

The United States, International Law, and the Death Penalty: Human Rights Hypocrisy

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Justice and Peace Studies Thesis
April 07, 2003

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“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world; whereas disregard and contempt for human rights have resulted in the barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”—U.N. Universal Declaration of Human Rights

In our global society, international law has increasingly played a significant role in diplomatic relations, especially since World War II. More importantly, human rights have become an integral part of international law in our modern world where such abuses are no longer acceptable in the evolving standards of decency that have emerged. In its unique position as the sole superpower left in the world and a permanent member of the UN Security Council, the U.S. is consistently considered a model for democracy around the world. Yet, although the U.S. continues to preach against the human rights violations of other countries, the U.S. actively retain the use of the death penalty. U.S. law does not consider the death penalty a human rights violation, though most countries around the world have now recognized not only its biased application but also its clear violation of the dignity of persons. The trend towards worldwide abolition is clear in the fact that the number of countries that have abolished the death penalty for ordinary crimes since 1986 has doubled from 46 to 91. Moreover, another 21 countries have stopped using the death penalty in practice, leaving only 83 countries that actively retain the death penalty as opposed to the 112 countries that have abolished it in practice.¹ Besides certain international organizations that have incorporated abolition as part of their constitutions, such as the powerful coalition of the European Union (EU), a number of treaties and norms that codify

¹ As of January 2003: <http://www.deathpenaltyinfo.org/article.php?did=140&scid=30>

international law either encourage or require abolition of capital punishment and specifically state the human rights standards under which it must operate.

International pressure has encouraged abolition in the U.S., and will likely continue to do so in the future with a number of human right treaties and conventions and UN resolutions. The European Union has made abolition of capital punishment a precondition for entry, resulting in almost the entire European continent embracing abolition. More importantly, the United Nations has increasingly favored an abolitionist view. Efforts to delegitimize the death penalty began with a General Assembly (GA) resolution in 1977 that affirmed the objective of restricting the number of offenses where the death penalty could be imposed, with a view towards abolition.² Similarly, in 1984, the GA passed a resolution listing provisions to establish safeguards where capital punishment continued to be carried out, specifically outlawing juvenile death sentencing, which the U.S. continues to practice. In addition, the UN Human Rights Commission has routinely passed its own resolution every year since 1997 calling for a worldwide moratorium and ultimately abolition. For the first time since the commission's establishment, the United States failed to receive enough votes to retain its seat on the 53-member body in 2001. Although a number of explanations have been discussed as to the reasons behind the exclusion of the U.S., including its enormous debt to the UN, it cannot be denied that abolitionist are not pleased to see the world's fourth leading executioner as a leader on an international organization overseeing worldwide human rights standards. In this paper I will demonstrate that the growing international consensus increasingly views the death penalty as a human rights violation. The customs, treaties, and general principles that compose international law have created a trajectory of international law moving towards prohibition of the death penalty and against the U.S. position. A consequence of this development is friction between the U.S. and abolitionist

² Kronenwetter 95

countries, and between international and U.S. domestic courts. Chapter 1 will explore the treaties and conventions that formally compose existing international law prohibiting the death penalty; Chapter 2 will discuss customary international law, with evidence from bi-lateral and multi-lateral agreements, court decisions, and extradition cases; Chapter 3 will highlight various judicial, legislative, and political decisions that demonstrate a clear move towards abolition around the world, and in some areas, in the United States.

Chapter 1- International Treaties and Conventions

Under Article 38 of the Statute of the International Court of Justice (ICJ), the sources of international law are defined as including: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. In this chapter I will explore the first source of international law, conventions which focus on abolition of or prohibition of certain aspects of the death penalty and the role of the U.S. in their implementation. Further, I will discuss regional agreements of the European Union and the Organization of American States concerning the death penalty, and the responsibilities of their member states under these treaties and conventions.

I. Conventions

International human rights law can be classified into three generations: (1) civil and political rights, (2) economic, social, and cultural rights, and (3) solidarity rights.³ Both adopted by the U.N. in 1966, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (ICCPR), laid out the specific rights states must provide to all their people. Solidarity rights recognize that the state is unable to solve certain problems that stretch across the globe, and sets out universal rights for all states to respect. Such rights may include a right to peace, development, a healthy environment, and humanitarian disaster assistance. Subsystems of human rights law include bi-lateral and multi-

³ Joyner, Christopher. Lecture in GOVT 403 International Law, 10/16/02, Georgetown University.

lateral human rights agreements between states and among states party to a number of international organizations.

Consisting of both bi-lateral and multi-lateral agreements, treaties and conventions regulate state behavior through codified rules and norms. Besides providing constitutional charters for the creation of international organizations, treaties address an array of concerns in international relations, from economic to military issues. Moreover, they are legally binding once they enter into force, after having been ratified by the requisite number of states.

The UN Charter provides the base for a number of Charter-based bodies in the area of international human rights law, including: the Security Council, General Assembly, Economic and Social Council (ECOSOC), Commission on Human Rights (CHR), Sub-Commission on the Promotion and Protection of Human Rights, Commission on the Status of Women, and the Commission on Crime Prevention and Criminal Justice. Article 55 of the Charter commits all members to promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions to international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁴ According to Article 102 of the UN Charter, all treaties must be registered with the UN Secretariat if ever to be used before UN organs. The ICJ and the Security Council serve as the dispute mechanisms for states within the United Nations.

In addition to the provisions within each specific treaty, a broader set of procedural rules for treaties are codified within the Vienna Convention on the Law of Treaties. The formal agreements achieved by treaties promote cooperation between states, and increase the quality and flow of information. Treaties can also establish mechanisms to mediate potential disputes,

⁴ UN Charter Article 55 http://afronet.org.za/directory/UN_charter.htm

and can provide formal sanctions for rule violations.⁵ Before a state is bound by treaty obligations, the state must accept its obligation voluntarily and may not be bound to treaty obligations without their consent. However, the real source of the treaty obligation is the fundamental international law norm of *pactus sunt servanda*, where a state that becomes a party to a treaty is bound to carry out the duties established by that treaty.⁶ This norm is binding on all states in all their treaty relations regardless of whether or not they currently consent to it.⁷

With almost universal endorsement, the International Covenant on Civil and Political Rights is considered one of the most important human rights treaties and the basis of customary international human rights law, with 148 nations as parties. Adopted by the UN General Assembly in 1966, Article 6 of the treaty protects each individual's inherent right to life by law, and argues that this right should never be arbitrarily deprived. It goes on to prohibit capital punishment for crimes committed by persons below eighteen years of age and pregnant women. It promotes abolition and stipulates that countries that have not yet abolished the death penalty should only impose the sentence for the most serious of offenses. Article 7 of the treaty prohibits cruel, unusual, and degrading treatment, which is often linked to capital punishment when discussing means of execution or death row phenomenon, because of the lengthy stay of prisoners on death row.

A. The Debate on the Validity U.S. Reservations to the ICCPR

The U.S. finally signed and ratified the ICCPR in 1992, but with the reservations to two Articles. In their broad reservation to Article 6, the U.S. reserved the right to impose capital

⁵ Aceves, William J. "Institutionalist Theory and International Legal Scholarship." The American University Journal of International Law & Policy. 1997 p.10

⁶ Charney, Jonathon. "Universal International Law." The American Journal of International Law. October, 1993. p. 3

⁷ Ibid.

punishment on any person other than a pregnant woman duly convicted under the law, including allowing juvenile offenders to face the death penalty.⁸ The U.S. was the only country with a reservation to Article 7, prohibiting cruel and unusual punishment, thus allowing it to impose any kind of inhumane method of execution allowed under its own Constitution, without running afoul of its obligations under the Covenant.⁹ In a highly unusual act, eleven countries have formally protested the U.S.'s reservations, as contradicting the "object and purpose" of the treaty, which would render the treaty invalid under the Law of Treaties established by Article 19 of the Vienna Convention.¹⁰ Among the U.S.'s closest allies, these nations included France, Sweden, Belgium, Denmark, Finland, Germany, Italy, Netherlands, Norway, Portugal, and Spain. Moreover, the U.S. reservation is also invalidated by the nonderogation clause in Article 4(2) of the ICCPR. Article 4(2) prohibits derogation from Article 6 during time of emergency, indicating the drafters' intention that state parties may not derogate from the provision.¹¹ Since the ICCPR specifically denies nations the ability to remove themselves from the prohibition on the execution of children, the U.S. reservation is consequently invalid under international law. However, the reservation will remain in effect with the U.S. domestic jurisdiction until a state or federal court declares its invalidity or Congress withdraws it.

In an attempt to additionally limit individuals' rights under international human rights treaties, the U.S. Senate declared that provisions of Articles 1-27 of the ICCPR as non-self-executing. Thus, they have no legal force in U.S. domestic courts. In contrast, a self-executing treaty provision does not require domestic legislation authorizing a litigant to enforce the treaty

⁸ http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm Reservation 2

⁹ Schabas, William. "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?" *Brooklyn Journal of International Law*, 1995. p. 4

¹⁰ Dieter, Richard C. "International Perspectives on the Death Penalty: A Costly Isolation for the U.S." October 1999 <http://www.deathpenaltyinfo.org/article.php?scid=45&dd=536#efforts> p. 17

¹¹ "International Law and Juvenile Death Penalty." February 2001, <http://www.scaec.org/international.htm> p.2

rights through domestic courts.¹² However, scholars have argued that the ICCPR is still binding upon state courts because of the invalid reservation, and because the Senate's declarations that treaty provision are non-self-executing are incompatible with state judges' obligations under the Supremacy Clause.¹³ This clause provides that treaties made under the authority of the U.S. are the supreme law of the land, as stated under the U.S. Constitution. As long as treaty provisions do not conflict with the federal Constitution, they are equal in status to congressional legislation.¹⁴ According to Jordan Paust, Law Foundation Professor at University of Houston Law Center, even if certain portions of human rights treaties are legitimately non-self-executing, "the treaties should still trump inconsistent state law under the Supremacy Clause of the United States Constitution and the doctrine of federal preemption."¹⁵ Moreover, if Article 50 is read literally, it declares: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."¹⁶ Then regardless of reservations or declarations, states must abide by the terms of the treaty, and the non-self-executing declaration only applies to Articles 1 through 27. Additionally, even if the ICCPR is a non-self-executing treaty, individuals are only prevented from using the treaty as affirmative grounds for private cause of action, not from invoking treaty rights defensively in criminal proceedings.¹⁷ Yet, the legal significance of an invalid reservation is unclear. If the invalid reservation cannot be separated from the remaining treaty, the United States is no longer a party, but the objecting states do not

¹² Ibid. p. 5

¹³ Ibid p. 6

¹⁴ Ibid p.6

¹⁵ Levesque, Christian. "Comment: The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty In Federal Courts." American University Law Review, February 2001.

p. 8

¹⁶ Ibid.

¹⁷ Ibid p. 6

view the reservation as an obstacle to their obligations under the treaty between them and the U.S.¹⁸

B. Second Optional Protocol to the ICCPR

The U.S. reservations to the ICCPR in order to protect capital punishment is a stark contrast to the Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty, which entered into force in July 1991 and has been ratified by 49 states. Article 1 of the Second Protocol binds the states that are parties to it not to carry out execution and to abolish the death penalty.¹⁹ However, Article 7 of the Protocol does permit reservation of the application of the death penalty in time of war, pursuant to a conviction for the most serious military crime committed during wartime. Spain, Malta, Azerbaijan, Greece and Cyprus were the only states to have requested reservations to the treaty, which both Spain and Malta have since withdrawn.

C. Geneva Conventions

Passed in 1949, the four Geneva Conventions are another universally accepted set of conventions that include provisions limiting the use of capital punishment. Designed to make armed conflict occur in a more humane way, the Geneva Conventions were introduced following the atrocities committed during World War II, the main catalytic force being the treatment of German POW's by the Soviets. The four Conventions cover Treatment of Soldiers in the Field, Sailors and Shipwrecked Persons at Sea, Prisoners of War, and Occupation of Territories and Treatment of Civilians. According to the third Convention, prisoners of war are subject to the laws, regulations, and orders in force in the armed forces of the detaining power. Thus, if the

¹⁸ Ibid note 181

¹⁹ Cokley, Michael A. "Whatever Happened to That Old Saying: "Thou Shall not Kill?": A Plea for the Abolition of the Death Penalty." Loyola University New Orleans School of Law, Spring 2001. p.20

death penalty is in force in the laws of the detaining power, then a prisoner of war may be exposed to the threat of capital punishment for behavior not qualified as a lawful act of war.²⁰ Civilians, however, receive a higher level of protection under the fourth Convention, it prohibits an occupying power from imposing the death penalty if it has been abolished under the laws of the occupied State prior to the commencing of hostilities. The Convention also includes provisions that limit the nature of capital crimes, prohibit the execution of persons for crimes committed while less than eighteen years of age, and establish a six-month moratorium on an execution after the sentence has been given. The U.S. has both signed and ratified these Conventions but with a reservation to the Fourth Geneva Convention preserving the right of the U.S. to impose the death penalty without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time of the occupation begins.²¹ In 1997, two additional protocols were added to the 1949 Geneva Conventions. Protocol I Relating to the Protection of Victims of International Armed Conflict includes two provisions, which address the death penalty. One prohibits the death penalty for pregnant women or mothers having dependent infants for an offense related to armed conflict. The second protects prisoners of war who committed crimes while under the age of eighteen from execution. Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts protects mothers of young children and juveniles under eighteen from execution.

D. UN Convention Against Torture

Another instrument that may yield pressure on retentionist countries in the future is the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or

²⁰ Schabas, William A. The Abolition of the Death Penalty in International Law. p.212

²¹ Weissbrodt, David and Fitzpatrick, Joan. International Human Rights: Law, Policy, and Process. p. 675

Punishment. Article 3 of the Convention, which entered into force in 1987, states “no state shall expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²² Though the Convention attempts to narrow the definition of torture, interpretation as to which human rights violations constitute torture remains the decision of individual states. If a state that is party to the Convention were to decide that the death penalty itself, death penalty procedures, or death row conditions in the U.S. constitute torture, they would have grounds to refuse extradition.²³ Moreover, the Convention applies the same reasoning to cruel, inhuman, or degrading punishments, which some international and national courts have already declared to be characteristic of the application of capital punishment. However, in its reservation to Article 16 of the Convention, the U.S. considered itself bound “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means that cruel, unusual and inhumane treatment or punishment prohibited by the Constitution of the United States.”²⁴

E. International Criminal Tribunals

Further undermining the U.S. position, several recent conventions providing for international judiciary bodies are prohibiting capital punishment even for the most heinous offenses. Established in 1993 the International Criminal Tribunal on the Former Yugoslavia (ICTY) was designed as an ad hoc international tribunal to prosecute persons responsible for crimes against humanity and war crimes since 1991. These trials represent the first international war crimes tribunal since the Nuremberg Trials following WWII. Yet both the ICTY and

²² <http://www.hrweb.org/legal/cat.html>

²³ Shank, S. Adele and Quigley, John. “Strangers in Strange Lands: Extradition from Foreign Jurisdiction in Capital Cases.” *Capital Punishment: Litigating Capital Cases*, Vol. 3. p.35

²⁴ Amnesty International, A Briefing for the UN Committee Against Torture. <http://www.amnesty.org/ailib/aipub/2000/SUM/25105600.htm>

Criminal Tribunal on Rwanda prohibit the death penalty as a punishment for even the most heinous war crimes. This exclusion of the death penalty was affirmed in the Rome Statute, signed in December 1998, providing for the establishment of the International Criminal Court (ICC). Entering into force in July 2000, the Rome Statute provides the permanent ICC with jurisdiction over individuals who commit genocide, crimes against humanity, and war crimes. While the U.S. had initially signed but not ratified this internationally accepted document that excludes the death penalty for all crimes within its jurisdiction, President Bush has since withdrawn the signature of the U.S. on the Rome Statute.

