France).

<sup>82</sup> U.N. GAOR 3d Comm., 23d Sess., 1558th mtg., U.N. Doc. A/C.3/SR.1558, para. 2 (1968) (Austria).

<sup>83</sup> G.A. Res. 2857, U.N. GAOR, 26th Sess., 2027th plen. mtg., (XXVI) (1971).

More than twenty years later, in 1994, capital punishment returned to the agenda of the General Assembly in the form of a draft resolution inviting states which had not yet abolished the death penalty to consider the progressive restriction of the number of offences for which the death penalty might be imposed, and to exclude the insane from capital punishment.<sup>84</sup> The final paragraph,

encourage[d] states which 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.<sup>85</sup>

The proposer, Italy, eventually obtained forty-nine co-sponsors for the resolution. However, a skillful procedural gambit engineered by Singapore succeeded in blocking the resolution's adoption.<sup>86</sup>

When the European Union again attempted a resolution in the General Assembly in 1999, it was outmanoeuvred by some retentionist states, even though these were very much in the minority. The whole business ended in a fiasco, and the resolution was withdrawn before it could be put to a vote. Humiliated, the European Union withdrew the resolution rather than see it transformed beyond recognition. Speaking to the European Parliament, Commissioner Chris Patten said it had been necessary "to freeze our resolution on the death penalty or risk the passing of a resolution that would have incorporated wholly unacceptable arguments that asserted that human rights are not universally applicable and valid."<sup>87</sup> He said that "following intensive negotiation, we decided at last year's General Assembly in November that no resolution was better than a fatally flawed text, and that therefore the [European Union] should not pursue its initiative in [the UN General Assembly]." Patten said that "hardline retentionists" now seem resigned to resolutions in the Commission on Human Rights, but that "they will continue to resist strongly any efforts to secure a General Assembly resolution."<sup>88</sup>

In 2003, there were initiatives within Italy, which held the presidency of the European Union during the second half of the year, to attempt yet another resolution in the General Assembly. Caution prevailed, however, and the proposal was

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<sup>84</sup> See U.N. GAOR, 49th Sess., at 1–4, U.N. Doc. A/49/234 (1994), A/49/234/Add.1, A/49/234/Add.2, revised by U.N. GAOR 3d Comm., 49th Sess., at 1–2, U.N. Doc. A/C.3/49/L.32/Rev.1 (1994).

<sup>85</sup> *Id.*

<sup>86</sup> See *id.* at 2.; see generally Ilias Bantekas & Peter Hodgkinson, *Capital Punishment at the United Nations: Recent Developments*, 11 CRIM. L.F. 23 (2000).

<sup>87</sup> The Rt. Hon. Christopher Patten, Speech Before the European Parliament (Feb. 16, 2000).

<sup>88</sup> The Rt. Hon. Christopher Patten, Speech Before the European Parliament, Plen. Sess., (Oct. 25, 2000).

dropped before there could be a showdown with retentionist states. Just as the Commission on Human Rights has proven itself to be fertile ground for death penalty initiatives, the General Assembly now appears to be a tough nut to crack on the subject. Although in practice, most member states do not impose capital punishment, for a variety of reasons relating to geo-political issues and regional alliances, it is difficult to build a political majority within the General Assembly for abolitionist proposals.

### III. INTERNATIONAL CRIMINAL LAW

The first truly international trials were held in the aftermath of the Second World War, and led, in many cases, to executions.<sup>89</sup> The Charter of the International Military Tribunal<sup>90</sup> 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."<sup>91</sup> Many of the Nazi defendants were condemned to death, although a few received lengthy prison terms and some were acquitted. At the Tokyo Trial, seven defendants were sentenced to death and fifteen to life imprisonment.<sup>92</sup> The president of the Tokyo Tribunal penned a separate opinion which 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 that the speedy termination of existence on the scaffold or before a firing squad.<sup>93</sup>

In 1989, the General Assembly initiated work in the International Law Commission aimed at the establishment of an international court. When the issue of sentencing came before the International Law Commission in 1991, special rapporteur Doudou Thiam declared that capital punishment should be excluded from

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<sup>89</sup> See William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 736 (1997).

<sup>90</sup> See *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Military Tribunal (I.M.T.)*, art. 27, 82 U.N.T.S. 279 (1951).

