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INTERNATIONAL LAW AND ABOLITION OF THE DEATH PENALTY: RECENT DEVELOPMENTS

*William A. Schabas**

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I. INTRODUCTION

As a goal for civilized nations, abolition of the death penalty was promoted during the drafting of the *Universal Declaration of Human Rights*¹ in 1948. It found, however, that expression was only implicit in the recognition of what international human rights law designated “the right to life;” the same approach was taken in the *American Declaration of the Rights and Duties of Man*, adopted May 4, 1948.² At the time, all but a handful of states maintained the death penalty. In the aftermath of a brutal struggle which took hundreds of millions of lives, few were even contemplating its abolition. The idea of abolition gained momentum over the following decades. International lawmakers urged the limitation of the death penalty, by excluding juveniles, pregnant women, and the elderly from its scope and by restricting it to an ever-shrinking list of serious crimes. Enhanced procedural safeguards were required where the death penalty still remained. In several subsequent international human rights instruments, notably the *International Covenant on Civil and Political Rights*,³ the *European Convention on Human Rights*,⁴ and the *American*

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1. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), art. 3.

2. O.A.S. Doc. OEA/Ser.L./V/I.4 (1948), art. I.

3. 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 6.

Convention on Human Rights,⁵ the death penalty is mentioned as a carefully-worded exception to the right to life. From a normative standpoint, the right to life protects the individual against the death penalty unless otherwise provided as an implicit or express exception. Eventually, three international instruments were drafted that proclaimed the abolition of the death penalty. The first instrument was adopted in 1983 and the others at the end of the 1980s.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 Fifty years after the Nuremberg trials, the international community has now ruled out the possibility of capital punishment in prosecutions for war crimes and crimes against humanity.⁹

The importance of international standard setting was evidenced by parallel developments in domestic laws. In 1945, there were only a handful of abolitionist states. By 1997, considerably more than half the countries in the world abolished the death penalty *de facto* or *de jure*.

4. 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953, art. 2§1.

5. American Convention on Human Rights, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978.

6. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. no. 114, *entered into force* Mar. 30, 1985; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, G.A. Res. 44/128, *entered into force* Jul. 7, 1991; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. no. 73, 29 I.L.M. 1447, *entered into force* Oct. 6, 1993. The American Convention on Human Rights, is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it. Thus, a State which has abolished the death penalty at the time of ratification of the *American Convention* is abolitionist from the standpoint of international law. *Id.*

7. 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, Venezuela. These States are abolitionist either *de jure* or *de facto*, and have either signed or ratified one or more of the abolitionist treaties (Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 18 HUM. RTS. L. J. 79 (1997)).

8. Albania, Belgium, Bosnia and Herzegovina, 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.

9. The Security Council has excluded use of the death penalty by the two international *ad hoc* tribunals created to deal with war crimes in the former Yugoslavia and Rwanda: *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S/RES/827 (1993), annex, art. 24(1); *Statute of the International Criminal Tribunal for Rwanda*, S/RES/955 (1994) annex, art. 23(1). The International Law Commission has also excluded the death penalty in its draft statute for an international criminal tribunal: U.N. Doc. A/49/10 (1994), art. 47.

Those that still retain it find themselves increasingly subject to international pressure in favor of abolition. Sometimes the pressure is quite direct. One example is the refusal by certain countries to grant extradition where 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 cases, abolition is affected by explicit reference in constitutional instruments to the international treaties that prohibit the death penalty. In others, 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 that prohibit cruel, inhuman, and degrading treatment or punishment).¹⁰

Several recent works provide detailed overviews of international legal issues relating to abolition of the death penalty.¹¹ The intention of this article is considerably more modest: to update the existing material by addressing recent developments in international law. Three subjects are considered; the ongoing debate within international organizations including the United Nations and European institutions, the issue of the death penalty and general sentencing matters involved in establishment of the international criminal court, and the growing refusal of states to extradite to the United States of America in cases where fugitives are subject to the death penalty.

II. INTERNATIONAL CRIMINAL JUSTICE

The first truly international trials were held in the aftermath of the Second World War and in many cases led to capital executions. 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."¹² Many of the Nazi defendants were condemned to death, although a few received lengthy prison terms and some were acquitted. The Soviet judge expressed the

10. Makwanyane & Mchunu v. The State, 16 HUM. RTS L. J. 154 (1995); (Constitutional Court of South Africa); Ruling 23/1990 (X.31) AB, Constitutional Court of Hungary, Judgment of October 24, 1990, Magyar Közlöny (Official Gazette), Oct. 31, 1991.

11. Roger Hood, *The Death Penalty* (1996); William A. Schabas, *The Abolition of the Death Penalty in International Law* (1997); *Capital Punishment: Global Issues and Prospects* (Peter Hodgkinson, Andrew Rutherford, eds., 1996). On the death penalty in the United States, see: *The Death Penalty in America, Current Controversies* (Hugo Adam Bedau, ed., 1997).

12. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), Aug. 8, 1945, art. 27, 82 U.N.T.S. 279.

minority view that all of those convicted should also have been sentenced to death. Those condemned to death were subsequently executed within a few weeks, with the exception of Göring, who committed suicide hours before the time fixed for sentence.¹³ A series of successor trials were held in Nuremberg pursuant to *Control Council Law No. 10*.¹⁴ Again, large numbers were sentenced to death or to various lesser punishments, including life imprisonment or lengthy terms of detention. The sentencing provisions of the *Charter of the Tokyo Tribunal* were similar to those adopted at Nuremberg.¹⁵ Of those convicted, seven were sentenced to death and fifteen to life imprisonment.¹⁶ 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 than the speedy termination of existence on the scaffold or before a firing squad.¹⁷

In response to arguments that these sentences breached the rule *nulla poena sine lege*, it was said that “[i]nternational law lays down that a war criminal may be punished with death whatever crimes he may have committed.”¹⁸ 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.”¹⁹ A post-war 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

13. *France et al. v. Göring et al.*, (1946) 23 Trial of the major war criminals before the international military Tribunal, 13 I.L.R. 203. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS, A PERSONAL MEMOIR* (1992); *LES PROCÈS DE NUREMBERG ET DE TOKYO* (Annette Wieviorka, ed., 1996).

14. *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, Official Gazette Control Council for Germany, 50-55.

15. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 4 BEVANS 20, *as amended*, 4 BEVANS 27 (“Charter of the Tokyo Tribunal”).

16. R. JOHN PRITCHARD & SONIA MAGBANUA, *THE TOKYO WAR CRIMES TRIAL* 854-858 (1981).

17. *Id.*; See also B.V.A. RÖLING, ANTONIO CASSESE, *THE TOKYO TRIAL AND BEYOND*, 1993.

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

19. FIELD MANUAL 27-10, Oct. 1, 1940, para. 357.

war were always punished by death under international law.²⁰ In 1948, the Secretary-General of the United Nations suggested that the drafting committee of the *Convention for the Prevention and Punishment of the Crime of Genocide* might wish to provide that the crime of genocide be subject to capital punishment.²¹ This indicates the general acceptance of capital punishment at the time. A group of three experts involved in drafting the *Genocide Convention*, Donnadieu de Vabres, Pella, and Lemkin, revived provisions from a 1937 treaty that never came into force and that provided for capital punishment for serious international crimes.²² Even then, the drafters of the *Universal Declaration of Human Rights* rejected proposals that the death penalty be explicitly mentioned as an exception to the right to life because this might pose an obstacle to the growing abolitionist trend.²³

Within a few years, international lawmakers were more circumspect about the death penalty. A draft provision proposed by the International Law Commission for its "Draft Code of Offenses Against The Peace and Security of Mankind" avoided any categorical reference to capital punishment: "The penalty for any offense defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offense."²⁴ A general assembly committee subsequently recommended that the statute contain only the most general of provisions dealing with sentencing and suggested the phrase "the court shall impose such penalties as it may determine."²⁵ The General Assembly committee even stated that the statute might exclude certain forms of punishment, such as the death penalty.²⁶

The post-Nuremberg efforts by the International Law Commission and the general assembly to establish an international court did not progress as quickly as hoped.²⁷ Ultimately, the international criminal court project was shelved for thirty-five years. Following a 1989 request by the

20. Public Prosecutor v. Klinge, (1946) 13 I.L.R. 262 (Supreme Court, Norway).

21. "List of substantive items to be discussed in the remaining stages of the Committee's session, Memorandum submitted by the Secretariat," U.N. Doc. E/AC.25/11 (1948).