II. Regional Agreements

In addition to the number of abolitionist countries to include prohibition of the death penalty in their national laws, two regional systems, the European Union (EU) and the Organization of American States (OAS), have conventions abolishing the death penalty. Under the regional system considered to be most highly advanced in abolition of the death penalty, the EU's Protocol No.6 to the European Convention on Human Rights calls for abolition of the death penalty and requires abolition by its member states, in both times of war and peace. Established by members of the Council of Europe and passed in 1983, Protocol 6 was years ahead its counterparts in the United Nations and the OAS.²⁵ Entered into force in 1988 and ratified by forty-one States as of May 2001, the European Convention clearly laid out that everyone's right to life must be protected by law, but did initially allow capital punishment. Protocol 6 to the Convention was drafted to promote abolition of the death penalty in peacetime and to refuse extradition to States on other continents where capital punishment still exists. Article 1 of the Protocol establishes three principles: the death penalty shall be abolished, no one may be

²⁵ <http://conventions.coe.int/treaty/en/Treaties/Html/114.htm>

condemned to death, and no one may be executed. Article 2 prohibits execution even in the case of an individual condemned to death prior to the entry into force of the Protocol, but also sets out the exception that a State may make provision in its law for the death penalty in respect to acts committed in time of war or in imminent threat of war.

The first legal instrument to provide the European Union with a mandate to promote abolition was the Amsterdam Treaty, which entered into force in May 1999. Quickly following was the Charter of Fundamental Rights of the European Union, adopted in December 2000. Article 2 of the Charter explicitly declares that everyone has the right to life, and no one shall be condemned to the death penalty or executed. All countries seeking to join the EU must first abolish the death penalty before they are allowed to be considered for membership, which includes fifteen countries. In fact, the last execution in the European Union occurred in France in 1977. In 2001, the Council of Europe threatened to revoke the U.S.'s observer status unless it took action on the death penalty.²⁶ In February 2002, the Council of Europe's Committee of Ministers adopted Protocol 13 to the European Convention on Human Rights, the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions. When it opened for signature in May 2002, 36 countries signed it.²⁷

In June 1998, the EU adopted the "Guidelines to EU Policy Towards Third Countries on the Death Penalty," calling for members to work towards universal abolition. Where the death penalty still exists, the Guidelines asks members to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards. In 2000, the EU delivered a memorandum to the U.S, explicitly calling the U.S. to establish a moratorium on the use of the death penalty, and providing a guide for alternative solutions. The EU expressed its particular

²⁶ Dieter, Richard C. p.7

²⁷ http://www.amnestyusa.org/abolish/international_h_r_standards.html

concern about the offenders under the age of 18 at the time of the crimes, suffered from mental disorders, or were in fact innocent and unable to prove their innocence due to evident lack of adequate legal assistance.²⁸ The EU additionally asked the U.S. to withdraw their reservation to the ICCPR, to ratify the Convention on the Rights of the Child, and to respect the rights guaranteed under the Vienna Convention. In the U.S. alone, the EU has protested the death sentences of individual prisoners by writing to governors and other officials in Arizona, Illinois, Georgia, Nevada, New Hampshire, Missouri, Ohio, Oklahoma, Tennessee, Texas, and Virginia. The EU has also intervened in proceedings in U.S. Supreme Court as an *amicus curiae*, supporting the appeal of Ernest Paul McCarver in arguing that executions of the mentally disabled is contrary to international law.²⁹ The European Parliament has denounced the death sentences imposed in the U.S. upon Joaquin Jose Martinez, Mumia Abu Jamal, Larry Robinson, Derek Rocco Barnabei and Juan Raul Garza. In July 1999, the European Parliament called upon Turkey to commute the death sentence imposed upon Abdullah Ocalan, noting that the execution could impede Turkey's admission into the EU.³⁰ Even more recently, a European Court ruling in March 2003 found that Turkey's imposition of the death penalty on Abdullah Ocalan violated the European Convention on Human Rights' ban on cruel and degrading treatment. Turkey had signed Protocol No. 6 in January 2003, prohibiting capital punishment in peacetime. The Court held that capital sentences are now regarded as "an unacceptable form of punishment" which can "no longer be seen as having any legitimate place in a democratic society."³¹ Turkey's parliament began its move towards abolishing the death penalty in August 2002 in order to

²⁸ <http://www.eurunion.org/legislat/DeathPenalty/Demarche.htm>

²⁹ Schabas, William. p. 320

³⁰ Ibid. p.308

³¹ <http://www.deathpenaltyinfo.org/article.php?scid=2&did=533>

increase its chances of joining the EU, with legislation to replace the death penalty with life in prison without parole, although capital punishment will remain on the books in times of war.³²

As a leading member of the OAS, the U.S. has committed to helping the OAS be “the most effective instrument of hemispheric cooperation possible.”³³ Under the OAS, the Inter-American Commission on Human Rights has played a crucial role in promoting human rights in the Western Hemisphere - from its efforts to end political disappearances in South America during the era of military dictatorships, to urging the release of political prisoners in Cuba, to documenting human rights abuses committed by the Fujimori government in Peru. Relating to the status of capital punishment, the OAS has introduced three important documents.

Adopted in 1948, the American Declaration of the Rights and Duties of Man was originally intended as a non-binding resolution, but amendments in 1967 to the Charter of the OAS made the Declaration mandatory. Member States are now legally bound to respect the provisions of the Declaration, including Article 1, which states that “every human being has the right to life, liberty and the security of his person.” In a series of decisions, the Commission has developed an interpretation of Article 1 of the Declaration whereby it has an inherent content focused against the death penalty but does not directly prohibit it. “Inherent in the construction of Article I, is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes guarantees contained in its Constitution, and its international obligations, including those rights and freedoms enshrined in the American Declaration.”³⁴

However, the U.S. continues to insist that the Declaration is a non-binding instrument, and

³² Ibid.

³³ “New U.S. Envoy to OAS Says Organization Must Promote Maximum Hemispheric Cooperation.” <http://www.oas.org/OASpage/press2002/en/Press98/011298ae.htm>

³⁴ *Andrews v. United States*, para. 177.

regularly defies precautionary measures request from the Inter-American Commission in cases involving application of capital punishment.³⁵

Entering into force in 1978, the American Convention on Human Rights has been signed by twenty-five states in the western hemisphere that compose the OAS. Article 4 of the Convention mirrors the text of the ICCPR, only allowing the death penalty “in those countries where capital punishment exists” for “the most serious of crimes.”³⁶ Additional limitations listed in the Convention include a prohibition on extension of the death penalty to crimes to which it does not apply at the time of treaty ratification, no reestablishment once the death penalty has been abolished, prohibition for political offenses; and prohibition of the penalty's application to persons under eighteen or over seventy at the time the crime was committed, and pregnant women. The U.S. signed the Convention in 1977, but has not yet ratified it. Because of non-ratification, the United States cannot submit to the jurisdiction of the Inter-American Court of Human Rights, which hears cases referred to it by the Commission or by governments.³⁷

The American Convention on Human Rights added a protocol similar to the Second Optional Protocol of the ICCPR in 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. However, it does not require that states change their domestic legislation to expressly prohibit the death penalty, but that the States shall not apply the death penalty in their territory to any person subject to their jurisdiction.³⁸ Also, it does allow the application of the death penalty for the most serious cases of a military nature in wartime.

³⁵ Schabas, William. p. 315

³⁶ Ibid. p. 327

³⁷ Wilson, Richard J. “The United States’ Position on the death penalty in the Inter-American Human Rights System.” *Santa Clara Law Review*, 2002. 42 *Santa Clara L. Rev.* 1159 p.1

³⁸ Schabas, William. p. 352

Though adopted by the General Assembly of the Organization of American States in 1990, only 8 countries have ratified it thus far.³⁹

Though the U.S. prides itself on being a leading member of the OAS, it has shown clear disregard for the authority of the Inter-American Commission on Human Rights, established in 1960 to hear cases involving members of the OAS. In the 2001 case of *Garza v. United States*, the U.S. executed Juan Raul Garza despite a finding some weeks earlier by the Inter-American Commission that his execution would violate its obligations under the American Declaration. The Commission focused on the arbitrariness of the sentence, examining the practice whereby alleged crimes for which a person has never been convicted may be taken into account in the decision to impose a death sentence for another offense. In this case, four other murders that Garza was allegedly involved in were used as evidence, but they were committed in Mexico so the U.S. could not exercise jurisdiction. The Commission found that it was “prejudicial and improper” to consider the four unadjudicated murders in the sentencing phase, violating Mr. Garza’s rights under Articles I, XVIII, and XXVI of the American Declaration.⁴⁰ In addition, in 1987 the Inter-American Commission of Human Rights found that the U.S. violated the American Declaration of the Rights and Duties of Man by executing two men convicted of juvenile crimes in the case of *Roach and Pinkerton v. United States* (discussed further in section on juvenile offenders).

³⁹ http://www.unhchr.ch/html/menu3/b/a_opt2.htm

⁴⁰ Schabas, William. p. 323

Chapter 2- (General) Customary International Law

For the development of customary international law, two elements are required: (1) state practice must be consistent, evidenced by widespread, long-term compliance by many states; and (2) state practice must develop out of a sense of legal obligation. Known as *opinio juris*, the basis of international customary law stems from the assumption that states implicitly consent to the creation and application of international legal rules.⁴¹ Custom provides a means of regulating state behavior and promoting cooperation between states. Yet, because customary international law is not explicitly codified and it is not clear at what point state practice becomes customary international law, there may be problems regarding interpretation and the scope of obligations.⁴² Further, acceptance of custom may be established by acquiescence, which is often not tantamount to voluntary consent by states. However, only a widespread, rather than unanimous, acquiescence is needed to establish customary international law, which may occur in a short period of time.⁴³ Thus, the basis of customary international law is the notion that states in and by their international practice may implicitly consent to the creation and application of international legal rules.⁴⁴ A customary norm binds all governments, including those which have not recognized the norm, so long as they have not expressly and persistently objected to its development.

Apart from U.S. treaty obligations, international customary law can be considered an independent source of binding law. The importance of customary international law in the U.S. is evident in the case of *The Paquete Habana*, decided by the Supreme Court in 1900. In its decision the Court stated:

⁴¹ Aceves, William. p.11.

⁴² Ibid.

⁴³ Weissbrodt, David and Fitzpatrick, Joan. p.22

⁴⁴ Aceves, William. p.15

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁴⁵

However, the difficult nature of determining customary international law forces scholars to look at a variety of indicators of state practice and *opinio juris* including: international and domestic court decisions, national legislation, and statements of governmental leaders.⁴⁶

I. Evidence of Customary International Law

In this chapter I will look at UN General Assembly resolutions and those of its organs, extradition agreements, international court decisions, domestic court decisions of various countries, and how custom has evolved as a result of treaty obligations in order to meet the criteria of state practice consistently moving against the death penalty and the existence of an *opinio juris*, in order to prove capital punishment has increasingly become considered a violation of customary international law.

A. UN GA Resolutions

In the wake of World War II and the Holocaust, international human rights law was elevated into an integral facet of international law as a whole new set of rules that were codified in order to protect the individual from the state. Up until World War II, the prevalent belief among international lawyer was that other states had no business interfering with the respective state's citizens. In a monumental step, the UN General Assembly adopted the Universal

⁴⁵ *The Paquete Habana* 175 U.S. 677

⁴⁶ Arend, Anthony. Legal Rules and International Society. p. 48

Declaration of Human Rights in 1948 without a dissenting vote, though including several abstentions. Yet, the fact that the Universal Declaration of Human Rights was passed as a UN General Assembly resolution means that it is not legally binding. However, most human rights lawyers argue that the number of the provisions set out in the Universal Declaration of Human Rights have been adopted in the legal principles evident in customary international law. The Declaration is a pledge among nations to promote fundamental rights as the foundation of freedom, justice and peace in the world, proclaiming each person's right to protection from deprivation of life.⁴⁷ Moreover, according to the International Court of Justice, General Assembly resolutions may sometimes have normative value even if they are not binding. They can often provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.⁴⁸ Article 3 of the Declaration enshrines each person's right to life, in addition to the right to "liberty and security of the person."⁴⁹ While Article 3 appears to most people as neutral in its stance towards the death penalty, the fact that several important resolutions of the General Assembly and the Economic and Social Council dealing with the ultimate abolition of capital punishment cite Article 3 implies it is aimed towards eventual abolition of the death penalty.⁵⁰

Resolutions of charter-based bodies may be considered binding on their member states or recommendations that their member states are expected to follow. Yet all resolutions are used for the dual purpose of interpreting the general human rights obligations of member states and reflecting customary international law. Under the Charter of the United Nations, General Assembly resolutions are for the most part recommendations, except those that deal with such

⁴⁷ Cokley, Michael A. p. 20

⁴⁸ Schabas, William. p 23

⁴⁹ <http://www.un.org/overview/rights.html> Article III

⁵⁰ Schabas, William. p.43

issues as financial contributions, budgetary matters and internal housekeeping, which are binding.⁵¹ However, the legal consequences of resolutions can be one of the indicators of state practice, leading to customary international law and authority due to the binding nature of their respective Charter.⁵² In 1971, the U.N. General Assembly passed a resolution limiting the number of crimes for which capital punishment may be imposed, and reminding states of the desirability of full abolition. The first report on capital punishment by the U.N. Secretary General was presented to the Economic and Social Council, observing: “The United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed on, the issue of capital punishment favoring the eventual abolition of the death penalty.”⁵³ In order to clearly determine what constitutes summary and arbitrary executions, as opposed to legitimate executions, the Economic and Social Council passed a resolution adopted the “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty” in 1984. In essence, the safeguards emphasize the rights listed in Articles 6, 14, and 15 of the ICCPR, increasing the limitations for application of the death penalty. Foremost, Article 3 states “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.”⁵⁴ In 1988, the Economic and Social Council adopted a resolution promoting the implementation of the safeguards, and including provisions such as adequate assistance of counsel “going above and beyond the protection afforded in non-capital cases,” promoting that a maximum age should be established above which the death penalty could not be imposed, and most importantly, including an exemption for “persons suffering from mental

⁵¹ Ibid. p. 55

⁵² Ibid. p. 56

⁵³ Schabas, William. p. 163

⁵⁴ http://www.unhchr.ch/html/menu3/b/h_comp41.htm

retardation or extremely limited mental competence.⁵⁵ While not elevated to the status of treaties, the effect of the Safeguards and resolution is to codify the norms of articles 6 and 14 (judicial process requirements) of the ICCPR, to the status of customary international law.