<sup>91</sup> *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, art. 16, 4 BEVANS 20, as amended, art. 16, 4 BEVANS 27.

<sup>92</sup> *United States v. Araki* (1948), reprinted in 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 527 (B.V.A. RÖLING & C.F. RÜTER eds., 1977).

<sup>93</sup> *Id.* at 478. See also B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER* 98 (Antonio Cassese ed., 1993).

the Code of Crimes Against the Peace and Security of Mankind, and that a maximum sentence of life imprisonment be provided.<sup>94</sup> Although a few Commission members argued that the supreme penalty should not be abandoned,<sup>95</sup> the vast majority felt it would be unthinkable, given the international trend in favor of abolishing the death penalty.

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 regarding sentencing, essentially proposing 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 taking into account the general practice of the criminal courts in the former Yugoslavia or Rwanda, as the case may be.<sup>96</sup>

The death penalty is formally excluded from the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002. The exclusion of the death penalty from the Rome Statute is an important benchmark in an unquestionable trend towards the universal abolition of capital punishment.<sup>97</sup>

#### IV. INTERNATIONAL NORMS AND DOMESTIC LAW

International standards with respect to capital punishment are increasingly influential before domestic courts. Courts of several states, including South Africa,<sup>98</sup>

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<sup>94</sup> See Draft Code of Crimes Against the Peace and Security, U.N. Doc. A/CN.4/435 and Add.1, § 29 (1991). For the discussion of this proposal by the International Law Commission, see Summary Records of the 2207th–2214th Meetings, U.N. Doc. A/CN.4/SR.2207–14, and U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), and Report of the International Law Commission on the Work of its Forty-third Session, A/46/10, §§ 70–105.

<sup>95</sup> Summary Records of the 2211th Meeting, U.N. Doc. A/CN.4/SR.2211, § 15 (1991); Summary Records of the 2212th Meeting, U.N. Doc. A/CN.4/SR.2212, § 19, § 28 (1991); Summary Records of the 2213th Meeting, U.N. Doc. A/CN.4/SR.2213, § 55 (1991). Special rapporteur Thiam promised that the Commission's report would state that "two or three of its members" had expressed reservations about exclusion of the death penalty. See U.N. Doc. A/CN.4/SR.2213, § 59 (1991).

<sup>96</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), art. 24; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), art. 23, § 1.

<sup>97</sup> *Question of the Death Penalty*, C.H.R. Res. 1999/61, pmb1.

<sup>98</sup> *State v. Makwanyane*, 1995 (3) SARL 391 (CC) (S. Afr.), reprinted in 16 HUM. RTS. L.J. 154 (1995).



Zimbabwe,<sup>99</sup> Canada,<sup>100</sup> Hungary,<sup>101</sup> Tanzania,<sup>102</sup> Bosnia and Herzegovina<sup>103</sup> and the United Kingdom<sup>104</sup> have found international law to be particularly helpful in the interpretation of such notions as the right to life, and cruel, inhuman, and degrading punishment. Often, judges use the UN resolutions and the treaty provisions as persuasive authority for the application of domestic constitutions. All around the world, courts and lawmakers increasingly look to other courts and legislatures for guidance. The synergy between them has driven the debate. When Canada's Supreme Court reversed itself on the issue of the death penalty in 2001, the evolving international debate weighed heavily and perhaps decisively on the minds of the judges. The Court wrote:

The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.<sup>105</sup>

The Supreme Court of Canada was particularly impressed with evidence of the danger of executing an innocent person. This issue was not addressed in *Kindler v. Canada*<sup>106</sup> and, to be fair, it has emerged as a central theme in the death penalty debate only within the past decade. Technological advances, principally the possi-

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<sup>99</sup> Catholic Comm'n for Justice & Peace in Zimb. v. Attorney-General, 1993 (4) SALR 239 (Zimb.), reprinted in 14 HUM. RTS. L.J. 323 (1993).

<sup>100</sup> United States v. Burns, [2001] S.C.R. 183.

<sup>101</sup> Alkotmánybíroság [Hungarian Constitutional Court], Dec. No. 23/1990 (X.31) AB (Oct. 24, 1990), in MK., Oct. 31, 1991, translated in 1 E. EUR. CASE REP. CONST. L. 177 (1994).