22. "Establishment of a permanent international criminal court for the punishment of Acts of Genocide," U.N. Doc. E/447, at 73-74, 82-83 (1948).

23. U.N. Doc. E/CN.4/AC.1/SR.2 (1947), pp. 10-11.

24. Yearbook 1951, Vol. II, at 134 et seq., U.N. Doc. A/1858, §59.

25. "Report of the Committee on International Criminal Jurisdiction," U.N. GAOR 7th Sess., Supp. No. 11, A/2136 §110-111 (1952). See draft art. 32: "The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court."

26. *Id.* §111.

27. G.A. Res. 898 (IX), G.A. Res. 1187 (XII).

general assembly, the International Law Commission (The Commission) returned to the issue. In 1990, special rapporteur Doudou Thiam proposed three different provisions of a sentencing provision, one which did not rule out the death penalty, the other two expressly excluded the death penalty. Thiam said "[i]t therefore seems appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community."²⁸ When the issue of sentencing came before the Commission in 1991, special rapporteur Thiam then proposed that the *Code of Crimes Against the Peace and Security of Mankind* set out specific penalties. This time, the death penalty was formally proscribed and a maximum sentence of life imprisonment was provided.²⁹ A few members of the Commission argued that capital punishment should not be abandoned.³⁰ However, the vast majority felt it would be unthinkable to retain the death penalty, given the international trend in favor of its abolition.³¹ Several members also expressed their reservations about sentences of life imprisonment, which they said were also a form of cruel, inhuman, and degrading punishment.³² After lengthy discussion in the Commission, special rapporteur Thiam produced two new draft sentencing provisions. Both of these drafts allowed for sentences up

28. "Eighth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur," U.N. Doc. A/CN.4/430/ Add.1 §§101-105 (1990). See also "Report of the International Law Commission on the work of its forty-second session," U.N. Doc. A/CN.4/SER.A/1990/Add.1 (Part 2), A/45/10 §§148-149 (1990).

29. U.N. Doc. A/CN.4/435/ Add.1, §29. For the discussion of this proposal by the International Law Commission, see U.N. Doc. A/CN.4/SR.2207-2214, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §§70-105.

30. U.N. Doc. A/CN.4/SR.2211, §15; U.N. Doc. A/CN.4/SR.2212, §19; U.N. Doc. A/CN.4/SR.2212, §28; U.N. Doc. A/CN.4/SR.2213, §55. 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: U.N. Doc. A/CN.4/SR.2213, §59. The report eventually stated that "many members of the Commission" opposed the death penalty and "[s]ome other members" supported the death penalty: U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §§85-85.

31. U.N. Doc. A/CN.4/SR.2207, §§23-24; U.N. Doc. A/CN.4/SR.2208, §2; U.N. Doc. A/CN.4/SR.2208, §21; U.N. Doc. A/CN.4/SR.2208, §30; U.N. Doc. A/CN.4/SR.2209, §5; U.N. Doc. A/CN.4/SR.2209, §29; U.N. Doc. A/CN.4/SR.2210, §25; U.N. Doc. A/CN.4/SR.2210, §33; U.N. Doc. A/CN.4/SR.2210, §46; U.N. Doc. A/CN.4/SR.2212, §4; U.N. Doc. A/CN.4/SR.2213, §12; U.N. Doc. A/CN.4/SR.2213, §23; U.N. Doc. A/CN.4/SR.2213, §33.

32. U.N. Doc. A/CN.4/SR.2208, §10 (Graefrath); U.N. Doc. A/CN.4/SR.2208, §21 (Calero Rodriguez); U.N. Doc. A/CN.4/SR.2209, §19 (Barboza); U.N. Doc. A/CN.4/SR.2210, §47 (Njenga); U.N. Doc. A/CN.4/SR.2212, §4 (Solari Tudela). See also: U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §88. The German Constitutional Court has suggested that life imprisonment without possibility of parole constitutes cruel, inhuman and degrading punishment: [1977] 45 BVerfGE 187, 228 (as translated in KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 316 (1987)).

to life imprisonment (which was square bracketed), or for a term of fifteen to thirty years not subject to commutation. The draft provided for additional sanctions including community work, total or partial confiscation of property and deprivation of some or all civil and political rights.

In 1993, as attention shifted to a draft statute of the proposed international criminal court, it was necessary to include a sentencing provision in that instrument also.³³ The draft statute adopted by the Commission stated that a person convicted under the statute could be sentenced up to life imprisonment, but capital punishment was not included. These provisions were reworked in the 1994 draft, although the substance was not changed significantly.³⁴ The 1995 discussion confined itself to reiterating the importance of having a *residual* sentencing provision in the statute in order not to run afoul of the *nulla poena sine lege* principle, and once again eliminated the death penalty.³⁵

During the August 1996, session of the Preparatory Committee on the international criminal court, some states with a predominantly Moslem population argued that if the statute was to be considered representative of all legal systems, it should include the death penalty.³⁶ When work on the draft statute of the proposed international criminal court was being discussed by the Sixth Committee of the General Assembly in October 1997, several states seized the opportunity to insist that capital punishment be excluded from the instrument. These states included Poland, Haiti, Paraguay, Ukraine, and Italy. Kuwait, on the other hand, urged its retention.³⁷ Retentionist States are likely to insist upon the issue when the Preparatory Committee discusses penalties during its December 1997 session. The recent history of these debates would suggest that they have no chance of succeeding. What is more likely is that their silence might imply acquiescence, something that human rights tribunals might later interpret as evidence of the emergence of a customary norm.

While the debate had been underway in the International Law Commission and the Preparatory Committee, the Security Council also

33. "Report of the International Law Commission on the work of its forty-fifth session," 3 May-23 July 1993, GAOR 48th Sess., Supp. No. 10 (A/48/10), §84.

34. "Report of the International Law Commission on the work of its forty-sixth session," 3 May-23 July 1994, GAOR 49th sess., Supp. No. 10 (A/49/10), 123-125.

35. "Report of the International Law Commission on the work of its forty-seventh session," U.N. GAOR 50th Sess., Supp. No. 10 (A/50/10), 183.

36. U.N. Doc. L/2805 (1996); *see also* U.N. Doc. L/2806 (1996), U.N. Doc. L/2813 (1996).

37. U.N. Doc. GA/L/3044 (1997); U.N. Doc. GA/L/3046 (1997); U.N. Doc. GA/L/3047 (1997); U.N. Doc. GA/L/3048 (1997).

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. The provisions essentially propose 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 by taking into account the *general practice* of the criminal courts in the former Yugoslavia or Rwanda, as the case may be.³⁸ 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 would only be subject to life imprisonment.³⁹ Rwanda's representative said:

[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. . . . That situation is not conducive to national reconciliation in Rwanda.⁴⁰

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

38. Statute of the International Criminal Tribunal for the former Yugoslavia, art. 25, *supra* note 9; Statute of the International Criminal Tribunal for Rwanda, art. 24, *supra* note 9. On the *ad hoc* tribunals generally, see M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); Dai Tribunali Penali Intrnazionali ad hoc a una Corte Permanente (Flavia Lattanzi, Elena Sciso, eds., 1996); D. Shraga & R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360 (1994); Eric David, *Le tribunal international pénal pour l'ex-Yougoslavie*, 25 REV. BELGE DROIT INT'L. 565 (1992); M. Bergsmo, *The Establishment of the International Tribunal on War Crimes*, 14 HUM. RTS. L. J. 371 (1993); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994); Karine Lescure, *Le tribunal pénal international pour l'ex-Yougoslavie*, 1994; Christopher Greenwood, *The International Tribunal for former Yugoslavia*, 69 International Affairs 641 (1993); Jules Deschênes, *Toward International Criminal Justice*, 5 CRIM. L. F. 249 (1994); David Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401 (1994); M. Gordon, *Justice on Trial: The Efficacy of the International Tribunal for Rwanda*, 1 ILSA J. INT'L COMP. L. 217 (1995).