B. UN Commission on Human Rights

Established in 1946 by the United Nations Economic and Social Council (ECOSOC), the 53-member Commission on Human Rights meets for six weeks on a yearly basis, and occasionally holds special sessions, to pass resolutions condemning human rights violations that have been codified in customary international law. In 1997, the United Nations Human Rights Commission passed its first resolution condemning capital punishment, with the United States being the only country in the Western Hemisphere to vote against that resolution.⁵⁶ Introduced by Italy, the resolution had 45 other co-sponsors and the final vote was 27 in favor, 11 against and 14 abstentions. The text of the resolution combined an unmistakable abolitionist goal but with a gradualist approach, calling upon all states to regulate and limit the application of the death penalty. The most recent resolution, resolution 2002/77 passed at the 2002 session, urged all States that still maintain the death penalty “not to impose it for crimes committed by persons below 18 years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence.”⁵⁷ Moreover, the resolution reminded all states to observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal

⁵⁵ UN Doc. E. 1989/91

⁵⁶ Cokley, Michael A. p.20

⁵⁷ <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/e93443efabf7a6c4c1256bab00500ef6?Opendocument>

procedure. The resolution placed international organizations above the States, asking States not to execute any person as long as any related legal procedure, at the international or at the national level, is pending. It calls upon states which no longer apply the death penalty but maintain it in their legislation to abolish it, and requests states that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out.

In 1982, the Commission on Human Rights recommended that the Economic and Social Council appoint a special rapporteur to submit a comprehensive report to the Commission at its thirty-ninth session on the occurrence and extent of the practice of summary or arbitrary executions, together with his conclusions and recommendations. This resolution was subsequently adopted by the Economic and Social Council as resolution 1982/35 and established the mandate of the Special Rapporteur. In 1992, the Council extended the mandate of the Special Rapporteur to include all extrajudicial, summary, and arbitrary executions. The Special Rapporteur conducts investigations, issues urgent appeals to governments in specific cases, sends letters, and may conduct on-site missions. Since her appointment in 1998, the current Special Rapporteur, Asma Jahangir, has visited and submitted reports on situations of concern in Mexico, East Timor, Nepal, Turkey, Honduras, the Former Yugoslav Republic of Macedonia and Albania in connection with the Kosovo conflict, the Democratic Republic of the Congo and, most recently, Afghanistan in October 2002.

II. Extradition Agreements and Court Decisions

Besides the international treaties, conventions, and courts designed to establish universal international criminal law, both multi-lateral and bi-lateral agreements exist to regulate the prosecution of foreign nationals outside their home country. The U.S.'s growing isolation on its active use of the death penalty has begun to result in some friction in its international relations, especially in the area of extradition of criminals. International extradition is the formal process in which one state surrenders to a second state an individual who stands accused or convicted of a crime committed within the territorial jurisdiction of the requesting state. Typically, states have bi-lateral treaties that impose certain legal obligations before extradition is permitted to occur, and the U.S. currently has extradition treaties with over 100 countries.⁵⁸ The Vienna Convention on Consular Relations is the primary multi-lateral treaty involving extradition procedures. Extradition treaties between the U.S. and abolitionist countries have traditionally included the option of the abolitionist state to require that capital punishment not be imposed before extradition could take place. However, the international legal principle of non-refoulement, which prohibits sending individuals to a country where there is a serious risk that they would be subject to violations of their fundamental human rights, has increasingly become directly associated with capital punishment. The continually exacerbated struggle over extradition of capital offenders between the U.S. and other countries provides clear evidence of the emerging worldwide trend of abolition. More countries are demanding on extradition treaties that prohibit a death penalty trial. Further, the fact that countries are bringing suit against the U.S. for violating Article 36 of the Vienna Convention on Consular relations is a reflection of the growing state practice willing to take a stand against the death penalty, especially when their own citizens are involved. International and national judicial decisions provide valuable

⁵⁸ Amnesty International. United States of America "No Return to Execution-The US death penalty as a barrier to execution." <http://web.amnesty.org/library/Index/engAMR511712001?OpenDocument>. p.3

evidence of customary international law, as they declare the existence of custom in the numerous cases brought before them. Thus, extradition treaties and court decisions are a good indication of evolving international consensus moving against the death penalty and in guaranteeing some safeguards having reached the status of customary international law.

With the growing number of states opposing the use of the death penalty, the *Soering v. Great Britain* case in 1989 gave rise to a significant number of extradition treaties renegotiated to prohibit capital punishment in all cases. Some states even include such a provision in the national constitution. For example, Australia's Extradition Act requires that surrender may only proceed if the Attorney General is satisfied by assurances that the death penalty will not be carried out, and in January 1998 the U.S. and Austria signed a new extradition where Austria insisted that a death sentence not be imposed.⁵⁹ Italy's Constitutional Court has gone so far as to prohibit the extradition of fugitives charged with a capital crime in retentionist countries, as in the 1996 case of Pietro Venezia.

The Vienna Convention on Consular Relations, a multilateral treaty which the U.S. has been a party to since 1969, along with at least 164 other countries, includes Article 36 requiring officials in all states who place foreign nationals under arrest to inform them of their right to confer with the consular officials of their home country. A self-executing treaty, the Convention is equivalent to an act of Congress, making it operable without the need for enabling legislation besides already being binding on all States party to it. Unfortunately, due to ignorance on the part of U.S. officials or a purposeful attempt to sidestep the law, there have been numerous cases of foreign nationals sentenced to death in the U.S. for capital crimes, without having been notified of their right to consular assistance. This failure has led to international disputes between the United States and abolitionist countries.

⁵⁹ Ibid. p. 4

The UN General Assembly convened the United Nations Conferences on Consular Relations in 1963 to establish and codify a uniform consular protocol. The resulting Convention included a provision to facilitate communication between detained individuals and their consulates, included in Article 36 of the Vienna Convention. The U.S. ratified the Vienna Convention on Consular Relations on December 24, 1969, a delay of over six years after signature because the U.S. did not believe the Convention went far enough to ensure proper standards for consular communication.⁶⁰ The Vienna Convention contains a built-in procedure for the adjudication of disputes arising from the Convention provisions. The United States is also party to the Optional Protocol Concerning the Compulsory Settlement of Disputes, which confers upon the ICJ compulsory jurisdiction over the interpretation of the treaty to the parties to the protocol.

Article 36 creates an individual right for a noncitizen in U.S. custody to receive consular assistance from his or her consulate that, when violated, often infringes upon constitutional protections. Observation of Article 36 does not create any special rights upon which the noncitizen defendant may call; its purpose is simply to give noncitizens equal access to their rights in a justice system of which they may have no prior knowledge. In assuring fair treatment of citizens abroad, when the law enforcement seizes an individual in the U.S., he is entitled to a presumption of innocence and a guarantee of the protection by the Constitution. Yet, violations of this Convention occur repeatedly in the U.S., denying fair treatment to noncitizens, especially in capital cases where access to mitigating evidence may be possible only through consular assistance.⁶¹

⁶⁰ Lehman, Daniel J. "The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access." Law and Inequality. Summer, 2002. p. 3

⁶¹ *Ibid.* p. 3

In the case of Angel Francisco Breard in April 1998, the Commonwealth of Virginia executed the Paraguayan national without adhering to his right to consular assistance. The Virginia court paid little heed to the joint *amicus curiae* briefs filed by Argentina, Brazil, Ecuador, and Mexico, outlining the repeated violations of the Vienna Convention by the U.S., and the necessary significance of consular assistance for foreign nationals. However, in this case Virginia went the extra step of flagrantly defying the ICJ in its historic ruling in favor of a “provisional measures” order, which required the U.S. to take all measures at its disposal to stop Breard’s execution pending full adjudication by the ICJ of the treaty violation itself.⁶² Created in 1945, the International Court of Justice was created to serve as the arbiter between two states or disputes arising from treaties that specifically providing for the ICJ to serve as arbiter. The ruling is believed to be the first time the ICJ has intervened to halt an execution, but the U.S. federal government and the Supreme Court both upheld Virginia’s right to proceed with the execution, and Breard was executed on schedule. The Supreme Court justified its decision in applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which aimed to speed up and reduce the cost of executions, dictated tighter filing deadlines, limited the opportunity for evidentiary hearings, and allowed only a single habeas corpus filing in federal court for death row inmates. The Act also included a provision that precludes federal habeas corpus review for claims that did not first arise in state court. Because Breard did not raise the issue in a state court proceeding, the Court found that the AEDPA precluded the claim for a stay of execution, as the AEDPA is an act of Congress that supercedes language in a prior enacted treaty inconsistent with the Act.⁶³ Yet, the failure of the defendant to raise an Article 36 claim in state proceedings stems from a lack of adequate legal advice from the defendant’s counsel,

⁶² Amnesty International p.2

⁶³ Lehman, Daniel J. p.4

which may have been improved if the defendant had been informed of their right to speak with their consulate. The Court also held that the state authorities' violation of consular notification provisions of the Vienna Convention did not permit Paraguay to bring suit in court. More importantly, the U.S. Supreme Court seemed to express indifference to the international legal system, showing no concern about the AEDPA's having violated international law or any reference to the rule that a treaty should not be regarded as overridden unless the congressional intent is plain. However, seven months after Breard's execution the U.S. issued a formal apology to Paraguay over the failure of U.S. authorities to notify Breard of his consular rights, noting this failure as "unquestionably a violation of an obligation owed to the Government of Paraguay."⁶⁴

Similar to the Breard case, in the 2001 case of *LaGrand v. U.S* Germany decided to use the ICJ as a vehicle to remedy the unfair imposition of capital sentences of two German brothers living in the United States. The ICJ's jurisdiction rested on the Vienna Convention's Optional Protocol granting the ICJ jurisdiction to settle disputes arising from interpretations of the Convention, mandating that an ICJ interpretation of the treaty is authoritative.⁶⁵ The ICJ found that the U.S. violated its treaty obligations to Germany in the case of Walter and Karl LaGrand, since they had been tried, convicted and sentenced to death in 1982, 10 years before the German government was even informed of their arrest. Even worse, the state of Arizona was aware of the fact that the LaGrands were German citizens by 1984 at the latest.⁶⁶ Despite efforts of the German government to prevent Karl LaGrand's, execution through diplomatic channels, and a following a provisional order from the ICJ, pending the opportunity for the ICJ to hear the case and indicating the U.S. to take all measures at its disposal to ensure that Walter LaGrand not be

⁶⁴ Coyne, Randall and Entzerth, Lyn. Capital Punishment and the Judicial Process. p. 980

⁶⁵ Lehman, Daniel J. p.4

⁶⁶ Ibid.

executed, both brothers were still executed by the state of Arizona as scheduled in February 1999. Though the U.S. conceded that it had failed to perform its obligations under Article 36, the U.S. pointed to the numerous efforts made to implement treaty obligations within law enforcement. The ICJ clearly disagreed, citing violations of both Paragraph 1 and 2 of the Vienna Convention. First, in Paragraph 1, the U.S. violated the rights of individuals to have access to their consulates and the rights of states to be notified when their nationals are in custody of another state. Next, the ICJ found that the U.S. violated Paragraph 2, which requires that the domestic laws of the state in custody of a foreign national reflect the rights contained in the Vienna Convention. By not allowing the LaGrand brothers to raise the violation of the Vienna Convention in their subsequent appeals, the domestic laws of the U.S. contradicted its international obligations under the Vienna Convention. By the time the LaGrands learned of their rights under the Convention, the doctrine of procedural default prevented an effective exercise of those rights. Finally, the ICJ provided for future action by holding that the U.S. courts can no longer dismiss a claim for violation of the Vienna Convention solely on the basis of a rule of procedural default, but instead must examine the merits of the claim, ensuring that the violation did not infringe upon the right of a foreign national to receive a fair trial. Both the LaGrand case and the Breard case illustrate a lack of concern for consular rights of foreign nationals in the U.S., but also jeopardize the consular rights of the many U.S. nationals living and working abroad, putting them in potential danger if they are arrested. More importantly, both cases illustrate carelessness by the U.S. for international rule of law on which human rights protections rely upon, and the ICJ, an institution whose decisions the U.S. has pledged to uphold.

Decided by the European Court of Human Rights, the Court held in *Soering v. Great Britain* that Great Britain could not extradite a Virginia murder defendant without first obtaining

assurance that the death penalty would not be sought. Soering had been accused of the 1985 murder of a Bedford County couple whose daughter he was dating, and caught a year later in London. After the Commonwealth's Attorney failed to guarantee that the death penalty would not be imposed, Soering filed a complaint with the European Commission on Human Rights, claiming the U.K. would violate the European Convention for the Protection of Human Rights and Fundamental Freedoms if they extradited him to Virginia. In his three-pronged defense, Soering argued that: (1) death row conditions at Virginia's Mecklenburg Correctional Center were "inhuman or degrading" in violation of Article 3 of the European Convention, (2) if convicted, Soering would not be afforded counsel at government expense in federal habeas corpus proceedings, (3) the U.K. courts had denied him due process because they had refused to consider the potential violations of his rights in Virginia.⁶⁷

The Court of Human Rights agreed solely with Soering's third argument, that surrendering Soering for trial on capital murder would violate Article 3 of the European Convention on Human Rights. The Court noted that although de facto the death penalty no longer existed in the contracting states, extradition of a person to a state where that person risked the death penalty did not in itself raise an issue for dispute. However, Soering argued that having to endure a very long period of time on death row would result in the inhuman and degrading treatment prohibited under Article 3. In its decision the Court found that the average time between trial and execution in Virginia was six to eight years; combined with Soering's age and mental state at the time of his offense extradition would thus result in a violation of Article 3.⁶⁸ Other unacceptable conditions noted by the court were the small cells, the limited time out of the cells, a lack of protection against assault by other inmates, quarterly lockdowns, and

⁶⁷ Shank and Quigley 26

⁶⁸ Kruger, Hans Christian. "Protocol No. 6 to the European Convention on Human Rights." The Death Penalty: Abolition in Europe. p.90

mental anguish caused by the fifteen day pre-execution procedure.⁶⁹ Finally, the Court focused on the possibility that Soering could be extradited to face charges in Germany, which eliminated the possibility that he might elude justice if not extradited to the U.S. The decision obliged the English government to extradite Mr. Soering only after obtaining a promise from the U.S. authorities that he would only be charged with first degree murder, an offense which did not carry the death sentence. The significance of the Soering decision lay in its explicit stance that the European Convention apply to all persons within the jurisdictions of the contracting parties, including subjects of extradition proceedings, regardless of whether the receiving State is also a party to the Convention.⁷⁰ With *Soering's* decision, the U.S. has been forced to negotiate with abolitionist countries for extradition, with a number of extradition cases decided when prosecutors have made assurances not to seek the death penalty. However, it may be possible that this case will be used to block extraditions in the future on the basis of inhumane prison conditions.