<sup>102</sup> See Republic v. Mbushuu, [1994] 2 L.R.C. 335 (Tanz. High Court).

<sup>103</sup> See Damjanovic v. Federation of Bosnia and Herzegovina, CH/96/30, Decisions and Reports 1996-1997, at 147.

<sup>104</sup> See Pratt v. Attorney General for Jam., [1994] 2 A.C. 1 (P.C. 1993) (appeal taken from Jam.), reprinted in 14 Hum. Rts. L.J. 338 (1993).

<sup>105</sup> United States v. Burns, [2001] S.C.R. 183, at para. 92.

<sup>106</sup> Kindler v. Canada, [1991] S.C.R. 779.

bility of DNA testing, have facilitated revelations about miscarriages of justice. Within the United States, there is now substantial literature on the subject.<sup>107</sup> Several erstwhile enthusiasts for capital punishment in the political sphere have “blinked” on this issue. Perhaps the most celebrated development is the moratorium ordered by Governor George H. Ryan of Illinois in late 1999, a move that was followed in January 2003 by his systematic commutation of death row prisoners.<sup>108</sup>

Following the *Burns* ruling by the Supreme Court of Canada, the Constitutional Court of South Africa tackled a similar issue. In 1995, the South African Court issued a landmark ruling holding capital punishment to be inconsistent with the post-apartheid interim constitution’s protection of the right to life and prohibition of cruel, inhuman, and degrading treatment or punishment.<sup>109</sup> In June 2001, the same court granted a petition from Khalfan Khamis Mohamed, a participant in the Al Qaeda bombing of the U.S. embassy in Dar es Salaam. After being arrested in South Africa, Mohamed was summarily turned over to the FBI in what the state called a deportation, although the court saw no reason to view it as anything but a disguised extradition.<sup>110</sup> According to the court:

In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.<sup>111</sup>

But Mohamed was already on trial in New York when the Constitutional Court issued its ruling. He was being tried jointly with an accomplice, Mahmoud Mahmud Salim, who had been extradited to the United States from Germany subsequent to a commitment from the United States that capital punishment would not be imposed.

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<sup>107</sup> E.g., MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000).

<sup>108</sup> Press Release, Governor George H. Ryan, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.state.il.us/gov/press/00/jan/morat.htm>.

<sup>109</sup> *State v. Makwanyane*, 1995 (3) SARL 391 (CC) (S. Afr.), reprinted in 16 HUM. RTS. L.J. 154 (1995). The Court reaffirmed the validity of *Makwanyane* in light of the new Constitution, in *Mohamed v. President of the Republic of South Africa*, 2001 (3) SARL 893 (CC), para. 39.

<sup>110</sup> *Mohamed*, 2001 (3) SARL 893 (CC), paras. 40, 60.

<sup>111</sup> *Id.* at para. 49.

The South African Court noted the unfairness of the situation and refuted any suggestion that the United States might not have provided the assurance had it been sought.<sup>112</sup> As a remedy for the constitutional violation, the South African Constitutional Court ordered “the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency.”<sup>113</sup> It noted in addition:

Not only is the learned judge presiding aware of these proceedings, but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding. On the papers there is a conflict of opinion as between one of the defense lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal proceedings of any finding we might make. It is for the presiding judge to determine such issues. For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial judge is enabled to exercise his judicial powers in relation to the proceedings in this Court . . . .<sup>114</sup>

Apparently Judge Sand, who was presiding over the trial, had specially authorized the use of funds for the court-appointed defense team to pursue Mohamed’s interests in South Africa, as the South African Constitutional Court observed.<sup>115</sup>

Within days of the Constitutional Court ruling, a New York jury found Mohamed guilty of murder. Under federal law, the jury then had to deliberate again to decide whether or not Mohamed should be sentenced to death. Judge Sand took the extraordinary step of informing the jury of the South African Constitutional Court’s views. The jury also knew that Salim, who had also been found guilty, could not be sentenced to death because this had been a condition of his extradition from Germany. On June 10, 2001, eleven of the twelve jurors concluded that “others of equal or greater culpability in the murders [would] not be sentenced to death,” which is a mitigating factor under the applicable federal statute. Mohamed was given a sentence of life imprisonment.<sup>116</sup>

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<sup>112</sup> *Id.* at paras. 44, 55.