39. U.N. Doc. S/PV.3453, at 16.

40. *Id.*

unacceptable, and a dreadful step backwards, to introduce it here."⁴¹ Since domestic trials began in Rwanda in December 1996, more than one hundred people have been sentenced to death. These sentences have not yet been carried out.⁴² In fact, Rwanda has not imposed capital punishment since 1982. In 1992, President Habyarimana systematically commuted all outstanding death sentences.⁴³ 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.⁴⁴ 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 Aimed at Abolition of the Death Penalty* although it has not yet formally taken this step.⁴⁵ Recent legislation adopted by Rwanda in order to expedite trials of genocide suspects abolishes the death penalty for the vast majority of offenders, who would otherwise be subject to capital punishment under the country's *Code pénal*.⁴⁶

III. INTERNATIONAL ORGANIZATIONS

International organizations have played an important role in promoting abolition of the death penalty, through resolutions, treaties, and other initiatives. Foremost among them are the various organs of the United Nations, notably the General Assembly, the Commission on Human Rights, and European regional organizations such as the Council of Europe and the Parliamentary Assembly of the European Union.

41. *Id.* at 5.

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

43. *Arrêté présidentiel no 103/105, Mesure de grâce*, J.O. 1992, p. 446, art. 1.

44. *Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, Report of the Secretary-General*, U.N. Doc. E/1995/78 §36 (1995). See also: *The Death Penalty, List of Abolitionist and Retentionist Countries (September, 1985)*, AI Index: ACT 50/06/95.

45. "Protocole d'Accord entre le Gouvernement de la République Rwandaise et le Front Patriotique Rwandais portant sur les questions diverses et dispositions finales signé à Arusha", Aug. 3, 1993, *Journal officiel*, Year 32, no. 16, August 15, 1993, p. 1430, art. 15.

46. WILLIAM A. SCHABAS & MARTIN IMBLEAU, *INTRODUCTION TO RWANDAN LAW* 44, 59-60 (1997).

A. United Nations

In 1994, at the forty-ninth session, a draft General Assembly resolution called for a moratorium on the death penalty.⁴⁷ The resolution originated from a newly-formed non-governmental organization, "Hands Off Cain — the International League for Abolition of the Death Penalty Before the Year 2000," which obtained the support of the Italian Parliament for the draft resolution. A series of introductory paragraphs referred to earlier General Assembly resolutions on the death penalty: the 1984 *Safeguards*, relevant provisions, in the *Universal Declaration of Human Rights*,⁴⁸ the *International Covenant on Civil and Political Rights*⁴⁹ and the *Convention on the Rights of the Child*,⁵⁰ the Statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda,⁵¹ and the draft statute of the proposed International Criminal Court.⁵² 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 which had not abolished the death penalty to consider the progressive restriction of the number of offenses for which the death penalty may be imposed, and to exclude the insane from capital punishment. 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."

Italy launched the campaign with a request addressed to the Office of the Presidency of the General Assembly that the item *capital punishment* be added to the agenda. Pakistan, speaking on behalf of the Organization of the Islamic Conference, argued that capital punishment was a highly sensitive and complicated issue, and warranted further and thorough consideration. Pakistan opposed modification of the agenda to include the

47. U.N. Doc. A/49/234 and Add. 1 and Add.2 (1994), later revised by U.N. Doc. A/C.3/49/L.32/Rev.1 (1994).

48. *Supra* note 1, art. 3.

49. *Supra* note 3, art. 6.

50. G.A. Res. 44/25, Annex (1989), art. 6, 37(a).

51. *Supra* note 9.

52. *Supra* note 34.

item, adding that if the resolution were to be considered, it should be in the Sixth Committee that deals with legal issues, not the Third Committee that deals with human rights issues.⁵³ The representative of Sudan described capital punishment as “a divine right according to some religions, in particular Islam.”⁵⁴ Iran, Malaysia, and Egypt also opposed discussing the draft resolution, while Uruguay, Malta, Cambodia, Austria, Burundi, Guinea-Bissau, Nicaragua, France, Ukraine and Andorra urged that it be included on the agenda of the Third Committee.⁵⁵ The item *capital punishment* was added to the agenda of the Third Committee not by consensus, as many had hoped, but on a vote of the General Assembly, with seventy States in favor, twenty-four opposed, and forty-two abstentions.⁵⁶

Italy eventually obtained forty-nine co-sponsors for the resolution.⁵⁷ During debate in the Third Committee, Singapore took the initiative in attacking the draft resolution. According to the Singapore representative, it strongly opposed efforts by certain states to use the United Nations to impose their own values and system of justice on other countries. He added that it was evident, from the wording of the *International Covenant on Civil and Political Rights*, that no universal consensus held capital punishment to be contrary to international law. He also said that the abolition of the death penalty did not necessarily contribute to the advancement of human dignity. Rather, its retention served to preserve and safeguard the interests of society, notably in the repression of drug trafficking.⁵⁸ Other states opposing the resolution during the debate included Malaysia, Jamaica, Bangladesh, China, Sudan, Saudi Arabia, Libya, Egypt, Iran, Japan, and Jordan.

Germany spoke on behalf of the European Union, of which it was the President at the time, supporting the resolution and noting that capital punishment was not applied by any of its members. The German representative cited its lack of significant deterrent effect, and a preference

53. U.N. Doc. A/BUR/49/SR.6, §2.

54. U.N. Doc. A/BUR/49/SR.5, §13.

55. U.N. Doc. A/BUR/49/SR.5-6.

56. U.N. Doc. A/49/610, §2.

57. Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Marshall Islands, Micronesia, Monaco, New Zealand, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, San Marino, Sao Tomé and Príncipe, Slovak Republic, Solomon Islands, Spain, Sweden, Uruguay, Vanuatu and Venezuela.

58. U.N. Doc. A/C.3/49/SR.33, §§23-27.

of European States for rehabilitation rather than retribution as a goal of punishment. The text did not create new standards, but did urge that while *looking ahead* towards abolition, the status quo of persons currently on death row should be preserved.⁵⁹ Slovenia, Sweden, Italy, Ireland, Nicaragua, New Zealand, Andorra, Malta, Portugal, Cambodia, and Namibia took the floor to support the draft resolution.

At the conclusion of the debate in the Third Committee, the Chair attempted to summarize the debates:

[T]he Committee had clearly been divided into two camps those favoring the abolition of capital punishment and those wishing to retain it. Arguments in favor of abolishing the death penalty had been the following: States could not impose the death penalty as a means of reducing crime because there was no evidence that it had a deterrent effect; the right to life was the most basic human right and, consequently, States did not have the right to take the life of any individual; the death penalty sometimes veiled a desire for vengeance or provided an easy way of eliminating political opponents; the death penalty, once applied, could not be reversed in the event of judicial error; and capital punishment was excluded from the penalties used by international tribunals, including those established to deal with the situations in the former Yugoslavia and Rwanda, and should consequently become less prevalent in national legislation.

Arguments in support of maintaining the death penalty had been the following: certain legislative systems were based on religious laws; it was not possible to impose the ethical standards of a single culture on all countries; there was a need to discourage extremely serious crimes, and, in some countries, capital punishment was a constitutional or even a religious obligation.

At the same time, all members had agreed on certain fundamental points: the death penalty should be applied only in exceptional circumstances and subject to strict

59. U.N. Doc. A/C.3/49/SR.36, §§7-15.

preconditions, and its scope of application should be extremely limited.⁶⁰

Singapore initially attempted to block the resolution by proposing a *no action* motion. This attempt was rejected, sixty-five states voting in favor to seventy-four against, with twenty abstentions. Singapore then proposed an *amendment* that distorted the original purpose of the resolution, by adding the following preambular paragraph: "Affirming the sovereign right of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively."⁶¹ In order to save the resolution, Italy modified its original text by incorporating the Singapore amendment. At the same time, Italy added a reference to the *Charter of the United Nations* and to international law, aimed at making Singapore's reactionary appeal to *state sovereignty* subject to some recognition of international norms.⁶² By a close vote, seventy-one to sixty-five, with twenty-one abstentions, Singapore's amendment was adopted.⁶³ Those voting in favor of the amendment were retentionist states, essentially from Africa, Asia, and the Caribbean. However, such an amendment made the resulting text unacceptable to many abolitionist states. It constituted a setback to efforts within the United Nations system dating to the 1950s to consider capital punishment

60. *Id.* at §§74-76.

61. U.N. Doc. A/C.3/49/L.73.

62. U.N. Doc. A/C.3/49/L.74.

63. *In favor:* Afghanistan, Algeria, Antigua-Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Bhutan, Brunei, Burkina Faso, Burundi, Cameroon, China, Côte d'Ivoire, Cuba, Korea, Egypt, Eritrea, Grenada, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Libya, Malaysia, Maldives, Mauritania, Mongolia, Morocco, Myanmar, Namibia, Nigeria, Oman, Pakistan, Papua New Guinea, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka, Sudan, Surinam, Swaziland, Syria, Thailand, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, Tanzania, Uzbekistan, Vietnam, Yemen, Zambia, and Zimbabwe.