In a following case between France and the U.S. in 1994, *Joy Aylor Davis v. France*, the European Commission decided that extradition could proceed after the French government received firm assurances from both U.S. federal authorities and the prosecuting authorities of the state of Texas that the death penalty would not be sought in murder proceedings against the applicant. By eliminating that danger, the Court ruled that extradition should not expose her to a serious risk of treatment or punishment contrary to Article 3 or Protocol No.6, of which France was a party.⁷¹ In a similar case in 2001, a French court recommended that James Kopp, charged with the 1998 killing of a New York abortion doctor, be extradited to the U.S. only after

⁶⁹ Shank and Quigley. p.26

⁷⁰ Newcomer, Mary. "Arbitrariness and the Death Penalty in an International Context." December, 1995, Duke Law Journal. 45 Duke L.J. 611. p.5.

⁷¹ Kruger, Hans Christian. p.88.

receiving assurances that the U.S. government would not seek the death penalty. At the same time as the case was unfolding in France, French President Jacques Chirac, speaking at the 2001 Session of the Commission on Human Rights, called for the “universal abolition of the death penalty, with the first step being a general moratorium.”⁷² These cases have set a precedent that may be strengthened in the future, should the U.S. insist on the conditional extradition of a terrorist leader from a European nation, forcing the U.S. to confront the ever-growing divide between abolitionist and retentionist countries.

Neighbor and ally, Canada has a history of capital punishment that differs greatly from that of the United States. Removed from the Canadian Criminal Code in 1976 for all civilian offenses, the last execution had taken place fourteen years earlier, in 1962. In 1988 capital punishment was also removed from the Canadian National Defense Act, bringing Canadian military law in line with civil law. In 1996, the Canadian government attempted to halt the execution of Canadian citizen Joseph Faulder in Texas, in the case of *Faulder v. Johnson*. The Canadian government argued that Faulder had been denied his rights under the Vienna Convention, as he was not notified of his right to inform the Canadian consulate of his arrest and receive the assistance of the consulate. Thus, Canada claimed that this deprivation violated the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.⁷³

In a landmark decision by the Supreme Court of Canada in February 2001, the Court ruled unanimously in the case of *Minister of Justice v. Burns and Rafay* that except in exceptional (and unforeseen) circumstances, the federal government must not extradite fugitives to places that retain capital punishment without assurances that the death penalty will not be

⁷² Coyne and Entzeroth. p.939

⁷³ Ibid.

imposed, or if imposed not carried out.⁷⁴ The Court declared that the death penalty violated an individual's right as granted by Article 7 of the Canadian Charter of Rights and Freedoms to life, liberty and security of person. Under the extradition treaty between the U.S. and Canada, Canada is permitted to refuse extradition of fugitives unless provided with assurances that they will not suffer the death penalty. However, in this case the Minister declined to seek such assurances because of his policy that assurances should only be sought in exceptional circumstances, which did not exist in this case because in his opinion persons who are found to commit crimes in foreign countries forfeit the benefit of Canada's abolitionist policy.⁷⁵ The Court disagreed with the Minister in this case; in a complete reversal of two previous Canadian Supreme Court decisions, *Kindler v. Canada* and *Reference Re Ng Extradition*, where the court had held that extradition without assurances did not violate the Charter, the Court now agreed that the death penalty violated Canadians' sense of fundamental justice. In the 1999 decision of *Kindler and Ng*, a one-vote majority wrote that there was not cruel and unusual punishment in the part of Canada in these cases because the death penalty would be carried out by U.S. officials within the U.S. for a crime committed within the United States.⁷⁶ The UN Human Rights Committee also considered Canada's human rights obligations with respect to the Kindler and Ng extraditions and Canada's obligations under the ICCPR. The Committee denied Kindler's claim that the death penalty per se constituted cruel, inhuman, and degrading punishment under Article 7, in light of Article 6(2)'s express permission of the imposition of the death penalty for the most serious crimes, the lack of exceptional circumstances that would require Canada to insist on extradition with assurances, and that the death row phenomenon did not violate Article

⁷⁴ Ibid. p.970

⁷⁵ Ibid. p.959

⁷⁶ Newcomer, Mary. p.10.

7 of the Covenant.⁷⁷ However, the Committee agreed with Ng's argument that the "real risk" of violation existed in his probable execution by gas asphyxiation in California, which constituted cruel, inhuman, and degrading punishment contrary to the ICCPR.⁷⁸ Because of the agony that an individual endures during the gas asphyxiation procedure, which can last over ten minutes, the Committee found that execution by gas asphyxiation failed to meet the "least possible physical and mental suffering" standard set by the Committee's *General Comment on Article 7*, and thus violated Article 7 of the ICCPR (discussed further in the section on customary international law and the ICCPR).⁷⁹

In *Burns*, the Court noted the greater force of the international human rights movement against the death penalty, and Canada's sole position as the only state that had abolished the death penalty at home but continued to extradite without assurances.⁸⁰ Moreover, the Court elaborated on the growing awareness of the rate of wrongful convictions in murder cases since *Kindler and Ng*, and concerns about the death row phenomenon. Besides solidifying the Western democracies separation from the U.S. on this issue by joining the EU countries in requiring assurances before extradition in a capital case, in practice this case illustrated Canada's willingness to refuse to assist enforcement of a form of punishment Canada staunchly opposes, even in regards to its powerful neighbor.

Since the European countries have long since prohibited the death penalty, and refuse to extradite suspects to any country where they might face execution, the U.S. and Europe have consistently clashed over the means of dealing with some of the most wanted criminals in the U.S. Italy in particular has played a leading role in seeking the abolition of the death penalty in

⁷⁷ Newcomer, Mary. p. 9.

⁷⁸ Schabas, William. "The ICJ Ruling Against the United States: Is it Really About the Death Penalty?" *Journal of International Law*, Summer 2002. 27 *Yale J. Int'l.* 445. p1.

⁷⁹ *Ibid.*

⁸⁰ Stevens, Geoffrey. *Maclean's*. 03/05/2001, Vol. 114 Issue 10. p.4.

the international arena. In 1996, in the case of Pietro Venezia, the Italian Constitutional Court held that Italy could not extradite a person charged with a capital crime in the U.S., even with assurances that he would not receive the death penalty, thus declaring provisions of the U.S.-Italy Extradition Treaty to be in violation of the Italian Constitution. According to the judgment of the court, the prohibition of capital punishment is of special importance, like all sentences that violate humanitarian principles, in the first part of the Constitution. The right to life is the first of the inviolable human rights, enshrined in Article 2, and the court noted that it had already stated that the participation of Italy in punishments that cannot be imposed within Italy in peacetime constitutes a breach of the Constitution. The U.S. has yet to issue any protest in the aftermath of this decision, and in this case, seemed to be satisfied with the assurance that the accused would be prosecuted in Italy for the crime he committed in Florida.⁸¹ Other European countries would comply with extradition, but only after they have received assurances that the accused would not be subject to the death penalty. However, with the growing U.S. focus on terrorism, more obstacles have quickly become apparent. For example, the Spanish government told U.S. authorities it will not extradite any of the fourteen Al Qaeda suspects it is holding without a promise that they would be tried in civilian courts, not in military courts. In the case of Zacarias Moussaoui, the only person charged in an American court with involvement in the Sept. 11 attacks, Germany and the U.S. are disputing over Germany's failure to provide the U.S. with intelligence files on the terror suspect. Germany has urged the Bush administration to drop its plans to seek the death penalty, the only move that might lead Germany to share the files.⁸² Earlier in 2002, the French government warned the U.S. that it might end its cooperation in the investigation if the U.S. seeks the death penalty. In January 2002, the Council of Europe adopted

⁸¹ Bianchi, Andrea. "Venezia v. Ministero di Grazia E Giustizia. Judgement No.233.79 Rivista di Diritto Internazionale 815." American Journal of International Law. Volume 91, Issue 4 (Oct. 1997) p. 731

⁸² Shenon, Philip. "Germany Urges U.S. to Drop Death Penalty Plan." The New York Times. Oct. 25 2002

a resolution calling for all efforts to combat terrorism to comply fully with national and international law and to respect human rights. The Assembly called upon member states “to refuse the extradition of suspected terrorists if the death penalty is sought,” and hoped the International Criminal Court may soon have its competence extended to acts of terrorism.⁸³

Even with the existence of bi-lateral treaties, the U.S. has often gone to great measures to ensure its jurisdiction over criminals in regards to trying them where the death penalty can be employed as a sentence. In the case of *Alvarez-Machain v. United States* in 1990, a Mexican national was forcibly abducted from his home in Mexico by agents under the order of the U.S. Drug Enforcement Agency (DEA) for his alleged involvement in the murder of a DEA officer. The U.S. Supreme Court ruled that while his abduction may have violated general international law principles, it was not a violation of the extradition treaty between Mexico and the U.S. because it had not been invoked. However, in its decision to award damages to Alvarez-Machain in his civil lawsuit against the U.S. government in September 2001, the Ninth Circuit of Appeals stated that his abduction had been a violation of customary international human rights law because it violated his rights to freedom of movement, to remain in his country, to security of his person, as well as the right to freedom from arbitrary detention.⁸⁴

The most evident friction between the United States and an abolitionist country has been clear in Mexico’s continual protest over execution of its nationals. In January 2003, Mexico filed a complaint against the United States in the ICJ charging that American officials have violated the rights of all 54 Mexicans currently on death row in the U.S. and asking that their sentences be commuted to life in prison. The complaint focused primarily on the failure of the U.S. to consistently fail to provide Mexican nationals facing capital punishment access to

⁸³ “Fight Against terrorism: no extraditions if the death penalty is sought.” COE press releases [www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Death_penalty/e_CP042\(02\).asp](http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Death_penalty/e_CP042(02).asp)

⁸⁴ Amnesty International. p.9

consular assistance, a direct violation of the Vienna Convention. In addition, the brief claimed that the Mexican nationals are frequently provided with public defenders that speak little or no Spanish and have no experience in death penalty cases.⁸⁵

A country that has effectively abolished the death penalty in practice, since it has not applied the death penalty in over 70 years, Mexico has more foreign nationals on death row in the United States than any other country: 51 of the 112 foreign national currently on death row.⁸⁶ In recent years, Mexico has taken a leading role in opposing the U.S.'s capital punishment policy, organizing a number of protest groups and trying to gain support from other abolitionist countries. After Oklahoma governor Frank Keating first denied clemency for Mexican national Gerardo Valdez, despite a personal appeal from Mexican President Fox, the Oklahoma Court of Criminal Appeals reduced his sentence to life just before his execution was scheduled to take place in July 2001. The Court noted that his attorney and the state should have assisted the defendant in contacting the Mexican consulate, which could have provided assistance.⁸⁷ In August 2002, President Fox canceled a meeting with President Bush at his Texas ranch after the execution of Javier Suarez Medina. Similar to the Valdez case, evidence discovered at the last minute indicated that Texas police purposely provided false information to Mexican consular officials about his nationality and prevented them from assisting Medina during his capital murder trial. Texas governor Rick Perry refused to grant clemency or commutation, despite a personal phone call from President Fox to President Bush, and letters from 16 other nations pleading for clemency. However, the U.S. has showed some signs of submitting to the decisive Mexican position against capital punishment. In January 2001 the newly elected Los Angeles

⁸⁵ Washington Post "Mexico Challenges U.S. Sentences of Its Citizens, Seeks Commutations." Jan. 10, 2003

⁸⁶ As of February 1, 2003 <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31>

⁸⁷ Dieter, Richard C. p.27

District Attorney, Steve Cooley, announced that his office would henceforth forego the possibility of seeking the death penalty in order to obtain extradition of murder suspects.⁸⁸

In May 2001, the Constitutional Court of South African declared that its government officials had violated their constitutional and legal obligations when they handed over Khalfan Khamis Mohamed, a Tanzanian national, over to U.S. FBI agents in a 1999 case without first seeking assurances that he would not face the death penalty. Allegedly involved in the 1998 bombing of the U.S. embassy in Tanzania, Mohamed was interrogated without the presence of an attorney, held incommunicado, and summarily deported.⁸⁹ The Court cited its 1995 decision in the case of *State v. Makwanyane and Mchuna* that the death penalty violated fundamental human rights and the Constitution, of a country which once led the world in executions. It was later revealed that not only did the international law, but the decisions of the Human Rights Committee of the United Nations, the judgments of the European Courts of Human Rights and the various other international legal instruments prompted their decision.⁹⁰ In Mohamed's decision, the Court focused on the international community's agreement that the death penalty violated every person's right to life, and the freedom from cruel, inhuman, or degrading punishment, even in the most egregious offenses. Mohamed was convicted, but sentenced to life imprisonment without the possibility of parole, after the South African court sent its judgment directly to the U.S. federal judge presiding over his capital murder trial.

Furthering the debate over jurisdiction, the case of *Short v. Kingdom of the Netherlands* addressed the issue of extradition of military personnel, stationed in an abolitionist state, back to a retentionist state where they had the possibility of receiving a death sentence. In 1988 Charles Short admitted to killing his wife while they lived at the U.S. Air Base in Soesterberg. As a

⁸⁸ Weissbrodt, David and Fitzpatrick, Joan. p.644

⁸⁹ Amnesty International. p.7

⁹⁰ Cokley, Michael. p.10

member of the U.S. military, Short faced prosecution under the U.S. Uniform Code of Military Justice, upheld by the NATO Status of Forces Agreement giving the U.S. military jurisdiction over its members stationed abroad. However, this interest directly conflicted with the obligations of the Netherlands under the European Convention on Human Rights, Protocol No. 6. The High Court of the Netherlands first ruled that the Netherlands was obligated to ensure Short received all the rights and freedoms guaranteed by the European Convention because he was an individual within their jurisdiction.⁹¹ In light of the Netherlands having ratified the Sixth Protocol, they could not extradite an individual to face such inhuman treatment, as expressly described by the Protocol. Essentially, the Court found that the interest of the defendant not to be put to death takes precedence over the state's obligations under the NATO treaty. The Court ordered that he not be extradited without a written guarantee from the U.S. that the death penalty would not be imposed. After a thwarted attempt by twelve U.S. citizens to seize Short from Dutch custody, the U.S. agreed not to seek the death penalty at Short's trial.⁹² However, if the American request had not been issued nor granted, Short would have been released by the Netherlands. This would have resulted because the High Court upheld the District Court decision that determined that the Netherlands criminal courts lacked jurisdiction. Short's release would have been compelled because the High Court did not remand the case back to the Criminal Courts for a redetermination of that matter.⁹³

⁹¹ Newcomber, Mary. p.8.

