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INTERNATIONAL STANDARDS ON THE DEATH PENALTY: SHIFTING DISCOURSE

*Joan Fitzpatrick and Alice Miller**

I. INTRODUCTION

On December 20, 1971, the United Nations (UN) General Assembly affirmed that in order fully to guarantee the right to life protected by Article 3 of the Universal Declaration of Human Rights:¹ "[T]he main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries"² The recent fruits of this two-decade long abolitionist commitment appear bountiful. The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), binding the states parties to the peacetime abolition of the death penalty, was opened for signature on December 15, 1989.³ This action was bracketed by similar codifications of abolition at the regional level, with the adoption of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms in April 1983⁴ and the Protocol to the

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1. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 72, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

2. G.A. Res. 2857 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1971) [hereinafter G.A. Res. 2857 (XXVI)].

3. G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/824 (1989), reprinted in 29 I.L.M. 1464 (1990).

4. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, opened for signa-

American Convention on Human Rights to Abolish the Death Penalty in June 1990.⁵

But this apparent march toward the abolitionist millennium is deceiving. None of the international commitments to abolition has been achieved without struggle and dissent. Indeed, in recent years the discourse about abolition of the death penalty in international fora has taken a negative turn, with opposing states less often arguing that their societies are simply too imperfect to be ready for the abolitionist ideal and more often asserting that the ideal society is one that preserves execution. This change in the tone of the international debate can be traced to the greater aggressiveness of certain retentionist states, reflecting in particular the religiously based views of Islamic states and the more confrontational posture of the United States.

To speak of shifts in discourse about the death penalty will strike many as an impossibility. The arguments for and against capital punishment are wearily familiar, and as long ago as 1793 a Columbia College student (later to become an abolitionist governor of the State of New York) referred to abolition as "an old thread bare subject."⁶ Scholars delight in discovering identical debates on the death penalty occurring in vastly different time periods and societies.⁷ Authors of new books or articles on the death penalty generally feel compelled

ture Apr. 28, 1983, Europ. T.S. No. 114 (entered into force Mar. 1, 1985), reprinted in 22 I.L.M. 538 (1983).

5. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, reprinted in 29 I.L.M. 1447 (1990).

6. PHILIP E. MACKEY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861*, at 53 (1982) (quoting DANIEL D. TOMPKINS, *A COLUMBIAN COLLEGE STUDENT IN THE EIGHTEENTH CENTURY: ESSAYS BY DANIEL D. TOMPKINS* 21-23 (1990)).

7. See, e.g., two articles in *CAPITAL PUNISHMENT* (Thorsten Sellin ed., 1967): William M. Green, *An Ancient Debate on Capital Punishment* 46 (describing debate between Caesar and Cato on the fate of the Catiline conspirators and its resemblance to modern arguments); and Finn Hornum, *Two Debates: France, 1791; England, 1956*, 55 (using the device of parallel columns to display the similarities in legislative debates in the two times and places).

to explain or apologize for writing on a subject on which debate appears to recycle rather than to evolve.⁸

But little has been written concerning the tenor of debate on abolition of the death penalty within international fora. The international debate is distinct from that at the national level. However, the two have complex interrelationships, and fluctuations in national debate will cause a particular state to shift position on the international plane.

One of the key issues in international discourse on the death penalty is whether the discourse should occur at all, or whether capital punishment lies within the realm of purely domestic affairs. Some retentionist states have begun to assert that the death penalty cannot be made the subject of international human rights norms, even norms that bind only ratifying abolitionist states, because such norms lack universality. In contrast to this attempted exclusion of abolition from legitimate international discourse, debate on the death penalty at the national level is generally conceded to be legitimate. Indeed, in many societies the debate is constant or recurring.

Comparison of the experiences of abolitionist versus retentionist states⁹ has been central to international discourse on the death penalty, regardless of whether the focus is on the social scientific aspects (such as comparative crime rates), or on the possibility or impossibility of agreement on moral and philosophical principles. Attention to the experiences of other countries has varied widely in national debates over aboli-

8. Franklin Zimring and Gordon Hawkins refer to the death penalty as a subject "embedded in cliché and sentiment," but one about which there are new things to say. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* xiii (1986). Roger Hood prefaced his recent study with the remark that "no one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy standpoint there appears to be nothing new to be said." ROGER HOOD, *THE DEATH PENALTY* 6 (1989).

9. G.A. Res. 1396 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 23, U.N. Doc. A/4354 (1959), launched the continuing UN efforts to study "the effects of capital punishment, and the abolition thereof, on the rate of criminality," by gathering and analyzing data from states.

tion,¹⁰ influenced by the varying dominance of cosmopolitan versus parochial outlooks.

A striking aspect of the death penalty debate at both international and national levels is the tremendous—some might say inordinate—attention paid to a penal practice that affects an extremely small percentage of even the convicted population in any part of the world. Yet, the debate remains passionate and profoundly important. As Franklin Zimring and Gordon Hawkins note: "Capital punishment is an issue of largely symbolic importance, but symbols count."¹¹ The symbolic importance of the death penalty in current international discourse

10. In 1864, for example, a Royal Commission on Capital Punishment was established by the British Home Secretary. The Royal Commission analyzed data, obtained from British ambassadors and colonial officials, on execution practices in other countries and colonies. Two hundred and forty-five of the seven hundred and twenty-three pages in the Royal Commission's report concerned execution practices in Europe, South America, North America, and Australia. Influenced by this data, the Royal Commission proposed an end to public executions. The four abolitionist members of the Royal Commission dissented from this recommendation, reflecting the widely held belief by abolitionists of the time that an end to the public spectacle of executions would retard progress toward abolition rather than promote it. DAVID D. COOPER, *THE LESSON OF THE SCAFFOLD* 126-45 (1974). Comparative data on capital punishment laws and practices were also compiled by the United Kingdom Select Committee on Capital Punishment in 1930-31. *REPORT OF THE SELECT COMMITTEE ON CAPITAL PUNISHMENT, PARLIAMENTARY PAPERS, REPORTS FROM COMMITTEES* 1030-31, vol. VI (2). Arthur Koestler quotes the Select Committee conclusion from its "prolonged examination of the situation in foreign countries" that "capital punishment may be abolished in this country without endangering life or property, or impairing the security of Society." ARTHUR KOESTLER, *REFLECTIONS ON HANGING* 60 (1956). Similar comparative data were also considered by the Royal Commission on Capital Punishment of 1948-53, leading to similar conclusions. *Id.* at 60-61.

In contrast, Justice Scalia, writing for a plurality in *Stanford v. Kentucky*, 492 U.S. 361 (1989), rejected comparative and international data in determining whether the execution of juveniles violates the Eighth Amendment. "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant." *Id.* at 369 n.1. His views echo those of Sir James Fitzjames Stephens, writing in the June 1864 issue of *FRASER'S MAGAZINE*, rejecting the persuasive force of execution practices in other countries on the ground that the people of England were "more alive" to the need for harsh criminal laws. COOPER, *supra*, at 70.

11. ZIMRING & HAWKINS, *supra* note 8, at xiv.

has three divergent aspects: (1) the pursuit of gradual restrictions and eventual abolition of the death penalty as part of the progressive development of international human rights norms, and the associated transformation of the relationship between the individual and the state; (2) the marked tendency of post-repressive governments, in nations as diverse as the Philippines, Namibia, and Romania,¹² to announce the abolition of the death penalty as verification of their bona fide transformation into democracies; and, (3) the use of the death penalty as a battleground over cultural relativity and exclusive national sovereignty in international human rights law. The death penalty remains equally symbolic at the national level, serving the needs of repressive governments and politicians for a stark emblem of their ruthlessness against certain politically or socially disfavored elements or of their responsiveness to crime-related fears, while simultaneously providing a rallying point for those seeking to challenge the idea of absolute state power over the lives of individuals.

In this article, we will trace the patterns of international discourse on the death penalty through six phases: (1) the period of the late 1940s and early 1950s during which the Universal Declaration of Human Rights,¹³ the Geneva Conventions of 1949,¹⁴ and the European Convention on Human Rights¹⁵ were drafted, when the death penalty was not yet fully recognized as a human rights issue; (2) the period of the late 1950s and 1960s during which the final draft of the International Covenant on Civil and Political Rights (ICCPR)¹⁶ was

12. The Philippines abolished the death penalty in 1987 upon restoration of democracy. Romania abolished the death penalty in 1989 after its revolution. Namibia abolished the death penalty in 1990 upon achieving its independence. *The Death Penalty: List of Abolitionist and Retentionist Countries*, Feb. 1993, at 1-6 (available from Amnesty Int'l, New York, N.Y., AI Index: ACT 50/01/93) [hereinafter *List*].

13. See *Universal Declaration*, *supra* note 1.

14. Especially relevant is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

15. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

16. G.A. Res. 2200 (XXI), U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16, at

adopted and the UN began its examination of the death penalty as a criminological issue; (3) the period of the 1970s when the UN General Assembly committed itself to the abolitionist objective and the American Convention on Human Rights increased restrictions on the death penalty;¹⁷ (4) the period of the late 1970s and early 1980s when international attention shifted from judicial imposition of the death penalty toward the phenomena of extrajudicial executions and disappearances; (5) the period of the 1980s during which the abolitionist protocols¹⁸ were drafted; and, (6) the period of the 1990s, marked by slow ratification of the abolitionist protocols, increasing contentiousness of death penalty discussions in international fora, complex shifts in the imagery of abolition, and reimposition of the death penalty at the national level.

Our focus throughout will be on arguments for and against abolition of the death penalty as a matter of international human rights law, paying attention to debates over incremental measures, such as exemptions for juveniles and pregnant women, fair process safeguards, rights of appeal, or requests for commutation, only as they cast light on the larger abolition debate. While shifts in the nature of the discourse have sometimes been subtle, they have been real. Concrete progress toward abolition through discourse at the international level requires an understanding of these shifts and the factors that have driven them.

II. THE EARLY POSTWAR PERIOD

Revulsion against the atrocities committed by fascist regimes before and during the Second World War provided the dramatic impetus toward the creation of the modern international system for the protection of human rights. But, the

52, U.N. Doc. A/6316 (1966); International Convention on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

17. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter O.A.S.T.S. No. 36].

18. *See supra* notes 3-5.

death sentences meted out to war criminals and collaborators by international¹⁹ and national tribunals²⁰ during the immediate postwar era signal the failure of the international community to embrace abolition of the death penalty as a bedrock principle of human rights. The international community codified a prohibition on genocide,²¹ but conceptualized genocide as a crime²² rather than as a punishment, as its perpetrators tended to perceive it.²³

The Universal Declaration of Human Rights²⁴ contains two articles whose general terms might be construed to prohibit the imposition of capital punishment. Article 3 sparsely provides that "[e]veryone has the right to life, liberty and the security of person."²⁵ Article 5, in equally laconic style, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²⁶ While the

19. Seven of the 28 Japanese wartime leaders placed on trial for war crimes were sentenced to death by the International Military Tribunal for the Far East. 20 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 48, 425-26 (R. Pritchard & S. Zaide eds., 1981). Of the 23 defendants in the "Case Against the Nazi Physicians," one of the several prosecutions at Nuremberg, seven were executed. Alexander Mitscherlich & Fred Mielke, *Epilogue: Seven Were Hanged, in THE NAZI DOCTORS AND THE NUREMBERG CODE* 105, 105-07 (George Annas & Michael Grodin eds., 1992).

20. For example, following World War II, Belgium, which had been de facto abolitionist since 1863 for ordinary crimes, executed a number of persons for treason. Sweden, which by statute had abolished the death penalty for ordinary crimes in 1921, also executed wartime collaborators and did not abolish the death penalty for such offenses until 1972. *Report on the Abolition of Capital Punishment by Mr. Lidbom*, Eur. Consult. Ass., 32d Sess., Doc. No. 4509 at 15-16, 19 (1980) [hereinafter *Lidbom Report*].

21. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

22. *Id.* at art. 1.

23. LEON S. SHELEFF, *ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE* 5 (1987).

24. See *Universal Declaration*, *supra* note 1. A very useful summary of discussions on the death penalty during the drafting of the Universal Declaration and the ICCPR is presented by Lilly E. Landerer, *Capital Punishment as a Human Rights Issue Before the United Nations*, 4 R. D. DE L'HOMME 511 (1971).

25. *Universal Declaration*, *supra* note 1.

26. *Universal Declaration*, *supra* note 1.

drafters of these articles did not intend to mandate immediate abolition of the death penalty, there is evidence in the drafting history of a common aspiration toward eventual abolition. This resulted in deletion of explicit references to capital punishment as an exception to the right to life, set the stage for the later commitment of the UN to abolition, and indicated early recognition of the death penalty as inescapably implicating human rights issues.

The Drafting Committee, established in 1947²⁷ at the first session of the UN Commission on Human Rights, received proposals for an international bill of rights from the UN Secretariat,²⁸ Chile,²⁹ the United Kingdom,³⁰ and the United States,³¹ all of which made specific death penalty exceptions to the right to life under some circumstances.³² Yet, during the Drafting Committee's sessions in the summer of 1947, the death penalty exceptions to the right to life were dropped, based on a consensus within the Drafting Committee that many states were moving toward abolition and that the UN's basic statement of human rights principles should not appear to approve the death penalty.

27. U.N. ESCOR, 1st Sess., U.N. Doc. E/CN.4/SR.12 (1947).

28. *Draft Outline of an International Bill of Human Rights: Report of the Drafting Committee*, U.N. ESCOR, 1st Sess., Annex 1, at art. 3, U.N. Doc. E/CN.4/21 (1947) [hereinafter *Draft Outline*].

29. *Draft Declaration prepared by the Inter-American Juridical Committee: Report of the Government of Chile*, U.N. ESCOR, 1st Sess., pt. 2, U.N. Doc. E/CN.4/2 (1947).

30. *Report of the Drafting Committee to the Commission on Human Rights*, U.N. ESCOR, 1st Sess., Annex B, at art. 8, U.N. Doc. E/CN.4/21 (1947) [hereinafter *United Kingdom Draft*].

31. *United States Suggestions for Articles to be Incorporated in Draft for an International Bill of Human Rights: Report of the Drafting Committee*, U.N. ESCOR, 1st Sess., Annex C, at art. 8, U.N. Doc. E/CN.4/21 (1947).

32. The Secretariat draft, *supra* note 28, simply referred to persons convicted of crimes under laws providing for the death penalty. The draft submitted by Chile, *supra* note 29, specified that the death penalty should be imposed only for the "gravest" crimes; the draft submitted by the United States, *supra* note 31, added a series of specific procedural protections in capital cases (competent and impartial tribunal, conformity with established law, fair public trial, right to confront witnesses, right to compulsory process for witnesses, right to counsel).

Eleanor Roosevelt, serving simultaneously as Chairman of the Commission on Human Rights and Chairman of the Drafting Committee, noted the "movement underway in some States to wipe out the death penalty completely" and suggested "it might be better not to use the phrase 'death penalty.'"³³ Professor Rene Cassin of France concurred, making a distinction between adherence to the aspiration of abolition and imposition of an immediately binding obligation to eliminate the death penalty.³⁴ Professor Koretsky of the Union of Soviet Socialist Republics (USSR), citing the example of his country, which was then in one of its brief abolitionist phases,³⁵ stressed that the UN "should not in any way signify approval of the death penalty."³⁶ Strikingly, Mr. Santa Cruz of Chile³⁷ and Mr. Wilson of the United Kingdom agreed with Professor Koretsky that the UN "should not sanction the death penalty,"³⁸ though their governments were retentionist and had submitted drafts containing specific death penalty exceptions to the right to life.

Thus, the general language of Article 3 of the Universal Declaration, as it emerged from the Drafting Committee in the summer of 1947, does appear to embody a consensus that abolition of the death penalty is a common human rights aspiration for all nations, though some may face delays in achieving that objective. This consensus appears to have held in the

33. U.N. ESCOR, 1st Sess., 2d mtg. at 10, U.N. Doc. E/CN.4/AC.1/SR.2 (1947) [hereinafter U.N. Doc. E/CN.4/AC.1/SR.2].

34. *Id.* Cassin stated that "if the principle of universal abolition of the death penalty could be adopted, it should not impose a strict obligation on States which wished to maintain the death penalty." *Id.*

35. The death penalty in the USSR was abolished by a decree in May 1947, but restored in July 1950 for traitors, spies and saboteurs, and in 1954 for premeditated murder. A 1958 criminal code revision extended the death penalty even further, and statutes in 1960 and 1961 extended it to certain economic crimes. U.N. DEPT OF ECONOMIC & SOCIAL AFFAIRS, CAPITAL PUNISHMENT, at 32, U.N. Doc. ST/SOA/SD/9, U.N. Doc. E/CN.4/AC.1/SR.2, U.N. Sales No. E67.1V.1S, (1962) [hereinafter CAPITAL PUNISHMENT].

36. U.N. Doc. E/CN.4/AC.1/SR.2, *supra* note 33, at 11.

37. U.N. Doc. E/CN.4/AC.1/SR.2, *supra* note 33, at 11.

38. U.N. Doc. E/CN.4/AC.1/SR.2, *supra* note 33, at 11.

Commission on Human Rights, which approved the Drafting Committee's approach.³⁹

A proposal by the USSR in the Third Committee of the General Assembly at its Third Session in 1948 to amend Article 3 to provide that "[t]he death penalty should be abolished in time of peace" provoked a "lively discussion,"⁴⁰ but one that reinforced the UN's acceptance at that time of an ultimate abolitionist goal. While the USSR amendment was rejected by a vote of twenty-one against, nine in favor, with eighteen abstentions,⁴¹ the warning by the representative of the United Kingdom that "a vote on the amendment submitted by the USSR could in no way be interpreted as a vote for or against the abolition of the death penalty"⁴² appears well-taken. In-

39. Mr. A.C.C. Victoria of Uruguay submitted an unsuccessful proposal to prohibit the death penalty for political offenses:

Human life is inviolable. The State shall grant protection to all persons born or those suffering from incurable diseases and those physically or mentally deficient are also entitled to it.

The right to life includes the right of obtaining from the State minimum standards for a dignified and worthy life.

The death penalty shall never be applied to political offenders. With regard to criminal offenders, it shall only be applied after sentence rendered under existing laws after a trial with the necessary guarantees for a just sentence.

U.N. ESCOR, 2d Sess., 35th mtg. at 13, U.N. Doc. E/CN.4/SR.35 (1947).

The Commission never took as a basis of discussion a proposal by Ecuador which, *inter alia*, called for prohibition of the death penalty ("There shall be no death penalty") and extended the right to life to the "moment of conception." *Draft Charter of International Human Rights and Duties submitted by the Delegation of Ecuador*, U.N. Doc. E/CN.4/32 (1947).

40. Landerer, *supra* note 24, at 517.

41. U.N. GAOR 3d Comm., 3d Sess., 107th mtg. at 185, U.N. Doc. A/C.3/SR.107 (1948).

42. U.N. GAOR 3d Comm., 3d Sess., 103d mtg. at 159, U.N. Doc. A/C.3/SR.103 (1948) [hereinafter U.N. Doc. A/C.3/SR.103]. The political tone of the debate adds to the difficulty in interpreting the vote on the USSR proposal. The Soviet representative called for a roll-call vote as "a means of testing the sincerity of representatives who had defended the right of the individual to life" and framed his proposal with sharp attacks on lynching in the United States and on British colonial practices. U.N. GAOR 3d Comm., 3d Sess., 102d mtg. at 142, 149, 150-51, U.N. Doc. A/C.3/SR.102 (1948) [hereinafter U.N. Doc. A/C.3/SR.102]. This attack and the response led the Mexican representative to remark that "[i]n the last few meetings the debate had in fact been in the main confined to a verbal duel be-

deed, the tone of the debate reflects an overwhelming acceptance of abolition as a goal, with only isolated expressions of dissent on grounds that the death penalty was purely a matter for domestic penal policy.⁴³

Some representatives objected to the USSR proposal because it did not also prohibit the death penalty in times of war⁴⁴ and might not have included *de facto* death sentences of confinement in concentration and forced labor camps.⁴⁵ Others

tween the representatives of the major Powers, with representatives of countries of lesser importance attending in the role of worried and helpless spectators." U.N. GAOR 3d Comm., 3d Sess., 104th mtg. at 163, U.N. Doc. A/C.3/SR.104 (1948) [hereinafter U.N. Doc. A/C.3/SR.104].

43. This view was expressed by the representatives of Turkey, U.N. Doc. A/C.3/SR. 103, *supra* note 42, at 158 ("His delegation would vote against the . . . amendment because it considered that it was not for the Committee to decide on the abolition of the death penalty, a highly controversial principle which a number of countries had not yet accepted."); Guatemala, U.N. GAOR 3d Comm., 3d Sess., 105th mtg. at 179, U.N. Doc. A/C.3/SR.105 (1948) [hereinafter U.N. Doc. A/C.3/SR.105] (urging the Committee to avoid a subject on which "[w]hole volumes had been written" and noting that in 1945 Guatemala had after debate chosen to retain the death penalty in restricted form; he was of the opinion that abolition of the death penalty "depended upon the particular circumstances of each country . . ."); and abolitionist Brazil, U.N. Doc. A/C.3/SR.103, *supra* note 42, at 155 ("The death penalty was not provided for in the legislation of Brazil, but the Brazilian delegation believed, nevertheless, that it was not for the Third Committee to make a decision on a question which was essentially one of penal law.") The representative of Syria made a more equivocal statement that the USSR proposal "raised questions which were within the scope of the penal code" but suggested that it could be studied at a later stage and could form a separate recommendation. U.N. Doc. A/C.3/SR.103, *supra* note 42, at 156.

44. Mr. Plaza of Venezuela stated that "the second part, referring to the abolition of the death penalty in time of peace, implied that such punishment would be legal in time of war. That idea was contrary to the laws of Venezuela which guaranteed the inviolability of human life at all times." U.N. Doc. A/C.3/SR.102, *supra* note 42, at 149. He reiterated that "Venezuela would have voted in favour of the . . . amendment dealing with the abolition of the death penalty in time of peace, if the USSR proposal had envisaged the complete abolition of the death penalty." U.N. Doc. A/C.3/SR.104, *supra* note 42, at 167. Venezuela abstained in the vote on the USSR proposal. *See also* U.N. Doc. A/C.3/SR.105, *supra* note 43, at 175 (Mr. Cañas of Costa Rica stated that "[h]e would abstain from voting on the proposed abolition of the death penalty because he considered it insufficient in that it was restricted to time of peace.").

45. The representative of France noted that "[h]e was, himself, in favour of the abolition of the death penalty; but if a recommendation to that effect were included in the declaration, it would have to be carefully defined, so as to cover

feared that prohibition in "time of peace" would interfere with on-going prosecutions of war criminals.⁴⁶ The opposition emphasized the need to retain the concise draft of Article 3 prepared by the Commission⁴⁷ and the greater suitability of the covenant to deal with details of restrictions on the right to life.⁴⁸ While a call for immediate abolition in the Universal Declaration was perceived as "controversial,"⁴⁹ no state indicated explicit dissent from the sentiment that would later be reflected in General Assembly Resolution 2857 (XXVI), in favor of universal abolition as soon as possible.

the practice of sending prisoners to concentration camps" U.N. Doc. A/C.3/SR.102, *supra* note 42, at 146.

46. The Belgian representative indicated an intent to abstain because the proposal was vague on whether "[w]ar criminals and collaborators" could be executed. U.N. Doc. A/C.3/SR.103, *supra* note 42, at 157. The representative of Denmark noted that although the death penalty had been abolished in her country for a long time, it had been reintroduced for a short time for "events arising out of the war." She warned that a roll-call vote would "only result in confusion" because some abolitionist states would vote against and some retentionist states had indicated an intent to vote in favor. U.N. Doc. A/C.3/SR.105, *supra* note 43, at 179-80. The representative of the Netherlands stated that his delegation "agreed in principle" with the USSR proposal to abolish the death penalty, except for war criminals and traitors, but "thought that it had no place in a declaration of human rights"; instead, it should be included in a "separate declaration of the rights and duties of the State." U.N. Doc. A/C.3/SR.103, *supra* note 42, at 158.

47. *See, e.g.*, Remarks of the Representatives of the United States, U.N. Doc. A/C.3/SR.102, *supra* note 42, at 146; Chile, U.N. Doc. A/C.3/SR.102, *supra* note 42, at 147; China, U.N. Doc. A/C.3/SR.103, *supra* note 42, at 153; France, U.N. Doc. A/C.3/SR.103, *supra* note 42, at 154; Netherlands, U.N. Doc. A/C.3/SR.103, *supra* note 42, at 157.