Against: Andorra, Angola, Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Cambodia, Canada, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Micronesia, Monaco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Moldova, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Vanuatu, and Venezuela.

Abstaining: Albania, Azerbaijan, Belarus, Benin, Bolivia, Croatia, Ecuador, Ethiopia, Fiji, Gabon, Gambia, Georgia, Ghana, Guatemala, Kazakhstan, Mali, Mauritius, Mexico, Niger, Togo, Ukraine.

as an issue of international concern, and not merely a domestic matter. In the vote on the entire resolution, Italy continued to support the resolution, even with the Singapore amendment, but most of its co-sponsors deserted the camp and abstained in the final vote (a total of seventy-four states abstained). The remainder, essentially retentionist states, tended to divide: thirty-six voted in favor and forty-four voted against.⁶⁴

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 resolution is the latest in a series adopted by the body and by its predecessor, the United Nations Committee on Crime Problems and Control, dealing with the death penalty.⁶⁵ In 1984, the Committee drafted the *Safeguards Guaranteeing the Rights of Those Facing the Death Penalty* (Safeguards),⁶⁶ a document which was inspired in large part by articles 6, 14, and 15 of the *Civil Rights Covenant*. However, it went further, detailing the scope of the phrase *most serious crimes* and adding new mothers and the insane to the categories of individuals upon whom the death penalty could never be carried out. The Congress on the Prevention of Crime and the Treatment of Offenders, held every five years, examined the death penalty and endorsed the *Safeguards*, as did the Economic and Social Council and the General Assembly. In 1988, the *Safeguards* were

64. U.N. Doc. A/C.3/49/SR.61. *In favor*: Argentina, Armenia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Ecuador, El Salvador, Fiji, Gambia, Georgia, Greece, Haiti, Ireland, Israel, Italy, Kyrgyzstan, Macedonia, Malta, Marshall Islands, Mexico, Mozambique, Namibia, Nepal, Nicaragua, Panama, Paraguay, Portugal, San Marino, Slovenia, Uruguay, Uzbekistan, and Venezuela.

Against: Afghanistan, Algeria, Antigua-Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Brunei, Cameroon, China, Comoros, Egypt, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Morocco, Myanmar, Nigeria, Oman, Pakistan, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sudan, Syria, Trinidad and Tobago, United Arab Emirates, United States of America, and Yemen.

Abstaining: Albania, Andorra, Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Côte d'Ivoire, Cuba, Czech Republic, Denmark, Estonia, Ethiopia, Finland, France, Gabon, Germany, Grenada, Guatemala, Honduras, Hungary, Iceland, Kazakhstan, Kenya, Korea, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Mauritius, Micronesia, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Niger, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Russian Federation, Slovakia, South Africa, Spain, Sri Lanka, Surinam, Swaziland, Sweden, Tanzania, Thailand, Togo, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Vanuatu, Vietnam, Zambia, Zimbabwe.

65. Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program, Formulation of Standards and Efforts at Their Implementation 1994*, 58-62.

66. E.S.C. Res. 1984/50. Subsequently endorsed by G.A. Res. A/39/118.

themselves strengthened 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.⁶⁷

The 1996 resolution calls upon Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty. This will ensure that each defendant facing a possible death penalty is given all guarantees to ensure a fair trial, 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; 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, for petitions for clemency of the prisoner in question, and to effectively apply the *Standard Minimum Rules for the Treatment of Prisoners*,⁶⁸ in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering. The resolution was subsequently endorsed by the Economic and Social Council.⁶⁹

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, *inter alia*, for a moratorium on the death penalty.⁷⁰ The preamble refers to the right to life provisions of the *Universal Declaration of Human Rights*,⁷¹ the *International Covenant on Civil and Political Rights*⁷² and the *Convention on the Rights of the Child*,⁷³ as well as relevant resolutions of the General Assembly⁷⁴ and the Economic and Social Council.⁷⁵ It notes deep concern that several countries impose the

67. E.S.C. Res. 1989/64.

68. E.S.C. Res. 663C(XXIV); as amended, E.S.C. Res. 2076(LXII), §§56-59. On the *Standard Minimum Rules*, see: ROGER S. CLARK, *supra* note 66 at 145-179

69. E.S.C. Res. 1996/15, July 23, 1996.

70. U.N. Doc. E/CN.4/1997/L.20 (1997).

71. *Supra* note 1, art. 3.

72. *Supra* note 3, art. 6.

73. G.A. Res. A/44/25, Annex (1989), art. 6, 37(a).

74. G.A. Res. A/26/2857 (XXVI) (1971); G.A. Res. A/32/61 (1977); G.A. Res. A/44/128 (1989).

75. E.S.C. Res. 1574 (L) (1971); E.S.C. Res. 1745 (LIV) (1973); E.S.C. Res. 1930 (LVIII) (1975); E.S.C. Res. 1984/50; E.S.C. Res. 1985/33; E.S.C. Res. 1989/64; E.S.C. Res. 1990/29; E.S.C. Res. 1990/51; E.S.C. Res. 1996/15.

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 guaranteeing protection of the rights of those facing the death penalty*.⁷⁶ 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."⁷⁷

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, the obligations 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 impose a moratorium on the death penalty.

There was fierce debate within the Commission as a handful of retentionist states struggled to resist this new initiative. The Philippines, with the support of Malaysia and Egypt, attempted to subvert the resolution by a number of amendments that, in effect, undermined its meaning.⁷⁸ Denmark noted that the United Nations Security Council, in the statutes governing the Tribunals for war crimes in the former Yugoslavia and Rwanda, did not provide for the death penalty. Canada, although not a co-sponsor of the resolution, commended Italy's leadership and announced it would vote in favor of the resolution. Speaking before the Commission on behalf of the non-governmental organization that originally promoted the revolution, I noted that thirty states ratified the *Second Optional Protocol*, and that international justice no longer tolerated capital punishment, even for those responsible for genocide and war crimes. I expressed deep concern about the number of executions taking place in many parts of the world, particularly in countries such as Nigeria, Iran, Iraq, Sudan, China, and the United States, and urged all States that maintained the death penalty not to apply it to pregnant women, juveniles or the insane.⁷⁹ Several opponents charged that the Italian draft was *unbalanced*, including China, Egypt, India, and the United States. India and Malaysia argued

76. E.S.C. Res. 1984/50, Annex.

77. *Id.*

78. U.N. Doc. E/CN.4/1997/L.35 (1997).

79. U.N. Doc. HR/CN/770 (1997).

that it was improper to present a resolution before the Commission that had already been rejected by the General Assembly. Others who spoke against the resolution were Japan, Republic of Korea, and Bangladesh.⁸⁰ The resolution was passed by a roll-call vote of twenty-seven in favor and eleven opposed, with fourteen abstaining.⁸¹

According to Italian Foreign Minister Lamberto Dini, in a recent interview:

We have to let some time pass, so that the abolitionist victory in Geneva can sink in, and produce results. Raising this issue prematurely with the General Assembly could compromise our efforts. This is why Italy, and other "like-minded" countries, prefer to avoid a confrontation with the General Assembly, and wait until the moment is right. We shall continue to closely monitor the situation, however, to avoid draft resolutions being presented by retentionist states.⁸²

The terms of the 1997 resolution require that the matter return to the Commission agenda in 1998. No death penalty resolution was presented to the General Assembly during its 1997 session.

The Commission on Human Rights has not designated a special rapporteur with specific responsibility for capital punishment. However, its special rapporteur on extrajudicial, summary or arbitrary executions, Senegalese lawyer Waly Bacre Ndaye, 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, Ndaye reiterated 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." He added that

80. U.N. Doc. HR/CN/788 (1997).

81. U.N. Doc. HR/CN/789 (1997). The resolution is recorded as 1997/12. *In favor*: 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, Uruguay. *Against*: Algeria, Bangladesh, Bhutan, China, Egypt, Indonesia, Japan, Malaysia, Pakistan, Republic of Korea, United States. *Abstaining*: Benin, Cuba, El Salvador, Ethiopia, Gabon, Guinea, India, Madagascar, Philippines, Sri Lanka, Uganda, United Kingdom, Zaire, and Zimbabwe.