⁹² Doherty, Roman. "Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility under International Law." October, 1996, 82 Va. L. Rev. 1281 n.91

⁹³ Roecks, Craig. "Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime." Fall 1994, 25 Cal. W. Int'l L.J. 189.

III. Customary International Law and the ICCPR

Under the provisions of the ICCPR, a newly created U.N. Human Rights Committee has the authority to determine the validity of reservations. Its 1994 *General Comment* on reservations created a new test to determine whether a reservation is compatible with the Covenant's object and purpose, if it is a violation of customary international law. The Committee declared that provisions in the ICCPR that are also norms of customary international law may not be the subjects of reservation. Included in its list were prohibitions of the right of a State to subject persons to cruel, inhuman or degrading treatment or punishment, and to execute pregnant women or children.⁹⁴ Thus, the *General Comment* indicates that reservations in reference to article 6.5 and article 7 by the United States were in fact illegal because they violate a customary norm in regards to the execution of juveniles. Member states are required to supply periodic reports evaluating their own compliance with the terms of the Covenant, and after reviewing the report of the U.S. in 1995 the Committee agreed that U.S. reservations were illegal.⁹⁵ The Committee asked the U.S. to withdraw its reservations, but received no response except a threat from the U.S. Senate to withhold funds slated for U.S. participation in the work of the Committee.⁹⁶ Again in 1998 the U.S. was asked to withdraw its reservation by the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, but the U.S. declined to do so.⁹⁷

If a norm is considered customary international law, all states must recognize it and follow it unless a particular State has persistently objected to the norm. To be recognized as a persistent objector, a state must continually and consistently object to the establishment of a

⁹⁴ Schabas, William. p.83

⁹⁵ Bedau, H.A. The Death Penalty in America: Current Controversies. "International Human Rights Law and the Death Penalty in America." p.247

⁹⁶ Dieter, Richard C. p.10

⁹⁷ Cothorn, Lynn. Juveniles and the Death Penalty. p.8

norm while it is becoming law, persistently up to the present, and attempted enforcement of a specific international norm, in order to be exempt from that norm.⁹⁸ A state that does not object to a norm when it is being established is bound by it, even if after the norm becomes law that state voices an objection.⁹⁹ However, some norms belong in a special class known as *jus cogens*, based on natural law propositions and are exempt from the persistent objector rule. International laws that prohibit genocide, war crimes, and crimes against humanity are binding on all states regardless of their timely objections.¹⁰⁰

If it is indeed considered a customary international law, the persistent objector doctrine has been argued to excuse the U.S. obligation to outlaw juvenile capital punishment. Enough evidence exists to consider the prohibition of the death penalty, for juveniles at least, a customary norm. The first criterion is easily met, as very few states currently retain capital punishment for juvenile offenders. The second criteria, *opinio juris*, is met by the numerous treaties announcing the intentions of the drafters—including the ICCPR, Protocol No. 6, and the American Convention on Human Rights. Some argue that the U.S. has consistently refused to ratify conventions and treaties or their specific articles that remove the sovereign power of the states to decide this issue, so the U.S. may be exempt if it is determined that execution of juveniles is in fact a violation of customary international law. However, of particular importance is that at the time of the negotiating, drafting, and opening for signature of the International Covenant, the Geneva Protocols, the American Covenant, and the Security Council Resolutions, the U.S. had discontinued its use of the death penalty on juvenile offenders, therefore rendering

⁹⁸ Charney, Jonathon. p.4

⁹⁹ Ibid. p.5

¹⁰⁰ Ibid. p.6

its 1992 reservation to the ICCPR ineffective.¹⁰¹ Thus, there is a lack of case law to provide a basis for the U.S. to qualify as a persistent objector. Moreover, during the drafting of the American Convention on Human Rights the U.S. did not object to the prohibition of the death penalty for juvenile offenders, instead arguing that a specific age limit went against the trend of abolishing the death penalty altogether.¹⁰² From 1964 to 1985, no juveniles were executed in the U.S., and the U.S. resurrected the death penalty for juveniles after it had signed the ICCPR but before ratification. Treaty obligations require states not to pass laws that contradict treaty provisions once it has signed that treaty.¹⁰³

Finally, even if the U.S. could be considered a consistent objector to the juvenile death penalty, many scholars argue that prohibition of the death penalty for juveniles has reached the level of *jus cogens*. As recognized by the Vienna Convention Law of Treaties, *jus cogens* norms are peremptory norms of international law that the international community as a whole accepts and recognizes as a norm in which no derogation is permitted. If a country objects to a *jus cogens* norm, the country will still be obligated by the norm, despite its continued objections. Examples of international *jus cogens* norms include prohibitions against genocide, slavery, and torture. Since almost all the countries in the world have ratified the ICCPR and the Convention on the Rights of the Child, and that all but five countries have abolished the practice of execution of juveniles, gives strong evidence that it has reached that level. Therefore, if *jus cogens* status is in fact met, the U.S. reservation to Article 6(5) of the ICCPR is void, and the U.S. must follow the Article 6 (5) provision and abolish the death penalty. In addition to the decision in *Roach and Pinkerton v. United States* citing juvenile death penalty prohibition as a *jus cogens* norm, the

¹⁰¹ De la Vega, Connie and Brown, Jennifer. "Can a United States Treaty Reservation Provide Sanctuary for the Juvenile Death Penalty?" University of San Francisco Law Review, Summer 1998. p.11

¹⁰² De la Vega and Brown. p.12

¹⁰³ Ibid.

UN Special Rapporteur on extrajudicial, summary, and arbitrary execution has also taken the position that the implementation of the death penalty against juvenile offenders is a per se violation of the *jus cogens* norm.¹⁰⁴ Thus, the juvenile death penalty is an excellent example of the tensions between the U.S.'s isolationist tendencies and the need to participate in the international community.

¹⁰⁴ E/CN.4.1998/68 (Add.3) para. 49

Chapter 3- Towards a New Abolitionism: Specific Areas of Customary International Law in Regards to the Death Penalty

The failure to achieve a consensus on the death penalty is hardly a new issue to emerge in the dual judicial system used by the United States. Michigan, Rhode Island, and Wisconsin in fact abolished the death penalty for murder in the 1840's and 1850's, years before the first European state, Portugal did so, and over a century before Canada did. However, the worldwide trajectory towards abolition has become more prominent as more and more countries have found the death penalty unfair in its implementation. As the Secretary General of the United Nations states that two third's of the world's countries have now abolished the death penalty, a number of domestic courts in recent years have ruled the death penalty in its entirety in violation of their respective constitutions, or unconstitutional in its implementation, or for certain groups such as juveniles or the mentally retarded. Former Leader of one of the world's prominent nations, Russia's then-President Boris Yeltsin commuted over 700 death sentences to life in 1999, in a step toward ending that country's death penalty and paving the way for Russia's admission to the Council of Europe. Since 2000, the governments of Pakistan, Philippines, and Saudi Arabia have commuted the death sentences of groups of prisoners.¹⁰⁵ Further, the U.S. Supreme Court itself has begun to cite the growing trends towards abolition in customary international law, as seen in the 2002 case of *Atkins v. Virginia*, prohibiting the execution of the mentally retarded. In this chapter I will explore a number of rulings by domestic courts concerning death row phenomenon, execution of the mentally retarded, innocence and racial discrimination issues in the U.S. judicial system, and execution of juvenile offenders.

¹⁰⁵ Amnesty International USA "Illinois Governor Ryan's Commutation Empowers 38 Executing States to End Capital Punishment." News Release 01/11/03 <http://www.amnestyusa.org/news/2003/usa01112003.html>

A. Death Row Phenomenon

The *Soering* case has encouraged many abolitionist countries to take a strong stance against the death row phenomenon. In the case of *Pratt v. Morgan*, the Judicial Committee of the Privy Council (the highest court of appeals for a member of the British Commonwealth) ruled that it is inhuman punishment to hold a prisoner on death row for several years after he has been sentenced to death, even if the delay is caused by the prisoner himself pursuing all available lines of appeal.¹⁰⁶ The Council decreed that future cases that take more than five years to reach execution would be commuted to life imprisonment. The fourteen years of delay experienced by Pratt and Morgan equals a violation of the prohibition of inhuman or degrading punishment in Jamaica's Constitution. The judgment had implications for over 200 death row prisoners in a number of countries in the British Commonwealth.

Prior the Privy Council's decision, Pratt and Morgan appealed to the UN Human Rights Committee in 1989, arguing that their length of stay on death row constituted cruel, inhuman, and degrading treatment prohibited under Article 7 of the ICCPR. The Committee concluded, "In principle, judicial proceedings do not per se constitute cruel, inhuman, or degrading treatment even if they can be a source of mental strain to convicted prisoners."¹⁰⁷ Yet, the Committee recognized the uniqueness of death penalty cases in this area, asserting that an assessment of circumstances of each particular case would be necessary to determine a violation of article 7 of the ICCPR. In this case, the Committee denied any violation of Article 7, due to the lack of any additional circumstances.

However, the addition of any "further compelling circumstances" have tipped the scales in the plaintiffs' favor in numerous cases by arguing a prolonged stay on death row is in

¹⁰⁶ Coyne and Entzeroth. p.955

¹⁰⁷ Schmidt, Marcus. "The Death Row Phenomenon: A Comparative Analysis." The Jurisprudence of HR law: A Comparative Interpretive Approach. p. 49

violation of Article 7 of the ICCPR. In the 1995 case of *Clement Francis*, the Committee found a violation of Article 7 when the complainant had developed clear signs of severe mental imbalance over a period of detention on death row, which had exceeded 12 years.¹⁰⁸ Other compelling circumstances cited by the Court have included beatings by prison warders sustained on death row and continued harassment and humiliation of death row inmates by prison warders. While the United Nations has clearly moved towards a worldwide abolitionist movement, the Human Rights Committee is actually behind in establishing limits to the death row phenomenon, in comparison to the highest domestic courts of parties to the ICCR, and the European Court of Human Rights.

Since the 1980's, several of the highest domestic courts have also had the opportunity to address the issue of death row phenomenon in respect to national constitutional provisions or international human rights standards. In the 1983 case of *Vatheeswaran v. State of Tamil Nadu*, the Supreme Court of India commuted a death sentence to life imprisonment in light of the Bill of Rights in the Indian Constitution, Article 3 of the European Convention of Human Rights, and Article 7 of the ICCPR.¹⁰⁹ In an *ober dictum*, the Court suggested that a delay exceeding two years should be the limit allowed under Article 21 of the Constitution of India that guarantees certain fundamental rights. However, this two-year limit was overturned in the case of *Sher Singh and Others v. State of Punjab*, when the Supreme Court of India recognized that a rigid cut-off date might be inappropriate, as many cases often exceeded two years in appellate proceedings.

The Supreme Court of Zimbabwe formed concrete recommendations designed to revise and accelerate capital cases, in the 1993 decision of *Catholic Commission for Justice and Peace*

¹⁰⁸ Schmidt, Marcus. p.51

¹⁰⁹ Ibid. p.56

in Zimbabwe v. Attorney-General and Others. The Court determined that the five and six year delay of execution justified the commutation of their sentences to life imprisonments. In particular, the Court recommended that once the accused had been sentenced to death, the trial judge should have the trial transcript produced immediately, and that appeals would be set down for hearing as a matter of urgency, resulting in a more expeditious execution of condemned prisoners.¹¹⁰

While the U.S. Supreme Court has yet to address the death row phenomenon, at least two State Supreme Court decisions have recognized prolonged stays on death row as constituting cruel punishment. In the 1980 case of *District Attorney of the Suffolk District v. Watson*, the Supreme Court of Massachusetts held that the death penalty violated the State Constitution of Massachusetts, due to the delay and mental anguish experienced while awaiting execution.¹¹¹ In the 1980 case of *People v. Anderson*, the Supreme Court of California agreed that the death penalty violated California's constitutional provision prohibiting cruel and unusual punishment. While almost all courts have difficulty determining the exact length of time on death row that constitutes cruel and unusual punishment, it has been documented that there should be a limit imposed in order to ensure the death penalty is carried out in the most humane manner possible, an issue many courts will likely be revisiting in the near future.

B. Execution of the Mentally Retarded

In recent years, the practice of executing people with mental retardation, leading to diminished culpability, has been known to occur only in the countries of Japan, Kyrgyzstan, and the United States. Mental retardation is characterized by three criteria: significantly subaverage

¹¹⁰ Ibid. p.58

¹¹¹ Ibid. p.64

intellectual functioning; concurrent and related limitations in two or more adaptive skill areas; and manifestation before age 18. Mentally retarded persons frequently do not know the difference between right and wrong, and have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others reactions.¹¹² The generally accepted definition includes an I.Q. of 70 or less, with the additional demonstrated limitation on abilities like communication or caring for oneself. Due to their limited capacities, these men and women cannot fully understand what they did wrong and many cannot even comprehend the punishment that awaits them.¹¹³ Even worse, their disability results in them being in a more vulnerable position when trying to protect their legal rights and secure a fair trial. Customary international law under the ICCPR is viewed by most interpretations as precluding the judicial execution of offenders with mental retardation. A 1989 ECOSOC resolution recommended “eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence.”¹¹⁴ The UN Commission on Human Rights followed with its own resolutions in 1999 and 2000, urging states that retain the death penalty not to impose it “on a person suffering from any form of mental disorder,” a term that includes both the mentally ill and the mentally retarded.¹¹⁵ In 1998, the UN special rapporteur on extrajudicial, summary, or arbitrary executions condemned the U.S. for executing people with mental retardation in contravention of relevant international standards. In 1989, the American Bar Association first began calling for an end to capital punishment for people with mental retardation. In their

¹¹² *Atkins v. Virginia*. Summary (c), page 2. <https://laws.findlaw.com/us/000/00-8452.html>

¹¹³ “Capital Punishment and Mental Retardation: Legal Standards.” Human Rights Watch. <http://www.hrw.org/reports/2001/ustat/ustat/usta0301-02.htm>. p.6.