48. *See, e.g.*, Remarks of the Representatives of the United States, U.N. Doc. A/C.3/SR.102, *supra* note 42, at 147; China, U.N. Doc. A/C.3/SR.105, *supra* note 43, at 177; France, U.N. Doc. A/C.3/SR.105, *supra* note 43, at 178. Several representatives, such as the representative of Ecuador, U.N. Doc. A/C.3/SR.104, *supra* note 42, at 169, and the representative of Uruguay, U.N. Doc. A/C.3/SR.105, *supra* note 43, at 173, indicated that the death penalty would be better dealt with in another article of the Universal Declaration, while others, such as the representative of Peru, U.N. Doc. A/C.3/SR.104, *supra* note 42, at 168, and the representative of Pakistan, U.N. Doc. A/C.3/SR.105, *supra* note 43, at 177, felt that it would be better dealt with in a separate resolution of the General Assembly.

49. *See, e.g.*, Remarks of the Representative of Haiti, U.N. Doc. A/C.3/SR.105, *supra* note 43, at 172; and the Representative of Bolivia, who found the subject too controversial but "did not want to appear to approve the death penalty . . . ," U.N. Doc. A/C.3/SR.105, *supra* note 43, at 174.

The postwar impulse to prevent recurrence of the recent atrocities extended beyond the relatively new field of human rights to that of humanitarian law. Concern about mass executions motivated by racial, religious, and political hostility prompted attention to measures to restrict the application of the death penalty in future wars—both in the case of combatants and noncombatants. Indeed, the International Committee of the Red Cross, in preparatory meetings leading to the diplomatic conference that would draw up the Geneva Conventions of 1949, went so far as to propose that the death penalty should be abolished entirely in the postwar recodification of humanitarian law.⁵⁰ This suggestion failed because some opponents expressed concern that the inclusion of an abolition requirement might restrict the number of states ratifying the conventions or lead to excessively broad invocations of emergency exceptions.⁵¹ However, drafters of the Geneva Conventions of 1949 managed to restrict the death penalty in a number of significant ways.

These restrictions primarily concern the status of the potential victims of the death penalty and strict procedural requirements. Postwar codifications of humanitarian law introduced the exemption for juveniles⁵² that was later incorporated into human rights treaties. The procedural restrictions took several forms: (1) limitations on the nature of the offenses for which the death penalty could be imposed;⁵³ (2) prohibitions on the extension of the death penalty by an occupying power beyond the prewar scope established by the government of an occupied territory;⁵⁴ (3) prescription of basic procedural fair-

50. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 230-31 (1947).

51. *Id.* at 231.

52. For example, Article 68 of Geneva Convention IV prohibits the execution of a protected person who was under the age of eighteen at the time of the offense. Geneva Convention IV, *supra* note 14.

53. Article 68 of Geneva Convention IV limits the permissible application of the death penalty to espionage, "serious" acts of sabotage, and intentional homicide. Geneva Convention IV, *supra* note 14.

54. This issue aroused controversy, with the United States among others rath-

ness for the imposition of the death penalty against protected persons;⁵⁵ and, (4) extension of prescribed delays after the imposition of death penalties for the purpose of intercession by the condemned person's protecting power.⁵⁶

Given this detailed consideration of the death penalty in the Geneva Conventions of 1949, it is rather surprising that the subject received so little consideration in the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁷ during roughly the same time period. Throughout much of the drafting process of the European Convention, the participants were divided over the basic approach, between proponents of a precise definition model⁵⁸ and proponents of an enumeration model.⁵⁹ Neither approach

er implausibly arguing that soon-to-be-occupied nations would rapidly abolish the death penalty in order to prevent the occupying power from imposing the death penalty against resistance forces, thus taking advantage of Article 68(2) of Geneva Convention IV. JEAN PICTET, COMMENTARY TO THE GENEVA CONVENTION VOL. IV 345 (1958) ("The United States reserves the right 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 the occupation begins.").

55. Article 71 of Geneva Convention IV requires a regular trial by a competent court and written notice of charges; Article 72 permits the accused to present defense evidence and a right to assistance by counsel or advocate; Article 75 guarantees condemned persons a right to petition for pardon or reprieve. Geneva Convention IV, *supra* note 14.

56. Article 75 of Geneva Convention IV provides that no death sentence can be carried out, except in case of grave emergency, before the expiration of six months after the receipt by the protecting power of notification of the final judgment confirming the death sentence or denying pardon or reprieve. Geneva Convention IV, *supra* note 14.

For a general description of the death penalty provisions of the Geneva Conventions of 1949 and the 1977 Protocols see M. Sassoli, *La Peine de Mort en Droit International Humanitaire et Dans l'Action du Comité International de la Croix-Rouge*, 58 R.I.D.P. 583 (1987).

57. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 15.

58. The precise definition model would prescribe in detail both the rights to be guaranteed and their permissible limitations.

59. Drawing largely from the Universal Declaration, the enumeration model simply listed the rights, with a general limitations clause, or offered a vague collective guarantee for existing protections for human rights in national laws. See 1 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" 92 (1975) [hereinafter 1 TRAVAUX PRÉPARATOIRES] (discussion within the Consultative

appears to have envisioned using the occasion of drafting the European Convention as an opportunity for abolishing the death penalty within Europe.

During the early stages of the drafting, when the enumeration model was in the ascendant, the Consultative Assembly considered a draft prepared by the European Movement that simply guaranteed "security of life and limb."⁶⁰ The Committee on Legal and Administrative Questions urged that only those rights and freedoms "defined and accepted after long usage, by the democratic regimes" could realistically be protected in the new human rights convention.⁶¹

Caution appears to have dominated the drafting process, even after enumeration was jettisoned in favor of precise definition. The United Kingdom representative made a proposal modeled upon the then-current draft UN human rights covenant, and Article 2 of the European Convention⁶² was adopted with little discussion.⁶³ Article 2 left the states parties free to

Assembly in August 1949, discussing draft prepared by the International Judicial Section, which proposed collective guarantees of existing national legal protections); 3 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 254-62 (1976) [hereinafter 3 TRAVAUX PREPARATOIRES] (discussion of division of opinion between proponents of precise definition/enumeration approaches in Preliminary Draft Report by Committee of Experts to the Committee of Ministers, Doc. CM/WP 1 (50) 1, 24 Feb. 1950).

60. 1 TRAVAUX PREPARATOIRES, *supra* note 59, at 296 (draft convention prepared by European Movement).

61. 1 TRAVAUX PREPARATOIRES, *supra* note 59, at 218 (Teitgen Report).

62. The text of the United Kingdom proposal read:

1) No one shall be deprived of his life intentionally save in the execution of the sentence of the court following his conviction of a crime for which his [sic] penalty is defined by law.

2) Deprivation of life shall not be regarded as intentional when it results from the use of force, which is no more than absolutely necessary

a) in defense of any person from unlawful violence,

b) in order to effect lawful arrest or to prevent an escape from lawful custody;

c) any action lawfully taken for the purpose of quelling a riot or insurrection or for prohibiting entry to clearly defined places to which access is forbidden on grounds of national security.

3 TRAVAUX PREPARATOIRES, *supra* note 59, at 186.

63. The Committee of Ministers was offered a choice between the United

continue imposing death sentences, as long as the crime and penalty were previously defined in law—a limitation that was not only modest but duplicative of the general *nulla poene sine lege* provision of Article 7(1) of the Convention.⁶⁴

During this early period the death penalty received clear recognition as an international human rights issue. The substantial restrictions imposed in the Geneva Conventions of 1949 and the more modest limits of the European Convention did not signal any commitment to total abolition, however. It was in the debates over the drafting of the Universal Declaration that eventual abolition of the death penalty emerged as a principle of the new international system for the protection of human rights. Agreement on that principle remained at best implicit in the text of the Universal Declaration.

III. CONCERN WITHIN THE UNITED NATIONS—THE COVENANT AND SOCIAL DEFENSE

Within the UN, the period of the 1950s and the 1960s was characterized by two significant developments: (1) confrontation of the death penalty as a human rights issue in the drafting of the ICCPR, leading to important limitations on its per-

Kingdom proposal in the context of a "precise definition" draft, or a rather indefinite guarantee of "life, liberty and security of person" in an enumeration-style draft, both forwarded by the Committee of Experts in March 1950. 3 TRAVAUX PRÉPARATOIRES, *supra* note 59, at 312-20. In June 1950, the Committee of Ministers referred the matter to a Conference of Senior Officials which opted for the precise definition model. 4 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 182 (1977). Little attention was paid to Article 2 during debate in the Consultative Assembly in August 1950, aside from discussion of an unsuccessful proposal to include an explicit reference to genocide. *Id.* at 64, 80; 5 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 258 (1979).

64. Article 7(1) provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

missible scope and tentative adherence to abolition as a goal; and, (2) recognition of the death penalty as a matter of legitimate concern for international penology. Each of these trends contributed to the recognition of the death penalty as an international issue, and erosion of the view that the death penalty was purely a matter of domestic concern.

The drafting process of the ICCPR actually began as early as 1947, when the Commission on Human Rights undertook the task of preparing the "International Bill of Human Rights," which only later assumed the guise of a declaration and two separate treaties.⁶⁵ The Drafting Committee, appointed by the Commission, decided in July 1947 to draft two instruments—a declaration and a convention.⁶⁶ Proposals for the convention's right to life article took several forms, none of which had a strong abolitionist thrust.⁶⁷ The United Kingdom proposal from July 1947 placed only limited formalist restrictions on the death penalty, in language almost identical to that later incorporated into Article 2(1) of the European Convention.⁶⁸ An early United States proposal contained both substantive and procedural limits on the death penalty, rather similar to those that would be included in the final draft.⁶⁹ Yet, later in 1947,

65. These are the Universal Declaration of Human Rights, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For discussion of early drafting efforts, see Landerer, *supra* note 24, at 513-14.

66. *Draft Outline*, *supra* note 28, at 3, 12.

67. Ecuador submitted to the General Assembly a "Draft Charter of International Rights and Duties" which provided in its Article I that "[t]here shall be no death penalty." Although this proposal was referred to the Commission in November 1947, it did not become a focus for discussion in relation to the ICCPR. See *supra* note 39; Landerer, *supra* note 24, at 515 n.12.

68. The United Kingdom proposal for the UN convention provided, "It shall be unlawful to deprive any person of his life save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law." *United Kingdom Draft*, *supra* note 30, at Annex G, art. 1 at 62.

69. The proposal read:

The right to life is fundamental and may not be denied to any person except upon conviction of the gravest of crimes under general law providing for the penalty of death.

No one shall be deprived of life or personal liberty, or be convicted or punished for a crime in any manner, save by judgment of a competent and impartial tribunal, in conformity with law, after a fair and public

both the United States and the Commission's Working Group on the Convention had shifted to the minimalist approach favored by the United Kingdom.⁷⁰

However, in 1949 the Commission defined further limits on the permissible application of the death penalty, including a restriction to the most serious crimes, a requirement of sentence by a competent court, a prohibition on retroactive death penalties, limitation of penalties to those consistent with the principles of the Universal Declaration, and a preservation of the possibility of amnesty, commutation, or pardon.⁷¹ During the lengthy debates, only occasional mention was made of the prospect for total abolition, with the USSR deciding not to push the issue in light of the General Assembly's failure to include abolition in the Universal Declaration.⁷²

Although the entire issue was reopened at the Commission's Sixth Session in 1950,⁷³ the text was only changed minimally.⁷⁴ With Uruguay taking the lead, greater

trial

Draft Outline, *supra* note 28, at Annex C, art. 8 at 41.

70. In December 1947, the Working Group submitted a draft that simply stated: "It shall be unlawful to deprive any person of his life, save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law." *Report of the Working Party on an International Convention on Human Rights*, U.N. ESCOR, 2d Sess., at 6, U.N. Doc. E/CN.4/56 (1947). This tracks the language of the United Kingdom's proposal, *supra* note 30, and is identical to a proposal submitted by the United States in November 1947. *Proposal For Human Rights Convention*, U.N. ESCOR, 2d Sess., Pt. 1, at 4, U.N. Doc. E/CN.4/37 (1947).

Comments submitted by Uruguay and Brazil during 1948 suggested the addition of an exception to the death penalty for political or "merely political" offenses. See *Comments from Governments on the Draft International Declaration on Human Rights*, *Draft International Convention on Human Rights and the Question of Implementation*, U.N. ESCOR, 3d Sess., at 8, U.N. Doc. E/CN.4/82/Add.2 (1948).

71. U.N. ESCOR, 9th Sess., Supp. No. 10, at 27, U.N. Doc. E/1371 (1949).

72. Mr. Pavlov of the USSR found it "a pity" that the "backward legislation of some countries" prevented adoption of the abolitionist position. U.N. ESCOR, 5th Sess., 91st mtg. at 4, U.N. Doc. E/CN.4/SR.91 (1949).

73. Landerer comments that this "was not too surprising in view of the relatively small majority" (of eight in favor, six opposed, and one abstention) obtained at the Fifth Session. See Landerer, *supra* note 24, at 520-21.

74. The most noteworthy change was a clarification that the condemned per-

discussion of the abolitionist perspective occurred.⁷⁵ Uruguay asserted that if total abolition was not an attainable goal, the Commission should nevertheless make "every effort" to limit the application of the death penalty, "particularly with regard to children, pregnant women and women in general . . ."⁷⁶ Uruguay's abolitionist view prompted several responses. Australia simply objected that its own constitution was not abolitionist,⁷⁷ while Chile made the pragmatic argument that the instrument should be drafted so as to maximize the number of possible signatories,⁷⁸ both being variants on the "least common denominator" approach to human rights drafting. Egypt, inspired by its own national law, made the first, unsuccessful effort to exempt juveniles from the death penalty.⁷⁹ The only real concession to the abolitionist perspective was insertion of the prefatory phrase, "[i]n countries where capital punishment

son "had the right to seek amnesty, or pardon or commutation of the sentence." U.N. ESCOR, 11th Sess., Supp. No. 5, at 44, U.N. Doc. E/1681 (1950).

75. Mr. Rodriguez Fabregat urged that "thou shalt not kill" must be the "supreme commandment for the conscience of mankind." Since the right to life was "the very foundation of moral thought in Uruguay," it had abolished the death penalty in 1905. U.N. ESCOR, 6th Sess., 39th mtg. ¶ 27, U.N. Doc. E/CN.4/SR.139 (1950).

76. *Id.* at ¶¶ 28-29.

77. *Id.* at ¶ 37.

78. U.N. ESCOR, 6th Sess., 140th mtg. ¶ 1, U.N. Doc. E/CN.4/SR.140 (1950).

79. Egypt introduced an amendment to exempt "[o]ffenders under the age of 17," but withdrew it in light of discussion concerning varying ages for majority in national laws and assurances that the amendment's humane principle was already implicitly reflected in the general terms of the article. U.N. ESCOR, 6th sess., 149th mtg. ¶¶ 68-92, U.N. Doc. E/CN.4/SR. 149 (1950); *Draft International Convention on Human Rights*, U.N. ESCOR, 6th Sess., U.N. Doc. E/CN.4/384 (1950). The issue resurfaced in debate during the Third Committee of the General Assembly in 1957. See U.N. Doc. A/C.3/SR.820, *infra* note 85, ¶ 7.

Aside from Mr. Rodriguez Fabregat's statement concerning pregnant women, the first concrete suggestion that pregnant women be exempted from the death penalty came in comments by Yugoslavia on the Draft International Covenant on Human Rights reported by the Seventh Session of the Commission in 1951, proposing to add the following phrase, "In no case shall sentence of death be put into effect when the sentence concerns a pregnant woman." U.N. ESCOR, 7th Sess., Annex III, Agenda Item 16, at 92, U.N. Doc. E/1992 (1951). Yugoslavia's representative offered a revised version at the Commission's Eighth Session, U.N. ESCOR, 8th Sess., 311th mtg. at 6, U.N. Doc. E/CN.4/SR.311 (1952).

exists," recognizing abolition in many societies without committing retentionist states to immediate or even to gradual abolition.⁸⁰

The Commission completed its work on the right to life article at its Eighth Session in 1952, where the abolitionist view was revived by both Uruguay⁸¹ and Sweden.⁸² The United Kingdom failed in its effort to substitute the minimalist text of Article 2 of the European Convention for the Commission's much-revised text.⁸³ Instead, the Commission chose to retain the basic framework of a guarantee of the right to life with a single explicit exception for the death penalty, subject to certain limits. These limits were tightened by an added reference to the Genocide Convention and the exemption for pregnant women. The Commission's final draft of the right to life article read:

1. No one shall be arbitrarily deprived of his life. Everyone's right to life shall be protected by law.
2. In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes pursuant to the sentence of a competent court and in accordance with law not contrary to the principles of the Universal Declaration of Human Rights or the Convention on the Prevention and Punishment of the Crime of Genocide.
3. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
4. Sentence of death shall not be carried out on a pregnant woman.⁸⁴

80. This phrase was added upon the suggestion of Rene Cassin of France, in response to abolitionist views expressed by Mr. Pavlov of the USSR. U.N. ESCOR, 5th Sess., 93d mtg. at 12, U.N. Doc. E/CN.4/SR.93 (1949).

81. U.N. ESCOR, 8th Sess, 310th mtg. at 10, U.N. Doc. E/CN.4/SR.310 (1952).

82. U.N. Doc. E/CN.4/SR.311, *supra* note 79, at 3.

83. *Draft International Covenants on Human Rights and Measures of Implementation*, U.N. ESCOR, 8th Sess., Annex, Agenda Item 4 ¶ 59, U.N. Doc. E/CN.4/528/Add.1 (1952); U.N. ESCOR, 8th Sess., 309th mtg. at 3, U.N. Doc. E/CN.4/SR.309 (1952).

84. U.N. ESCOR, 14th Sess., Supp. No. 4, Annex I B, U.N. Doc. E/2256

The Third Committee of the General Assembly took up the right to life article of the ICCPR in 1957, devoting thirteen meetings to an exhaustive review of the varying approaches adopted or rejected⁸⁵ by the Commission, the lingering textual uncertainties, and the further amendments to limit application of the death penalty.⁸⁶

A major focus throughout the debate was a proposal by Uruguay and Colombia for immediate abolition: "Every human being has the inherent right to life. The death penalty shall not be imposed on any person."⁸⁷ The Uruguayan/Colombian amendment, forcefully and eloquently presented by its sponsors,⁸⁸ had a large impact on shaping the debate. Although, in

(1952); U.N. ESCOR, 8th Sess., Annex I, Agenda Item 4, at 44, U.N. Doc. E/CN.4/668 (1952).

85. For example, the Netherlands revived the proposal to adopt a right to life provision identical to that in Article 2 of the European Convention. U.N. GAOR 3d Comm., 12th Sess., 809th mtg. ¶¶ 24-26, U.N. Doc. A/C.3/SR.809 (1957); U.N. GAOR 3d Comm., 820th mtg. ¶ 7, U.N. Doc. A/C.3/SR.820 (1957) [hereinafter U.N. Doc. A/C.3/SR.820] (Netherlands amendment defeated by vote of fifty in favor, nine opposed, and eleven abstentions); U.N. GAOR 3d Comm., 12th Sess., Agenda Item 35, at 1, U.N. Doc. A/C.3/L.651 (1957).

86. Among the further limits was the prohibition on the execution of persons under the age of eighteen. U.N. Doc. A/C.3/SR.820, *supra* note 85, at 291.

87. U.N. GAOR 3d Comm., 12th Sess., Agenda Item 33, at 1, U.N. Doc. A/C.3/L.644 (1957) [hereinafter U.N. Doc. A/C.3/L.644].

88. Mr. Tejera of Uruguay, introducing the amendment, rejected the task set by the Committee to agree on a formula of words limiting the death penalty in a manner consistent with the Universal Declaration.

Although he was fully aware of the difficulties facing delegations from countries where capital punishment existed, it seemed to him anachronistic that in the twentieth century, at the current stage of moral enlightenment, a United Nations Committee should be attempting to define the cases in which it was lawful to kill a human being. Nothing could justify capital punishment; most of the arguments brought forward in its defence did not stand up to scrutiny. [Noting that many murderers were mentally ill, that the death penalty was not a deterrent, that errors led to executions of the innocent that could not be rectified]. The Uruguayan delegation therefore believed that instead of holding fruitless discussions on the merit of a particular wording, it would be simpler to discard the article and adopt the amendment

There was . . . nothing in the Declaration to justify the existence of capital punishment. Any penal code providing for capital punishment

the end, only two somewhat equivocal references to the desirability of eventual abolition were added to the text of Article 6,⁸⁹ the Uruguayan and Colombian delegates could state with a fair degree of accuracy that "[t]he death penalty was an anachronism in the twentieth century and it was significant that no one in the Committee had defended it."⁹⁰

The most striking aspect of the debate over the Uruguayan/Colombian amendment and milder substitutes calling for gradual abolition⁹¹ is the surprising source of opposition.

and any legal judgement imposing that sentence were [sic] *ipso facto* contrary to the Universal Declaration.

U.N. GAOR 3d Comm., 12th Sess., 810th mtg. ¶¶ 22-23, U.N. Doc. A/C.3/SR.810 (1957).

89. See *infra* notes 91, 100.

90. U.N. GAOR 3d Comm., 12th Sess., 811th mtg. ¶ 32, U.N. Doc. A/C.3/SR.811 (1957) [hereinafter U.N. Doc. A/C.3/SR.811] (comments of Mr. Tejera of Uruguay). Mr. Zea Hernandez of Colombia stated that "[n]o one had defended capital punishment in the course of the debate; at best, it had been deplored as a necessary evil." U.N. GAOR 3d Comm., 12th Sess., 812th mtg. ¶ 10, U.N. Doc. A/C.3/SR.812 (1957) [hereinafter U.N. Doc. A/C.3/SR.812]. He reiterated this observation at the end of the debate: "The consensus [sic] of opinion was that capital punishment was an evil which, though still necessary in some countries, should eventually be abolished." U.N. Doc. A/C.3/SR.820, *supra* note 85, ¶ 28.

91. The French delegate made an oral proposal

to express the Committee's wish to abolish the death penalty by inserting a provision to the effect that the States parties to the Covenant would undertake to develop their penal legislation in such a way as progressively to abolish capital punishment. Although the Covenant on Civil and Political Rights was to contain provisions which could be applied immediately, there was nothing against inserting provisions to be applied progressively. The solution might not be fully satisfactory, but he thought it was the best way of taking the realities of the situation into consideration.

U.N. Doc. A/C.3/SR.811, *supra* note 90, ¶ 27.

Despite favorable reaction from many delegations, France offered no written proposal of this sort. Instead, Panama proposed inserting the sentence, "The States Parties to the Covenant recognize the propriety of promoting the abolition of the death penalty." U.N. GAOR 3d Comm., 12th Sess., Agenda Item 33, U.N. Doc. A/C.3/L.653 (1957) [hereinafter U.N. Doc. A/C.3/L.653]; U.N. GAOR 3d Comm., 12th Sess., 813th mtg. ¶ 29, U.N. Doc. A/C.3/SR.813 (1957) [hereinafter U.N. Doc. A/C.3/SR.813]. The Irish delegate orally proffered a softer version intended to make "clear that the Covenant could not be regarded as an instrument perpetuating the institution of capital punishment" but which would not involve an explicit commitment to gradual abolition. *Id.* ¶ 41 ("Nothing in this article shall be in-

States such as the United Kingdom,⁹² Belgium,⁹³ New Zealand,⁹⁴ Australia⁹⁵ and Canada,⁹⁶ which have all since be-

voked to prevent or to retard any State Party to the Covenant from abolishing capital punishment, either wholly or in part, by constitutional means.")

In light of two changes adopted by the Working Group, Panama withdrew its proposal during discussions in a Working Party convened to reconcile the text of Article 6. U.N. GAOR 3d Comm., 12th Sess., Agenda Item 33, ¶ 95, U.N. Doc. A/3764 (1957). The Working Party altered the text of Article 6(2) to read, "In countries which have not abolished the death penalty, . . ." *Id.* ¶ 102. A variant on the Irish proposal was added by the Working Party as a new paragraph, "Nothing in this article shall be invoked to retard or to prevent any State Party to the Covenant from abolishing capital punishment." *Id.* ¶ 105. A slightly revised version proposed by Ceylon, U.N. GAOR 3d Comm., 12th Sess., 819th mtg. ¶ 31, U.N. Doc. A/C.3/SR.819 (1957) [hereinafter U.N. Doc. A/C.3/SR.819], was adopted by the Committee.

92. Sir Samuel Hoare noted that capital punishment had recently been "hotly debated" in the United Kingdom and that "with much travail" it had been greatly restricted by Parliament. Thus, he felt he could not support the French suggestion for a commitment to gradual abolition. U.N. Doc. A/C.3/SR.811, *supra* note 90, ¶ 40. Mr. Tejera of Uruguay replied that the Parliamentary debates had revealed that "capital punishment was opposed by a large body of public opinion in the United Kingdom" and that the recent Parliamentary action symbolized progress, indicating that "what some had called an ideal might become a reality sooner than they thought." U.N. Doc. A/C.3/SR.811, *supra* note 90, ¶ 41. Sir Samuel Hoare later indicated that the United Kingdom's support for the Working Party's new paragraph was "based on the Panamanian amendment." U.N. GAOR 3d Comm., 12th Sess., 817th mtg. ¶ 19, U.N. Doc. A/C.3/SR.817 (1957) [hereinafter U.N. Doc. A/C.3/SR.817].