82. Alessandra Filograno, *Italy's Greatest Triumph, Hands Off Cain, Review Against the Death Penalty* No. 3, October/December 1997, at 35-37.

“where there is a fundamental right to life, there is no right to capital punishment.”⁸³

In his report, Ndaye noted such positive developments as the abolition of the death penalty by Belgium during July 1996. He expressed concern about 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. The special rapporteur referred to the importance of maintaining the highest procedural standards in capital trials, including public hearings. He said he was disturbed by reports that the death penalty was imposed in secrecy in some countries, such as Blears, China, Kazakhstan and Ukraine.

Ndaye noted that:

[A]s 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 defense, the absence of obligatory appeals and racial bias continue to be the main concerns.⁸⁴

In his report, he said he:

[R]emains 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 defense 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

83. Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1997/60 (1996). *See also* Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1996/614, §§507-517, §§540-557.

84. Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1997/60 (1996), §543.

appeals procedure after conviction in capital cases in some states.⁸⁵

In the course of 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; where individuals had been sentenced to death without resorting to their right to lodge any legal or clemency appeal; and where they had been sentenced to death despite strong indications casting doubt on their guilt.⁸⁶ Ndaye 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 twenty-one days after conviction."⁸⁷ Despite an international campaign, O'Dell was executed in July 1997. Ndaye also noted that in response to his urgent appeals, the Government of the United States 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.⁸⁸

Ndaye had inquired on several occasions as to whether the United States would "consider extending him an invitation to carry out an on-site visit."⁸⁹ 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.⁹⁰ In October 1997, Special Rapporteur Ndaye conducted a two-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. Ndaye'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."⁹¹ Helms asked, "Bill, is this man confusing the United States with some other country or is this an intentional insult to

85. *Id.* §551.

86. *Id.* §544.

87. *Id.*

88. *Id.* §546.

89. *Id.* §§547, 548.

90. *Id.* §549.

91. John M. Goshko, *Helms Calls Death Row Probe "Absurd U.N. Charade,"* THE WASHINGTON POST, October 8, 1997; at A07.

the United States and to our nation's legal system?"⁹² Ndaye 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."⁹³

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 Protocol*.⁹⁴ The *Protocol* is an optional instrument, allowing states that are parties to the *European Convention on Human Rights*⁹⁵ to extend their obligations and to bind themselves as a question of international law to the prohibition of capital punishment. The *Protocol*, although not without its shortcomings, represents a seminal development in the abolition of the death penalty, setting an example that goes well beyond its own borders. It provided a model to drafters in the United Nations and the Organization of American States, who followed Europe's example several years later.

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 the *Protocol*.⁹⁶ 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.

92. *Id.*

93. *Id.*

94. PROTOCOL NO. 6, *supra* note 6.

95. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, E.T.S. no. 5, entered into force Sep. 3, 1953.

96. Resolution 1044 (1994) on the abolition of capital punishment, October 4, 1994 (25th sitting). See also C. of E. P.A. Doc. 7154.

It urged all heads of state and all parliaments in whose countries death sentences are passed to grant clemency to the convicted. 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 is held to the highest standard of compliance with contemporary human rights norms, including ratification of the *Protocol* and the incorporation of its terms as the fundamental law of the new republic.⁹⁷ The irony is that the agreement was negotiated in Ohio, a state that still retains the death penalty.

The Parliamentary Assembly (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.⁹⁸ An indication that the death penalty is far from a theoretical issue in Europe, it expressed shock that fifty-nine 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 re-introduce it under any circumstances. The recommendation also proposed establishing a control mechanism that would oblige states where the death penalty is still provided by law to set up a commission 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 scheduled an execution would be required to halt it for a period of six months from the time of notification of the Secretary General. 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. Finally, all states would be bound not to allow the

97. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina, art. II§2, Annex I, §7; General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6: Agreement on Human Rights, art. 1.

98. Recommendation 1246 (1994) on the abolition of capital punishment, October 4, 1994 (25th sitting).

extradition of any person to a country in which he or she risked being sentenced to death and subjected to the extreme conditions on *death row*.

The Committee of Ministers of the Council of Europe, in a January 1996, interim reply, indicated that the proposals of the Assembly were being examined. The Assembly adopted a new recommendation, on June 28, 1996, calling for the Committee of Ministers to follow up on the 1994 proposals without delay.⁹⁹ On June 28, 1996, the Assembly adopted a resolution reaffirming its opposition to the death penalty. 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 *The Protocol*. The resolution added:

[T]he 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 Assembly¹⁰⁰

Resolution 1097 (Resolution) was also an answer to reports that the Russian Federation and Ukraine, which had recently joined the Council of Europe, were not honoring their commitments. The Resolution condemned Ukraine for apparently violating its commitments to introduce a moratorium on executions of the death penalty upon its accession to the Council of Europe. As for Russia, the Assembly demanded that it respect its undertakings to stop all executions. The Resolution stated that further executions could imperil the continued membership of the two states in the Council of Europe. The Assembly extended its warning to Latvia, where apparently two executions have been carried out since it joined the Council of Europe. Amnesty International has reported that in 1996, Ukraine carried out 167 executions and Russia carried out 140 executions. This put 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.¹⁰¹ In order to advance the debate within Ukraine, the Assembly of the Council of Europe held a seminar on the abolition of the death penalty in Kiev, November 28-29, 1996, at which

99. Recommendation 1302 (1996).

100. Resolution 1097 (1996).

101. *The Death Penalty Worldwide: Developments in 1996*, Amnesty International, June 1997, AI Index: ACT 50/05/97.

international experts debated the issues with members of the Ukrainian judicial community.¹⁰²

Russia and the Ukraine have now signed the *Protocol*, on April 17, 1997 and May 5, 1997 respectively. These states must still ratify the instrument, although pursuant to the *Vienna Convention on the Law of Treaties*:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty¹⁰³

It appears that both the Russian Federation and the Ukraine have, in effect, respected the moratorium and that executions in those countries have stopped.¹⁰⁴ If they stay the course, it will be a compelling argument in support of those who argued that it was preferable for the Council to admit Russia and Ukraine as members despite their initial failure to meet the basic conditions of the organization, the Council would be in a better position to influence them to conform to its fundamental norms.

On October 11, 1997, at the Second Summit of the Council of Europe, the Heads of State or Government of the Council of Europe adopted a series of declarations, including one dealing with capital punishment. 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, including Romano Prodi of Italy, Jean-Claude Juncker of Luxembourg, Alfred Sant of Malta and Poul Nyrup Rasmussen of Denmark. 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."¹⁰⁵ The President of Latvia, Guntis Ulmanis, explained that a year earlier he had imposed a moratorium on

102. C. of E. Doc. AS/Jur (1996) 70-72.

103. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 18a, 1155 U.N.T.S. 331.

104. The Committee Against Torture recently urged Ukraine to make its moratorium on the death penalty permanent: U.N. Doc. HR/4326.

105. C. of E. Doc. SUM(97)PV1 prov., at 65.

executions and that it is still in force.¹⁰⁶ In the final Declaration of the Summit, the heads of state and government call for the universal abolition of the death penalty and insist on the maintenance, in the meantime, of existing moratoria on executions in Europe.

C. European Union

Death penalty issues have frequently been raised within the European Parliament, which has generated a number of resolutions over the years. A resolution in 1981 called for abolition of the death penalty in the European Community.¹⁰⁷ Following the coming into force of the *Protocol*, the European Parliament called upon member states to ratify that abolitionist instrument.¹⁰⁸ In 1989, the European Parliament adopted *The Declaration of Fundamental Rights and Freedoms*, which proclaims the abolition of the death penalty.¹⁰⁹ In 1990, the President of the European Parliament announced that he had forwarded a motion for a resolution on abolition of the death penalty in the United States.¹¹⁰ 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 whose legislation still provided for the death penalty in the case of exceptional crimes, namely Greece, Belgium, Italy, Spain, and the United Kingdom, to abolish it altogether. It also urged all member states that had not yet done so to ratify the *Protocol* as well as the *Second Optional Protocol to the International Covenant on Civil and Political Rights*. 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 provided were obtained. The resolution also stated that the European Parliament:

106. *Id.* at 28.