¹¹⁴ *Ibid.* p.1

¹¹⁵ *Ibid.*

resolution, the ABA held that execution of such individuals is unacceptable in a civilized society, irrespective of their guilt or innocence.¹¹⁶

Since the death penalty was re-instated in the U.S. in 1976, at least 35 people have been executed that were classified as having mental retardation. The 1989 Supreme Court case of *Perry v. Lynaugh* held that executing person with mental retardation was not in fact a violation of the Eighth Amendment's ban on cruel and unusual punishment. Instead, the Court found that mental retardation should only be a mitigating factor to be considered by the jury during sentencing. However, the Court also recognized that evolving standards of decency that define the progress of society should be considered in the decision of whether people with mental retardation should be allowed to be executed. At the time, Justice O'Connor's majority opinion that that a "national consensus" had not yet developed against executing those with mental retardation, since only two states prohibited such executions.¹¹⁷

In one of the most recent steps towards recognizing internationally accepted standards of human decency in the application of capital punishment, the U.S. Supreme Court barred the execution of mentally retarded offenders in the June 2002 case, *Atkins v. Virginia*. In this 6-3 ruling, the Court reversed its decision in *Perry*, declaring that executing mentally retarded offenders does in fact violate the Eighth Amendment's protection against cruel and unusual punishment. The Court cited the changes in public opinion since its 1989 decision, as the number of states barring execution of the mentally retarded increased from two to eighteen. Moreover, of the 38 states that retain the death penalty, that leaves only 20 states that allow the execution of such offenders. The Court relied on this evidence to draw the conclusion that today's society views mentally retarded offenders as far less culpable than the average criminal,

¹¹⁶ <http://www.deathpenaltyinfo.org/article.php?did=176&scid=28>

¹¹⁷ *Ibid.*

in addition to the practice of executing mentally retarded offenders, even in states that allow it, as uncommon. The Court addressed two main reasons as they reached their conclusions. First, in concern with the retribution and deterrence justification of the death penalty, the lesser culpability of the mentally retarded offender does not merit the severity of the appropriate punishment afforded to offenders of normal intelligence. As to deterrence, the same cognitive and behavioral impairments make it less likely that they can process the information of the possibility of execution as a penalty. Second, mentally retarded defendants face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the fact that they are typically poor witnesses and that their demeanor may create an unwarranted impression of a lack of remorse for their crimes.¹¹⁸

In the footnote, the Court referenced the overwhelming world disapproval to this practice, and the *amicus curiae* brief filed by the European Union, expressing its opposition to execution of mentally retarded criminals.¹¹⁹ A group of senior American diplomats also filed a brief, telling the court that the practice of executing retarded offenders was not only out of step with much of the world, but a source of friction between the U.S. and other countries.¹²⁰ Such executions, the brief asserted, “hurt diplomatic relations with close American allies, provide ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolations, and impair the U.S. foreign policy interests.” Thus, the Supreme Court is beginning to legitimize the disapproval of the international community in this important area of human rights, providing fertile grounds for future cases fighting for abolition of the death penalty. Amnesty International noted that by applying the Supreme Court’s reasoning in the

¹¹⁸ *Atkins v. Virginia* brief Summary (c)

¹¹⁹ *Ibid.*

¹²⁰ Greenhouse, Linda. “Justices Bar Death Penalty for Retarded Defendants.” New York Times. 6/21/02

Atkins case to the execution of child offenders leads to the conclusion that such use of the death penalty is unconstitutional too. In its report the organization point out that in some respects the evidence of a consensus against the judicial killing of child offender is stronger than that existing against the execution of the mentally impaired.¹²¹

C. Innocence and Racial Discrimination

Following his mission to the U.S. in Fall 1997, UN Special Rapporteur on extrajudicial, summary, and arbitrary executions Bacre Waly Ndiaye concluded that the U.S. practice of executing juvenile offenders violated international law, as well as the execution of the mentally retarded. Moreover, the Special Rapporteur found the lack of adequate counsel for many capital defendants disturbing, and that “race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive the sentence of death.”¹²² He also raised doubts about the objectivity of the imposition of the death penalty, and the need to seek alternative solutions to fight violent crime in a civilized society.

Innocence and racial discrimination continue to plague the U.S. judicial system, permanently wronging death row defendants. According to the Death Penalty Information Center, since 1973, 107 people in 25 states have been released from death row with evidence of their innocence.¹²³ According to one prominent study by Amnesty International, at least 23 people had been executed in the U.S. during the 20th century prior to 1984. With the advances in DNA testing, for every eight people executed since 1977, another has been released after

¹²¹ “Indecent and Internationally Illegal, the Execution of Juvenile Offenders” New Release 9/25/02 <http://www.amnestyusa.org/news/2002/usa09252002.html>

¹²² Death Penalty News June 1998 p. 2. <http://www.deathpenaltyinfo.org/>

¹²³ <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>

evidence of their innocence emerged.¹²⁴ Meanwhile, while blacks and whites are the victims of murder in approximately equal numbers, 80 percent of the executions since 1977 were of people convicted of crimes involving white victims.¹²⁵ In a highly publicized case, Mumia Abu-Jamal illustrated many of the international community's concerns regarding the administration of capital punishment in the U.S. In this case, the evidence their concerns were manifested in the inadequate legal representation of a Native American accused of killing a white police officer, a trial judge who apparently was far more concerned about expediting the trial, and a bias of the appeal courts.¹²⁶ Mumia has maintained his innocence throughout his numerous trials and long imprisonment, and his case begs the question of whether the U.S. should continue to practice a fatal form of punishment that has continually shown to be filled with errors. Meanwhile, the 1996 Anti-Terrorism and Effective Death Penalty Act severely limits the federal courts' ability to ensure that the legal proceedings at state level guaranteed the defendants' rights enshrined in the U.S. Constitution and under international human rights standards.¹²⁷

The race discrimination in the U.S. has not gone unnoticed by the international community. In 1992, the International Commission on Human Rights of the Organization of American States noted the indifference shown by the United States towards the issue of race and racial discrimination in the infliction of the death penalty in the case of William Andrews, an African-American executed in Utah. What was problematic about this was that during the jury selection process, all African-American citizens were eliminated as jurors during jury selection,

¹²⁴ 09/20/02. "Wrong 800 Times." Statement used by Amnesty International as the United States Executes 800th Person Since Use of the Death Penalty Resumed in 1977. <http://www.amnestyusa.org/news/2002/usa09202002.html>

¹²⁵ Ibid.

¹²⁶ Amnesty International USA "USA: A Life in the Balance, the Case of Mumia Abu-Jamal." <https://www.amnestyusa.org/abolish/reports/mumia/summary.html>.

¹²⁷ Ibid.

and the overt racism displayed was evident when one of the jurors, during trial, received a note with the words "Hang the Niggers."¹²⁸

Entering into force in 1969, the International Convention on the Elimination of All Forms of Racial Discrimination, which the U.S. has signed and ratified, guarantees "the right to equal treatment before [all] tribunals . . . administering justice," and this certainly includes the application of the death penalty.¹²⁹ Although the Race Convention does not specifically address capital punishment, it binds all state parties to "condemn racial discrimination and undertake to pursue by *all appropriate means* and without delay a policy of eliminating racial discrimination in all its forms."¹³⁰ The Convention further requires states to provide both a remedy and a forum for challenging racial discrimination. With 155 states as parties to this convention, it is clear the international arena takes the commitment to remove racial discrimination from judicial proceedings seriously. However, the U.S. has yet to take any measurable steps to combat the racial bias evident in their judicial system, especially in concern with capital offenders.

Respected internationally as the collective voice of America's attorneys, the American Bar Association had never taken a position for or against capital punishment in most cases until 1997. That year, the ABA House of Delegates approved a call for a moratorium on executions in the U.S. until jurisdictions implement politics to ensure that death penalty cases are administered fairly, impartially, and in accordance with due process and minimize the risk that innocent persons may be executed.¹³¹ In their report, the ABA focused on the poor legal services given to defendants, and the difficulties faced by defendants wishing to raise violations of federal law in

¹²⁸ Cokley, Michael. p. 5

¹²⁹ Dieter, Richard C. "A Response to the Initial Report to the United States to the United Nations. " <http://www.deathpenaltyinfo.org/article.php?scid=18&did=537>

¹³⁰ International Convention on the Elimination of All Forms of Racial Discrimination Article 2 <http://www1.umn.edu/humanrts/instree/d1cerd.htm>

¹³¹ <http://www.abanet.org/media/feb97/death.html>

their capital sentencing process. More importantly, the report cited the “longstanding patterns of racial discrimination that remain across the country,” the numerous studies that have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black, and the studies that have shown in some jurisdictions African Americans tend to receive the death penalty more often than do white defendants.¹³² Their condemnations further included the execution of mentally retarded individuals and juveniles, practices the ABA had long-standing policies against. Described in their press release concerning the report:

“The adequacy of legal representation of those charged with capital crimes is a major concern. Many death penalty states have no working public defender systems, and many simply assign lawyers at random from a general list. The defendant's life ends up entrusted to an often underqualified and overburdened lawyer who may have no experience with criminal law at all, let alone with death penalty cases. The U.S. Supreme Court and the Congress have dramatically restricted the ability of our federal courts to review petitions of inmates who claim their state death sentences were imposed in violation of the Constitution or federal law. Studies show racial bias and poverty continue to play too great a role in determining who is sentenced to death.”¹³³

On January 30, 2000 Governor Ryan of Illinois called for a statewide moratorium on executions, due to concerns about his state's “shameful record of convicting innocent people and putting them on death row.” In deep concern of executing an innocent person, Ryan noted that in the same amount of time that the state executed twelve people, since 1977, surfacing DNA evidence led directly to the release thirteen innocent inmates. The fourteen member Commission on Capital Punishment appointed by Governor Ryan released a series of recommendations for sweeping reforms, including reducing the number of crimes eligible for the death penalty from twenty to five, limiting the use of jailhouse informants, setting standards to ensure adequate legal

¹³² ABA Death Penalty Project, February 3, 1997 Resolution approved by the ABA House of Delegates <http://www.uncp.edu/home/vanderhoof/dp-news/aba-rept.html>

¹³³ Koenig, Dorean Marguerite. “International Reaction to Death Penalty Practices in the United States.” <http://www.againstdp.org/reaction.html>

representation for defendants, and videotaping interrogations of murder suspects.¹³⁴ The changes aim to protect innocent inmates from execution and ensure improved fairness for capital defendants.

D. Juvenile Offenders and the Death Penalty

While the execution of juvenile offenders has been virtually eliminated around the world, as of 2000, the U.S. had 74 people sitting on death row for crimes they committed as juveniles.¹³⁵ Under federal law the minimum age for death penalty eligibility is eighteen, along with fifteen states, while four states maintain seventeen as the minimum age, and twenty hold sixteen as the minimum. Since 1990, seven countries are known to have executed offenders who were under eighteen at the time their crimes were committed: Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States.¹³⁶ Besides the United States, those countries that have violated their agreement in the convention have been censured by the Committee and most have passed national legislation to prohibit the execution of persons below eighteen. According to Amnesty International, the U.S., the Democratic Republic of the Congo, and Iran were the only countries that still executed juvenile offenders. In 2000, the United Nations Sub-Commission on the Protection and Promotion of Human Rights called upon all states to abolish the death penalty for those under eighteen at the time of the offense. In the case of *Thompson v. Oklahoma*, the Supreme Court ruled in 1987 that a State's execution of a juvenile who had committed a capital offense prior to age 16 violated the 8th amendment unless the State had minimum age limit in its death penalty statute. The Court held that fifteen-year-olds do not possess requisite culpability to be death penalty eligible because "during the

¹³⁴ "Illinois Commission Announces Nation's most Comprehensive Death Penalty Review."
<http://www.deathpenaltyinfo.org/article.php?scid=1&did=382>

¹³⁵ Cothorn, Lynn. p.1

¹³⁶ Schabas, William. p.191

formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.”¹³⁷ The majority opinion noted the practice of other nations in outlawing capital punishment for offenders under eighteen years of age as “evolving standards of decency that mark the progress of a maturing society.”¹³⁸ In fact, in the U.S. between the years of 1964 and 1985, no one was executed for crimes they committed while under the age of eighteen.¹³⁹ In 1988 however, the Court ruled in *Stanford v. Kentucky* and *Wilkins v. Missouri* that the eighth amendment does not prohibit the death penalty for crimes committed at age 16 or 17.¹⁴⁰ In *Stanford*, the Court found that capital punishment of juveniles ages 16 or 17 did not offend the evolving standards of decency in society. The Court reasoned that an insufficient number of states explicitly excluded juveniles from death penalty eligibility to conclude that a majority of U.S. citizens opposed such eligibility.¹⁴¹ The Court ignored international standards, stating that eighteen is an arbitrary age, and that since most minors understand right from wrong, those committing murders could be held morally responsible for their crimes.¹⁴² The EU member states strongly disagree with the United States on this matter, as the EU recently issued a memorandum condemning capital punishment as a whole, but showing special concern for the imposition of the death penalty on persons below eighteen years of age.

All the EU Member States reject the idea of incorrigibility of juveniles. These States hold the view that the problem of juvenile delinquency should be addressed bearing in mind that young offenders are in the process of full development, facing several difficulties of adaptation. In addition, poor backgrounds, lack of success in school at school and dependence on drugs are just some of the social problems affecting them and fostering their criminal behavior. As a result, they are less mature, and thus less culpable,

¹³⁷ De la Vega and Brown. p.2

¹³⁸ Ibid.

¹³⁹ Ibid. p.3.

¹⁴⁰ Cothorn, Lynn. p. 4

¹⁴¹ De la Vega and Brown. p. 3

¹⁴² Ibid.

and should be treated as adults, deserving a more lenient criminal sanctions system. This implies, among other things, rejection of death penalty for juveniles.¹⁴³

In 2001, the US Supreme Court refused to grant certiorari to an appeal of a Nevada death row inmate named Michael Domingues, who was appealing his conviction by claiming that execution for a murder he committed when he was sixteen years old violated the ICCPR.¹⁴⁴ Domingues asserted that the U.S. reservation to the treaty was invalid, but the Nevada Supreme Court concluded that the Senate's express reservation of the U.S.'s right to impose a penalty of death on juvenile offenders negated his claim that he was illegally sentenced.¹⁴⁵ The Solicitor General submitted an *amicus curiae* brief with this case, maintaining that the reservation to Article 6 was valid; therefore the U.S. was not bound by any customary legal obligation with respect to juvenile executions. In 1999, Sean Sellers became the first 16-year old offender executed in over 40 years by the state of Oklahoma, despite pleas from Archbishop Desmond Tutu and the American Bar Association, and his documented mental illness.¹⁴⁶

Moreover, since the Supreme Court has yet to rule all juvenile executions unconstitutional, the U.S. has signed two human rights treaties, but not yet ratified them due to their inclusion of a juvenile execution prohibition. The U.S. and Somalia are now the only two countries in the entire world that have not yet ratified the UN Convention on the Rights of the Child, adopted by the General Assembly in 1989.¹⁴⁷ This convention includes a prohibition on execution of individuals for crimes committed while under the age of eighteen. Almost every nation in the world recognizes that the culpability of those under the age of eighteen is less than that of adults, as all parties agree to ensure that:

¹⁴³ EU Memorandum on the Death Penalty, Article V Juvenile Justice.