93. Mr. Delhaye described the proposal as "too radical" and as potentially "creating obstacles to accession." He noted that Belgium had not repealed its death penalty, though it had not been carried out for seventy-five years. U.N. Doc. A/C.3/SR.813, *supra* note 91, ¶¶ 5, 6.

94. New Zealand could not support the Uruguayan/Colombian amendment "at the current time" because it would "hinder the success of the Covenant." U.N. GAOR 3d Comm., 12th Sess., 814th mtg. ¶ 46, U.N. Doc. A/C.3/SR.814 (1957) [hereinafter U.N. Doc. A/C.3/SR.814]. Mr. Small of New Zealand stiffly rejected the view that "retention of the death penalty indicated a lack of social progress on their part." However, he indicated his government's support for the paragraph added by the Working Party to clarify that the Covenant should not retard abolition of capital punishment "in those countries which believed that to be the proper course." U.N. Doc. A/C.3/SR.817, *supra* note 92, ¶ 10.

95. Australia's delegate stated that he must oppose both the Uruguayan/Colombian amendment and a provision for gradual abolition because some Australian states retained the death penalty. He stated, however, that Australia "hoped that the need for capital punishment would ultimately disappear . . ." U.N. Doc. A/C.3/SR.812, *supra* note 90, ¶ 24.

96. Canada noted that its Parliament had recently undertaken a review of the

come abolitionist, raised the most categorical objections to the Uruguayan/Colombian amendment. In contrast, Islamic states which addressed the issue generally conceded the desirability of eventual abolition.⁹⁷ For example, the delegate from Indonesia "appreciated the lofty reasons that had prompted" the Uruguayan/Colombian amendment, described abolition as "an object to be sought by all States," and asserted that Indonesia "earnestly . . . hoped that it would ultimately be attained."⁹⁸

death penalty and had not taken any final decision on abolition. In light of that, he stated that he could not support either the Uruguayan/Colombian amendment (which was "unrealistic at the current time") or the French suggestion for a commitment to gradual abolition. However, he indicated that Canada might be able to support the milder Irish proposal (similar to the language actually adopted into Article 6(6)). U.N. Doc. A/C.3/SR.814, *supra* note 94, ¶¶ 35-37.

97. Mr. Osman of Morocco "sympathized with those who had so eloquently put the case for the abolition of capital punishment . . . and he hoped that the death penalty would be eliminated in due course." He cautioned that the Uruguayan/Colombian amendment might be an "obstacle to ratification." U.N. Doc. A/C.3/SR.813, *supra* note 91, ¶ 21.

Mr. Rafik of Afghanistan "regretted that the Colombian-Uruguayan amendment . . . appeared to be impractical at the current time and he could only hope that all States would abolish the death penalty in the near future." U.N. Doc. A/C.3/SR.814, *supra* note 94, ¶ 30.

Mr. Baroodi of Saudi Arabia described the Uruguayan/Colombian amendment as a "noble declaration of principle," but cautioned that "all countries were not as fortunate as Uruguay and many of the Member States had not found it possible to abolish capital punishment." U.N. Doc. A/C.3/SR.811, *supra* note 90, ¶ 20.

Begum Jehan-Murshid of Pakistan did not indicate whether her delegation could support gradual abolition, but did indicate that she could not vote for the Uruguayan/Colombian amendment because Pakistan was retentionist. U.N. GAOR 3d Comm., 12th Sess., 818th mtg. ¶ 13, U.N. Doc. A/C.3/SR.818 (1957).

Mr. Brillantes of the Philippines, which has a sizeable Muslim population, stated that the "Philippine people shared the sentiments which had led Uruguay and Colombia to plead for the prohibition of the death penalty." He urged, however, that abolition not be required in the Covenant since such a provision would not be compatible with the laws of some states. U.N. GAOR 3d Comm., 12th Sess., 815th mtg. ¶¶ 13-14, U.N. Doc. A/C.3/SR.815 (1957).

98. U.N. Doc. A/C.3/SR.812, *supra* note 90, ¶ 30. The Indonesian delegate opposed the amendment because it might deter ratification by retentionist states. However, Indonesia could support the paragraph added by the Working Party because it "did not bind States to abolish the death penalty immediately but rather held out an ideal to aspire to." U.N. Doc. A/C.3/SR.819, *supra* note 91, ¶ 49.

The United States did not address the substance of Article 6 because it had decided not to ratify the Covenants and intended to abstain from voting and de-

The debates over Article 6 in the Third Committee leave a degree of uncertainty as to whether the article can fairly be characterized as containing an implicit commitment to gradual abolition.⁹⁹ Had the Working Party not replaced a more explicit Panamanian proposal with what became the text of Article 6(6),¹⁰⁰ such a commitment would be clearer. However, the Chairman of the Working Party indicated, without challenge, that the prefatory language in Article 6(2) ("[i]n countries which have not abolished the death penalty . . .")¹⁰¹

bate. U.N. Doc. A/C.3/SR.812, *supra* note 90, ¶ 17.

99. The vote on the Uruguayan/Colombian amendment was nine in favor, fifty-one against, twelve abstentions. U.N. Doc. A/C.3/SR.820, *supra* note 85, ¶ 7 (the nine being Brazil, Colombia, Dominican Republic, Ecuador, Finland, Italy, Panama, Uruguay and Venezuela). The vote on the final version of Article 6 was fifty-five in favor, none opposed, and seventeen abstentions. U.N. Doc. A/C.3/SR.820, *supra* note 85, ¶ 27. As Landerer points out, the abstentions consisted mainly of the Uruguayan/Colombian immediate abolition camp and the United Kingdom camp favoring further explicit exceptions to the right to life along the model of Article 2(2) of the European Convention. *See* Landerer, *supra* note 24, at 529.

100. *See supra* note 91. The Panamanian proposal would have provided that "[t]he States Parties to the Covenant recognize the propriety of promoting the abolition of the death penalty." U.N. Doc. A/C.3/L.653, *supra* note 91. The eventual text of Article 6(6) was much weakened: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." *See supra* note 16.

As the delegate from Panama stated:

The Working Party had suggested a new paragraph . . . as a substitute for the text submitted by the Panamanian delegation . . . , which the latter had agreed to withdraw. He still thought, nevertheless, that the Panamanian amendment would have been more satisfactory, for its wording had been more positive, without, however, imposing any further obligation on the signatory States than to recognize "the propriety of promoting the abolition of the death penalty", the word "promoting" being understood to mean the carrying out of studies with a view to the progressive abolition of capital punishment and the adoption of measures gradually restricting its application He recalled that a number of representatives had expressed their regret at the withdrawal of the Panamanian amendment; and in that regard he mentioned the suggestion offered by the representative of El Salvador, who had referred to the possibility of organizing a seminar to discuss the best means of securing the abolition of the death penalty, as a procedure which would be in accordance with the Panamanian amendment.

U.N. Doc. A/C.3/SR.819, *supra* note 91, ¶ 24.

101. *See supra* note 16.

was "intended to show the direction in which the drafters of the Covenant hoped that the situation would develop,"¹⁰² presumably a reference to gradual worldwide abolition. It was far from hyperbolic for the Colombian delegate to describe the consensus of opinion in the Committee debates as being that "capital punishment was an evil which, though still necessary in some countries, should eventually be abolished."¹⁰³

Another significant development in the Third Committee debates of 1957 was the suggestion by the Swedish delegate that the UN undertake a "comparative study . . . of the frequency of crimes punishable by death in countries where the death penalty had been abolished and in countries where it was still in force" that "might be sufficiently thought-provoking to produce a movement for reform in the countries which still applied the death penalty."¹⁰⁴ This faith in the power of social scientific data to overcome the political and cultural/symbolic factors influencing retentionist states may have been misplaced, but General Assembly Resolution 1396 (XIV) of 1959¹⁰⁵ launched the UN's efforts to study "the question of capital punishment, of the laws and practices relating thereto, and of the effects of capital punishment, and the abolition thereof, on the rate of criminality."¹⁰⁶

The General Assembly debates over Resolution 1396 (XIV) reveal a degree of discomfort with, though not adamant objection to, discussion of the death penalty as a human rights

102. U.N. GAOR 3d Comm., 12th Sess., 816th mtg. ¶ 19, U.N. Doc. A/C.3/SR.816 (1957).

103. U.N. Doc. A/C.3/SR.820, *supra* note 85, ¶ 28.

104. U.N. Doc. A/C.3/SR.813, *supra* note 91, ¶ 24. She suggested that the study be undertaken by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

105. The co-sponsors of this proposal were Austria, Ceylon, Ecuador, Sweden, Uruguay, Venezuela, and, in revised form, Italy. U.N. GAOR 3d Comm., 14th Sess., Annex, Agenda Item 12, at 1, U.N. Doc. A/C.3/L.767 (1959), *revised by* U.N. Doc. A/C.3/L.767/Rev.1 (1959) [hereinafter U.N. Doc. A/C.3/L.767]; U.N. GAOR 3d Comm., 14th Sess., Annex, Agenda Item 12, at 1, U.N. Doc. A/C.3/L.775 (1959) [hereinafter U.N. Doc. A/C.3/L.775]; U.N. GAOR 3d Comm., 14th Sess., Annex, Agenda Item 12, ¶¶ 54-62, 82, U.N. Doc. A/4250 (1959).

106. *See supra* note 9.

issue, and with explicit UN commitment to abolition. This discomfort is reflected in the vote on the resolution: forty-three in favor, one opposed, and thirty abstentions. During the debate, sponsors, such as Austria,¹⁰⁷ reassured the Third Committee that the study would not constitute an interference in internal affairs and would not necessarily lead to abolition. Other supporters, including Italy¹⁰⁸ and Colombia,¹⁰⁹ and even some retentionist states such as Japan,¹¹⁰ favored the study precisely because it would be the first step toward worldwide abolition. Other retentionist states, such as India,¹¹¹ viewed the study as a way to assist states in forming their own views on capital punishment, and not as a commitment of all governments to abolition.

The most divisive issue concerned the proper body to supervise the study, a debate that revealed reluctance in some quarters to identify the death penalty as a human rights issue. The original resolution¹¹² had invited the Economic and Social Council (ECOSOC) to request the Commission on Human Rights to undertake the study. After objection, this was revised¹¹³ to provide that the study should be carried out by the Commission on Human Rights "in consultation with the Social Commission." Several states¹¹⁴ argued that the issue of capital punishment was suitable only for the Social Commission, but the resolution's supporters stressed the expertise that the Commission on Human Rights had developed on capital punishment through drafting the Universal Declaration and the

107. U.N. GAOR 3d Comm., 14th Sess., 939th mtg. ¶ 22, U.N. Doc. A/C.3/SR.939 (1959) [hereinafter U.N. Doc. A/C.3/SR.939].

108. *Id.* ¶¶ 36-37.

109. U.N. GAOR 3d Comm., 14th Sess., 940th mtg. ¶ 15, U.N. Doc. A/C.3/SR.940 (1959) [hereinafter U.N. Doc. A/C.3/SR.940].

110. U.N. Doc. A/C.3/SR.939, *supra* note 107, ¶ 25.

111. U.N. Doc. A/C.3/SR.940, *supra* note 109, ¶ 13.

112. U.N. Doc. A/C.3/L.767, *supra* note 105.

113. U.N. Doc. A/C.3/L.767/Rev.1, *supra* note 105; U.N. Doc. A/C.3/L.775, *supra* note 105 (Italian amendment).

114. U.N. Doc. A/C.3/SR.939, *supra* note 107, ¶ 30 (Philippines); U.N. Doc. A/C.3/SR.939, *supra* note 107, ¶ 31 (United Kingdom).

ICCPR.¹¹⁵ A compromise left the question as to which body should undertake the study to ECOSOC.¹¹⁶

ECOSOC responded with Resolution 747 (XXIX) of 6 April 1960,¹¹⁷ which called upon the Secretary General to prepare a "factual review of various aspects of the question of capital punishment" in consultation with the ad hoc Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders, thus tipping the scales toward the social defense aspect of the issue. The study was undertaken by the Department of Economic and Social Affairs, with Marc Ancel, a Justice of the French Supreme Court and Director of the Criminal Science Section of the Institute of Comparative Law of Paris,¹¹⁸ as its author.

As Chairman of the European Committee on Crime Problems, Ancel had also been Rapporteur of a Council of Europe report.¹¹⁹ In preparing that survey, "[i]t was understood that the question of the abolition or otherwise of the death penalty was not to be examined as such . . ."¹²⁰ Instead, the Council of Europe survey presented comprehensive information on the following: historical trends; existing capital crimes; trial, appeal, and clemency procedures; modes of execution; crime statistics; and reform proposals.

115. U.N. Doc. A/C.3/SR.940, *supra* note 109, ¶ 9 (remarks of delegate of France), ¶ 22 (remarks of delegate of Sweden).

116. U.N. Doc. A/C.3/SR.940, *supra* note 109, ¶ 23. The final text read:

The General Assembly

Invites the Economic and Social Council to initiate a study of the question of capital punishment, of the laws and practices relating thereto, and of the effects of capital punishment, and the abolition thereof, on the rate of criminality.

This text was adopted by the Plenary Assembly by a vote of fifty-seven to none with twenty-two abstentions. U.N. GAOR, 14th Sess., 841st plen. mtg. ¶ 74, U.N. Doc. A/4286 (1959).

117. U.N. ESCOR, 29th Sess., Supp. No. 1, at 4, U.N. Doc. E/3373 (1960).

118. CAPITAL PUNISHMENT, *supra* note 35, at 1.

119. M. MARC ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (1962).

120. *Id.* at 3. However, the introduction also described capital punishment as "a serious problem to which no upholder of individual freedom and human dignity can be indifferent." *Id.* at 7.

While leaving the human rights aspects of the death penalty largely to implication, the Ancel reports were powerful tools for abolitionism. *The Death Penalty in European Countries* noted that abolition tended to go through several stages: reduction in the number of crimes punishable by death, introduction of an alternate penalty, systematic commutation of capital sentences, de facto abolition, followed finally by abolition in law.¹²¹ Deviations from this pattern might occur due to extraordinary events. For instance, Italy had embraced abolition in the Zanardelli Code of 1889, but Mussolini's fascist regime had reintroduced it for ordinary crimes in 1930. In 1945 the death penalty was again abolished in revulsion against the fascist period.¹²² A similar repudiation of fascism led to the abolition of the death penalty in Germany in 1949, but without the earlier Italian experience of gradual abolition in orderly steps.¹²³ The Council of Europe report also described how a series of notorious crimes, or, conversely, revelations of miscarriages of justice, could cause a particular state to deviate from the general pattern of gradual abolition.¹²⁴ The thrust of the report clearly supported the desirability and inevitability of abolition:

An impartial glance at the facts clearly shows that the death penalty is regarded in Europe as something of an anachronism, surviving precariously for the moment but perhaps doomed to disappear.¹²⁵

The UN report took a somewhat more equivocal stance, given the greater variety of practices and views among the

121. *Id.* at 47.

122. *Id.* at 11, 14, 48. Austria had abolished the death penalty in 1919, but it was reintroduced in 1934 under German domination. It was abolished again in 1945 (although operation of this provision was suspended until 1950). *Id.* at 11, 13.

123. *Id.* at 14, 48. The report notes that public opinion in Germany remained strongly pro-death penalty and cautioned that its abolitionist status might be fragile. *Id.* at 53-54.

124. *Id.* at 50-51.

125. *Id.* at 55.

states responding to the two questionnaires circulated by the Secretary General.¹²⁶ For example, Ancel noted that although there is a general trend to reduce the number of crimes punishable by death, recently in certain countries there had been an extension of the death penalty to economic crimes or political offenses.¹²⁷ Ancel concluded¹²⁸ that "among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment," the latter being primarily "political figures" or "jurists with a traditional training."¹²⁹ In his discussion of the influence of religious views on the status of capital punishment, Ancel described various abolitionist movements within Christian sects, and did not mention Islam at all.¹³⁰

Ancel's report was reviewed by the ad hoc Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders.¹³¹ The Committee generally concurred in Ancel's conclusions:

The Committee noted from Mr. Ancel's report, which matched its own knowledge and experience, that if one looked at the

126. Sixty-nine states replied to the first questionnaire; a number of national correspondents and non-governmental organizations in the field of prevention of crime and treatment of offenders replied to the second questionnaire on the deterrent effect of the death penalty. CAPITAL PUNISHMENT, *supra* note 35, at 1-4.

127. CAPITAL PUNISHMENT, *supra* note 35, ¶ 100.

128. Almost apologetically, Ancel notes that "since the controversy has recently been revived and has even become heated, the author felt that he could hardly refrain from mentioning the arguments briefly in the present report." CAPITAL PUNISHMENT, *supra* note 35, ¶ 230.

129. CAPITAL PUNISHMENT, *supra* note 35, ¶ 231.

130. CAPITAL PUNISHMENT, *supra* note 35, ¶¶ 239-46.

131. The members of this body were the following: Murad bin Ahmad, Commissioner of Prisons of Taiping; James V. Bennett, Director of the U.S. Federal Bureau of Prisons; Torsten Eriksson, Director General of the National Swedish Prisons Board; J. Carlos García Basalo, Inspector General of Argentina's Penal Institutions; Edward R. Moore, Assistant Attorney General of Liberia; A.W. Peterson, Chairman of the U.K. Prison Commission; Hafez Abdel-Hadi Sabek, ex-President of the United Arab Republic Supreme Court; and L.N. Smirnov, Chairman of the Supreme Court of the USSR. *Note by the Secretary-General transmitting the observations and recommendations of the ad hoc Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders*, U.N. ESCOR, 35th Sess., Annexes, Agenda Item 11, at 2, U.N. Doc. E/3724 (1963).

whole problem of capital punishment in a historical perspective it became clear that there was a world-wide tendency towards a considerable reduction of the number and categories of offenses for which capital punishment might be imposed. This was of major importance in the assessment of capital punishment policy.¹³²

Observing that "modern studies of the deterrent effect of capital punishment are limited and inconclusive,"¹³³ the Committee recommended further sophisticated studies of deterrence, especially in countries contemplating a change in death penalty policies.¹³⁴ Noting Ancel's data on de facto abolition, the Committee urged governments to repeal death penalty statutes "concerning any crime to which it is in fact not applied . . ."¹³⁵ The Committee also suggested further reports by governments on death penalty trends, and consideration of new developments by the Consultative Group on the Prevention of Crime and the Treatment of Offenders.¹³⁶

ECOSOC adopted Resolution 934 (XXXV) of 9 April 1963,¹³⁷ tracking the recommendations of the ad hoc Advisory Committee. The Resolution's co-sponsor, Italy, urged retentionist states to study the issue, with a view to eventual abolition if possible.¹³⁸ Retentionist states generally agreed that more information on the subject would be valuable, and regarded progress in limiting the scope of the death penalty as

132. *Id.*

133. *Id.* at 3.

134. *Id.* at 4.

135. *Id.*

136. *Id.* The Committee also urged that governments provide complete medical and social investigation of offenders liable to capital punishment and the "most careful legal procedures and the greatest possible safeguards for the accused . . ." *Id.*

137. E.S.C. Res. 934, U.N. ESCOR, 35th Sess., Supp. No. 1, at 5, U.N. Doc. E/3753 (1963). Resolution 934 was adopted by a vote of sixteen in favor, none opposed, and two abstentions. U.N. ESCOR, 35th Sess., 1251st mtg. Agenda Item 11, ¶ 13, U.N. Doc. E/SR.1251 (1963).

138. U.N. ESCOR, 35th Sess., 1249th mtg. Agenda Item 11, ¶ 6, U.N. Doc. E/SR.1249 (1963) [hereinafter U.N. Doc. E/SR.1249]. Austria and Italy co-sponsored the Resolution. *Id.* ¶ 3.

desirable.¹³⁹ At the time, the United States was in one of its greater abolitionist phases, and its delegate noted that "[c]apital punishment raised the moral issue of whether man, organized into society, had the right to take the life of man as an individual."¹⁴⁰

When the General Assembly endorsed the recommendations of ECOSOC Resolution 934 (XXXV), it gave renewed emphasis to the human rights aspects of the issue by asking the Commission on Human Rights to study the Ancel report and to make appropriate recommendations.¹⁴¹ Yet, a supplementary report prepared by expert consultant Norval Morris, *Capital Punishment: Developments 1961-1965*,¹⁴² continued to emphasize the social scientific aspects, with a special focus on deterrence.¹⁴³

139. See, e.g., remarks of the United States, *id.* ¶¶ 11-15; Yugoslavia, *id.* ¶¶ 16-19 (recommendations were practical and not philosophical and thus merited support); Japan, *id.* ¶¶ 22-24; India, *id.* ¶¶ 27-28; Ethiopia, *id.* ¶ 29; Czechoslovakia, U.N. ESCOR, 35th Sess., 1250th mtg. Agenda Item 11, ¶¶ 1-4, U.N. Doc. E/SR.1250 (1963).

140. U.N. Doc. E/SR.1249, *supra* note 138, ¶ 12. The United States delegate attacked the extension of the death penalty to economic crimes by some states, provoking a heated reply by the USSR delegate, who nevertheless supported the resolution because it reflected "common ground in pursuing the general aim of the limitation and eventual abolition of capital punishment." U.N. Doc. E/SR.1249, *supra* note 138, ¶¶ 15, 35. The Ancel report noted that the USSR, having abolished the death penalty in 1947, restored it in 1950 for traitors, spies and saboteurs, and extended it in 1954 to premeditated murder and to a number of other crimes between 1958 and 1961. CAPITAL PUNISHMENT, *supra* note 35, at 32.

The most categorical retentionist position voiced in debates over ECOSOC Res. 934 (XXXV) was that of the French delegate, who "felt, as a matter of principle, that the topic came within the exclusive competence of individual Member States." U.N. Doc. E/SR.1249, *supra* note 138, ¶ 36.

141. G.A. Res. 1918 (XVIII), U.N. GAOR, 18th Sess., Annexes, Agenda Item 12, ¶¶ 44-46, U.N. Doc. A/5606 (1963).

142. NORVAL MORRIS, CAPITAL PUNISHMENT: PART II DEVELOPMENTS 1961-1965, U.N. Doc. ST/SOA/SD/10, U.N. Sales No. E.67.IV.15 (1967).

143. Morris's study, though hampered by uneven data, was even more carefully crafted than Ancel's. Morris concluded that:

all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing, abolition does not appear to interrupt the decrease; where the rate is stable, the presence of or absence of capital punishment does not appear to affect it.

When the Consultative Group on the Prevention of Crime and the Treatment of Offenders reviewed the data at its August 1968 session, heightened attention was given to the human rights aspects of the debate. The pro-abolition views that are only implicit in the Ancel and Morris reports became explicit:

The capital punishment argument has changed. No member of the Consultative Group supported capital punishment other than as a temporary expedient or until the public should come to see the lack of need for this [sanction]. All looked with favour towards the day of abolition. Capital punishment thus becomes an "exceptional" not a routine sanction, which should be used sparingly as social circumstances permit, so that the provisions of Article 3 of the Declaration of Human Rights may be implemented. Such a statement is not an interference with national autonomy, it simply recognizes that the burden of proof in relation to the need for capital punishment for any type of crime and for the execution of any individual criminal has shifted with the progress of social understanding and a larger recognition of the rights of man.¹⁴⁴

The Consultative Group endorsed meaningful appeal rights¹⁴⁵ and information from member states to the Secretary General concerning "their present attitude—with indication of the reasons therefor—to possible further restriction of the use of the death penalty or to its total abolition . . ."¹⁴⁶ The Consulta-

Id. at 82. While trends were mixed in the period under review, Morris found a continuation of the long-term trend toward abolition. *Id.* at 81-82. "[T]he categories of offences from which the death penalty was removed are those, particularly homicide, to which it has traditionally been applied; whereas the categories for which it was newly invoked are economic and political crimes that are seen as involving a threat to social order or governmental stability." *Id.* at 85.

144. UNITED NATIONS CONSULTATIVE GROUP ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, CAPITAL PUNISHMENT, Annex, ¶ 15, U.N. Doc. A/7243 (1968) [hereinafter U.N. Doc. A/7243].

145. *Id.* ¶ 6. The Consultative Group also emphasized access to competent counsel. *Id.* ¶¶ 17-19. E.S.C. Res. 1337 (XLIV) of 31 May 1968 also included these recommendations. U.N. Doc. A/7243, Annex, *supra* note 144, ¶ 6.