107. E.C. Doc. 1-20/80, March 13, 1980; E.C. Doc. 1-65/81; *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 116-129; the Irish extremist Ian Paisley spoke against the proposal, as did some Greek members. The Report was adopted on June 18, 1981: *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 225-228; E.C. Doc. A 2-167/85, Doc. B 2-220/85; *Official Journal of the European Communities, Debates of the European Parliament*, No. 2-334, Annex, pp. 300-303.

108. E.C. Doc. A2-0187/85; *Official Journal of the European Communities, Debates of the European Parliament*, C 36, February 17, 1986, at 214.

109. *Official Journal of the European Communities, Debates of the European Parliament*, Annex, No. 2-377, pp. 56-58, 74-79, 151-155; E.C. Doc. A 2-3/89.

110. E.C. Doc. B3-0605/89. See also E.C. Doc. B3-0682/90; E.C. Doc. B3-1915/90.

[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 C.S.C.E., in which the death penalty still exists (Bulgaria, United States of America, Commonwealth of Independent States, Yugoslavia, Lithuania, Estonia, Latvia, and Albania).¹¹¹

It urged the United Nations to adopt a “binding decision imposing a general moratorium on the death penalty.”¹¹² 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 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.¹¹³

In October 1997, the European Union adopted the *Treaty of Amsterdam*, which amends the various conventions concerning the body and its components. The instrument is completed with a series of declarations, the first of which concerns the death penalty. It states:

With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty. In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them.¹¹⁴

111. *Id.*

112. *Id.*

113. Conference on Yugoslavia, opinion No. 7, on International Recognition of the Republic of Slovenia by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1512, 1516 (1992).

114. *Treaty of Amsterdam* (visited February 21, 1998)
<http://ve.ev.int/Amsterdam/en/amstera/en.htm7>.

IV. EXTRADITION

Extradition has become an important indirect way in which international law promotes 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 will not be imposed. Such 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.¹¹⁵ These clauses have now become a form of international law *boilerplate* and are contained in model extradition treaties adopted within international organizations including the United Nations.¹¹⁶ Several important cases have been heard by courts in Europe and Canada concerning extradition to the United States. Extradition to the United States from Europe is now virtually contingent on such assurances, the result of the case law of the European Court of Human Rights, while in Canada the position is not nearly as clear.

The European Commission of Human Rights (Commission) 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. The United Kingdom was empowered to refuse Soering's extradition to the United States because of a provision in the extradition treaty between the two countries. This provision entitles either contracting party to insist upon an undertaking from the other that the death penalty would not be imposed. The text is drawn from Article 11 of the *European Convention on Extradition*. Although the death penalty is ostensibly

115. P. Leboucq, *Influence en matière d'extradition de la peine applicable dans le pays requérant*, (1911) J.D.I. 437; J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 AM. J. INT'L L. 298 (1924); *American Institute of International Law, Project No. 17*, 20 AM. J. INT'L L. Supp. 331 (1926); *Harvard Law School Draft Extradition Treaty*, 29 AM. J. INT'L L. 21, 228 (1935); GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 99-100 (1991); Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 28 CAN. Y.B. INT'L L. 117 (1990); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition*, 62 INT'L REV. PENAL L. 259 (1991); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191 (1992).

116. Model Treaty on Extradition, U.N. Doc. A/CONF.14/28/Rev.1, p. 68 (1990), art. 4; Inter-American Convention on Extradition, Feb. 25, 1981, art. 9, 20 I.L.M. 723 (1981); European Convention on Extradition, (1960) 359 U.N.T.S. 273, E.T.S. 24, art. 11. The Italian Constitutional Court has ruled that article 11 of the *European Convention on Extradition* does not codify a customary rule of international law: *Re Cuillier, Ciamborrani and Vallon*, (1988) 78 I.L.R. 93 (Constitutional Court, Italy).

permitted by article 2, section 1 of the *European Convention on Human Rights*, which subjects the right to life to limitations, the Commission considered that it might raise issues under article 3, which is the prohibition of inhuman and degrading treatment. 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 3.¹¹⁷ Implicitly, the Commission recognized that the *European Convention on Human Rights* might intervene to prevent extradition from a state party.

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.¹¹⁸ In a judgment issued on July 7, 1989,¹¹⁹ the European Court of Human Rights confirmed that circumstances relating to a death sentence could give rise to issues respecting the prohibition of inhuman and degrading treatment or punishment. It addressed four of them: length of detention prior to execution; conditions on death row; age and mental state of the applicant; and the competing extradition request from Germany.

The Court noted that a condemned prisoner could expect to spend six to eight years on death row before being executed. The Court agreed that this was "largely of the prisoner's own making," in that it was the

117. *Kirkwood v. United Kingdom* (App. No. 10308/83), (1985) 37 D.R. 158, at 184.

118. C. Warbrick, *Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering case*, 11 Mich. J Int'l L. 1073, (1989-90); Vincent Berger, *Jurisprudence de la Cour européenne des droits de l'homme* 12-13 (1994).

119. *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989). For scholarly comment on the *Soering* case, see: W. Ganshof VAN DER MEERSCH, *L'extradition et la Convention européenne des droits de l'homme. L'affaire Soering*, 1990 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 5; Frédéric Sudre, *Extradition et peine de mort - arrêt Soering de la Cour européenne des droits de l'homme du 7 juillet 1989*, 1990 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 103; Michael O'BOYLE, *Extradition and Expulsion under the European Convention on Human Rights, Reflections on the Soering Case*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW, ESSAYS IN HONOUR OF BRIAN WALSH 93 (James O'REILLY, ed., 1994); Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990); David L. Gappa, *European Court of Human Rights - Extradition - Inhuman or Degrading Treatment or Punishment, Soering Case*, 161 Eur.Ct.H.R. (Ser.A) 1989), 20 GA. J. INT'L & COMP. L. 463 (1990); H. Wattendorff, E. du Perron, *Human Rights v. Extradition: the Soering case*, 11 MICH. J. INT'L L. 845 (1990); J. Quigley, J. Shank, *Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?*, 30 VA. INT'L L.J. 251 (1989); Christine van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990); Susan Marks, *Yes, Virginia, Extradition May Breach the European Convention on Human Rights*, 49 CAMBRIDGE L. J. 194 (1990); Henri Labayle, *Droits de l'homme, traitement inhumain et peine capitale: Réflexions sur l'édification d'un ordre public européen en matière d'extradition par la Cour européenne des droits de l'homme*, 64 SEMAINE JURIDIQUE 3452 (1990); L.E. Pettiti, *Arrêt Soering c./Grande-Bretagne du 8 juillet 1989*, 1989 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 786.

result of systematic appellate review and various collateral attacks by means of *habeas corpus*. The Court said:

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However, well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.¹²⁰

The Court took note of the exceptionally severe regime in effect on death row, adding that it was "compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years."¹²¹ What the Court had described is often labeled the *death row phenomenon*.¹²² As

120. *Id.* §106.

121. *Id.* §107.

122. The issue of the *death row phenomenon* has been litigated before many domestic courts. For case law on the subject, see: *Sher Singh v. State of Punjab*, [1983] 2 S.C.R. 582, A.I.R. 1983 S.C. 465; *Rajendra Prasad v. State of Uttar Pradesh*, [1979] 3 S.C.R. 78, A.I.R. 1979 S.C. 915; *Chessman v. Dickson*, 275 F.2d 604, 608 (9th Cir. 1960); *Arsenault v. Commonwealth*, 353 Mass. 575, 233 N.E.2d 730 *rev'd*, 393 U.S. 5, 89 S. Ct. 35, 21 L. Ed. 2d 5 (1968); *People v. Anderson*, 6 Cal. 3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, 894 (1972), *cert. denied*, 406 U.S. 958, 92 S. Ct. 2060, 32 L. Ed. 2d 344 (1972); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D.Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir.1986), *cert. denied*, 485 U.S. 919, 108 S. Ct. 1091, 99 L. Ed. 2d 253, *reh'g denied*, 485 U.S. 1015, 108 S. Ct. 1491, 99 L. Ed. 2d 718 (1988); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995); *et al. v. Carter N.O. et al.*, [1968] 1 R.L.R. 136 (A.), 1968 (2) S.A. 445; *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe, et al.*, [1993] 4 S.A. 239 (Z.S.C.), [1993] 1 Z.L.R. 242 (S), 14 H.R.L.J. 323; *Abbott v. A.-G. of Trinidad and Tobago*, [1979] 1 W.L.R. 1342, 32 W.I.R. 347 (J.C.P.C.); *Riley v. Attorney-General of Jamaica*, [1983] 1 A.C. 719, 3 All. E.R. 469, 35 W.I.R. 279 (J.C.P.C.); *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 H.R.L.J. 338, 33 I.L.M. 364 (J.C.P.C.). On the *death row phenomenon* in general, see: STEPHEN M. GETTINGER, *SENTENCED TO DIE: THE PEOPLE, THE CRIMES AND THE CONTROVERSY* (1979); BRUCE JACKSON, DIANE CHRISTIAN, *DEATH ROW* (1980); J. Alexis, M. De Merieux, *Inordinately delayed hanging: Whether an inhuman punishment*, 29 J. INDIAN L. INSTITUTE 356 (1987); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 SOUTH AFRICAN J. HUM. RTS 183 (1989); J.L. Gallemore Jr., J.H. Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMERICAN J. PSYCHIATRY 167 (1972); Nancy Holland, *Death Row Conditions: Progression Toward Constitutional Protections*, 2 AKRON L. REV. 293 (1985); ROBERT JOHNSON, *CONDEMNED TO DIE, LIFE UNDER SENTENCE OF DEATH* (1981); HELEN PREJEAN, *DEAD MAN WALKING* (1993); WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* 96-156 (1996).