<http://www.erunion.org/legislat/DeathPenalty/eumemorandum.htm#5>

¹⁴⁴ Kronenwetter, Michael. Capital Punishment: A Reference Edition, Second Edition. p. 99

¹⁴⁵ Coyne and Entzeroth. p.982

¹⁴⁶ Dieter, Richard C. p.10

¹⁴⁷ <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age...States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.¹⁴⁸

The American Convention on Human Rights specifically prohibited the execution of juvenile offenders, an OAS treaty that the U.S. has also failed to ratify. In addition, in 1987 the Inter-American Commission of Human Rights found that the U.S. violated the American Declaration of the Rights and Duties of Man by executing two men convicted of juvenile crimes in the case of *Roach and Pinkerton v. United States*. By condemning two seventeen-year-olds to death sentences, the Commission found that the U.S. had in fact created a situation of arbitrary deprivation of life and inequality before the law, contrary to articles I and II of the American Declaration which guarantee a right to life and equality before the law. More importantly, the Commission made three important findings: (1) it found that international obligations of the United States within the OAS derive not from the American Convention, but from its ratification of the Charter of the OAS, and from the "acquired binding force" of the American Declaration and the Statute and Regulations of the Commission, (2) it found that within the OAS member States, "there is a recognized norm of jus cogens which prohibits the State execution of children." Because of the existence of this jus cogens norm - a peremptory norm from which no derogation is permitted - U.S. objection to a customary norm barring the execution of children was unavailing to avoid a violation; (3) the Commission concluded that the "patchwork scheme of legislation" in the states of the United States made the imposition of the death penalty on

¹⁴⁸ Convention on the Rights of the Child, Articles 37 and 40. <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

juveniles "dependent, not primarily, on the nature of the crime committed, but on the location where it was committed." This gave rise, the Commission concluded, to violations of Articles I (right to life) and II (right to equality) of the American Declaration.¹⁴⁹ However, the U.S. completely disagreed with the Court, claiming that American Declaration is not a treaty and is not binding on the U.S., that there was no customary norm prohibiting the execution of juveniles, but if there was the U.S. was considered a persistent objector. In fact, both South Carolina and Texas went ahead and executed Roach and Pinkerton before the conclusion of the proceeding.¹⁵⁰

As Chapter 2 and Chapter 3 demonstrate, international customary law can arise from numerous sources, both general and specific. Since a lengthy customary law develops without formal codification, we must look carefully for the criterion of state practice and *opinio juris* to be met. Evidence of state practice can be seen not only in the treaties they sign, but each State's domestic laws, high court decisions, statements by their leaders, and even legislative history of domestic acts. Though the death penalty is not yet considered by most scholars to have reached the status of customary international law, it has proven its potential to do so in the near future, as the number of states that have abolished capital punishment has increased exponentially within the last fifty years. However, most scholars view certain aspects of the death penalty to have reached the status of violations of international customary law, such as the execution of juveniles and the mentally retarded, because of the widespread belief of the decreased culpability of certain people during the commission of their crimes. Even if the argument that the U.S. has been a persistent objector to the death penalty, the influence of the international community's move towards abolition has begun to have an impact on its implementation in the U.S. and will

¹⁴⁹ Schabas, William. p.980

¹⁵⁰ De la Vega and Brown. p. 9

continue to do so in the future, as all sources of customary international law take hold against the death penalty.

Conclusion: A Worldwide Movement

The United States has long since held a prominent position fighting for the recognition of human rights for all people across the globe. However, while the U.S. has been very vocal when it comes to the human rights violations of other countries, it has not been free from violating international human rights law itself. Whether capital punishment should be used as form of punishment, be it for deterrence, retribution, or other reasons, is a source of debate in both abolitionist and retentionist countries alike. However, the treaties and conventions that have been passed during that past fifty years, as well as the various sources of customary law have all resulted in a clear international consensus moving towards abolition of the death penalty. As I have shown in this paper, both the execution of juvenile offenders and the mentally retarded have reached the status of prohibition under customary international law, with the death row phenomenon working its way to the same level of consideration by most countries. The failure of the U.S. to take any significant response to the worldwide concern about the death penalty is likely eroding U.S. prestige and leadership in the field of human rights. For example, the world community has recently gone ahead without the U.S. on such important matters as the treaty to ban land mines, and the establishment of the ICC, even though the U.S. had worked extensively on both measures.¹⁵¹ As a world community, all States have indeed moved towards a more “civilized” existence, demonstrating that their talk of evolving standards of decency are not simply words to make themselves look superior but have in fact led to dramatically better protections for all people in the area of human rights. Fifty years ago this topic did not even exist because there were virtually no abolitionist countries. By 1986, 46 countries had abolished the death penalty for traditional crimes (exclusive of crimes committed under military law or in time of war). Yet, only twelve years later, the number of countries in the same category had

¹⁵¹ Dieter 23

almost doubled to 82, and the number today has climbed substantially to 91 states outlawing it and another 21 states abolitionist in practice, leaving only 83 countries that actively retain an active death penalty as opposed to the 112 total countries that have abolished it in law or practice.¹⁵²

In the landmark Supreme Court case of *Furman v. Georgia* in 1972, the Court invalidated existing death penalty statutes and declared a moratorium on all executions. In their reasoning, the Court believed that then-existing states statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases. Four years later, in the Supreme Court case of *Gregg v. Georgia* the Court held that the new state statutes' special procedural requirements for capital prosecutions provided a means by which the states would achieve that balance.¹⁵³ Yet, innocence and race issues continue to plague the U.S. judicial system, as prisoners continued to be exonerated as a result of advances in DNA testing and governors have declared moratoriums in several states. In stark contrast to the progress made around the world, the U.S. completed its 800th execution since *Gregg* in March of 2003. Interestingly, the state of Texas has carried out over one-third of these executions, and 10 Southern states constitute three-fourths of all the executions that have taken place in the 38 states, and the federal government, that still retain the death penalty.¹⁵⁴ Our hypocrisy on human rights is clear to nations around the world as we try to fight the tide moving closer and closer to reaching the status of customary international law in regards to capital punishment. Now is the time to right the wrongs in our judicial system, and abolish capital punishment to meet the standards set by international law, and the U.S.'s own Constitution's eighth amendment, guaranteeing each citizen the freedom from cruel and unusual punishment.

¹⁵² As of January 2003: <http://www.deathpenaltyinfo.org/article.php?did=140&scid=30>

¹⁵³ ABA Report p. 2

¹⁵⁴ <http://www.amnestyusa.org/abolish/retentionist-state.html>

Works Cited

- www.deathpenaltyinfo.org
<http://afronet.org.za>
http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm
<http://www.scaec.org/international.htm> “International Law and Juvenile Death Penalty.”
February 2001.
<http://www.hrweb.org/legal/cat.html>
<http://www.amnesty.org/ailib/aipub/2000/SUM/25105600.htm> Amnesty International, A
Briefing for the UN Committee Against Torture.
http://www.amnestyusa.org/abolish/international_h_r_standards.html
<http://www.eurunion.org/legislat/DeathPenalty/Demarche.htm>
<http://www.oas.org/OASpage/press2002/en/Press98/011298ae.htm> “New U.S. Envoy to OAS
Says Organization Must Promote Maximum Hemispheric Cooperation.”
http://www.unhchr.ch/html/menu3/b/a_opt2.htm
<http://www.un.org/overview/rights.html> Article III
http://www.unhchr.ch/html/menu3/b/h_comp41.htm
<http://www.unhchr.ch>
<http://web.amnesty.org/library/Index/engAMR511712001?OpenDocument>. United States of
America “No Return to Execution-The US death penalty as a barrier to execution.” 29
November 2001.
[www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Death_penalty/e_CP042\(0](http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Death_penalty/e_CP042(0)
[asp](http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Death_penalty/e_CP042(0) “Fight Against terrorism: no extraditions if the death penalty is sought.” COE Press
Releases
<http://www.amnestyusa.org/news/2003/usa01112003.html> Amnesty International USA “Illinois
Governor Ryan’s Commutation Empowers 38 Executing States to End Capital
Punishment.” News Release 01/11/03
<http://www.hrw.org/reports/2001/ustat/ustat/usta0301-02.htm>. Human Rights Watch. “Capital
Punishment and Mental Retardation: Legal Standards.”
<http://www.deathpenaltyinfo.org/article.php?did=176&scid=28>
<http://www.amnestyusa.org/news/2002/usa09252002.html> “Indecent and Internationally Illegal,
the Execution of Juvenile Offenders.” Amnesty International USA. New Release
9/25/02
<http://www.deathpenaltyinfo.org/> Death Penalty News June 1998
<http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>
<http://www.amnestyusa.org/news/2002/usa09202002.html> 09/20/02. “Wrong 800 Times.”
Statement used by Amnesty International as the United States Executes 800th Person
Since Use of the Death Penalty Resumed in 1977.
<https://www.amnestyusa.org/abolish/reports/mumia/summary.html>. “USA: A Life in the
Balance, the Case of Mumia Abu-Jamal.” Amnesty International USA.
<http://www1.umn.edu/humanrts/instree/d1cerd.htm> International Convention on the Elimination
of All Forms of Racial Discrimination Article 2
<http://www.abanet.org/media/feb97/death.html>
<http://www.uncp.edu/home/vanderhoof/dp-news/aba-rept.html> ABA Death Penalty Project,
February 3, 1997 Resolution approved by the ABA House of Delegates
<http://www.deathpenaltyinfo.org/article.php?scid-1&did=382> “Illinois Commission Announces
Nation’s most Comprehensive Death Penalty Review.”

<http://www.erunion.org/legislat/DeathPenalty/eumemorandum.htm#5> EU Memorandum on the Death Penalty, Article V Juvenile Justice.

<http://www.unhchr.ch/html/menu3/b/k2crc.htm>

<http://www.unhchr.ch/html/menu3/b/k2crc.htm>

<http://www.amnestyusa.org/abolish/retentionist-state.html>

Aceves, William J. “Institutionalist Theory and International Legal Scholarship.” The American University Journal of International Law & Policy. 1997

Arend, Anthony. Legal Rules and International Society. New York: Oxford University Press, 1999.

Bedau, H.A. “International Human Rights Law and the Death Penalty in America.” The Death Penalty in America: Current Controversies. Oxford: Oxford University Press, 1997.

Bianchi, Andrea. “Venezia v. Ministero di Grazia E Giustizia. Judgement No.233.79 Rivista di Diritto Internazionale 815.” American Journal of International Law. Volume 91, Issue 4

Charney, Jonathon. “Universal International Law.” The American Journal of International Law. October, 1993. 87 A.J.I.L. 529.

Cokley, Michael A. “Whatever Happened to That Old Saying: “Thou Shall not Kill?”: A Plea for the Abolition of the Death Penalty.” Loyola University New Orleans School of Law, Spring 2001. 2 Loy. J. Pub. Int. L.67

Cothorn, Lynn. Juveniles and the Death Penalty. Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2000.

Coyne, Randall and Entzereth, Lyn. Capital Punishment and the Judicial Process. Durham, North Carolina: Carolina Academic Press, 2001.

De la Vega, Connie and Brown, Jennifer. “Can a United States Treaty Reservation Provide Sanctuary for the Juvenile Death Penalty?” University of San Francisco Law Review, Summer 1998. 32 U.S.F.L. Rev. 735.

Dieter, Richard C. “International Perspectives on the Death Penalty: A Costly Isolation for the U.S.” October 1999

<http://www.deathpenaltyinfo.org/article.php?scid=45&dd=536#efforts>

Dieter, Richard C. “A Response to the Initial Report to the United States to the United Nations.” <http://www.deathpenaltyinfo.org/article.php?scid=18&did=537>

Doherty, Roman. “Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility under International Law.” October, 1996, 82 Va. L. Rev. 1281 n.91

Greenhouse, Linda. “Justices Bar Death Penalty for Retarded Defendants.” New York Times. 6/21/02

Koenig, Doreen Marguerite. “International Reaction to Death Penalty Practices in the United States.” <http://www.againstdp.org/reaction.html>

Kronenwetter, Michael. Capital Punishment: A Reference Edition, Second Edition. Santa Barbara, California: ABC-CLIO, Inc., 2001.

Kruger, Hans Christian. “Protocol No. 6 to the European Convention on Human Rights.” The Death Penalty: Abolition in Europe. Strasbourg, France: Council of Europe Publishing, 1999.

Lehman, Daniel J. “The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access.” Law and Inequality. Summer, 2002.

Levesque, Christian. “Comment: The International Covenant on Civil and Political Rights: A

- Primer for Raising a Defense Against the Juvenile Death Penalty In Federal Courts.” American University Law Review, February 2001.
- Newcomer, Mary. “Arbitrariness and the Death Penalty in an International Context.” December, 1995 Duke Law Journal. 45 Duke L.J. 611.
- Roecks, Craig. “Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime.” Fall 1994, 25 Cal. W. Int’l L.J. 189.
- Schabas, William A. “Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?” Brooklyn Journal of International Law, 1995.
- Schabas, William A. The Abolition of the Death Penalty in International Law, Third Edition. Cambridge: Cambridge University Press. 2002.
- Schabas, William. “The ICJ Ruling Against the United States: Is it Really About the Death Penalty?” Journal of International Law, Summer 2002. 27 Yale J. Int’l. 445.
- Schmidt, Marcus. “The Death Row Phenomenon: A Comparative Analysis.” The Jurisprudence of HR law: A Comparative Interpretive Approach. Turku: Institute for Human Rights, Abo Akademi University, 2000.
- Shank, S. Adele and Quigley, John. “Strangers in Strange Lands: Extradition from Foreign Jurisdiction in Capital Cases.” Capital Punishment: Litigating Capital Cases, Vol. 3. New York: Garland Publishing, Inc., 1996.
- Shenon, Philip. “Germany Urges U.S. to Drop Death Penalty Plan.” The New York Times. Oct. 25 2002
- Stevens, Geoffrey. Maclean’s. 03/05/2001, Vol. 114 Issue 10.
- Wilson, Richard J. “The United States’ Position on the death penalty in the Inter-American Human Rights System.” Santa Clara Law Review, 2002. 42 Santa Clara L. Rev. 1159
- Weissbrodt, David and Fitzpatrick, Joan. International Human Rights: Law, Policy, and Process. Cincinnati, Ohio: Anderson Publishing Co. 2001.

Annex 1: **Ratifications of International Treaties to Abolish the Death Penalty (As of January 1, 2003)**

<http://web.amnesty.org/library/print/ENGACT500012003>

The community of nations has adopted four international treaties providing for the abolition of the death penalty. One is of worldwide scope; the other three are regional.