146. U.N. Doc. A/7243, *supra* note 144, ¶ 6.

tive Group did not regard further studies of deterrence to be of great value¹⁴⁷ to "expedite the trend towards the abolition of capital punishment"¹⁴⁸ The Consultative Group recommended that states collating data on their capital sentencing practices supply it to the Secretary General for dissemination.¹⁴⁹

The Third Committee of the General Assembly took up the issue at its Twenty-third Session in 1968, coincidentally the International Year for Human Rights.¹⁵⁰ Noting the conclusions of the Ancel, Morris, and Consultative Group reports of a worldwide trend toward abolition, the Third Committee, "[desiring] to promote further the dignity of man and thus to contribute to the International Year for Human Rights,"¹⁵¹ endorsed the recommendations of meaningful rights to appeal and competent counsel, and it called upon member states to report their attitude and plans for further restriction or total abolition of the death penalty.¹⁵² General Assembly Resolution 2393 (XXIII) marks the commencement of the periodic reports on capital punishment by the Secretary General that were to serve as the focus of continued UN attention to the issue.¹⁵³ Most strikingly, the pre-ambular paragraphs of General Assembly Resolution 2393 (XXIII) link the issue of capital punishment both to Article 3 of the Universal Declaration concerning the right to life, and also to Article 5 concerning torture.¹⁵⁴ Yet, little was ultimately to be made of this per-

147. See U.N. Doc. A/7243, *supra* note 144, ¶ 30.

148. U.N. Doc. A/7243, *supra* note 144, ¶ 30.

149. U.N. Doc. A/7243, *supra* note 144, ¶ 31.

150. See UNITED NATIONS, INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, PROCLAMATION OF TEHRAN, at 3, U.N. Doc. A/CONF.32/41, U.N. Sales No. E.68.XIV.2 (1968).

151. G.A. Res. 2393 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 42, U.N. Doc. A/7218 (1968).

152. *Id.*

153. The resolution calls upon states to inform the Secretary General of actions they take to comply with the resolution, and calls upon the Secretary General to report to ECOSOC in 1971. *Id.*

154. *Id.*; Landerer, *supra* note 24, at 533.

ception of capital punishment as a form of torture in UN consideration of the subject.

The debates leading to the adoption of General Assembly Resolution 2393 (XXIII) reveal a general, though not universal, commitment to the abolitionist goal.¹⁵⁵ Many retentionist countries participating in the debate conceded the desirability of abolition.¹⁵⁶ The United States, still at an historical high water mark for abolitionist sentiment, regarded the resolution as an important step toward abolition and stated that there was no justification for the death penalty.¹⁵⁷

However, the lopsided vote of ninety in favor, with none opposed, and three abstentions¹⁵⁸ is due, in large measure, to the modest nature of General Assembly Resolution 2393 (XXIII), which emphasized procedural rights in capital cases rather than abolition per se. A number of abolitionist states regretted this caution, asserting that the conclusions of the Ancel and Morris reports and the recommendations of the Consultative Group justified much more rapid progress toward abolition.¹⁵⁹

155. China (Taiwan) supported the draft but felt capital punishment was a complex issue related to social and political traditions in various countries. U.N. GAOR 3d Comm., 23d Sess., 1557th mtg. ¶ 17, U.N. Doc. A/C.3/SR.1557 (1968) [hereinafter U.N. Doc. A/C.3/SR.1557]. Morocco questioned whether humanitarian attitudes were appropriate with respect to persons committing monstrous crimes, but supported the draft. U.N. GAOR 3d Comm., 23d Sess., 1558th mtg. ¶ 41, U.N. Doc. A/C.3/SR.1558 (1968) [hereinafter U.N. Doc. A/C.3/SR.1558].

156. See, e.g., Remarks of Yugoslavia, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 1; France, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 9; Chile, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 16; the Philippines, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 36; Afghanistan, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 37; Canada, U.N. GAOR 3d Comm., 23d Sess., 1559th mtg. ¶ 2, U.N. Doc. A/C.3/SR.1559 (1968); Syria, *id.* ¶ 16; Israel, *id.* ¶ 25. Upper Volta, however, successfully urged deletion of the request for states to indicate the reasons for their retention or abolition of the death penalty, on grounds that this placed retentionist states on the defensive. See *Capital Punishment: Upper Volta: Amendment to the Draft Resolution Contained in Document A/7243*, U.N. GAOR 3d Comm., 23d Sess., Agenda Item 59, at 4, U.N. Doc. A/C.3/L.1555 (1968).

157. U.N. Doc. A/C.3/SR.1557, *supra* note 155, ¶ 20.

158. U.N. Doc. A/C.3/SR.1557, *supra* note 155, ¶ 34.

159. See, e.g., Remarks of Italy, U.N. Doc. A/C.3/SR.1557, *supra* note 155, ¶ 11; Portugal, U.N. Doc. A/C.3/SR.1557, *supra* note 155, ¶ 18; Austria, U.N. Doc.

While the strategy of urging safeguards promotes human rights objectives by reducing capricious application of the death penalty, it also risks blunting the impetus toward abolition by permitting retentionist states to seek shelter from human rights criticism through claims that their procedural systems are above reproach.¹⁶⁰ The focus thus strays from the central question of whether human rights are violated whenever persons are executed.

IV. THE AMERICAN CONVENTION ON HUMAN RIGHTS

Despite the strong Latin American abolitionist tradition, political realities prevented the adoption of a prohibition on the death penalty in the American Convention on Human Rights. A Uruguayan amendment to Article 4 of the American Convention providing that "[n]o one shall be sentenced to death,"¹⁶¹ failed on a vote of eight in favor, none opposed, and eleven abstentions.¹⁶² Undaunted, the pro-abolition forces at the Conference of San José pronounced a declaration that foreshadowed the adoption, twenty-one years later, of a protocol for the abolition of the death penalty:

The undersigned Delegations . . . , in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the

A/C.3/SR.1558, *supra* note 155, ¶ 2.

160. A number of retentionist states participating in the debate on G.A. Res. 2393 (XXIII) asserted that their systems provided safeguards consistent with the resolution. *See, e.g.*, Remarks of delegate of the United Arab Republic, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 22; Pakistan, U.N. Doc. A/C.3/SR.1558, *supra* note 155, ¶ 24.

161. HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 248 (Thomas Buergenthal & Robert Norris eds., 1982) (amendment proposed at Second Plenary Session of the Conference of San José, Nov. 20, 1969, Doc. 86, Corr. 1 (1970)) [hereinafter Buergenthal & Norris].

162. Voting in favor were Colombia, Ecuador, Honduras, Panama, Argentina, Uruguay, Venezuela, and Costa Rica. Abstaining were El Salvador, Trinidad and Tobago, United States, Paraguay, Dominican Republic, Brazil, Mexico, Chile, Guatemala, Nicaragua, and Peru. *Id.* Costa Rica abstained on the vote on Article 4 as a whole because of its abolitionist tradition. *Id.* at 248-49.

most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering [sic] goal of making all possible efforts so that, in a short time, an additional protocol to the American Convention on Human Rights—Pact of San José, Costa Rica—may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man.¹⁶³

Article 4 embodies several real advances in the restriction of the death penalty despite its concessions to retentionist realities. As early as 1959, the Inter-American Council of Jurists had prepared a draft convention whose right to life article tracked that of the draft UN covenant,¹⁶⁴ with the addition of a bar on capital punishment for political offenses.¹⁶⁵ In 1965,

163. Buergenthal & Norris, *supra* note 161, at 270 (Summary Minutes of Closing Plenary Session, Nov. 22, 1969, Doc. 84 (1969)). The sponsoring delegations were Costa Rica, Uruguay, Colombia, Ecuador, El Salvador, Panama, Honduras, the Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina, and Paraguay.

164. *See supra* note 99.

165. *Proteccion de los Derechos Humanos*, OAS Doc. OEA/Ser.E/XI.1 Doc. 8 corr. at 2 (1964) (transmitting draft human rights convention to the OAS Council). The text of the draft's Article 2 read (translated from Spanish):

1. The right to life is inherent in the human person. This right shall be protected by law from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries where capital punishment has not been abolished, sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of a competent court, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.
3. In no case shall capital punishment be inflicted for political offenses.
4. Capital punishment shall not be imposed on persons who, at the time the crime was committed, were under 18 years of age; nor shall it be applied to pregnant women.

The exception for political offenses caused difficulty based on concerns by states such as Brazil and the United States that political offenses could not be precisely defined. Buergenthal & Norris, *supra* note 161, at 90-91, 152. A proposal by El Salvador to define them in the text failed. Buergenthal & Norris, *supra* note 161, at 37. The solution, also proposed by El Salvador, was to keep the text of Article 4(4), and to ask the Conference to adopt a resolution asking the Council of

Uruguay made the intriguing suggestion that the convention prohibit the death penalty, but permit states to enter limited reservations to this provision.¹⁶⁶ This proposal was not adopted by the Inter-American Commission on Human Rights (IACHR) when it submitted a draft convention to the Council of the Organization of American States (OAS) in 1968,¹⁶⁷ which became the basis for discussions at the Conference of San José. But the IACHR draft limited the death penalty to the most serious crimes under law adopted prior to the crime, barred capital punishment for political offenses, excluded persons under eighteen or over seventy¹⁶⁸ and pregnant women from the death penalty, and guaranteed condemned prisoners the right to apply for pardon or commutation or to receive amnesty.¹⁶⁹

the OAS to request the Inter-American Juridical Committee to update its 1959 study of the concept of political offenses. Buerghenthal & Norris, *supra* note 161, at 41-42.

166. Uruguay's proposed Article 2(2), submitted to the Second Special Inter-American Conference in Rio de Janeiro in May and June 1965, provided:

The States Parties to this Convention shall abolish capital punishment. Reservations to this provision shall be admitted solely on condition that sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of an independent and impartial regular court, which will satisfy due process of law, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

Draft Convention on Human Rights, OAS Doc. OEA/Ser.E/XIII.1 Doc. 49, at 1 (1965).

167. The IACHR had indicated approval of Uruguay's approach during its preliminary consideration of the draft convention. See OAS Doc. OEA/Ser.L/V/II.15 Doc. 29, at 25 (1966); OAS Doc. OEA/Ser.G/IV C-i-787 Rev. 3, at 88 (1967).

168. The over 70 age limit is also reflected in Article 44 of the Guatemalan Penal Code and in Article 54 of the 1966 Constitution, as noted in a 1966 study of the death penalty prepared by IACHR member Angela Acuna de Chacon. *El Derecho a la Vida*, OAS Doc. OEA/Ser.L/V/II.15 Doc. 13, at 27-28 (1966) [hereinafter Angela Acuna de Chacon].

169. Buerghenthal & Norris, *supra* note 161, at 2-3 (1982) (Draft Inter-American Convention on Protection of Human Rights (IACHR), adopted as a working document by the Council of the OAS on October 2, 1968). Article 3 of the IACHR draft read:

1. Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Commenting on the IACHR draft, Uruguay expressed regret for the "unavoidable compromises" underlying the draft and noted that "there does not seem to be a climate of opinion favoring the elimination of the death penalty"¹⁷⁰ However, Uruguay proposed the interim solution of adding the following provision:

The death penalty shall not be established in states that have abolished it, nor shall its application be extended to crimes with respect to which it does not presently apply.¹⁷¹

This provision gave concrete shape to the gradual trend toward abolition¹⁷² by attempting to forestall the two phenomena running contrary to that trend—instances of abolitionist countries reversing direction¹⁷³ and expansion to new crimes by

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

3. In no case shall capital punishment be inflicted for political offenses.

4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

5. Every person condemned to death shall have the right to apply for pardon or commutation of sentence. Amnesty, pardon, or commutation of capital punishment may be granted in all cases. Capital punishment shall not be imposed while a decision is pending on the first application for commutation, presented to the competent authority.

The IACHR explained that it chose not to adopt Uruguay's proposed paragraph 2 for the sake of similarity to Article 6(2) of the ICCPR. Buergenthal & Norris, *supra* note 161, at 36 (Annotations on the Draft IACHR, prepared by its Secretariat).

170. Buergenthal & Norris, *supra* note 161, at 205 (Uruguay's Observations Regarding the Draft IACHR, dated December 27, 1968).

171. Buergenthal & Norris, *supra* note 161, at 205. With minor textual changes, this proposal was added to the draft article in the Second Session of Committee I at the Conference of San José. Buergenthal & Norris, *supra* note 161, at 32-33.

172. Acuna de Chacon's 1966 study on the death penalty in the Americas noted the trend toward abolition. See *supra* note 168, at 13.

173. Morris noted in the study period from 1961-65 that, among jurisdictions replying to his questionnaires only Delaware of the United States had restored the

retentionist states.¹⁷⁴ The commitment to eventual abolition was so strong at the Conference of San José that the United States even argued that the exemptions for minors, the elderly, and pregnant women should be deleted because they clashed with "the general trend, already apparent, for the gradual abolition of the death penalty."¹⁷⁵

V. A VISIBLE UNITED NATIONS COMMITMENT TO THE GOAL OF ABOLITION

With the adoption of General Assembly Resolution 2857 (XXVI) of 20 December 1971, the UN General Assembly explicitly committed the organization to the "main objective . . . of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries . . ."¹⁷⁶ Yet, the Third Committee debates on this resolution were brief and anticlimactic. Oddly, the ire of retentionist states was directed toward language that merely restated passages from the almost unanimously adopted General Assembly Resolution 2393 (XXIII),¹⁷⁷ expressed "the desirability of continuing and

death penalty after three years of abolition. MORRIS, *supra* note 142, at 6. Argentina, abolitionist since 1921, restored the death penalty in March 1971 and abolished it (except for exceptional crimes in the military penal code) again in December 1972. *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 54th Sess., Agenda Item 13, at 73, U.N. Doc. E/5242/Add.1 (1973). Argentina again restored the death penalty in 1974. *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Agenda Item 6, ¶ 25, U.N. Doc. E/1980/9 (1980). The death penalty was abolished for ordinary crimes in 1984 with the restoration of civilian government. HOOD, *supra* note 8, at 27. Argentina did not ratify the American Convention on Human Rights until September 1984. *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.L/V/II.81 Rev.1 Doc. 6 Annex A (1992).

174. Morris noted that during the 1961-65 period these tended to be economic and political crimes. See *supra* note 142, at 7.

175. Buergethal & Norris, *supra* note 161, at 152 (Observations and Proposed Amendments to the Draft IACHR, submitted by the United States on July 2, 1969).

176. G.A. Res. 2857 (XXVI), *supra* note 2.

177. Separate votes were held on the words: "or its total abolition" in preambular paragraph 1 and operative paragraph 4, even though these were merely

extending the consideration of the question of capital punishment by the UN,¹⁷⁸ or called for a special report by the Secretary General on provisions for pardon, reprieve or commutation in retentionist states.¹⁷⁹ No amendments were proposed to operative paragraph 3 nor was a separate vote held on it, despite its call for progressive abolition and its linkage of abolition to the full guarantee of the right to life.¹⁸⁰

General Assembly Resolution 2857 (XXVI) represented a small but concrete step toward abolition to its sponsors, but they reassured retentionist states that the commitment was one of only gradual abolition.¹⁸¹ Such assurances did not garner the support of abstaining states citing concerns such as the instability of developing countries,¹⁸² the need to restore the death penalty to combat terrorists,¹⁸³ or the inconclusiveness of internal debates on abolition.¹⁸⁴

references to G.A. Res. 2393 (XXIII). The language was retained by votes of twenty-four in favor, eight opposed, and sixty-one abstentions and twenty-three in favor, nine opposed, and sixty-two abstentions, respectively, U.N. GAOR 3d Comm., 26th Sess., 1905th mtg. ¶ 69, U.N. Doc. A/C.3/SR.1905 (1971) [hereinafter U.N. Doc. A/C.3/SR.1905], even though G.A. Res. 2393 (XXIII) had been adopted, only three years earlier, by a vote of eighty-seven in favor, one opposed, and seven abstentions. See *supra* note 151.

178. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶ 42. This pre-ambular paragraph was retained by a vote of thirty-one in favor, four opposed, and fifty-eight in abstentions. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶ 69.

179. Operative paragraph 6 was retained by a vote of thirty-three in favor, none opposed, and sixty-two abstentions. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶ 69.

180. Yet its significance was noted by Landerer, *supra* note 24, at 534 n.101. When the similar language of ECOSOC Res. 1574 (L) was quoted in the 1973 report of the Secretary General on capital punishment, it was underscored to emphasize its perceived significance in committing the United Nations to a program for abolition. *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 54th Sess., Agenda Item 13, ¶ 5, U.N. Doc. E/5242 (1973) [hereinafter U.N. Doc. E/5242].

181. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶¶ 41-44, 47, 53 (Sweden); ¶ 51 (Italy).

182. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶ 61 (Senegal).

183. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶¶ 65-67 (Brazil). In 1942 Brazil had abolished capital punishment, aside from military courts. Angela Acuna de Chacon, *supra* note 168, at 16. It was restored in 1969 for crimes against the state causing loss of life. U.N. Doc. E/5242, *supra* note 180, ¶ 36.

184. U.N. Doc. A/C.3/SR.1905, *supra* note 177, ¶ 46 (United States, noting

Cautionary notes were strongly sounded in the Secretary General's 1973 report¹⁸⁵ which indicated the fragile nature of the consensus on abolition. The report included observations that the UN, after its examination of "practical issues" such as deterrence, had "gradually shifted from the position of a neutral observer concerned about, but not committed on the issue of capital punishment, to a position favouring the eventual abolition of the death penalty."¹⁸⁶

Suggesting doubt about the strength of this commitment, the report noted that "[f]or every State Member of the United Nations devoted to the abolition of capital punishment in law or fact there would appear to be three others legally committed to its sanction and use—at least as a very last resort."¹⁸⁷ Criticizing earlier studies for undue reliance on Western data,¹⁸⁸ the report found it "extremely doubtful whether there is any uniform progression towards the restriction of the use of the death penalty; progress is discernible only in the very long run and it is usually marked by many ups and downs."¹⁸⁹ The

planned study by Department of Justice Task Force and pending litigation in the Supreme Court).

185. U.N. Doc. E/5242, *supra* note 180, ¶ 73, written pursuant to G.A. Res. 3011 (XXVII) of 18 December 1972, which called for an updating of the 1962 and 1967 reports. U.N. GAOR, 27th Sess., Supp. No. 28A, at 67, U.N. Doc. A/8928 (1972).

186. U.N. Doc. E/5242, *supra* note 180, ¶ 16. The report also notes that "[t]he States Members of the United Nations have decided that abolition must be the right direction for human society to take though they do not say when." U.N. Doc. E/5242, *supra* note 180, ¶ 77.

187. U.N. Doc. E/5242, *supra* note 180, ¶ 13.

188. No particular studies are identified, and the target of criticism appears to be intellectuals in general:

The result has been a rather misleading picture which has frequently given an unwarranted universality to values, theories or practices prevalent in the west. In academic circles it has sometimes become unfashionable to support capital punishment: civilization is tolerance and severity in punishment a sign of backwardness and regression, and so liberal thinking and the abolition of the death penalty are expected to coincide.

U.N. Doc. E/5242, *supra* note 180, ¶ 23.

189. U.N. Doc. E/5242, *supra* note 180, ¶ 24. The report notes the extension of capital punishment in some states to new crimes such as hijacking and drug trafficking. U.N. Doc. E/5242, *supra* note 180, ¶¶ 27, 74.

report questioned the utility of promoting the abolitionist goal by social science studies, noting that the death penalty is still regarded by some governments as an efficient or acceptable means "of getting rid of certain types of problems—whatever the experts may have to say about the lack of deterrent effect of this penalty."¹⁹⁰ The gloomy tone of the report is especially striking given that the developments noted since 1967 included abolition or further restriction in eight countries, reintroduction in two (Argentina and Brazil), a five-year moratorium in Canada, and the *Furman* decision of the United States Supreme Court¹⁹¹ striking down the death penalty laws of all the states.¹⁹²

ECOSOC responded with Resolution 1745 (LIV) of 16 May 1973, which called upon the Secretary General to provide analytical reports on capital punishment at five-year intervals beginning in 1975,¹⁹³ "believing that scientifically based studies are needed to improve knowledge and understanding of the death penalty and to define what further work could be done by the United Nations in this field"¹⁹⁴ The involvement of the social defense arm of the UN was also stressed in the request that the Committee on Crime Prevention and Control examine the Secretary General's 1973 report and "the issues presently involved in the question of capital punishment."¹⁹⁵

The sense of stagnation in the progress toward abolition, reflected in the 1973 and 1975 reports of the Secretary General, was noted "with concern" by the General Assembly in Resolution 32/61 of 8 December 1977,¹⁹⁶ which also reiterated the

190. U.N. Doc. E/5242, *supra* note 180, ¶ 28.

191. *Furman v. Georgia*, 408 U.S. 238 (1972).

192. *Id.*; see also U.N. Doc. E/5242, *supra* note 180, ¶ 36.

193. U.N. ESCOR, 54th Sess., Supp. No. 1, at 4, U.N. Doc. E/5367 (1973) [hereinafter U.N. Doc. E/5367]. The first brief report noted mixed trends of abolition and further restriction of the death penalty, versus increasing executions in states such as the Philippines. *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 8th Sess., at 21-48, U.N. Doc. E/5616 (1975) [hereinafter U.N. Doc. E/5616].

194. U.N. Doc. E/5367, *supra* note 193.

195. U.N. Doc. E/5367, *supra* note 193.

196. U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1977)

"main objective" of progressive restriction and gradual abolition. The General Assembly expressed regret at the low number of responses to the Secretary General's questionnaire on capital punishment,¹⁹⁷ and called upon the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders to prepare documentation and discuss the use of the death penalty and access to pardon, commutation or reprieve.¹⁹⁸ Finally, the General Assembly decided to consider "with high priority" the issue of capital punishment at its thirty-fifth session in 1980.¹⁹⁹

The Secretary General's 1980 report²⁰⁰ noted a similar mixture of developments as had the 1975 report, finding the "legal status of capital punishment . . . relatively unchanged" over the reporting period.²⁰¹ Noting the "erratic" pattern of increases and decreases in actual imposition of the death pen-

[hereinafter U.N. Doc. A/32/45].

197. Only 32 states had responded. *Id.* The General Assembly also urged the Secretary General to complete the study of pardon, commutation and reprieve (requested in 1971) in the context of preparing the 1980 report. *Id.*

198. U.N. Doc. A/32/45, *supra* note 196, ¶¶ 4-5. The Committee on Crime Prevention and Control in 1978 decided to discuss capital punishment in conjunction with norms and guidelines on criminal justice and to place the issue on the agenda of the Sixth Crime Congress. U.N. ESCOR, 26th Sess., at 6, U.N. Doc. E/CN.5/558 (1978).

199. U.N. Doc. A/32/45, *supra* note 196, ¶ 6. G.A. Res. 32/61 was adopted by consensus. U.N. GAOR 3d Comm., 32d Sess., 49th mtg. ¶ 35, U.N. Doc. A/C.3/32/SR.49 (1977).

200. *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Supp. No. 1, at 17, U.N. Doc. E/1980/9 and Corr.1, Add.1, Add.1/Corr.1, Add.2, Add.3, Corr.2 (1980) [hereinafter U.N. Doc. E/1980/9]. The 1980 report finally provides the study of systems of pardon, commutation and reprieve called for in G.A. Res. 2857 (XXVI), finding that in states responding to the Secretary General questionnaire "about two thirds of the convicts sentenced to death . . . were eventually reprieved." *Id.* ¶ 57. The report notes that this pattern raises "the issue of equal treatment," but in some countries may be "indicative of a trend towards the *de facto* abolition of capital punishment and, eventually, towards an abolitionist tradition." *Id.* ¶ 58.

E.S.C. Res. 1979/22 of 9 May 1979 expressed concern about the slow progress in restricting the number of capital offenses and reiterated the aim of eventual abolition. E.S.C. Res. 1979/22, U.N. ESCOR, 1st Sess., Supp. No. 1, at 17 (1979).

201. U.N. Doc. E/1980/9, *supra* note 200, ¶ 19.

alty,²⁰² the report concludes that the data do "not indicate any major progress towards change in policy with regard to the restriction or abolition of the death penalty."²⁰³ Though less caustic in tone than the 1975 report, the 1980 report suggested that the UN must make "[f]urther efforts . . . to pursue its declared principal objective in this area—the ultimate total abolition of the death penalty in all countries."²⁰⁴

Perhaps most significantly, the 1980 report introduced a note of concern about extrajudicial executions "which are increasing in certain countries, retentionist and abolitionist alike."²⁰⁵ The phenomena of disappearances and extrajudicial executions were to preoccupy UN bodies over the next decade, diverting attention from the traditional debates over capital punishment and possibly contributing to the stall in progress toward abolition.