a result of the Court's decision, the United Kingdom sought and obtained more thorough assurances that the death penalty would not be imposed, as was noted by the Committee of Ministers of the Council of Europe on March 12, 1990.¹²³ Soering was subsequently extradited, tried, and sentenced to life imprisonment.¹²⁴

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, to the effect 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*, where the prosecutor had made clear an intention to seek the death penalty.¹²⁵ 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.¹²⁶

In *Cinar v. Turkey*, the applicant was sentenced to death in 1984, and the judgment was upheld on appeal in 1987. In 1991, the applicant was released on parole, pursuant to legislation that also declared that all death sentences were to be commuted. The Commission recalled that Article 3 of the *Convention* could not be interpreted as prohibiting the death penalty. Moreover, it held that a certain period of time between pronouncement of the sentence and its execution was inevitable. The Commission added that Article 3 would only be breached where an individual passed a very long time on death row, under extreme conditions, with the constant anxiety of execution. Thus, the Commission adopted a large view of *Soering* by not insisting upon the various extenuating factors, such as young age and mental instability, which had been referred to by the

123. Council of Europe, *Information Sheet No. 26*, Strasbourg, 1990, 116.

124. Richard B. Lillich, *The Soering case*, 85 AM. J. INT'L L. 128 (1991).

125. *Aylor-Davis v. France* (No. 22742/93), (1994) 76B D.R. 164.

126. *Dame Joy Davis-Aylor*, C.E., req. no 144590, 15/10/93, D. 1993, IR, 238; J.C.P. 1993, Actualités No. 43, [1993] *Revue française de droit administratif* 1166, conclusions C. Vigoreux.

Court.¹²⁷ Furthermore, the Commission concluded that in Turkey during the period Çinar was on death row, there was not actually any serious danger of his death sentence being carried out. Referring to the Court's judgment in *Soering*, which observed that the death penalty no longer existed in the states parties to the *Convention*, the Commission described the threat of execution as "illusory."¹²⁸

The Commission implied, in a decision issued in September 1994, that it might be prepared to go further and find the death penalty itself to be contrary to Article 3 of the *Convention*. That case involved an alleged deserter from the Syrian army, who was contesting his expulsion from Sweden. The Commission concluded that it was far more likely the applicant was a draft evader, a crime for which capital punishment did not apply. It stated: "Concerning his possible imprisonment for that offense, the Commission does not find such a penalty so severe as to raise an issue under Article 3 of the *Convention* even considering the general situation in Syrian prisons."¹²⁹ Interestingly, the Commission did not cite *Soering*, or state that in any case, expulsion to a country where the death penalty would be imposed would not *per se* violate the *Convention*, which authorized capital punishment in Article 2. Was the Commission suggesting it may be prepared to find extradition to a state where the death penalty might be imposed, irrespective of whether it would be associated with the *death row phenomenon*, to be contrary to Article 3 of the *Convention*?

Still more recently, the Commission considered the case of Lei Ch'an Wa, who was threatened with extradition from Macao to China for trafficking in narcotics, which is a capital crime. 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. This was allowed by the Portuguese extradition legislation in force in Macao. Portugal's Constitution says that extradition is forbidden for crimes for which the death penalty is provided in the receiving state's legislation. 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. In the meantime, Lei had registered an application with the European Commission, which issued provisional measures pursuant to Article 36 of its *Regulations*. However, once the Constitutional Court had settled the matter, the problem was resolved, and the Commission decided

127. *Çinar v. Turkey* (App. No. 17864/91), (1994) 79A D.R. 5, at pp. 8-9.

128. *Id.* at 9.

129. (App. No. 22408/93), (1994) 79A D.R. 85, at p. 96.

that it was unnecessary to further examine the application.¹³⁰ 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. The commission also noted the fact that the two accomplices had been sentenced to nine years, concluding 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."¹³¹

The *Protocol* 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 the *Protocol* establishes a European *ordre public* that prohibits extradition in capital cases.¹³² The Supreme Court of the Netherlands took a similar view. The court invoked the *Protocol* in refusing to return a United States serviceman,¹³³ although required to do so by the *N.A.T.O. Status of Forces Agreement*.¹³⁴ The Court also considered the *European Convention* and the *Protocol* took precedence over the other treaty.

In 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. The court refused despite assurances from American prosecutors that the death penalty would not be sought or imposed. Venezia's extradition to Dade County, Florida had been requested by the United States, pursuant to the Treaty of Extradition, dated October 13, 1983. Article IX of the treaty entitles Italy to request that

130. *Lei Ch'an Wa v. Portugal* (App. No. 25410/94), unreported decision of November 27, 1995. See also: *Yenng Yuk Lennng v. Portugal* (App. No. 24464/94), unreported decision of November 27, 1995; *Cheong Meng v. Portugal* (App. No. 25862/94), (1995) 83-A D.R. 88.

131. *Raidl v. Austria* (App. no. 25342/94), (1995) 82-A D.R. 134, at 145.

132. *Fidan*, (1987) II *Receuil Dalloz-Sirey* 305 (Conseil d'État); Gacem, (1988) I *Semaine juridique* IV-86 (Conseil d'État). *Fidan* was cited by Judge De Meyer in his concurring opinion in *Soering v. United Kingdom*, *supra* note 119, at 51.

133. *Short v. Netherlands*, (1990) 76 *Rechtspraak van de Week* 358, (1990) 29 I.L.M. 1378.

134. *Agreement Between the Parties to the 1949 North Atlantic Treaty Regarding the Status of Their Forces*, (1951) 199 U.N.T.S. 67. Note that on June 19, 1995 the States parties to the NATO treaty finalized the *Agreement among the State Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces* together with an *Additional Protocol*. Article 1 of the *Additional Protocol* states:

Insofar as it has jurisdiction according to the provisions of the agreement, each State party to the present additional protocol shall not carry out a death sentence with regard to any member of a force and its civilian component, and their dependents from any other state party to the present additional protocol.

extradition be conditional upon an undertaking by the United States that the death penalty not be imposed. The United States government gave assurances in the form of a *note verbale* on July 28, 1994, August 24, 1995 and January 12, 1996. However, this was not enough for the Constitutional Court.

According to the judgment of the Constitutional Court, "the prohibition of capital punishment is of special importance — like all sentences which violate humanitarian principles — in the first part of the Constitution." The right to life is the first of the inviolable human rights enshrined in Article 2. The judgment continues: "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." The Court notes that it has already stated that the participation of Italy in punishments which cannot be imposed within Italy in peacetime constitutes a breach of the Constitution.

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

Such a solution has the advantage of providing a flexible solution for the requested State, and allows for policy to be developed over time based on considerations of criminal law policy; but in our system, where the prohibition of the death penalty is enshrined in the Constitution, the formula of 'sufficient assurances' — for the purpose of granting extradition for crimes for which the death penalty is provided in the legislation of the requesting State — is not admissible from the standpoint of the Constitution. The prohibition set out in paragraph 4 of article 27 of the Constitution and the values that it expresses — foremost among them being life itself — impose an absolute guarantee.¹³⁵

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. It also declared that the portion of Law 225 of March 26, 1984, implementing article IX of the extradition treaty, was unconstitutional. It noted, however, that Italian law allowed for Venezia to be prosecuted by Italian courts for crimes

135. *Id.*

committed abroad.¹³⁶ 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.¹³⁷

Canadian courts have been reluctant to follow the European precedents, 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*,¹³⁸ 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. 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.