<sup>113</sup> *Id.* at para. 74.

<sup>114</sup> *Id.* at para. 71 (citation omitted).

<sup>115</sup> *Id.*

<sup>116</sup> *United States v. Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001).

The refusal of abolitionist states to cooperate in the imposition of capital punishment is increasingly manifesting itself in another related manner, namely the denial of other forms of mutual legal assistance. For example, on November 27, 2002, French and German authorities agreed to provide evidence requested by the United States in the prosecution of French national Zacarias Moussaoui for his involvement in the September 11, 2001 attacks, after receiving an assurance that the information would not be used to seek or impose the death penalty.<sup>117</sup> German documents apparently provided information about the transfer of money from a man alleged to have belonged to al Qaeda in Germany, Ramzi Binalshibh, to Moussaoui. French documents depicted the childhood and early adulthood of Moussaoui in France, and apparently assisted in establishing his connections with Muslim radicals. The German embassy in Washington issued a statement on its website:

The German government will meet the request for legal assistance by the U.S. government in the case of French citizen Zaccharias Moussaoui. The United States of America has assured, that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty.

. . . .

. . . The German constitution (Art.2, par.1; Art.102), which prohibits the imposition of the death penalty or any submittance of material that might lead to the capital punishment. The U.S. government has acknowledged this legal position with the aforementioned assurance.<sup>118</sup>

In December 2002, the European Union reached a deal allowing the United States to obtain personal data from the Europol law enforcement agency on suspects. The agreement was described by journalists as a “breakthrough” that resulted when the United States accepted that European Union members would not be expected to surrender suspects if they could face the death penalty.<sup>119</sup>

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<sup>117</sup> Dan Eggen, *U.S. to Get Moussaoui Data from Europe*, WASH. POST, Nov. 28, 2002, at A19; Christopher Marquis, *Germany Agrees to Share Evidence Against 9/11 Defendant*, N.Y. TIMES, Nov. 28, 2002, at A18; Bruce Zagaris, *Germans and French Agree to Give Evidence in Moussaoui Case*, 19 INT’L ENFORCEMENT L. REPORTER 21 (2003).

<sup>118</sup> Press Release, German Embassy in the United States, *Germany Gives Legal Assistance in the Moussaoui Case* (Nov. 20, 2002), at [http://www.germanyinfo.org/relaunch/politics/new/pol\\_terror\\_trial3.html](http://www.germanyinfo.org/relaunch/politics/new/pol_terror_trial3.html) (last visited Jan. 12, 2005).

<sup>119</sup> Ian Black, *EU Agrees to Pass on Intelligence to FBI*, GUARDIAN (London), Dec. 20, 2002, at 12; Press Release, Europol, *USA and Europol Sign a Full Co-operation Agreement* (Dec. 20, 2002), at <http://www.europol.eu.int/index.asp?page=news&news=pr021220.htm> (last visited Jan. 12, 2005).

## CONCLUSION

Human rights law — the Universal Declaration and the treaties that followed — has become the touchstone for new constitutions and for the case law of constitutional courts. The phenomenon is one of legal globalisation, and is promoting moves to limit and eliminate the death penalty in those countries where it still exists. There are many paths to abolition. In Ireland, it was by referendum when, on May 31, 2001, some sixty-three percent of voters supported a constitutional amendment prohibiting capital punishment.<sup>120</sup> In South Africa, Albania, and Ukraine it has been by Constitutional Court judgment. In Russia, it was by executive fiat. In Turkey, it was by legislation. There appears to be no formula to follow as each country finds its own path to a civilised and humane system of criminal law. But in all of these recent cases of abolition of the death penalty, probably the most significant single impetus has been the dynamism of international human rights law.

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<sup>120</sup> Twenty-first Amendment of the Constitution Act, No.2 (2001) (Ir.) (forbidding the Oireachtas, Ireland's Legislature, from enacting "any law providing for the imposition of the death penalty"). The death penalty was abolished in Ireland by statute eleven years earlier. Criminal Justice Act (1990) (Ir.) ("No person shall suffer death for any offence.").