VI. CONCERN WITH SUMMARY AND ARBITRARY EXECUTIONS

In the early 1980s, international attention increasingly focused on the phenomenon of disappearances and the often related practice of extrajudicial execution.²⁰⁶ Concern for these gross violations of human rights, though obviously justi-

202. U.N. Doc. E/1980/9, *supra* note 200, ¶ 35.

203. U.N. Doc. E/1980/9, *supra* note 200, ¶ 82.

204. U.N. Doc. E/1980/9, *supra* note 200, ¶ 85.

205. U.N. Doc. E/1980/9, *supra* note 200, ¶ 84. The report noted that the number of de facto executions probably exceeded the reported judicial executions during the relevant period. U.N. Doc. E/1980/9, *supra* note 200, ¶ 84.

206. As Roger Hood noted in his study:

Despite the fact that all countries, when replying to the United Nations, both deny and condemn such practices, it is well known that such executions have occurred in a substantial number of such countries, often on a large scale and out of all proportion to executions carried out under the due process of law. It has happened in those which have formally abolished the death penalty as well as in those which retain it. [citation omitted].

HOOD, *supra* note 8, at 7.

See generally AMNESTY INTERNATIONAL USA, DISAPPEARANCES: A WORKBOOK (1981); IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (1990).

fied and compelling, had the effect of dampening the impetus toward the abolition of the judicial death penalty as a matter of high priority for the UN.²⁰⁷ Although the Sixth UN Congress on the Prevention of Crime and Treatment of Offenders responded to General Assembly Resolution 32/61 by placing the issue of capital punishment on its agenda,²⁰⁸ the Con-

207. Under G.A. Res. 32/61 of 1977, further restriction and eventual abolition of the death penalty were to be matters of high priority at the Thirty-fifth Session of the General Assembly in 1980. *See supra* note 199 and accompanying text.

208. SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, at 39, U.N. Doc. A/CONF.87/14/Rev.1, U.N. Sales No. E.81.IV.4 (1980) [hereinafter U.N. Doc. A/CONF.87/14/Rev.1]. The Sixth Crime Congress received a working paper from the Secretary General describing the United Nation's previous work on the death penalty. U.N. Doc. A/CONF.87/14/Rev.1, *supra*. The report noted a symposium on Human Rights and Fundamental Freedoms in the Arab Homeland, held in Baghdad in May 1979, at which "a strong position against the death penalty was expressed." U.N. GAOR 3d Comm., 34th Sess., Agenda Item 12, at 9, U.N. Doc. A/C.3/34/11 (1979). The Secretary General's working paper suggested two possible approaches toward gradual abolition: that taken by some common law countries in appointing high-level fact-finding commissions and imposing a formal moratorium to assess the effects and pave the way to de jure abolition, or in increasing use of pardons and amnesty to achieve abolition de facto which may lead to "a firmly established abolitionist tradition." U.N. Doc. A/CONF.87/14/Rev.1, *supra*, ¶¶ 83-91.

At the European Regional Preparatory Meeting, "a number of participants strongly supported the inclusion of the question of capital punishment, although there was some contrary opinion It would therefore be appropriate for the Congress to explore the possibilities of further restricting the use of the death penalty and of elaborating safeguards against its abuse. It was also pointed out, however, that progress in this direction might be difficult because of differences in cultures and moral values." UNITED NATIONS, GENERAL ASSEMBLY, REPORT ON THE EUROPEAN REGIONAL PREPARATORY MEETING ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, ¶ 53, U.N. Doc. A/CONF.87/BP/1, U.N. Sales No. E.81.IV.4 (1978). At the African Regional Preparatory Meeting, "[t]he participants declared their agreement with the stated policy . . . which envisaged the eventual abolition of all capital punishment. But difficulties had to be anticipated on that road Agreement was expressed that all penal codes needed urgent review as to whether . . . its use could not be restricted to progressively fewer offenses, with a view toward ultimate abolition." UNITED NATIONS, GENERAL ASSEMBLY, REPORT ON THE AFRICAN REGIONAL PREPARATORY MEETING ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, ¶ 53, U.N. Doc. A/CONF.87/BP/4, U.N. Sales No. E.81.IV.4 (1979). At the Asian and Latin American preparatory meetings, specific notice of the phenomenon of disappearances and extra-judicial executions was taken, along with invocation of the U.N. commitment to eventual abolition. UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE ASIAN AND PACIFIC PREPA-

gress took no action on an innovative proposal by Austria, Ecuador, the Federal Republic of Germany and Sweden calling on retentionist states to impose a moratorium on the imposition of the death penalty.²⁰⁹ Given the divisiveness of the moratorium proposal, the Sixth Crime Congress found it politically far easier to deplore extrajudicial executions as a "particularly abhorrent crime, the eradication of which is a high international priority" ²¹⁰

The fate of the moratorium proposal at the Sixth Crime Congress is symptomatic of the stall in progress in the UN's abolitionist agenda that characterized the 1980s. With preambular language citing both the right to life and torture articles of the Universal Declaration and the ICCPR,²¹¹ and questioning the deterrent value of the death penalty,²¹² the four-nation moratorium proposal expressed the hope that the death penalty would not be re-established by abolitionist states, extended to new categories of crimes by retentionist states,²¹³ nor applied by retentionist states while they "study the effects of abolition on a provisional basis" ²¹⁴ Basic disagreement on the premises of the moratorium proposal, manifested especially by Egypt's introduction of a contrary

RATORY MEETING, at 17, U.N. Doc. A/CONF.87/BP/2, U.N. Sales No. E.81.IV.4 (1978).

209. *United Nations Rules and Guidelines In Criminal Justice From Standard Setting To Implementation, And Capital Punishment*, Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Comm. I, Agenda Item 7, at 3, U.N. Doc. A/CONF.87/C.1/L.1 (1980) [hereinafter U.N. Doc. A/CONF.87/C.1/L.1].

210. U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, at 9 (Resolution 5).

211. Draft resolution, U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, preambular ¶¶ 1-2.

212. U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, ¶¶ 5-6, reads:

Being aware that the evidence on the deterrent effect of capital punishment is inconclusive,

Noting that it has not been established that the total abolition of the death penalty has led to negative consequences in the field of criminal policy

213. U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, ¶ 4.

214. U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, ¶ 5.

resolution that asserted the continued value of the death penalty as a general deterrent,²¹⁵ blocked abolitionist progress at the Sixth Crime Congress. The four sponsors withdrew the resolution "[r]ealizing that there was inadequate time for the completion of work on the question" and with the assurance that the proposal would be appended to the report of the Sixth Congress to the General Assembly.²¹⁶

Undaunted by their failure at the Sixth Crime Congress, the sponsors²¹⁷ of the moratorium proposal renewed their efforts at the Thirty-fifth Session of the General Assembly, only to meet further procedural roadblocks.²¹⁸ The Third Commit-

215. The pre-ambular paragraphs referred to "the importance of general deterrence" and the need to "instil [sic] the necessary fear in the hearts of people to prevent them from committing certain serious crimes" Amendment proposed by Egypt, U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208, at 60-61.

216. According to Manuel Lopez-Rey, Chairman of the United Nations Committee on Crime Prevention and Control, the debate on the four nation proposal: was a good example of international ambivalence. Many countries expressed their deepest sympathy for abolition, but at the same time regarded capital punishment as necessary for the protection of what they called the state. More specifically the representatives of Nigeria, Sudan, several Arab countries, the Popular Democratic Republic of Yemen, India, Japan, Czechoslovakia, Bulgaria and the USSR also expressed their sympathy, but insisted on the necessity of maintaining capital punishment at least 'temporarily.' Most of the Latin American countries remained silent, the most significant exceptions being Ecuador and Mexico which were openly in favour of abolition. The Caracas Declaration [final document of the Sixth Congress] does not contain any reference to the gradual abolition of capital punishment, the impression being that it would not have been adopted if the reference had been made

The draft resolution submitted by Ecuador, the Federal Republic of Germany and Sweden asking for abolition was eventually withdrawn in view of the overwhelming combination of comments concerning 'sympathy' and 'necessity'; the representative of Egypt played a leading role in defeating it. In sum, in spite of the numerous requests of the General Assembly, ECOSOC, abolitionist countries and the Secretariat, no action was taken.

MANUEL LOPEZ-REY, A GUIDE TO UNITED NATIONS CRIMINAL POLICY 111 (A.E. Botoms ed., 1985) (citations omitted).

217. Sweden took the lead, with co-sponsors Austria, Costa Rica, Denmark, Ecuador, Federal Republic of Germany, Panama, Papua New Guinea, Portugal, Spain, Venezuela, Italy and Norway. U.N. GAOR 3d Comm., 35th Sess., Agenda Item 65, at 1, U.N. Doc. A/C.3/35/L.67 (1980).

218. The proposal was the same, except that the sponsors agreed to an oral

tee decided to take no action on the draft resolution "while awaiting the conclusions of the Sixth Committee on the subject."²¹⁹ This was the result of clever procedural maneuvering by India (citing a "general feeling that it was premature to abolish capital punishment or to accept a moratorium"²²⁰), abetted by Morocco.²²¹ During this debate, retentionist states, especially Islamic ones, sounded notably new discordant notes concerning the UN's commitment to the goal of abolition.²²²

Abolition in the classic sense was diverted into efforts to elaborate a Second Optional Protocol for abolition of the death penalty, commenced at the same General Assembly session. The Federal Republic of Germany²²³ introduced a

amendment to replace "the words 'Sub-Commission with the Committee on Crime Prevention and Control.'" U.N. GAOR, 35th Sess., Annexes, Agenda Item 65, ¶ 11, U.N. Doc. A/35/742 (1980) [hereinafter U.N. Doc. A/35/742].

219. U.N. GAOR 3d Comm., 35th Sess., 84th mtg. ¶ 28, U.N. Doc. A/C.3/35/SR.84 (1980) [hereinafter U.N. Doc. A/C.3/35/SR.84] (proposal by India with amendment by Morocco). The vote on the amended decision was seventy-six in favor, thirty-three opposed, and twenty-four abstentions. U.N. Doc. A/35/742, *supra* note 218, ¶ 15(b).

220. U.N. GAOR 3d Comm., 35th Sess., 76th mtg. ¶ 27, U.N. Doc. A/C.3/35/SR.76 (1980). *See also* Remarks of Japan, *id.* ¶ 22 ("Because it was so closely related not only to crime rates and criminal justice administration but also to the history, culture and ethical and moral norms of each nation, the question of retaining or abolishing the death penalty was too difficult an issue to resolve immediately and would undoubtedly be a perennial subject for debate, both domestically and internationally.").

221. U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶ 28. Several delegations pointed out that capital punishment was not on the agenda of the Sixth (legal) Committee of the General Assembly. U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶¶ 38 (Italy), 51 (Jamaica), 59 (Sweden).

222. India stated that it could not accept references to capital punishment as a violation of the right to life and to negative consequences that would result if it were not abolished. U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶ 22. Zaire asserted that "[i]t had not, in fact, been established that capital punishment was a violation of human rights." U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶ 25. Oman objected to the resolution "which implied a value judgement on Islamic custom and Islamic law." U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶ 27. Ethiopia stated that the resolution "did not seem to take account of the fact that there were many forms of societies and Governments with different values, cultures and legal principles based on religious precepts . . ." U.N. Doc. A/C.3/SR.84, *supra* note 219, ¶ 54.

223. With co-sponsors Austria, Costa Rica, the Dominican Republic, Italy, Por-

resolution²²⁴ containing a draft protocol and a request that it be circulated for comment to member states by the Secretary General.²²⁵

The four-nation proposal at the Sixth Crime Congress had also delineated "generally accepted international human rights standards,"²²⁶ consisting of minimal due process standards and substantive restrictions on the death penalty. Though unable to agree on the desirability of a moratorium, the Gener-

tugal and Sweden.

224. Article 1 of the draft protocol provided:

1. Each State Party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.

2. The death penalty shall not be re-established in States that have abolished it.

U.N. GAOR 3d Comm. 35th Sess., Agenda Item 65(a), at 3, U.N. Doc. A/C.3/35/L.75 (1980).

225. The General Assembly, in decision 35/437 of 15 December 1980, circulated the draft and asked for a report to its Thirty-sixth Session. U.N. GAOR, 35th Sess., Supp. No. 48, at 288, U.N. Doc. A/35/48 (1981).

226. U.N. Doc. A/CONF.87/14/Rev.1, *supra* note 208. These standards, drawn from the ICCPR, were:

(a) Capital punishment may be imposed only for the most serious crimes;

(b) Capital punishment may be imposed only in accordance with the law in force at the time of the commission of the crime;

(c) Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women;

(d) Capital punishment shall not be carried out pending any appeal proceedings or other proceedings relating to pardon or commutation of sentence;

(e) Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, including the right of anyone suspected of or charged with a crime for which death sentence may be imposed, to adequate legal assistance at all stages of the proceedings;

(f) Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction;

(g) Anyone sentenced to death shall have the right to seek pardon or commutation of sentence;

(h) Amnesty, pardon or commutation of sentence may be granted in all cases of death sentences.

U.N. Doc. A/Conf.87/14/Rev.1, *supra* note 208.

al Assembly easily adopted Resolution 35/172,²²⁷ expressing alarm at the incidence of summary and arbitrary executions and calling on all states to respect the death penalty restrictions in Article 6 of the ICCPR and the fair trial rights in Articles 14 and 15.

Heightened concern over summary and arbitrary executions channelled UN energies into two paths: (1) the appointment of a Special Rapporteur on Summary and Arbitrary Executions;²²⁸ and (2) the adoption of resolutions elaborating minimal universal standards for substantive and procedural restrictions on the death penalty.²²⁹ The Sub-Commission in Resolution 1 (XXXIV) emphasized the growing problem of politically motivated executions and disappearances, suggesting consideration of abolition of capital punishment for political offenses.²³⁰ Later in 1981, the General Assembly deplored the growing incidence of summary and arbitrary executions, drew attention to the minimal standards suggested in Resolution 35/172 of the previous year, urged the Secretary General to use his good offices to intervene in cases where these standards were not respected, and asked the Committee on Crime Prevention and Control to examine the subject.²³¹

The UN human rights bodies, having already tackled a related problem by the creation of the Working Group on Enforced and Involuntary Disappearances,²³² followed suit in

227. G.A. Res. 35/172, U.N. GAOR, 35th Sess., Supp. No. 48, at 195, U.N. Doc. A/35/48 (1981).

228. Appointed pursuant to E.S.C. Res. 1982/35, U.N. ESCOR, 1st Sess., Supp. No. 1, at 27, U.N. Doc. E/1982/82 (1982). The title was changed by the Commission in 1992 to that of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to express "a broad approach to the mandate on executions which encompasses all violations of the right to life as guaranteed by a large number of international human rights instruments." *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, 49th Sess., Annex, Agenda Item 12, at ¶ 7 (1992).

229. E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984) [hereinafter U.N. Doc. E/1984/84].

230. U.N. Doc. E/CN.4/Sub.2/L.769 (1981), *quoted in* AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS 97 (1983).

231. G.A. Res. 36/22, U.N. GAOR, 36th Sess., Supp. No. 51, at 168, U.N. Doc. A/36/51 (1982).

232. E.S.C. Res. 20 (XXXVI), U.N. ESCOR Comm. on Human Rights, 36th

1982 with a decision to appoint a Special Rapporteur on Summary and Arbitrary Executions.²³³ The Special Rapporteur in his first report noted the difficulty of defining the contours of his mandate, especially as it relates those "summary" executions that follow inadequate judicial process or violate the codified substantive restrictions on the scope of the death penalty:

Where a government has imposed a death penalty but failed to comply with procedural safeguards prescribed in international law, it has violated international law and has illegally deprived a person of his life. The deprivation of life in such circumstances can be called extra-legal execution. However, is it in all cases that such execution can be termed "arbitrary" or "summary"? If a person is executed as a result of a procedure which has not followed all the minimum guarantees, is the execution summary? If the execution is not summary, what combination of the breaches of minimum guarantees are necessary for the execution to be rendered summary? There is a whole range, from cases with only a single procedural defect to those where all or nearly all procedural guarantees are non-existent, that the trial could be said to have been in name only. At what stage does the trial become summary?²³⁴

Sess., Supp. No. 3, at 180, U.N. Doc. E/CN.4/1408 (1980).

233. E.S.C. Res. 1982/29, U.N. ESCOR, 35th Sess., Supp. No. 2, at 147, U.N. Doc. E/CN.4/1982/30 (1982). The Commission adopted the resolution by a vote of thirty-three in favor, one opposed, and eight abstentions. U.N. ESCOR, 38th Sess., 59th mtg. at 10, U.N. Doc. E/CN.4/1982/SR.59 ¶ 53 (1982). *See supra* note 228.

For a general examination of the "theme mechanisms" of the Commission on Human Rights, see Menno Kamminga, *The Thematic Procedures of the UN Commission on Human Rights*, 34 NETH. INT'L L. REV. 299 (1987); David Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 AM. J. INT'L L. 685 (1986); Joan Fitzpatrick, *UN Action With Respect to "Disappearances" and Summary or Arbitrary Executions*, in AIUSA LEGAL SUPPORT NETWORK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988*, at 35 (1988).

234. *Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, 39th Sess., Agenda Item 12, ¶ 55, U.N. Doc. E/CN.4/1983/16 (1983).

The dilemma of the Special Rapporteur is illustrated by his uncertainty whether he could approach governments (including those not party to the ICCPR) who were reported to be planning the execution of juvenile offenders.²³⁵

This aspect of the Special Rapporteur's mandate was clarified to some extent by the adoption of ECOSOC Resolution 1984/50 of 25 May 1984, adopting safeguards guaranteeing protection of those facing the death penalty, as recommended by the Committee on Crime Prevention and Control.²³⁶ The

235. The Special Rapporteur did address a communication to Bangladesh with respect to reports that a student of 16 or 17 was to be executed. *Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, 42d Sess., Annex, Agenda Item 12, at 4-5, U.N. Doc. E/CN.4/1986/21 (1986). Yet, after a rebuff by the United States to whom similar approaches had been made, the Special Rapporteur sought guidance from the Commission that such practices came within the scope of his mandate. See Kamminga, *supra* note 233, at 303-04; Weissbrodt, *supra* note 233, at 689-91.

236. See *Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. ESCOR, 41st Sess., Agenda Item 12, ¶ 24, U.N. Doc. E/CN.4/1985/17 (1985). The safeguards appended to ECOSOC resolution 1984/50 were:

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. 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 penalty be carried out on pregnant women, or on new mothers or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

safeguards drew largely, though not exclusively, on the death penalty restrictions in the ICCPR.

Although ECOSOC prefaced Resolution 1984/50 with the caution that it "shall not be invoked to delay or to prevent the abolition of capital punishment,"²³⁷ the safeguards began to take on a life of their own, distinct from the UN's general concern with the death penalty. While the quinquennial reports by the Secretary General on progress toward abolition of the death penalty continued to be compiled,²³⁸ separate reports on compliance with the minimal safeguards were also commissioned.²³⁹ In addition, the Commission on Human Rights,

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

U.N. Doc. E/1984/84, *supra* note 229, at 33.

237. U.N. Doc. E/1984/84, *supra* note 229, at 33. The United States attempted to replace this language with "shall not be interpreted as affecting the consideration of the question of the abolition or retention of capital punishment," noting that the existing wording was "biased towards abolition" while the United States was experiencing a "trend . . . towards the reintroduction of the death penalty." The United States delegate urged that the issue of safeguards be kept "separate from the debate on the retention or abolition of capital punishment." The United States amendment was defeated by a vote of twenty-three in favor, six opposed, and sixteen in abstentions. U.N. ESCOR, 1st Sess., 21st plen. mtg. at 81, U.N. Doc. E/1984/SR.21 (1984).

238. See *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Agenda Item 17, U.N. Doc. E/1985/43 (1985) [hereinafter U.N. Doc. E/1985/43]; see also U.N. ESCOR, 1st Sess., Agenda Item 17, U.N. Doc. E/1985/43/Add.1 (1986); *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Agenda Item 5, U.N. Doc. E/1990/38 (1990), revised by U.N. Doc. E/1990/38/Rev.1 (1990), revised by E/1990/38/Rev.1/Corr. 1.

239. See *Implementation of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1989/64, U.N. ESCOR, 1st Sess., Supp. 1, at 51, U.N. Doc. E/1989/89 (1989). E.S.C. Res. 1989/64 directed that the reports on capital punishment and on implementation of the safeguards should be combined in the future. *Id.*

ECOSOC, and the General Assembly took up the issue of summary and arbitrary executions in tandem with the periodic renewal of the mandate of the Special Rapporteur.²⁴⁰

The elaboration of minimal procedural standards, while designed to reduce arbitrary executions, risks muting awareness of the judicial death penalty as a human rights issue.²⁴¹ Retentionist states typically claim compliance with such procedural minima.²⁴² While dubious assertions by retentionist states that they adhere to fair process in the application of the death penalty are difficult to contest,²⁴³ the fact that they retain the death penalty on their statute books is incontestable.²⁴⁴ Consensus on the standards may reinforce the retentionist argument that the international community agrees that the death penalty is acceptable when inflicted with adequate procedures, undermining the abolitionist argument that capital punishment is inherently and under all circumstances incompatible with human dignity.

240. See, e.g., G.A. Res. 39/110, U.N. GAOR, 39th Sess., Supp. No. 51, at 206, U.N. Doc. A/39/51 (1985) (noting both the renewal of the Special Rapporteur's mandate and the adoption of the minimal safeguards in ECOSOC resolution 1984/50).

241. As the 1985 report of the Secretary General rather opaquely noted, "[A] trend developed in the capital punishment question which dealt with procedural deficiencies, as well as with procedural safeguards This new trend could mark a shift from the "pro" versus "con" question, to an instrumental position within a given legal status where procedural guarantees are applied to decrease arbitrariness in the capital sentencing process." *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Annex, Agenda Item 17, ¶ 93, U.N. Doc. E/1985/43 (1985) [hereinafter U.N. Doc. E/1985/43].

242. See *Implementation of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, U.N. ESCOR Comm. on Crime Prevention and Control, 10th Sess., Agenda Item 4, U.N. Doc. E/AC.57/1988/9 (1988), revised by U.N. Doc. E/AC.57/1988/9/Corr. 2 (1988).

243. According to the 1985 report of the Secretary General, "[s]ome retentionist countries reported that, in addition to [the safeguards in ECOSOC resolution 1984/50], their own legislation contained provisions exceeding those of the Covenant, thus contributing to the strengthening of safeguards at the global level. However, this process could not be fully appreciated in the replies to the questionnaire" U.N. Doc. E/1985/43, *supra* note 238, ¶ 50.

244. Lopez-Rey, notes that traditional proponents of abolition, such as Uruguay, lost credibility in light of their own reported practices of summary and arbitrary executions during this period. LOPEZ-REY, *supra* note 216, at 112.

The cumulative impact of these developments on the UN's progress toward the abolition of the death penalty must remain speculative,²⁴⁵ but the emboldenment of the retentionist elements may be linked to the diversion of attention to the indisputable human rights violations involved in arbitrary and summary executions.²⁴⁶ Retentionist states that had been in the habit of defending their attachment to the death penalty as a mere temporary phenomenon pending the evolution of their societies to a stage of greater social peace and civility began to characterize the death penalty in more permanent terms, challenging the basic premise of General Assembly Resolution 2857 (XXVI) and the "main objective" of the UN in this area.²⁴⁷ This hardening of retentionist attitudes was to present serious obstacles to the drafting of the Second Optional Protocol.

VII. PROTOCOLS FOR THE ABOLITION OF THE DEATH PENALTY

A. *Protocol No. 6 to the European Convention on Human Rights and Fundamental Freedoms*

Just as the retentionist elements in the UN were becoming more obstreperous, the Council of Europe was finally confronting the reality of near-total abolition within its member states and codifying it as a matter of principle in Protocol No. 6 to the European Convention.²⁴⁸ Article 2 of the European Con-

245. Both the 1975 and 1980 quinquennial reports had indicated that progress toward abolition was uneven at best. See U.N. Doc. E/5616, *supra* note 193; U.N. Doc. E/1980/9, *supra* note 200.

246. For example, the United States at the Thirty-fifth Session of the General Assembly in 1980 co-sponsored the draft resolution on summary and arbitrary executions "because, in its opinion, it was precisely in the direction of improving the standards applying to capital punishment that the international community should be active. His delegation therefore looked forward to subsequent proposals to provide the greatest possible safeguards for persons accused of crimes punishable by the death penalty." U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 95. The United States did not oppose circulating the draft protocol for comment, though it "did not at the present time intend to subscribe to an optional protocol . . . binding parties to abolish forever the death penalty." U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 95.