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, for which the Revised Code of Washington, s. 10.95.030, provides a sentence of death. Canada abolished the death penalty in 1976 for common law crimes. Although the death penalty still exists under military law, it has not been imposed for more than fifty years. A current revision of the *National Defense Act* will probably eliminate capital punishment from the statute books altogether.

Justice Donald, writing for the majority of the Court, admitted that he could not refuse extradition on the basis of section 12 of the *Canadian Charter of Rights of Freedoms*,¹³⁹ 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*.¹⁴⁰ However, he concluded that because Burns and Rafay were

136. *Id.*

137. *Venezia v. Italy* (App. No. 29966/96), (1996) 87-A D.R. 140.

138. (1997) 116 C.C.C. (3d) 524 (B.C.C.A.).

139. R.S.C. 1985, Appendix II, No. 44.

140. *Kindler v. Canada*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 6 C.R.R. (2d) 193, 129 N.R. 81, 26 C.R. (4th) 1. On the *Kindler* decision, see: William A. Schabas, *Kindler v. Canada*, 87 AM. J. INT'L L. 128 (1993); Sharon A. Williams, *Extradition*

Canadian citizens, their extradition would violate section 6(1) of the *Charter*, which declares: "Every citizen of Canada has the right to enter, remain in and leave Canada."¹⁴¹

As Justice Donald noted correctly, section 6(1) is subject to the limitation clause of section 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,¹⁴² Canadian courts consider whether the legal rule that violates the *Charter* right has a legitimate purpose, and whether it constitutes a minimal infringement upon the right in question. The Supreme Court of Canada has already determined that extradition constitutes an acceptable limit on the right of Canadians to remain in Canada.¹⁴³ According to Justice Donald, execution of Burns and Rafay would clearly violate their right to return to Canada upon completion of their sentence, something that extradition for non-capital offenses would not. Given alternatives, specifically a sentence of life imprisonment, it was clear that extradition without an assurance 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.¹⁴⁴

Although bound by precedent of the Supreme Court of Canada that allows the extradition of non-citizens for capital offenses — caselaw that,

and the Death Penalty Exception in Canada: Resolving the Ng and Kindler Cases, 13 LOY. L.A. INT'L COMP. L. J. 799 (1991); Donald K. Piragoff, Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, (1992) 3 CRIM. L. F. 191; William A. Schabas, *Extradition et la peine de mort: le Canada renvoie deux fugitifs au couloir de la mort*, 4 REVUE UNIVERSELLE DES DROITS DE L'HOMME 65 (1992); William A. Schabas, *Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion*, 51 REVUE DU BARREAU 673 (1991).

141. Kindler, *supra* note 131.

142. See WILLIAM A. SCHABAS, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER, 2ND ED. (1996).

143. United States of America v. Cotroni, United States of America v. El Zein, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 96 N.R. 321, 42 C.R.R. 101, 23 Q.A.C. 182.

144. *Id.*

incidentally, has been criticized by other courts in other countries¹⁴⁵ — Justice Donald is clearly opposed to extradition for capital offenses in general. He writes:

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. . . . Abolition reflected the will of the majority and their concern for the sanctity of life and the dignity of the person.¹⁴⁶

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

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 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.¹⁴⁷

Justice Donald states that Article VI of the treaty "was drawn to accommodate the difference between nations so that the requested State could give effect to its policy of abolition."¹⁴⁸ What he did not note is that, ironically, Article VI was inserted in the Extradition Treaty in 1974 at the demand of the United States, which had then abolished the death penalty judicially.¹⁴⁹ This was at a time when Canadian law still allowed for capital punishment.¹⁵⁰ Article VI was designed to protect Americans and not

145. Pratt et al. v. Attorney General for Jamaica et al., [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 H.R.L.J. 338, 33 I.L.M. 364 (J.C.P.C.).

146. *Id.*

147. *Id.*

148. *Id.*

149. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

150. *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, 31 C.C.C. (2d) 177, 38 C.R.N.S. 139, 70 D.L.R. (3d) 324, [1976] 5 W.W.R. 711, 11 N.R. 386.

Canadians! Of course, since 1974 the United States has slid backwards¹⁵¹ while Canada has gone on to abolish the death penalty.

Burns 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 its discomfort with the death penalty, with six of the seven justices indicating that capital punishment, were it to be imposed in Canada, would violate the right to life and the prohibition of cruel and unusual punishment.

V. CONCLUSION

In his 1995 report to the Economic and Social Council,¹⁵² English criminologist Roger Hood concluded that "there has been a considerable shift towards the abolition of the death penalty both de jure and in practice" in the years 1989-1993.¹⁵³ After consulting other sources, Professor Hood observed that "it appears that since 1989 twenty-four countries have abolished capital punishment, twenty-two of them for all crimes in peacetime or in wartime."¹⁵⁴ Over the same period, the death penalty was reintroduced in four states.¹⁵⁵ 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."¹⁵⁶ Amnesty International issued revised figures in July 1997, which declared that ninety-nine States have abolished the death penalty in law or in practice, whereas ninety-four retain the death penalty. Amnesty adds that "the number of countries which actually execute prisoners in any one year is much smaller."¹⁵⁷

Despite many decades of virtual indifference to international human rights norms, and an unfortunate legacy of traditional isolationist sentiments within the country's political constituency, in recent years the United States of America has sought to ratify some of the major

151. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

152. Pursuant to E.S.C. Res. 1994/206.

153. "Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, Report of the Secretary-General," U.N. Doc. E/1995/78 (1995), §32.

154. *Id.* §33.

155. *Id.* §38.

156. *Id.* §87.

157. Facts and figures on the Death Penalty, Amnesty International, AI Index: ACT 50/08/97. For an even more optimistic assessment, see: THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 1997 (William A. Schabas, ed., 1997).

conventions and to play a role in treaty bodies, such as the Human Rights Committee.¹⁵⁸ President Jimmy Carter made an unsuccessful attempt to ratify four of the principal instruments, but the issue stagnated during the Reagan presidency.¹⁵⁹ President George Bush revived the matter and in 1988, the United States ratified the *Convention for the Prevention and Punishment of the Crime of Genocide*.¹⁶⁰ Four years later, instruments of accession were produced at United Nations headquarters for the *International Covenant on Civil and Political Rights*.¹⁶¹ These instruments were accompanied by a series of reservations, understandings and declarations, aimed in part at the international norms dealing with limitation and eventual abolition of the death penalty. In 1994, similar statements were made upon ratification of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.¹⁶² The American initiatives have been challenged by both its treaty partners and by the Human Rights Committee, notably on the issue of the death penalty.¹⁶³ Indeed, the debate has undoubtedly given grist to the mill of politicians who resent the entire international human rights system. The consequences are that efforts to ratify other human rights treaties have been stalled since early 1995. The issue of the death penalty stands as an impediment to further efforts by the United States of America to play a full role within international human rights institutions and treaty bodies. Given public opinion that is largely favorable to the death penalty and a political

158. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

159. U.S. Ratification of the Human Rights Treaties: With or Without Reservations? (Richard B. Lillich, ed., 1981).

160. 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

161. Hurst Hannum, Dana D. Fischer, U.S. Ratification of the International Covenants on Human Rights 1993; David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 Hum. Rts. L. J. 77 (1993); Ved Nanda, *The U.S. Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 Depaul L. Rev. 1311 (1993); M. Cherif Bassiouni, *Reflections on the Ratification by the United States of the International Covenant on Civil and Political Rights by the United States Senate*, 42 Depaul L. Rev. 1169 (1993); Aryeh Neier, *Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1233 (1993); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993); William A. Schabas, *Les réserves des États-Unis d'Amérique aux articles 6 et 7 du Pacte international relatif aux droits civils et politiques*, 6 REVUE UNIVERSELLE DES DROITS DE L'HOMME 137 (1994).

162. U.N. Doc. A/39/51, p. 197 (1984).

163. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995).

leadership that chooses to follow rather than lead its electorate,¹⁶⁴ international pressure may well prove to be of decisive significance in advancing the abolitionist agenda within the United States.

164. William J. Bowers, Margaret Vandiver, Patricia H. Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77 (1994).