Following are short descriptions of the four treaties and current lists of **states parties** and countries which have **signed but not ratified** the treaties. (States may become parties to international treaties by *ratifying* or *acceding* to them. *Signature* indicates an intention to become a party at a later date through ratification. States are bound under international law to respect the provisions of treaties to which they are parties, and to do nothing to defeat the object and purpose of treaties which they have signed.)

Second Optional Protocol to the International Covenant on Civil and Political Rights

The *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, adopted by the UN General Assembly in 1989, is of worldwide scope. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state which is a party to the International Covenant on Civil and Political Rights can become a party to the Protocol.

States parties: AUSTRALIA, AUSTRIA, AZERBAIJAN, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CAPE VERDE, COLOMBIA, COSTA RICA, CROATIA, CYPRUS, DENMARK, DJIBOUTI, ECUADOR, FINLAND, GEORGIA, GERMANY, GREECE, HUNGARY, ICELAND, IRELAND, ITALY, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA, MALTA, MONACO, MOZAMBIQUE, NAMIBIA, NEPAL, NETHERLANDS, NEW ZEALAND, NORWAY, PANAMA, PORTUGAL, ROMANIA, SEYCHELLES, SLOVAK REPUBLIC, SLOVENIA, SOUTH AFRICA, SPAIN, SWEDEN, SWITZERLAND, TURKMENISTAN, UNITED KINGDOM, URUGUAY, VENEZUELA, YUGOSLAVIA

(total: 49)

Signed but not ratified: ANDORRA, CHILE, GUINEA-BISSAU, HONDURAS, NICARAGUA, POLAND, SAO TOMÉ AND PRÍNCIPE

(total: 7)

Protocol to the American Convention on Human Rights

The *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, adopted by the General Assembly of the Organization of American States in 1990, provides for the total abolition of the death penalty but allows states parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state party to the American Convention on Human Rights can become a party to the Protocol.

States parties: BRAZIL, COSTA RICA, ECUADOR, NICARAGUA, PANAMA, PARAGUAY, URUGUAY, VENEZUELA
(total: 8)

Signed but not ratified: CHILE
(total: 1)

Protocol No. 6 to the European Convention on Human Rights

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ["European Convention on Human Rights"] concerning the abolition of the death penalty, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime; states parties may retain the death penalty for crimes "in time of war or of imminent threat of war". Any state party to the European Convention on Human Rights can become a party to the Protocol.

States parties: ALBANIA, ANDORRA, AUSTRIA, AZERBAIJAN, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GEORGIA, GERMANY, GREECE, HUNGARY, ICELAND, IRELAND, ITALY, LATVIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA, MALTA, MOLDOVA, NETHERLANDS, NORWAY, POLAND, PORTUGAL, ROMANIA, SAN MARINO, SLOVAK REPUBLIC, SLOVENIA, SPAIN, SWEDEN, SWITZERLAND, UKRAINE, UNITED KINGDOM
(total: 41)

Signed but not ratified: ARMENIA, RUSSIAN FEDERATION, TURKEY
(total: 3)

Protocol No. 13 to the European Convention on Human Rights

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002, provides for the abolition of the death penalty in all circumstances, including time of war or of imminent threat of war. Any state party to the European Convention on Human Rights can become a party to the Protocol.

States parties: DENMARK, IRELAND, LIECHTENSTEIN, MALTA, SWITZERLAND
(total: 5)

Signed but not ratified: ANDORRA, AUSTRIA, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CROATIA, CYPRUS, CZECH REPUBLIC, ESTONIA, FINLAND, FRANCE, GEORGIA, GERMANY, GREECE, HUNGARY, ICELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MOLDOVA, NETHERLANDS, NORWAY, POLAND, PORTUGAL, ROMANIA, SAN MARINO, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN, MACEDONIA, UKRAINE, UNITED KINGDOM
(total: 34)

Annex 2: List of Abolitionist and Retentionist Countries (As of January 1, 2003)

<http://web.amnesty.org/library/print/ENGACT500032003>

More than half the countries in the world have abolished the death penalty in law or practice.

Attached is a list of countries and territories, indicating whether or not their laws provide for the death penalty. For abolitionist countries, information is also given, where available, on the date of abolition and the date of the last execution carried out; and for countries which have abolished the death penalty for all crimes, the date when it was abolished for ordinary offences if this was done before. (The date given for abolition is normally the date when the decision to abolish the death penalty was taken, but if that decision only came into effect several years later, the latter date is given.)

Also attached is a list of countries which have abolished the death penalty in law since 1976. It shows that in the past decade, an average of over three countries a year have abolished the death penalty in law or, having done so for ordinary offences, have gone on to abolish it for all offences.

As of 1 January 2003, the number of abolitionist and retentionist countries was as follows:

Abolitionist for all crimes 76

Abolitionist for ordinary crimes only 15

Abolitionist in practice 21

Total abolitionist in law or practice 112

Retentionist 83

Regular updates to the List of abolitionist and retentionist countries are posted on the death penalty page on the Amnesty International website at www.amnesty.org.

1. ABOLITIONIST FOR ALL CRIMES

Countries whose laws do not provide for the death penalty for any crime.

Abbreviations: **Date (A)** = date of abolition for all crimes; **Date (AO)** = date of abolition for ordinary crimes; **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

Country	Date(A)	Date(AO)	Date(last ex.)
ANDORRA	1990		1943
ANGOLA	1992		
AUSTRALIA	1985	1984	1967
AUSTRIA	1968	1950	1950
AZERBAIJAN	1998		1993
BELGIUM	1996		1950

BULGARIA	1998		1989
CAMBODIA	1989		
CANADA	1998	1976	1962
CAPE VERDE	1981		1835
COLOMBIA	1910		1909
COSTA RICA	1877		
COTE D'IVOIRE	2000		
CROATIA	1990		
CYPRUS	2002	1983	1962
CZECH REPUBLIC	1990		
DENMARK	1978	1933	1950
DJIBOUTI	1995		Ind.
DOMINICAN REPUBLIC	1966		
ECUADOR	1906		
ESTONIA	1998		1991
FINLAND	1972	1949	1944
FRANCE	1981		1977
GEORGIA	1997		1994K
GERMANY	1987		
GUINEA-BISSAU	1993		1986K
HAITI	1987		1972K
HONDURAS	1956		1940
HUNGARY	1990		1988
ICELAND	1928		1830
IRELAND	1990		1954
ITALY	1994	1947	1947
KIRIBATI			Ind.
LIECHTENSTEIN	1987		1785
LITHUANIA	1998		1995
LUXEMBOURG	1979		1949
MACEDONIA (former Yug. Rep.)	1991		
MALTA	2000	1971	1943
MARSHALL ISLANDS			Ind.
MAURITIUS	1995		1987
MICRONESIA (Federated States)			Ind.
MOLDOVA	1995		
MONACO	1962		1847
MOZAMBIQUE	1990		1986
NAMIBIA	1990		1988K
NEPAL	1997	1990	1979
NETHERLANDS	1982	1870	1952
NEW ZEALAND	1989	1961	1957
NICARAGUA	1979		1930
NORWAY	1979	1905	1948
PALAU			
PANAMA			1903K
PARAGUAY	1992		1928
POLAND	1997		1988
PORTUGAL	1976	1867	1849K
ROMANIA	1989		1989
SAN MARINO	1865	1848	1468K

SAO TOME AND PRINCIPE	1990		Ind.
SEYCHELLES	1993		Ind.
SLOVAK REPUBLIC	1990		
SLOVENIA	1989		
SOLOMON ISLANDS		1966	Ind.
SOUTH AFRICA	1997	1995	1991
SPAIN	1995	1978	1975
SWEDEN	1972	1921	1910
SWITZERLAND	1992	1942	1944
TIMOR-LESTE	1999		
TURKMENISTAN	1999		
TUVALU			Ind.
UKRAINE	1999		
UNITED KINGDOM	1998	1973	1964
URUGUAY	1907		
VANUATU			Ind.
VATICAN CITY STATE	1969		
VENEZUELA	1863		
YUGOSLAVIA	2002		

2. ABOLITIONIST FOR ORDINARY CRIMES ONLY

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances, such as wartime crimes.

Abbreviations: **Date (AO)** = date of abolition for ordinary crimes; **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

Country	Date(AO)	Date(last ex.)
ALBANIA	2000	
ARGENTINA	1984	
BOLIVIA	1997	1974
BOSNIA-HERZEGOVINA	1997	
BRAZIL	1979	1855
CHILE	2001	1985
COOK ISLANDS		
EL SALVADOR	1983	1973K
FIJI	1979	1964
GREECE	1993	1972
ISRAEL	1954	1962
LATVIA	1999	1996
MEXICO		1937
PERU	1979	1979
TURKEY	2002	1984

3. ABOLITIONIST IN PRACTICE

Countries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries which have made an international commitment not to use the death penalty.

Abbreviations: **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

Country	Date(last ex.)
ARMENIA	
BHUTAN	1964K
BRUNEI DARUSSALAM	1957K
BURKINA FASO	1988
CENTRAL AFRICAN REPUBLIC	1981
CONGO (Republic)	1982
GAMBIA	1981
GRENADA	1978
MADAGASCAR	1958K
MALDIVES	1952K
MALI	1980
NAURU	Ind.
NIGER	1976K
PAPUA NEW GUINEA	1950
RUSSIAN FEDERATION	1999
SAMOA	Ind.
SENEGAL	1967
SRI LANKA	1976
SURINAME	1982
TOGO	
TONGA	1982

4. RETENTIONIST

Countries and territories that retain the death penalty for ordinary crimes

AFGHANISTAN	LEBANON
ALGERIA	LESOTHO
ANTIGUA AND BARBUDA	LIBERIA
BAHAMAS	LIBYA
BAHRAIN	MALAWI
BANGLADESH	MALAYSIA
BARBADOS	MAURITANIA
BELARUS	MONGOLIA
BELIZE	MOROCCO
BENIN	MYANMAR
BOTSWANA	NIGERIA
BURUNDI	OMAN
CAMEROON	PAKISTAN
CHAD	PALESTINIAN AUTHORITY
CHINA	PHILIPPINES
COMOROS	QATAR
CONGO (Democratic Republic)	RWANDA
CUBA	SAINT CHRISTOPHER & NEVIS
DOMINICA	SAINT LUCIA
EGYPT	SAINT VINCENT & GRENADINES
EQUATORIAL GUINEA	SAUDI ARABIA
ERITREA	SIERRA LEONE
ETHIOPIA	SINGAPORE
GABON	SOMALIA
GHANA	SUDAN
GUATEMALA	SWAZILAND
GUINEA	SYRIA
GUYANA	TAIWAN
INDIA	TAJKISTAN
INDONESIA	TANZANIA
IRAN	THAILAND
IRAQ	TRINIDAD AND TOBAGO
JAMAICA	TUNISIA
JAPAN	UGANDA
JORDAN	UNITED ARAB EMIRATES
KAZAKSTAN	UNITED STATES OF AMERICA
KENYA	UZBEKISTAN
KOREA (North)	VIET NAM
KOREA (South)	YEMEN
KUWAIT	ZAMBIA
KYRGYZSTAN	ZIMBABWE
LAOS	

Annex 3: Countries Which Have Abolished the Death Penalty since 1976

1976: **PORTUGAL** abolished the death penalty for all crimes.

1978: **DENMARK** abolished the death penalty for all crimes.

1979: **LUXEMBOURG, NICARAGUA** and **NORWAY** abolished the death penalty for all crimes. **BRAZIL, FIJI** and **PERU** abolished the death penalty for ordinary crimes.

1981: **FRANCE** and **CAPE VERDE** abolished the death penalty for all crimes.

1982: The **NETHERLANDS** abolished the death penalty for all crimes.

1983: **CYPRUS** and **EL SALVADOR** abolished the death penalty for ordinary crimes.

1984: **ARGENTINA** abolished the death penalty for ordinary crimes.

1985: **AUSTRALIA** abolished the death penalty for all crimes.

1987: **HAITI, LIECHTENSTEIN** and the **GERMAN DEMOCRATIC REPUBLIC (1)** abolished the death penalty for all crimes.

1989: **CAMBODIA, NEW ZEALAND, ROMANIA** and **SLOVENIA (2)** abolished the death penalty for all crimes.

1990: **ANDORRA, CROATIA (2)**, the **CZECH AND SLOVAK FEDERAL REPUBLIC (3)**, **HUNGARY, IRELAND, MOZAMBIQUE, NAMIBIA** and **SAO TOMÉ AND PRÍNCIPE** abolished the death penalty for all crimes.

1992: **ANGOLA, PARAGUAY** and **SWITZERLAND** abolished the death penalty for all crimes.

1993: **GUINEA-BISSAU, HONG KONG (4)** and **SEYCHELLES** abolished the death penalty for all crimes. **GREECE** abolished the death penalty for ordinary crimes.

1994: **ITALY** abolished the death penalty for all crimes.

1995: **DJIBOUTI, MAURITIUS, MOLDOVA** and **SPAIN** abolished the death penalty for all crimes.

1996: **BELGIUM** abolished the death penalty for all crimes.

1997: **GEORGIA, NEPAL, POLAND** and **SOUTH AFRICA** abolished the death penalty for all crimes. **BOLIVIA** and **BOSNIA-HERZEGOVINA** abolished the death penalty for ordinary crimes.

1998: AZERBAIJAN, BULGARIA, CANADA, ESTONIA, LITHUANIA and the **UNITED KINGDOM** abolished the death penalty for all crimes.

1999: EAST TIMOR (now TIMOR-LESTE), TURKMENISTAN and **UKRAINE** abolished the death penalty for all crimes. **LATVIA (5)** abolished the death penalty for ordinary crimes.

2000: ALBANIA (6) abolished the death penalty for ordinary crimes. **COTE D'IVOIRE** and **MALTA** abolished the death penalty for all crimes.

2001: CHILE abolished the death penalty for ordinary crimes.

2002: CYPRUS and **YUGOSLAVIA (now SERBIA AND MONTENEGRO)** abolished the death penalty for all crimes. **TURKEY** abolished the death penalty for ordinary crimes.

Notes:

(1) In 1990 the German Democratic Republic became unified with the Federal Republic of Germany, where the death penalty had been abolished in 1949.

(2) Slovenia and Croatia abolished the death penalty while they were still republics of the Socialist Federal Republic of Yugoslavia. The two republics became independent in 1991.

(3) In 1993 the Czech and Slovak Federal Republic divided into two states, the Czech Republic and Slovakia.

(4) In 1997 Hong Kong was returned to Chinese rule as a special administrative region of China. Amnesty International understands that Hong Kong will remain abolitionist.

(5) In 1999 the Latvian parliament voted to ratify Protocol No. 6 to the European Convention on Human Rights, abolishing the death penalty for peacetime offences.

(6) In 2000 Albania ratified Protocol No. 6 to the European Convention on Human Rights, abolishing the death penalty for peacetime offences.