247. See G.A. Res. 2857 (XXVI), *supra* note 2.

248. Done at Strasbourg, 28 April 1983, Council of Europe Doc. H (83) 3. En-

vention imposed only minimal restrictions on the application of the death penalty. After the European Committee on Crime Problems completed its 1962 study of the death penalty in Europe,²⁴⁹ the issue was not revived until 1973, with the presentation of a resolution asserting that capital punishment "must now be seen to be inhuman and degrading within the meaning of Article 3 of the European Convention" and calling upon all member governments to abolish it.²⁵⁰ This resolution was referred to the Committee on Legal Affairs,²⁵¹ which appointed Mr. Lidgard as rapporteur.²⁵² Although Lidgard prepared two reports, the Committee on Legal Affairs failed to take any action, prompting his resignation as rapporteur.²⁵³

The issue was again revived at the 1978 meeting of the European Ministers of Justice at the initiative of Austrian Minister of Justice Christian Broda.²⁵⁴ In 1980, the Parliamentary Assembly adopted Resolution 727 (1980) which condemned capital punishment as inhuman and called upon retentionist members of the Council of Europe to abolish it for crimes in times of peace.²⁵⁵ At the same time, the Parliamentary Assembly adopted Recommendation 891 (1980)²⁵⁶ which

tered into force, 1 Mar. 1985. Conventions and Agreements in the Council of Europe in the field of Human Rights, Protocol No. 6, signed Apr. 28, 1983, Council of Eur. Doc. H/Inf (85) 1, at 6.

249. See ANCEL, *supra* note 119.

250. *Motion for a resolution on the abolition of capital punishment, presented by Miss Bergegren and others*, Eur. Consult. Ass., 25th Sess., Doc. No. 3297 at 2 (1973).

251. *Id.* at 1 n.1.

252. *Lidbom Report*, *supra* note 20, at 4.

253. *Lidbom Report*, *supra* note 20, at 6.

254. *Lidbom Report*, *supra* note 20, at 5. See also Dr. Christian Broda, *The Elimination of the Death Penalty in Europe* (1985) (paper presented to the meeting of European death penalty coordinators of Amnesty International, Stockholm, 30 March 1985).

At the suggestion of the European Ministers of Justice, the Committee of Ministers placed the issue of capital punishment back on the agenda of the European Committee on Crime Problems. The Legal Affairs Committee appointed Mr. Lidbom to revise the Lidgard reports and the Parliamentary Assembly considered Lidbom's report at its 32d Session in 1980. *Lidbom Report*, *supra* note 20, at 5.

255. EUR. PARL. ASS. DEB., 32d Sess. (April 22, 1980).

256. *Id.*

called upon the Committee of Ministers to amend Article 2 of the European Convention in order to bring it into conformity with Resolution 727 (1980).

A report by Mr. Lidbom on behalf of the Legal Affairs Committee²⁵⁷ laid down the challenge for the Council of Europe member states:

[T]he time has come to make a political choice, to decide whether or not the retention of capital punishment is compatible with our conception of human rights, which is not static.

. . . .
I agree with those who think that science cannot help to decide a question which is essentially moral and political. Everything that could be said for and against the death penalty has already been said. What remains is to make a choice.²⁵⁸

Among recent noteworthy developments were the admission of several new abolitionist states into the Council of Europe, including Spain, which abolished capital punishment in 1978 despite a significant terrorist threat.²⁵⁹ The decision by Amnesty International in 1977 to oppose the death penalty under all circumstances also affected European attitudes.²⁶⁰

Lidbom recommended proceeding "by stages,"²⁶¹ however, proposing only the abolition of capital punishment during peacetime.²⁶² The debates on Resolutions 727 (1980) and Rec-

257. *Lidbom Report*, *supra* note 20.

258. *Lidbom Report*, *supra* note 20, at 21-22. Lidbom and Lidgard began their reports with quotations from Cesare Beccaria ("What is this right whereby men presume to slaughter their fellows?") and Albert Camus ("In the United Europe of tomorrow . . . the formal abolition of capital punishment should be the first article of the European Code for which we all hope."). *Lidbom Report*, *supra* note 20, at 2.

259. *Lidbom Report*, *supra* note 20, at 4 (the other abolitionist states cited were Portugal and Liechtenstein).

260. *Lidbom Report*, *supra* note 20, at 4; Broda, *supra* note 254.

261. *Lidbom Report*, *supra* note 20, at 5.

262. Lidbom noted that only seven of twenty-one Member States of the Council of Europe retained the death penalty for crimes committed during peace (Belgium, Cyprus, France, Greece, Ireland, Liechtenstein (which had not imposed a death

ommendation 891 (1980) followed predictable paths, with special attention to the problem of terrorism by both retentionists and abolitionists.²⁶³ An amendment to preserve the death penalty for terrorist crimes, proposed by a Turkish delegate, was withdrawn.²⁶⁴ Recommendation 891 (1980) was adopted by a vote of ninety-eight to twenty-five.²⁶⁵ The Committee of Ministers responded by requesting the Steering Committee for Human Rights to prepare a draft additional protocol, which was adopted by the Committee of Ministers in December 1982 and opened for signature on 28 April 1983.²⁶⁶

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

Drafting of the Second Optional Protocol to the ICCPR began in 1980 with adoption by consensus²⁶⁷ of General Assembly decision 35/437,²⁶⁸ circulating the draft protocol pre-

sentence in 200 years and might be regarded therefore as abolitionist), and Turkey). *Lidbom Report*, *supra* note 20, at 18, 21. Only France was actually executing prisoners, at a rate of approximately one every two years. *Lidbom Report*, *supra* note 20, at 18, 21.

263. *See, e.g.*, EUR. PARL. ASS. DEB., 32d Sess. 57-61, 65 (1980) for remarks by Mr. Aksoy of Turkey, Mrs. Stoffelen of the Netherlands, Mrs. Meyer of Switzerland, Mr. Peces-Barba of Spain, and Mr. Reddemann of the Federal Republic of Germany.

Several United Kingdom delegates stressed that capital punishment should be a matter for each state (and indeed each parliamentarian) to decide. Capital punishment had been abolished in the United Kingdom on a private member's bill, and political parties did not instruct their members on the vote. *See* remarks of Mr. Smith and Mr. Beith, *id.* at 58-59, 80-81.

264. *Id.* at 88.

265. *Id.* at 89. Resolution 727 (1980) was adopted without a roll call vote. *Id.* at 87.

266. *Explanatory Report on Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Eur. Consult. Ass., Doc. H (83) 3 at 5 (1983).

267. The delegate from Yemen noted, however, that the decision was contrary to Islamic law. U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 13. Mrs. Warzazi of Morocco, who had joined with India in blocking action on the moratorium proposal, noted that the decision to circulate the draft Protocol was "in no way binding upon the member states." U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 15.

268. U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 11 (adoption in the Third Committee on December 5, 1980). Decision 35/437 was adopted in plenary session

sented by the Federal Republic of Germany.²⁶⁹ Decision 35/437 requested government comments on "the idea of elaborating" a Second Optional Protocol to abolish the death penalty. The original German proposal²⁷⁰ called for total abolition:

Article 1

1. Each State Party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.

2. The death penalty shall not be re-established in States that have abolished it.²⁷¹

The pre-ambular language cited the commitment of the UN to gradual abolition in General Assembly Resolution 2857 (XXVI) and Resolution 32/61 and the risk of error in executions.²⁷²

Only twenty-one states submitted comments on the draft Optional Protocol.²⁷³ Of greatest interest was the submission by Egypt, which indicated that "the death penalty cannot be abolished in the cases where it is laid down as *hadd* (prescribed castigation decreed by God or the Prophet) or *qisas* (equal retribution) but that the death penalty may be commuted in those cases where it is laid down as *ta'zir* (deterrent)."²⁷⁴ Other retentionist states based their inten-

on December 15, 1980. U.N. GAOR, 35th Sess., 96th plen. mtg. at 114, U.N. Doc. A/35/PV.96 (1980).

269. U.N. GAOR 3d Comm., 35th Sess., Agenda Item 65(a), U.N. Doc. A/C.3/35/L.75 (1980). No vote was taken on L.75 because the sponsors substituted L.97 in order to get consensus agreement to circulate the draft. U.N. Doc. A/C.3/35/SR.84, *supra* note 219, ¶ 9.

270. The proposal was co-sponsored by Austria, Costa Rica, Italy, Portugal, and Sweden.

271. *Crime Prevention and Control*, U.N. GAOR 3d Comm., 35th Sess., Agenda Item 65, U.N. Doc. A/35/742 (1980).

272. *Id.* at 11.

273. *Elaboration of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty: Report of the Secretary-General*, U.N. GAOR, 36th Sess., at 4-20, U.N. Doc. A/36/441 [hereinafter U.N. Doc. A/36/441].

274. *Id.* at 2. Syria stated that the death penalty was "still necessary" and that Islamic law is a "principal source" for Syrian law. *Id.* at 18.

tions not to ratify the Optional Protocol upon beliefs in the death penalty as a deterrent (even where all capital sentences are commuted)²⁷⁵ or because of popular support in their country for retention.²⁷⁶ The United States, signalling its newly assertive retentionism in the post-*Furman* era, challenged the pre-ambular language concerning General Assembly Resolution 2857 (XXVI) and Resolution 32/61, disagreeing that "the goal is necessarily to ban capital punishment completely."²⁷⁷ But perhaps the greatest difficulty to emerge from the state comments and debates in the Third Committee was a concern about elaborating on a human rights instrument that clearly would not be universally ratified, and consequently might pose a challenge to the very premise of universal human rights.²⁷⁸

Much of the discussion at the Thirty-seventh Session in 1982 reflected what had been the early underlying consensus within the UN on the subject of capital punishment—that abolition was inevitable and desirable but that states would have to proceed at their own pace in light of local conditions.

275. See, e.g., submissions by Botswana, *id.* at 5; Greece, *id.* at 9 (all sentences since 1972 commuted); Madagascar, *id.* at 12 (no sentences carried out for 20 years); Cameroon, U.N. *id.* at 19.

276. See, e.g., submission by Japan, *id.* at 11. The United Kingdom indicated that it could not ratify the Protocol because Parliament should remain free to reinstate the death penalty. *Id.* at 18.

277. The United States, however, had "no reason to object if other countries wished to adopt and accede to this Draft Protocol." *Id.* at 20.

278. See, e.g., submission by Finland, *id.* at 7 (supporting the Protocol but alluding to "questions of principle concerning the universality of the human rights criteria . . ."). The delegate of the Ukrainian SSR cautioned against "calling into question the universality of human rights by recognizing the existence of specific rights" U.N. GAOR 3d Comm., 36th Sess., 34th mtg. ¶ 28, U.N. Doc. A/C.3/36/SR.34 (1981). Spain also raised the issue of the death penalty in time of war, which remains part of Spanish law and thus might impede Spain's ability to ratify the Protocol. U.N. Doc. A/36/441, *supra* note 273, at 15.

Mrs. Warzazi of Morocco suggested careful study of the proposal and avoidance by abolitionist states of moral judgments on retentionist states. U.N. GAOR 3d Comm., 36th Sess., 31st mtg. ¶ 14, U.N. Doc. A/C.3/36/SR.31 (1981).

Finally, a General Assembly resolution requested additional government comments and placed the issue on the agenda of the Thirty-seventh Session. G.A. Res. 36/59, U.N. GAOR, 36th Sess., Supp. No. 51, at 174, U.N. Doc. A/36/51 (1982).

For example, retentionist states such as Algeria,²⁷⁹ Togo²⁸⁰ and Barbados²⁸¹ all voiced variations on this familiar refrain. The sponsors of the Protocol stressed its optional nature.²⁸² However, they also noted that its adoption would keep capital punishment under discussion and encourage states to reconsider their positions.²⁸³

It was precisely this symbolic significance of the Protocol that attracted the ire of Mrs. Warzazi of Morocco, who protested that the Commission on Human Rights "had not been elected to pronounce death sentences against certain states while at the same time allowing themselves to express value judgments on sovereign states that retained capital punishment."²⁸⁴ Other retentionist states suggested that the problem of summary and arbitrary executions should be the focus of UN concern, not retention consistent with the existing terms of Article 6.²⁸⁵ For the first time, a substantial number of Islamic states

279. The submission by Algeria indicated that prerogative of mercy was often exercised and stated that "it is not inconceivable that, in time, a *de facto* abolition of capital punishment will be witnessed." U.N. GAOR, 37th Sess., Agenda Item 87(d), at 4, U.N. Doc. A/37/407 (1982).

280. Togo's submission indicated that it was following the progress of the Protocol and saw it "as a way of encouraging those countries which are already advanced in criminology to pursue their policy of liberalization, until such time as it may gradually be extended to all the member states." *Id.* at 11.

281. Barbados had received a report from a consultant from Wales who suggested that they abolish the death penalty unless public opinion was strongly adverse. The parliament, however, had not yet acted on the recommendation. U.N. GAOR, 37th Sess., Agenda Item 87(d), at 2, U.N. Doc. A/37/407/Add.1 (1982).

282. U.N. GAOR 3d Comm., 37th Sess., 47th mtg. ¶ 13, U.N. Doc. A/C.3/37/SR.47 (1982) (remarks of Mr. van Well of the Federal Republic of Germany).

283. *Id.* ¶ 11.

284. U.N. GAOR 3d Comm., 37th Sess., 52d mtg. ¶ 13, U.N. Doc. A/C.3/37/SR.52 (1982). However, Morocco abstained on the resolution and Mrs. Warzazi indicated that her government did not object to a purely procedural resolution to refer the matter to the Commission on Human Rights. U.N. GAOR 3d Comm., 37th Sess., 67th mtg. ¶ 71, U.N. Doc. A/C.3/37/SR.67 (1982) [hereinafter U.N. Doc. A/C.3/37/SR.67].

285. U.N. GAOR 3d Comm., 37th Sess., 53d mtg. ¶ 4, U.N. Doc. A/C.3/37/SR.53 (1982) (remarks of delegate from Japan). Japan voted in favor of the Resolution to refer the draft Protocol to the Commission on Human Rights, however. U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶ 72.

objected to further consideration of the draft Protocol on grounds of its incompatibility with Islamic law.²⁸⁶ The Third Committee adopted the resolution by a split vote of fifty-two in favor, twenty-three opposed, with fifty-three abstentions.²⁸⁷

While it may not have been apparent at the time, a turning point in UN consideration of the death penalty had been reached. From the time of Beccaria's tract in the eighteenth century,²⁸⁸ the experiences of other nations had been an im-

Contemporaneously, the Human Rights Committee was adopting general comment 6(16) on Article 6. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 93-94, U.N. Doc. A/37/40 (1982). Paragraph 6 of general comment 6(16) stated:

While it follows from article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes." Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes." The article also refers generally to abolition in terms which strongly suggest (paras. 2(2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

Id.

286. For example, the delegate from Sudan stated that abolition was "incompatible with the criminal code and legislation of Sudan based on the divine and sacred laws of Islam which were immutable." U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶ 46. The delegate from Iran saw the draft as "an attempt to violate the fundamental and inherent right of countries to practice their religious beliefs." U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶ 49. For remarks by delegates from Oman, Kuwait, and Somalia, see U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶¶ 45, 47, 50.

287. U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶ 72. A number of prominent retentionist states voted in favor of the Resolution, including Japan and the United States. U.N. Doc. A/C.3/37/SR.67, *supra* note 284, ¶ 72. The Resolution requested the Commission on Human Rights to consider the draft Protocol at its Thirty-ninth and Fortieth sessions, and to report to the General Assembly at its Thirty-ninth session in 1984. U.N. GAOR 3d Comm., 37th Sess., Annex, Agenda Item 87, at 7, U.N. Doc. A/37/718 (1982).

288. CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963).

portant element in the abolitionist debate,²⁸⁹ both as a beacon of progress toward a more refined civilization and as a source of data to disprove the deterrent effect which functioned as the main justification for retention. The debates over the Universal Declaration and Article 6 of the ICCPR reflect this understanding,²⁹⁰ which also served as the premise for the Ancel²⁹¹ and Morris²⁹² studies and the Secretary General's quinquennial reports.²⁹³ Yet, as the comparative data continued to undermine the deterrence thesis,²⁹⁴ the advocates of

289. Great interest was shown by enlightenment theorists and rulers, for example, in the experiment by Leopold II of Austria, then grand duke of Tuscany, to implement a new penal code in 1786 modeled on Beccaria's ideas, including the complete abolition of the death penalty. MARCELLO MAESTRO, *CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM* 135 (1973). Leopold reported in 1789 that "mild laws together with a careful vigilance" had reduced common crimes and almost eliminated "the most atrocious" ones. *Id.* Jeremy Bentham and other abolitionists of the nineteenth century cited the Tuscan example. HUGA ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 85-86 (1987).

290. *See supra* at notes 24-49, 65-103.

291. ANCEL, *supra* note 119.

292. *See supra* note 142.

293. *See supra* note 193.

294. For a careful and balanced discussion of the continuing social science debate over deterrence see HOOD, *supra* note 8, at 117-48. Hood concludes:

[T]he data analysed so far "are not sufficiently strong to lead researchers with different prior beliefs to reach a consensus regarding the deterrent effects of capital punishment." [citation omitted] The implications of this conclusion for policy depend ultimately on moral and political views of what standards of proof are required. Most of those who favour abolition . . . would demand proof that executions have a substantial marginal deterrent effect. Those retentionists who rely on their intuitive belief in deterrence would require substantial proof that there was no additional risk to the lives of citizens before sparing murderers from execution. The balance of evidence, looked at in this way, favours the abolitionist position.

See HOOD, *supra* note 8, at 148. An extensive international bibliography on social science and legal studies of capital punishment was compiled by the Social Defence Research Institute of the United Nations in 1987. U. Leone, *International Bibliography on Capital Punishment*, 58 R.I.D.P. 821 (1987).

The 1985 report on Capital Punishment by the Secretary General noted of public opinion, that belief in the deterrent effect of capital punishment was often only a "surface manifestation" of "more deeply held sentiments and feelings" favoring execution. U.N. Doc. E/1985/43, *supra* note 241, ¶ 100. Zimring and Hawkins

retention at the international level shifted their arguments, a pattern also experienced within certain national debates on abolition.²⁹⁵ The emergence of a group of Islamic states asserting that retention of the death penalty was an immutable aspect of their culture presented a fundamental challenge to the shared assumptions that underlay General Assembly Resolution 2857 (XXVI).

No longer did retentionist states simply argue that their societies had not yet managed to evolve to a state of civilization that would enable them to take the risk of abolition. This defense of retentionism posed no essential contradiction to the common goal of gradual abolition, though there had been undercurrents in the earlier debates suggesting important and perhaps enduring cultural differences between abolitionist and retentionist states.²⁹⁶ The emerging Islamic bloc challenged the premise of scientific progress or more subjectively measured "evolving standards of decency"²⁹⁷ embedded in the UN's commitment to gradual but universal abolition. Though a perfected Islamic society might be one without crime, and thus abolitionist *de facto*, the terms of the Shari'a law could never be altered.

Progress on the Protocol was slow, as the Commission²⁹⁸

describe public opinion surveys indicating that half of the retentionist respondents assert that they would favor the death penalty even if it caused as many murders as it prevented. See ZIMRING & HAWKINS, *supra* note 8, at 17.

295. Hood, describing studies of pro-death penalty views, notes that "deterrence is often given as the justification because it appears to provide a 'scientific' and socially acceptable reason for supporting the death penalty. The underlying basis of support for capital punishment has been described as 'strongly held moral and political ideals,' 'deeply anchored in a person's personality, value and belief systems,' and as having an 'emotional, symbolic function' rather than stemming from 'a set of reasoned beliefs.'" See HOOD, *supra* note 8, at 154.

296. India, for example, cited the heterogeneous nature and low level of education of its populace as justification for its retention, and as a contrast to the leading abolitionist states. U.N. GAOR 3d Comm., 35th Sess., 76th mtg. ¶ 26, U.N. Doc. A/C.3/35/SR.76 (1980). While educational levels might increase over time, India is unlikely to lose its heterogeneity.

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

298. E.S.C. Res. 1984/19, U.N. ESCOR, 40th Sess., Supp. No. 4, at 53, U.N. Doc. E/CN.4/1984/77 (1984), suggested that the Sub-Commission establish an inter-

referred the matter to the Sub-Commission. After desultory discussion at its thirty-seventh session,²⁹⁹ the Sub-Commission recommended the appointment of a Special Rapporteur to analyze the pros and cons of elaborating the Protocol.³⁰⁰ The General Assembly approved this plan,³⁰¹ though Islamic states again voiced dissent.³⁰² The General Assembly requested a report on the progress of the Commission and Sub-Commission three years hence.³⁰³

Marc Bossuyt, appointed as Special Rapporteur, prepared a comprehensive report analyzing abolition in light of international standards and digesting debate over the draft Optional Protocol in the General Assembly, the Commission and the Sub-Commission.³⁰⁴ He noted of this debate that "most comments concerned the desirability or not of the abolition of capital punishment. Very few comments concerned the drafting of

sessional working group to draft the instrument and report to the Commission in 1985.

299. Summarized in, Marc Bossuyt, *Elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, U.N. ESCOR, 39th Sess., Agenda Item 9(e), ¶¶ 144-53, U.N. Doc. E/CN.4/Sub.2/1987/20 (1987) [hereinafter U.N. Doc. E/CN.4/Sub.2/1987/20].

300. E.S.C. Res. 1984/7, U.N. ESCOR, 37th Sess., 33d mtg., U.N. Doc. E/CN.4/Sub.2/1984/SR.33 (1984). This suggestion was accepted by Commission resolution 1985/46. U.N. ESCOR, 41st Sess., Supp. No. 2, at 93, U.N. Doc. E/1985/22 (1985); and E.S.C. Res. 1985/41, U.N. ESCOR, 41st Sess., Supp. No. 1, at 29, U.N. Doc. E/1985/85 (1986).

301. G.A. Res. 39/137, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 226, U.N. Doc. A/39/51 (1985).

302. Saudi Arabia called for a recorded vote because "the abolition of the death penalty was incompatible with . . . Islamic principle." U.N. GAOR 3d Comm., 39th Sess., 60th mtg. ¶ 22, U.N. Doc. A/C.3/39/SR.60 (1984). The sponsors had negotiated with Islamic states to try to achieve consensus and reassured retentionist states that the draft did not pass judgment on them. *Id.* ¶¶ 18-19 (remarks of Mr. Borchard of the Federal Republic of Germany). Kuwait expressed appreciation for this "constructive approach," but could not support any draft "that might be interpreted as consent to abolish capital punishment." *Id.* ¶ 24. The vote in the Third Committee was fifty-seven in favor, eighteen opposed, and fifty abstentions. *International Covenants on Human Rights*, U.N. GAOR 3d Comm., 39th Sess., Agenda Item 8 ¶ 11, U.N. Doc. A/39/707 (1984).

303. G.A. Res. 39/137, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 226, U.N. Doc. A/39/51 (1985).

304. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299.

the Second Optional Protocol itself.³⁰⁵ Bossuyt proposed several refinements in the original draft presented by the seven sponsors in 1980. These included deletion of the obligation not to reinstate the death penalty once abolished, since this would be implicit in the obligation not to execute any person as long as the state remained a party to the Second Optional Protocol.³⁰⁶ Further, in light of the number of states retaining capital punishment only in wartime and with the aim of increasing the number of potential ratifications, Bossuyt suggested that states be permitted to make a reservation at the time of ratification to permit the imposition of capital punishment for "a most serious crime of a military nature committed during wartime."³⁰⁷ The similarly limited scope of Protocol No. 6 to the European Convention was cited in support of this suggestion, since it would be unrealistic to expect states to assume more extensive obligations under a UN instrument than they would within the framework of a regional system.³⁰⁸

Bossuyt concluded that at the time Article 6 was drafted "there was a strong presumption in favour of the abolition of the death penalty."³⁰⁹ He urged retentionist states not to block the efforts of abolitionist states to bind themselves with an international commitment, noting that no state could be forced to assume this obligation.³¹⁰

The Sub-Commission's consideration of Bossuyt's report was anticlimactic, to say the least. Action by the Sub-Commission was blocked by a procedural objection raised by the member from the USSR.³¹¹ However, Mr. Al-Khasawneh of Jordan indicated substantive opposition to the draft Protocol, arguing

305. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶ 154.

306. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶ 162.

307. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶¶ 164-69.

308. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶ 165.

309. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶ 184.

310. U.N. Doc. E/CN.4/Sub.2/1987/20, *supra* note 299, ¶ 186.

311. Mr. Sofinsky protested that the report was not available in the Russian language. U.N. ESCOR, 39th Sess., 36th mtg. ¶ 65, U.N. Doc. E/CN.4/Sub.2/1987/SR.36 (1987). The Sub-Commission voted four in favor, three opposed and six abstentions to take no action on the report. *Id.* ¶ 68.

that it could not really be regarded as "optional" when many states could not ratify it. He questioned whether the Sub-Commission could draft an instrument that was contrary to the practices of the majority of states.³¹² With sponsors expressing disappointment with the Sub-Commission's inaction, the General Assembly adopted a resolution at its forty-second session in 1987 simply indicating its intention to return to the subject at its Forty-fourth session.³¹³

At its Fortieth session in 1988, the Sub-Commission adopted a resolution to forward Bossuyt's report to the Commission.³¹⁴ Mr. Al-Khasawneh again argued that the Protocol could not be regarded as optional when many states, particularly Islamic ones, could not ratify.³¹⁵ Mr. Eide of Norway replied that, while he was not an expert on Islam, his understanding was that religious precepts evolved over time, and thus Islamic states could ratify in the future when interpretations changed.³¹⁶

Few Islamic countries replied to the request of the Commission on Human Rights³¹⁷ that they forward their views on

312. U.N. ESCOR, 39th Sess., 25th mtg. ¶¶ 11-12, U.N. Doc. E/CN.4/Sub.2/1987/SR.25 (1987).

313. G.A. Res. 421, U.N. GAOR, 42d Sess., Supp. No. 49, at 320, U.N. Doc. A/42/49 (1987). Recorded votes were taken both in the Third Committee (sixty-two in favor, seventeen opposed, and thirty-five abstentions) and in plenary session (sixty-four in favor, fifteen opposed, and fifty-seven abstentions). Though the United States had voted in favor of the resolution in the Third Committee, U.N. GAOR 3d Comm., 42d Sess., 53d mtg. ¶ 64, U.N. Doc. A/C.3/42/SR.53 (1987) [hereinafter U.N. Doc. A/C.3/42/SR.53], consistent with its earlier position, it abstained in the plenary session. U.N. GAOR, 42d Sess., 93d mtg. at 40, U.N. Doc. A/42/PV.93 (1987). Several Islamic states noted the religious basis for their negative votes during the vote in the Third Committee. *See, e.g.*, Remarks of Kuwait, U.N. Doc. A/C.3/42/SR.53, *supra*, ¶ 63; Remarks of Iran, U.N. GAOR 3d Comm., 42d Sess., 54th mtg. ¶ 91, U.N. Doc. A/C.3/42/SR.54 (1987) ("inconsistent with the divine laws of Islam").

314. U.N. ESCOR, 40th Sess., 36th mtg. ¶ 60, U.N. Doc. E/CN.4/Sub.2/1988/SR.36 (1988).

315. U.N. ESCOR, 40th Sess., 19th mtg. ¶ 19, U.N. Doc. E/CN.4/Sub.2/1988/SR.19 (1988).

316. *Id.* ¶ 38.

317. E.S.C. Res. 1989/25, U.N. ESCOR, 45th Sess., Supp. No. 2, at 80, U.N. Doc. E/1989/20 (1989).

the draft Second Optional Protocol to the Secretary General in advance of the General Assembly's forty-fourth session.³¹⁸ Egypt cited deterrent, rather than immutable religious, concerns in justification for its retentionist stance.³¹⁹ Egypt criticized Amnesty International's opposition to the death penalty as "emotional and irrational," and accused it of ignoring "the circumstances of different human societies" and the "practical reality of many countries of the world."³²⁰ Japan indicated a hardening of its views on the draft Protocol, stating that no treaty should be adopted that did not have the support of a majority of countries.³²¹ Japan also suggested that in light of the rejection of the Uruguayan/Colombian proposal in the drafting of Article 6,³²² the Second Optional Protocol was really an improper amendment to the ICCPR.³²³

Debate within the Third Committee at the forty-fourth session in 1989 was relatively brief, but contentious. The sponsors of the draft Protocol failed in their efforts to craft a resolution with language neutral enough to garner adoption without a vote.³²⁴ Several opponents turned the question into a North/South issue, with Egypt characterizing the Protocol as "a racist, imperialist idea which certain countries were seeking to impose on the 115 countries which still had the death penalty."³²⁵ Iraq suggested that, since only one-third of UN members were abolitionist, adoption of the Protocol "would mean that many countries were hypocritical or that they had

318. The responses were compiled into U.N. GAOR, 44th Sess., Agenda Item 98, U.N. Doc. A/44/592 (1989) [hereinafter U.N. Doc. A/44/592].

319. *Id.* at 17.

320. *Id.* at 12.

321. *Id.* at 25.

322. U.N. Doc. A/C.3/L.644, *supra* note 87.

323. U.N. Doc. A/44/592, *supra* note 318, at 26.

324. U.N. GAOR 3d Comm., 44th Sess., 50th mtg. ¶ 72, U.N. Doc. A/C.3/44/SR.50 (1989) (remarks of Mr. Wentzel of the Federal Republic of Germany, introducing draft Resolution A/C.3/44/L.42).

325. U.N. GAOR 3d Comm., 44th Sess., 52d mtg. ¶ 7, U.N. Doc. A/C.3/44/SR.52 (1989) [hereinafter U.N. Doc. A/C.3/44/SR.52] (The Egyptian delegate also suggested that if the sponsors regarded the Protocol as optional "they should keep it to themselves and not impose it on the international community.").

succumbed to pressure [which] would be an extremely undemocratic approach for a Committee which was supposed to defend human rights, democracy and self-determination."³²⁶ Some retentionist opponents of the Protocol cited the traditional notion that although abolition was "commendable," not all societies were yet prepared for it.³²⁷ The resolution to promulgate the Second Optional Protocol was adopted in the Third Committee by a divided vote of fifty-five in favor, twenty-eight opposed, and forty-five abstentions.³²⁸

C. The Protocol to the American Convention on Human Rights to Abolish the Death Penalty

Attention to abolition as a human rights issue was revived by the IACHR at its Sixty-third session in 1984. The Commission resolved "in accordance with the spirit of Art. 4 . . . and the universal trend to eliminate the death penalty, to call on all countries in the Americas to abolish it."³²⁹ Following its return to democratic government,³³⁰ Uruguay took the lead in proposing the pursuit of this objective by means of codification in treaty form. In 1987 the IACHR appended to its annual report a draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty.³³¹ The OAS General Assembly referred this draft to the Committee on Juridical and Political Matters and requested member states to

326. *Id.* ¶ 11.

327. *Id.* ¶ 15. China also expressed fear that the adoption of the Protocol would lead to "pressure" on retentionist states. This concern was also raised by Morocco. *Id.* ¶ 17.

328. 44 U.N. GAOR, 44th Sess., Annexes, Agenda Items 83-161, at 3, U.N. Doc. A/44/824 (1989). The United States, without explanation, voted for the first time against the Resolution. U.N. Doc. A/C.3/44/SR.52, *supra* note 325, ¶ 23.

329. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1984-1985, OAS, 81st Sess., OAS Doc. OEA/Ser.L/V/II.66 doc. 10 rev.1 at 10 (1985).

330. In March 1985, an elected civilian government took power and restored constitutional rule. AMNESTY INT'L, REPORT 1986, at 201-04 (available from Amnesty Int'l, New York, N.Y., AI Index:POL 01/03/86).

331. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1986-1987, OAS 70th Sess., OAS Doc. OEA/Ser.L/V/II.71 doc. 9 rev.1 at 272 (1987).

submit observations on it.³³² Uruguay submitted a draft which provided simply: "No state party to this additional protocol shall apply the death penalty in its territory to any person subject to its jurisdiction."³³³

Progress was slowed by the dearth of state comments on the draft Additional Protocol, and the Committee on Juridical and Political Matter requested additional time for study.³³⁴ The Committee established a Working Group in August 1989 to examine the two drafts, those of the IACHR and Uruguay.³³⁵ The Working Group's report and draft of April 1990³³⁶ identified three main issues: (1) to define the nature of the Protocol as an addition of a new right, the progressive development of an existing right, or an amendment to the American Convention;³³⁷ (2) to determine whether the pre-

332. AG/RES 889 (XVII-0/87).

333. *Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Submitted by the Permanent Mission of Uruguay*, OAS Doc. OEA/Ser.G/CP/CAJP-706/88 (1988).

334. In addition to the proposal by Uruguay, observations had been received only from Venezuela by the time the Committee met in 1988. OAS Doc. OEA/Ser.G/CP/CAJP-706/88 add.1 (1988); *Report of the Committee on Juridical and Political Matters on the Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OAS Doc. OEA/Ser.G/CP/doc.1937/88 (1988). The Committee received an extension of time to study the issue in AG/RES. 943 (XVIII-0/88). The Committee set a deadline of June 1989 for comments. *Report of the Committee on Juridical and Political Matters on the Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OAS Doc. OEA/Ser.G/CP/doc.2022/89 corr.1, at 1 (1989) [hereinafter OAS Doc. OEA/Ser.G/CP/doc.2022/89 corr.1]. By October 1989, comments had been received only from Argentina, Bolivia, Uruguay and Venezuela. *Id.* at 2.

335. Members included Argentina, Bolivia, Colombia, Costa Rica, El Salvador, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela. OAS Doc. OEA/Ser.G/CP/doc.2022/89 corr.1, *supra* note 334, at 6.

336. *Report of the Chairman of the Working Group to Review the Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, appended to OAS Doc. OEA/Ser.P/AG.doc.2559/90, at 5-12 (1990) [hereinafter *Draft Additional Protocol*].

337. *Id.* at 8. The Working Group deleted the word "additional" from the Uruguayan draft of Article 1 on grounds that "adoption of this Protocol was not meant to include a new human right but to reflect the progressive development of the American Convention on Human Rights."

In the debates within the Permanent Council in May 1990, the representative of Mexico questioned whether the Protocol was an amendment or an addition-

ambular language should refer to capital punishment as being "cruel, inhuman and degrading punishment;"³³⁸ and, (3) to determine whether, similar to the Second Optional Protocol, states should be permitted to enter reservations at the time of ratification to preserve the death penalty in wartime.³³⁹ Within the Permanent Council, only Jamaica raised concerns about the substance of the Protocol, noting that it was a party to the Convention but also a retentionist state and, thus, unable to participate in the drafting efforts.³⁴⁰

While other states expressed difficulties with the Protocol during the General Assembly debates in June 1990,³⁴¹ the

al protocol and noted that Article 77 of the American Convention required approval of the states parties (not the entire OAS General Assembly) of additional protocols, while Article 76 established a distinct procedure for amendments. The Mexican delegate regarded Article 1 of the draft as a "modificacion" and not a "desarrollo" (development) of Article 4 of the Convention. This led the delegate to the conclusion that the draft in essence was an "enmienda" (amendment) to Article 4. Mexico preferred either an explicit amendment to Article 4(2) or a separate convention on abolition. *Transcripcion del Acta de la Sesión Ordinaria del Consejo Permanente de la Organización celebrada el 9 de mayo de 1990*, OAS Doc. OEA/Ser.G/CP/ACTA 816/90 at 2-5 (1990). The delegate from Uruguay replied that the Protocol was not an amendment to the Convention, since it would not require any change in internal laws among retentionist states that did not ratify the Protocol. *Id.* at 5. The issue was solved by providing in the resolution that the General Assembly submit the Protocol to the states parties for their adoption. *Id.* at 11-17.

338. See *supra* note 336, at 8. This pre-ambular language was not included in the draft sent to the General Assembly. OAS Doc. OEA/Ser.P/AG/doc.2632/90, at 2 (1990) [hereinafter OAS Doc. OEA/Ser.P/AG/doc.2632/90].

339. Draft Article 2 of the Working Group would permit states to enter reservations "to apply the death penalty in wartime [as defined under international law] for extremely serious crimes of a military nature [committed by the military]." The brackets indicated a lack of agreement within the Working Group. *Supra* note 336, at 9, 11. The draft sent to the General Assembly preserved the words in the first but not the second set of brackets. OAS Doc. OEA/Ser.P/AG/doc.2632/90, *supra* note 338.

340. See *Draft Additional Protocol*, *supra* note 336, at 9. The Jamaican delegate also objected to pre-ambular language that stated that the states parties to the Convention expressed an intention to adopt the Protocol "with a view to consolidating the practice of not applying the death penalty in the Americas." See *supra* note 336, at 9. This objection was met by deleting the word "the" in the pre-ambular paragraph ("States Parties . . . have expressed their intention"). Draft resolution, OAS Doc. OEA/Ser.P/AG/doc.2632/90, *supra* note 338, at 2.

341. Jamaica and Barbados noted that as retentionist countries they could not

United States struck a particularly contentious note. Requesting a vote on the resolution, the United States insisted on the following:

[It is] important that governments' opinions on this issue be clear. The United States does not support or seek abolition of the death penalty. In our view, imposition of the death penalty for very serious crimes after a fair trial with the full protections of due process, offered by an effective judiciary, is not a violation of fundamental human rights or of international law. The United States therefore does not regard this Protocol as setting a new political or moral norm or as contributing to the development of new legal principles binding on all states. We have also voted "no" because the resolution in its fourth preambular paragraph states that the adoption of the Protocol is important for the inter-American system. This statement implicitly criticizes both the internal laws of the significant number of states that retain the death penalty and the careful compromise incorporated into the American Convention on Human Rights, which allows states to retain the death penalty but does not permit it to be instituted in the first instance or reinstituted once abolished.³⁴²

While stopping short of a denial that the question of the death penalty is one of human rights at all, the position of the United States presented a challenge to the underlying assumption that abolition was a long-term common goal.³⁴³

ratify the Protocol. Asamblea General, Actas y Documentos, Volumen II segunda parte, OAS Doc. OEA/Ser.P/XX.O.2, at 321 (1991). Mexico indicated that although it was abolitionist, it could not ratify the Protocol because the exception permitted in Article 2 was narrower than the provisions of its constitution. *Id.* Guatemala also stated that its internal law was not consistent with the Protocol. *Id.*

342. Asamblea General, Actas y Documentos, volumen II, primera parte, OAS Doc. OEA/Ser.P/XX.O.2, at 250-51 (1991).

343. The United States, not having ratified the American Convention, could not in any case ratify the Protocol.

VIII. CONTINUING SYMBOLISM OF THE DEATH PENALTY AS AN INTERNATIONAL ISSUE

International surveys of the death penalty continue to evidence gradual abolitionist trends, mixed with continued retention and even expansion in some regions.³⁴⁴ This picture does not vary from that noted by Ancel in the early 1960s.³⁴⁵ But this surface resemblance masks real changes in the international dynamic of death penalty debate.

While abolitionist energies at the international level have been diverted toward the three protocols, the end result arguably is to present abolition as the specialized concern of a small group of distinctive societies that become parties to these instruments.³⁴⁶ Continued debate of capital punishment as a general human rights issue and of abolition as a common, if in some instances remote, goal has become more difficult in the 1990s. The failure of a proposal for a three-year moratorium on

344. See HOOD, *supra* note 8; *Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 2d Sess., Agenda Item 1, at 15, U.N. Doc. E/1990/38/Rev.1 ¶ 59 (1990) [hereinafter U.N. Doc. E/1990/38/Rev.1] (noting eleven countries abolishing the death penalty between 1984-1989, an increase in reported death sentences and a decline in reported executions since the last reporting period, but inconsistency in the sources of available data).

345. CAPITAL PUNISHMENT, *supra* note 35.

346. Fifteen states had ratified the Second Optional Protocol to the ICCPR as of February 1993, and seven additional states had signed it. Fourteen were European (only Romania not being Western European), six were Latin American and the other two were Australia and New Zealand. A *Summary of Events on the Death Penalty and Moves Toward World Wide Abolition*, DEATH PENALTY NEWS Feb. 1993, (available from Amnesty Int'l, New York, N.Y., AI Index: ACT 53/01/93) [hereinafter DEATH PENALTY NEWS]. Eighteen states had ratified Protocol No. 6 to the European Convention as of February 1993: Austria, Denmark, Finland, France, Germany, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, and Switzerland. *Council of Europe, Chart of Signatures and Ratifications, Date: 04/02/93*. The Czech Republic and the Slovak Republic, which divided in January 1993 after the Czech and Slovak Republic had ratified Protocol No. 6, may also soon be recognized as parties to the Protocol. DEATH PENALTY NEWS, *supra*. Only one state, Panama, has ratified the OAS Protocol to Abolish the Death Penalty, although five others have signed it. DEATH PENALTY NEWS, *supra*.

the death penalty at the Eighth Crime Congress in 1990 and the complete inability of the Conference on Security and Cooperation in Europe (CSCE) to grapple with the death penalty as a human rights issue serve as sobering object lessons. On the other hand, the exclusion of the death penalty as a possible punishment within the competence of the UN International Tribunal on War Crimes in ex-Yugoslavia³⁴⁷ signals continuing UN attachment to the abolitionist principle.

Efforts to use the crime congresses as a springboard for promotion of an international death penalty moratorium date back to the Sixth Crime Congress in 1980.³⁴⁸ Following defeat of the moratorium proposal in the Sixth Crime Congress,³⁴⁹ and later in 1980 at the General Assembly,³⁵⁰ the death penalty did not even appear as an agenda item at the Seventh Crime Congress in 1985.³⁵¹ But responding to ECOSOC Resolution 1990/51,³⁵² the Eighth Crime Congress confronted the issue of capital punishment³⁵³ in the guise of a revamped moratorium proposal by Italy and thirty-four diverse co-sponsors.³⁵⁴ The key operative paragraph invited³⁵⁵

347. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 112, U.N. Doc. S/25704 (1993), reprinted in 14 HUM. RTS. L.J. 197, 198 (1993); see also Julia Preston, *Balkan War Crimes Tribunal Established*, WASH. POST, May 26, 1993, at A25.

348. U.N. Doc. A/CONF.87/C.1/L.1, *supra* note 209.

349. See *supra* notes 209-16.

350. See *supra* notes 217-22.

351. Amnesty International did organize an ancillary meeting on judicial and extrajudicial executions at the Seventh Crime Congress. See *Dr. Christian Broda, Statements at the Seventh U.N. Congress on the Prevention of Crime*, AMNESTY INT'L REPORT, Aug. 1985 (available from Amnesty Int'l, New York, N.Y., AI Index: ACT 05/28/85); Robert Badinter, AMNESTY INT'L REPORT (available from Amnesty Int'l, New York, N.Y., AI Index: ACT 05/27/85), Aug. 27, 1985.

352. ECOSOC Res. 1990/51 of July 24, 1990 requested the Eighth Crime Congress to examine the question of capital punishment thoroughly. U.N. ESCOR, 2d Sess., Supp. No. 1A, at 6, U.N. Doc. E/1990/90/Add.1 (1991).

353. *United Nations, Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, ¶¶ 307-11, U.N. Doc. A/CONF.144/28/Rev.1 (1990) [hereinafter U.N. Doc. A/CONF.144/28/Rev.1].

354. The co-sponsors were Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Cape Verde, Chile, Colombia, Costa Rica, Czechoslovakia, the Dominican Republic, Ecuador, France, the Federal Republic of Germany, Hungary, Ireland, Malta, Mo-

States which have not abolished capital punishment to consider the possibility of establishing, within the framework of their national legislations, a moratorium in its application, at least on a three-year basis, or creating other conditions under which capital punishment is not imposed or executed, so as to permit a study of the effects of abolition on a provisional basis³⁵⁶

Presentation of the moratorium proposal was a clever strategy, playing on the deepest and least controversial chords in the UN's long consideration of the death penalty. A moratorium would provide the "laboratory conditions" for each retentionist state to study the effects of abolition under the "circumstances prevailing"³⁵⁷ within its own society. For this reason, the proposal could be supported by retentionist as well as abolitionist states, since the results of the "experiment" were not mandated. The flaws in the quinquennial surveys and in the existing social science literature consist mainly of a dearth of data on developing countries³⁵⁸ and an inability to compare data over time because of discontinuity in sources. Compliance with the moratorium proposal would permit each retentionist state to study the alleged deterrent effect of capital punishment, with the sponsors obviously assuming that the experiments would disprove such effect.

Whether the moratorium strategy, if adopted by the Crime Congress, would have advanced its sponsors' objectives is open

zambique, the Netherlands, New Zealand, Nicaragua, Panama, the Philippines, Poland, Portugal, Romania, Sierra Leone, Spain, Switzerland, the United Kingdom, Uruguay, Venezuela, and Yugoslavia. *Id.*

355. Draft Resolution A/CONF.144/C.2/L.7, reprinted in U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353, ¶ 352.

356. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353. The draft Resolution also noted a trend toward de facto and de jure abolition and, "while recognizing the diversity of political, economic, social, cultural and religious systems," expressed the hope that the death penalty would not be extended but would be gradually restricted by each state "taking into account the circumstances prevailing in each country" U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353.

357. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353 (quoting draft Resolution).

358. Leone, *supra* note 294.

to doubt. Belief in deterrence no longer explains the policy choices of a large number of retentionist states, and conclusive scientific proof of the absence of deterrence will not move all States toward the abolitionist goal.³⁵⁹ As the Secretary General's 1990 survey concluded, "capital punishment has a far greater symbolic than practical significance."³⁶⁰

Islamic states, in particular, coalesced to defeat the moratorium despite its cautious phrasing.³⁶¹ Islamic states even urged that the time-worn phrase drawn from Article 6 of the ICCPR, "States which have not abolished the death penalty," be replaced by the phrase, "States whose legal systems do not constitute absolute impediments to the abolition of capital punishment."³⁶²

Challenges to the previous international consensus on abolition as an ultimate goal have created new barriers to progress at the international level, even in fora where Islamic states play a marginal role. These barriers are visible in the failures of the CSCE to include abolition, either immediate or remote, among the human rights principles to which it is committed. Despite rapid and continuing evolution of its human

359. See HOOD, *supra* notes 294-95.

360. U.N. Doc. E/1990/38/Rev.1, *supra* note 344, ¶ 62 (referring to the fact that many states extending capital punishment to new crimes fail to impose the penalty on any offenders). See also Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC. REV. 21 (1982) (studies of pro-death penalty support in the United States reveal predominance of symbolic over instrumental concerns).

361. A move by Islamic states to postpone a decision until the Ninth Crime Congress was deflected. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353, ¶¶ 343-47. The draft Resolution was adopted by the Second Committee of the Crime Congress by a vote of forty in favor, twenty-one opposed, and sixteen abstentions. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353, ¶ 350. The draft Resolution was defeated, for lack of a two-thirds majority, in the plenary by a vote of forty-eight in favor, twenty-nine opposed, and sixteen abstentions. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353, ¶ 358. The USSR voted in favor and led an effort to close off debate to get the Resolution out of committee. Roger S. Clark, *Introduction to The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990*, 1 CRIM. L.F. 513, 519 (1990).

362. U.N. Doc. A/CONF.144/28/Rev.1, *supra* note 353, ¶ 337 (oral amendment proposed by Algeria, Egypt, Jordan, Saudi Arabia, Oman and Yemen).

rights machinery and standards,³⁶³ the CSCE participants have been completely stalled on the question of the death penalty, agreeing on no more than to "keep the question of capital punishment under consideration."³⁶⁴ This paralysis is especially striking, given the strong trend toward abolition in both Western and Eastern Europe in the post-Cold War era.³⁶⁵ But two of the key players in the CSCE process, the United States and Russia, remain retentionist—the former increasingly more strident as it continues an expansionist trend.

The contemporary symbolic importance of the death penalty extends beyond the religious/nationalist dimension perceived by Islamic states or the prickliness of powerful retentionist states.³⁶⁶ In the context of national debates on the death penalty, abolition is still widely perceived, as it has been since the eighteenth century, as an emblem of advancing civilization. Nations emerging from a period of oppression frequently include abolition prominently among the reforms intended to

363. See generally Thomas Buergenthal, *CSCE Human Dimension: The Birth of a System*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 163 (1992).

364. *Conference on Security and Co-Operation in Europe: Document of the Moscow Meeting on the Human Dimension*, reprinted in 30 I.L.M. 1670, 1686 ¶ 36 (1991). The Moscow Document merely recalled similar commitments expressed in the Document of the Copenhagen Meeting of the Human Dimension of 1990, reprinted in 29 I.L.M. 1305, 1314 ¶ 17 (1990), and the Concluding Document of the Vienna Meeting 1986 of the Conference on Security and Co-operation in Europe (CSCE), reprinted in 28 I.L.M. 527, 535 ¶ 24 (1989). At the Helsinki Follow-Up meeting in July 1992, the CSCE again agreed only to affirm the commitments of the Moscow and Copenhagen documents. *Helsinki Decisions*, 13 HUM. RTS. L.J. 288, 301 ¶ 58 (1992).

365. For example, Czechoslovakia (before its split), Hungary, Romania, Slovenia and Croatia have all abolished the death penalty, as had the German Democratic Republic even prior to its unification with the Federal Republic of Germany. *List*, *supra* note 12. See also Theodore S. Orin, *The Prohibition of the Death Penalty: An Emerging International Norm?* in HUMAN RIGHTS IN A CHANGING EAST/WEST PERSPECTIVE 136 (Allan Rosas & Jan Helgesen eds., 1990).

366. On the growing obstructionism of the United States, see discussion of OAS Protocol, *supra* notes 329-43. Japan voted against the moratorium proposal at the Eighth Crime Congress, *supra* note 361, and against adoption of the Second Optional Protocol, *supra* note 328. The United States also voted against the Second Optional Protocol and did not attend the Eighth Crime Congress, which was held in Cuba.

mark their new status as respecters of fundamental human rights.³⁶⁷

The four examples that follow illustrate the often complex ways the retention or abolition of the death penalty, by democratic or autocratic means, serves as a touchstone for other governmental interests. These domestic debates often mirror the debate at the international level, while at the same time the two debates influence each other. The examples will reveal the following: (1) how total abolition, or a death penalty moratorium, manifests a newly-democratic government's rhetorical commitment to human rights; (2) how continuing strife in newly democratic states can erode the power of an initial symbolic abolitionist act and tempt a regime which has lost control of events to seek reinstatement of the death penalty; and, (3) how the death penalty functions as a symbol of a regime's commitment to religious values to appease domestic constituencies and of nationalism on the international plane.

Diverse factors, including the role of opposition parties, have influenced the course of debate in each of the countries profiled here. Some of these factors include: religious traditions, both Islamic and Christian, and the ways in which participants in the debate invoke them; the relationship between the executive and the constituent body; and the increasing reference to public opinion as a validator of capital punishment. Public opinion appears to have replaced the committee of experts as the reference body of choice on the question of the death penalty at both national and international levels.³⁶⁸

367. In 1987 Haiti and the Philippines abolished the death penalty; as did Romania and Slovenia in 1989; and Croatia, the Czech and Slovak Republic, Hungary, Mozambique and Namibia in 1990. The National Assembly of Angola approved an abolitionist constitutional amendment in August 1992. *List, supra* note 12.

368. For example, the expert Committee on Crime Prevention and Control has been replaced by a Commission on Crime Prevention and Criminal Justice, a functional commission of ECOSOC consisting of state representatives. *See Report of the Commission on Crime Prevention and Criminal Justice*, U.N. ESCOR, 1st Sess., Supp. No. 10, U.N. Doc. E/1992/30 (1992).

A. Peru

Peru's experience of the death penalty embodies the romantic nineteenth century Latin American tradition of liberation and democracy, with rejection of the death penalty as the tool of autocrats against political activists.³⁶⁹ The Peruvian constitution of 1856 abolished the death penalty, but it was rapidly reinstated in 1860 for aggravated homicide and extended in 1920 for treason.³⁷⁰ Peru became abolitionist again in 1924, but beginning in 1949 the death penalty was extended by successive military regimes to various terrorist crimes.³⁷¹ The 1979 constitution that marked a return to civilian rule abolished the death penalty for all crimes except treason in times of external war.³⁷² The death penalty no longer was to be used as a weapon against internal enemies, either political or common criminal.

At the time of this writing, however, Peru is engaged in a grotesque masque in which the death penalty, visions of the nature of democracy, and the interaction of the national and international discourses on the death penalty blend in complex fashion. Two important events have set the stage for the present tensions. First, President Alberto Fujimori dissolved the Congress in April 1992 and instituted a Government of Emergency and National Reconstruction ruling by decree.³⁷³ Fujimori's action came after more than a decade of internal strife accompanied by massive atrocities committed both by security forces and insurgents, especially Sendero

369. Other Latin American states have been more constant in their adherence to abolition as an emblem of independence and democracy, as well as more adverse to its imposition for political crimes. Venezuela has been completely abolitionist since 1863 (and abolitionist for political crimes since 1849), Costa Rica since 1877, Uruguay since 1907 and Colombia since 1910. AMNESTY INT'L, *WHEN THE STATE KILLS* 191 (1989) [hereinafter *WHEN THE STATE KILLS*].

370. *Id.* at 190.

371. *Id.*

372. *Id.* at 191.

373. Nathaniel C. Nash, *Peruvian Election Free of Fraud, U.S. Officials Say*, N.Y. TIMES, Nov. 24, 1992, at A5.

Luminoso.³⁷⁴ Thousands have disappeared and were presumably killed by government agents,³⁷⁵ despite Peru's officially abolitionist status. Upon taking office in 1990, Fujimori asserted that terrorist violence could not justify such human rights violations and committed himself to preserving democracy within Peru's constitutional traditions.³⁷⁶ Yet by 1992, Fujimori had come to the conclusion that he had to jettison Peruvian democracy in order to "save" it. Some of his measures have attracted substantial popular and military support, though they have provoked international condemnation.³⁷⁷

The death penalty moved to prominence with the September 1992 arrest of Sendero Luminoso leader Abimael Guzman.³⁷⁸ Fujimori suggested that execution might be appropriate for Guzman, despite the absence of any law providing for such a penalty.³⁷⁹ Even the adoption of a prospective capital punishment law would pose a serious problem for Peru—as a party to the American Convention on Human Rights,³⁸⁰ Peru is forbidden to reinstate or extend the application of the death penalty. Fujimori and his political allies began to float the idea of denouncing the American Convention

374. Over 24,000 persons have been killed in political violence in Peru since 1980. HUMAN RIGHTS WATCH, *WORLD REPORT 1992* at 309-15 (1991) [hereinafter HUMAN RIGHTS WATCH].

375. See *Annual Report of Inter-American Commission on Human Rights*, 1990-1991, OAS 9th Sess., OAS Doc. OEA/Ser.L/V/II.79 rev. 1 Doc. 12 251-422 (1991) (reports on individual cases of disappeared Peruvians). Peru has the highest rate of recent disappearances in the world. See also HUMAN RIGHTS WATCH, *supra* note 374, at 310.

376. *Peru: Human Rights during the Government of President Alberto Fujimori*, May 1992, (available from Amnesty Int'l, New York, N.Y., AI Index: AMR 46/18/92).

377. William R. Long, *Peru's Pain May Be Giving Way to Improvement*, L.A. TIMES, July 4, 1992, at A13.

378. *Next, Legislation Will be Retroactive; San Jose Pact Withdrawal Heralds Death Penalty*, LAT. AM. WKLY. REP., Oct. 29, 1992, at 2, available in LEXIS, Nexis library [hereinafter LAT. AM. WKLY. REP.].

379. *Death Penalty in Peru*, HOUS. CHRON., Oct. 16, 1992, at A23.

380. O.A.S.T.S. No. 36, *supra* note 17, art. 4.

in order to permit the adoption of the death penalty for terrorist crimes.³⁸¹

Concerns about negative international reaction have caused Fujimori to seek alternatives to renunciation of the American Convention. One proposal would simply redefine the insurgency as an "external" war (on the premise that Sendero Luminoso receives financing from foreign sources) in order to avoid a clear conflict with the provisions of the 1979 Constitution.³⁸² However, the draft constitution circulated in June 1993 by the Democratic Constituent Congress would drop the "foreign war" clause and extend the death penalty to other acts of treason and terrorism.³⁸³ A referendum on the revised constitution is planned.³⁸⁴ According to the president of the Congressional Commission on the Constitution, "the decision to impose the death penalty has been made, it has the backing of [a] majority of the electorate, and so it will prevail. The jurists will just have to find the most adequate way of implementing it."³⁸⁵ Among the suggestions for reinstating the death penalty without renouncing the American Convention is a strategy for partial amendment to the Convention.³⁸⁶

The Peruvian situation illustrates how the internationalization of the death penalty issue can create barriers to the quick imposition of capital punishment by a regime seeking to demonstrate control over a situation that in fact eludes it. In Peru, it is clear that the state does not possess a monopoly of force. Both insurgents and undisciplined security forces exercise authority over large parts of the state territory. The death

381. LAT. AM. WKLY. REP., *supra* note 378.

382. DEATH PENALTY NEWS, *supra* note 346, at 1.

383. *Peru: New Constitution Debated, Death Penalty & Presidential Reelection Central Issues*, NOTISUR, June 18, 1993, available in LEXIS, Nexis Library, NOTSUR File.

384. *Id.*

385. Abraham Lama, *Peru: Government Seeks Legal Mechanisms to Impose Death Penalty*, INTER PRESS SERVICE, June 23, 1993, available in LEXIS, Nexis Library, INPRES File.

386. *Id.* (quoting former Senator Enrique Bernales, who bases his suggestion partially on the dubious proposition that the American Convention "was signed before the phenomenon of terrorism emerged").

penalty, a symbol of the exclusive power of the state to make life and death determinations, tempts as a means to shore up the appearance of power in the political center. The display of Guzman in his cage³⁸⁷ and the invocation of emergency powers were likewise ammunition in the battle for the loyalty of a battered public.

But Fujimori, at least temporarily, found his attempted show of strength baffled. The cost of the reimposed death penalty would be greater than the gain if it came at the expense of denouncement and repudiation of the entire system for the protection of human rights in the Americas. The proposal to redefine the nature of the insurgency to accomplish "constitutional" extension of the death penalty and the more recent attempt to reintroduce the death penalty "democratically,"—that is, by popular vote—present the international community with a difficult dilemma. The transparent violation of the substance of Article 4 of the American Convention could be vigorously protested,³⁸⁸ or the international community might tolerate it for the sake of giving the embattled Fujimori flexibility to redefine "democracy" under extreme circumstances. The impatience of the Peruvian public with objections to the fairness of Guzman's trial signals that the international community's leverage over the Peruvian situation may be limited.³⁸⁹

387. *Guzman Meets Press*, N.Y. *NEWSDAY*, Sept. 25, 1992, at 14 (Guzman displayed by military in "specially constructed cell").

388. If the Peruvian legislation is adopted, it could be challenged through an advisory opinion from the Inter-American Court of Human Rights, as was done in a similar instance concerning Guatemala. I-A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983, Series A, no. 3. See also *Death penalty proposal violates the American Convention on Human Rights*, *Amnesty International*, AI Index: AMR 46/18/93 (1993).

389. Adriana von Hagen & William R. Long, *Peru Guerrilla Chieftain Gets Life Term in Prison*, L.A. *TIMES*, Oct. 8, 1992, at A4; Douglass W. Cassel & Anthony D'Amato, *Justice: A Victim in Peru*, *CHRIST. SCI. MON'T.*, Oct. 27, 1992, at 18. The Catholic Church appears divided on the issue of the reintroduction of the death penalty and thus unlikely to play a significant role. Abraham Lama, *Peru: Church Refuses to Join Open Debate on Death Penalty*, *INTER PRESS SERVICE*, June 16, 1993, available in *LEXIS*, *Nexis Library*, *INPRES* file.

Fujimori's recourse to public opinion via a referendum provides him with some measure of protection from criticism that his death penalty proposal is another signal that his regime represents a return to authoritarianism and a betrayal of democracy. Fujimori's death penalty proposal is intended to serve a "reassurance" function with respect to Peruvian public opinion³⁹⁰ which some elements in the international community might try to accommodate, so long as the shell of democracy and international human rights protection are not entirely lost.

B. *The Philippines*

The 1987 abolition of the death penalty, welcomed as a rejection of the Marcos era and a commitment to human rights, was tenuous from the beginning.³⁹¹ Article III, Section 9 of the 1987 Constitution provides that the death penalty shall not be imposed "unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it"³⁹² The transition to democracy brought the unleashing of powerful new elements of public opinion, without guaranteeing that the criminal justice system would be rid of the many flaws inherited from the earlier autocratic period. Calls for the reimposition of the death penalty to combat organized crime—particularly drug crimes and kidnappings by rings that include corrupt police and security agents—signal the desperation of an elected government for a measure to symbolize a control and strength it does not really possess.³⁹³

390. See Barbara A. Stoltz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL'Y Q. 157, 163-165 (1983).

391. The vote in the Constitutional Commission was nineteen in favor and eighteen opposed. *Case Studies in the Use of the Death Penalty*, AMNESTY INT'L REPORT Apr. 1989, at 10 (Amnesty Int'l, New York, N.Y., AI Index: ASA 35/08/89) [hereinafter *Case Studies*].

392. *Id.* at 9.

393. *General Proposes Execution for Corrupt Officials*, REUTER LIBR. REP., Nov. 29, 1992, available in LEXIS, Nexis Library, LBYRPT File; *Manila Searches for Kidnapped Spanish Nuns*, AGENCE FRANCE PRESSE, Jan. 18, 1993, available in LEXIS, Nexis Library, AFP File. A Ministry of Defense official defended a 1989 proposal for reimposition of the death penalty as follows:

Reports indicating strong support in Congress for reimposition of the death penalty were borne out by recent votes in both the Senate and the House to reintroduce it.³⁹⁴ Opponents strive to link the issue to the nation's sorry history of human rights abuse.³⁹⁵ In this effort they are aided by abolitionist elements in the international human rights community, who regard potential retrocession by the Philippines as a serious setback.³⁹⁶ President Fidel Ramos seeks to provide the

Taking into account the rise in criminality and lawlessness in the country, the pestering insurgency, and the alarming incidents of violent crimes; and considering further the observations and recommendations coming from the military and police establishments, as well as the courts of justice, it is perceived there are compelling reasons for the restoration of the death penalty as an effective deterrent against the commission of heinous crimes and as matter of simple retributive justice.

Philippines: Possible Reintroduction of the Death Penalty, URGENT ACTION (Amnesty Int'l, London, U.K.), Feb. 8, 1990.

394. Xinhua General News Service reported on January 21, 1993, that sixteen of twenty-four Philippine Senators support restoration of the death penalty. *Major News Items in Leading Philippine English Newspapers*, XINHUA GEN. NEWS SERV., Jan. 21, 1993, available in LEXIS, Nexis Library, XINHUA File. The vote in February resulted in a Senate Committee being charged to draw up a compromise bill to be signed by President Ramos after further action by both houses. Telephone Interview with Enid Harlow, Program Assistant, Amnesty International USA Program to Abolish the Death Penalty (July, 13 1993).

395. PHILIPPINE DAILY INQUIRER, Dec. 13, 1992. The Spanish Penal Code of 1848, including the death penalty, was imposed on the Philippines in 1884. Under United States rule, the 1932 Revised Penal Code provided the death penalty for seven offenses. In 1941 it was extended to espionage. *Case Studies*, *supra* note 391, at 1-5. During the presidency of Ferdinand Marcos in the 1970s and 1980s, numerous death sentences were imposed on political offenders, many by martial law courts. *WHEN THE STATE KILLS*, *supra* note 369, at 191. Benigno Aquino was among those sentenced to death by military tribunals, in 1977, and he was still under this sentence when he was assassinated upon his return to the Philippines in 1983. *Case Studies*, *supra* note 391, at 5. When President Corazon Aquino assumed the presidency in 1987, she announced her intent to commute the more than 500 death sentences then outstanding. *WHEN THE STATE KILLS*, *supra* note 369, at 191. Despite the many politically motivated death sentences during the Marcos regime, the last official execution in the Philippines took place in 1976, for a common crime. *WHEN THE STATE KILLS*, *supra* note 369, at 191. In fact, Marcos occasionally proposed measures to limit the death penalty to shore up the respectability of his regime. *Case Studies*, *supra* note 391, at 8.

396. Amnesty International has testified against bills to reintroduce the death penalty in the Philippines. *WHEN THE STATE KILLS*, *supra* note 369, at 191.

same reassurance to an impatient public as President Fujimori of Peru,³⁹⁷ indicating how partial democratization under situations of great stress can strengthen the retentionist appeal. The clash of symbols between abolition as a mark of democracy and retention as a signal of responsiveness to public demand has yet to be resolved.

C. *Pakistan*

Pakistan presents some of the same elements as the Philippine scenario—a newly elected democratic government suspending the death penalty in revulsion against its political abuse during a martial law regime, followed by a regime attracted to the death penalty as an emblem of resolve to tackle political unrest and rampant crime. In Pakistan, the symbolic link of capital punishment to the aim of infusing public policy with the principles of Islam plays a critical role. The influence of Islam on death penalty debates varies greatly among Islamic states,³⁹⁸ but the religious element has figured in Pakistan. Recently, Pakistan's death penalty rhetoric at the national and international levels has also highlighted drug trafficking.³⁹⁹

Pakistan has had a judicial death penalty since its creation in 1947, but its application and the structures empowered to impose it have fluctuated widely over the periods of martial law and elected governments. The 1974-1985 period of martial law had seen an especially high rate of executions,

397. Stoltz, *supra* note 390.

398. Islam itself is multifaceted, as Deniz Kandiyoti remarks, *quoted in* Donna Sullivan, *Gender Equality and Religious Freedom*, 24 N.Y.U. J. INT'L L. & POL. 795, 812 n.39 (1992):

Islam may be involved and evoked at all sorts of levels — in the cultural practices of kin-based communities, in state ideologies incorporating coherent legislative practices, in a more privatized religious conviction, in organized and militant social movements, as a nod in the direction of Muslim aid donors or internal political allies, or as a more diffuse discourse on national and cultural authenticity. The meaning and daily reality of Islam can be so diverse as to justify the question, which Islam?

399. *ECO Members to Co-Ordinate Anti-Drug Fight*, REUTERS LIBR. REP., Apr. 26, 1993, available in LEXIS, Nexis Library, LBYRPT File.

including that of Prime Minister Zulfikar Ali Bhutto in 1979 after a military coup by President Zia Al-Haq.⁴⁰⁰ Bhutto's daughter, Benazir Bhutto, instituted a moratorium and commuted 2000 death sentences on her election in December 1988.⁴⁰¹ Benazir Bhutto in turn was removed from office when her government was dissolved by President Ishaq Khan, paving the way for the Islamic Democratic Alliance led by Nawaz Sharif to take power in November 1990.⁴⁰² Executions resumed in Pakistan in 1992.⁴⁰³

The influence of Islamic fundamentalism is only one factor explaining the prevalence of the death penalty in Pakistan.⁴⁰⁴ Four sets of courts are currently empowered to impose death sentences: ordinary courts, military courts during periods of martial law, Special Courts for Speedy Trials, and religious courts.⁴⁰⁵ The proliferation of courts and offenses providing for the death penalty signals the government's desire to present the death penalty as an answer to multiple issues. Yet-to-be-implemented is an additional layer of "extraordinary" institutional and legal measures: the 1991 Terrorist Affected Areas (Special Courts) Ordinance,⁴⁰⁶ which would empower yet another "special" body to dispense death sentences outside the regular legal system.

Pakistan's leaders have regularly appealed to Islamic fundamentalist support to solidify their power. President Zia did so, through measures such as the Enforcement of Hudood Ordinances of 1979.⁴⁰⁷ The government tried to associate it-

400. WHEN THE STATE KILLS, *supra* note 369, at 188.

401. WHEN THE STATE KILLS, *supra* note 369, at 189.

402. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, Report to the Senate Committee on Foreign Relations and the House of Representatives Committee on Foreign Affairs, 102d Cong., 1st Sess., 102-05, at 1586 (1991).

403. DEATH PENALTY NEWS, *supra* note 346, at 1.

404. Amnesty International reports that in 1991 over 200 death sentences were imposed. *Pakistan: Amnesty International Concerned About Executions*, Amnesty Int'l, AI Index: ASA 33/WU02/92 (1992).

405. WHEN THE STATE KILLS, *supra* note 369, at 187-88.

406. *Pakistan: Special Courts for Speedy Trial*, Amnesty International, AI Index: ASA 33/23/91 at 4 (1991).

407. *Pakistan: Legal Changes Affecting Application of the Death Penalty*, AM-

self with a return to Islamic values as interpreted by certain religious leaders. For example, a 1981 decision by the federal Shari'a Court that stoning was a punishment repugnant to Islam was reversed after alteration in the court's composition.⁴⁰⁸

Under the current regime, Islamic concerns animate such measures as a mandatory death penalty for defiling the name of the Prophet.⁴⁰⁹ The first case imposing this penalty, the death sentence of a Christian involved in a dispute with a Muslim League campaign worker, has aroused international attention⁴¹⁰ that potentially strains the Pakistani government's ability to defend its religiously based adherence to the death penalty as a matter of its own internal concern. Moreover, the treatment of women under Shari'a law attracts international human rights scrutiny,⁴¹¹ as international norms concerning gender justice as well as capital punishment expose Pakistan to external human rights criticism.

D. South Africa

Unlike several of its Southern African neighbors,⁴¹² South Africa has not yet embraced abolition as a symbol of its commitment to democratization and social progress. South Africa remains retentionist in a largely retentionist continent,⁴¹³ where regional human rights norms barely touch on

NESTY INTERNATIONAL SUMMARY, Mar. 1991, at 3 (Amnesty Int'l, New York, N.Y., AI Index: ASA 33/03/91).

408. WHEN THE STATE KILLS, *supra* note 369, at 188.

409. *Pakistani Legal Changes: The Death Penalty Made Mandatory for Defiling the Name of the Prophet Mohammad*, AMNESTY INT'L REPORT, Sept. 1991 (available from Amnesty Int'l, New York, N.Y., AI Index: ASA 33/09/91).

410. CATHOLIC NEW YORK, Nov. 26, 1992, at 4.

411. See Sullivan, *supra* note 398.

412. Namibia and Mozambique are both abolitionist, and Angola has taken steps in the same direction. *List, supra* note 12.

413. Hood noted at the time of his study that only the Seychelles and Cape Verde, among sub-Saharan African states, were de jure abolitionist though several other states appeared to be abolitionist de facto. See HOOD, *supra* note 8, at 19-21. Since that time, Guinea-Bissau, Mozambique, Namibia, São Tomé and Príncipe, and possibly Angola, have become abolitionist. *List, supra* note 12; DEATH PENALTY

the issue of the death penalty.⁴¹⁴ But South Africa is a special case. South Africa has had an effective moratorium on the death penalty since 1990,⁴¹⁵ and capital punishment remains a bargaining chip in the on-going negotiations toward multi-racial democracy. With indisputable evidence that the death penalty had been deeply infected with race bias and had in fact functioned as a tool of apartheid, the African National Congress and other anti-apartheid groups have demanded a moratorium on non-political as well as political applications of the death penalty as a prerequisite for constitutional negotiations.⁴¹⁶

NEWS, *supra* note 346. The prevalence of the death penalty in Africa is frequently explained on grounds that "countries suffering from political instability, where the state has difficulties in maintaining order, [regard] the death penalty . . . as an essential instrument of security, the abandonment of which would be interpreted as a sign of weakness." HOOD, *supra* note 8, at 21. See also A.A. Adeyemi, *Death Penalty: Criminological Perspectives, the Nigerian Situation*, 58 R.I.D.P. 485 (1987). Yet, the death penalty is a legacy of the colonial experience and not indigenous to African cultures. As the Chief Justice of Zimbabwe explained:

In Zimbabwe there was no death sentence passed on those who committed murder. The Shona inhabitants of Zimbabwe did not believe in taking away another human being's life because they believed that his spirit would return to torment them The penalty for killing another person was an award of damages to the guardian or family of the person killed. The damages were a form of punishment. They were also a form of compensation for the loss of a member of the aggrieved family.

E. Dumbutshena, *The Death Penalty in Zimbabwe*, 58 R.I.D.P. 521 (1987). The death penalty was introduced in 1890 by British settlers. The experience of Zimbabwe, in having no tradition of the death penalty until the colonial period, is typical of sub-Saharan Africa. See generally AFRICAN PENAL SYSTEMS (Alan Milner ed., 1969); JAMES S.E. OPOLOT, CRIMINAL JUSTICE AND NATION BUILDING IN AFRICA (1976); A.S. DIAMOND, PRIMITIVE LAW 161-93 (1935).

414. The African Charter of Human and Peoples' Rights makes at best oblique and ambiguous reference to the death penalty in its Article 4:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5 (1981).

415. Nathan V. Holt, Jr., *Human Rights and Capital Punishment: The Case of South Africa*, 30 VA. J. INT'L L. 273, 317 (1989).

416. Dennis Davis, *The Historical and Jurisprudential Evolution and Background to the Application of the Death Penalty and Its Relationship with Constitutional and Political Reform* (Mar. 28, 1990) (unpublished manuscript, on file with author, Alice Miller); *Inside South Africa's Death Factory*, Black Sash Research

The South African government has suggested that procedural reforms could cure the death penalty of the taint of linkage to apartheid.⁴¹⁷ The current rise in crime and the perceived need to reassure the white constituency about the results of transition to majority rule led the government to seek, and obtain, a vote from Parliament to lift the moratorium in June 1993.⁴¹⁸

Causes celebres such as the case of the "Uppington 14",⁴¹⁹ attracting high levels of international public scrutiny, taught the South African government the costs of political uses of the death penalty. The lifting of the moratorium was perceived by opponents as a "cynical public relations stunt" to mollify whites, while actual executions would continue to be stayed to avoid derailing the negotiations for constitutional transition to majority rule.⁴²⁰ The current level of violence in South Africa risks diluting the identification of the death penalty with the human rights abuses of the apartheid regime.⁴²¹ The other

Project (Feb. 1989).

417. See Jan van Rooyen, *South Africa's New Death Sentence: Is the Bell Tolling for the Hangman?*, 4 S. AFR. J. CRIM. JUST. 79 (1991).

418. Anton Ferreira, *De Klerk Seen Reassuring Whites in Key Speech*, REUTER LIB. REP., Jan. 30, 1993, available in LEXIS, Nexis Library, LBYPRT File; Jonathan Manthorpe, *S. Africa to Enrol Paramilitary Groups in Neighborhood Watch*, THE GAZETTE (Montreal), Jan. 30, 1993, at B7 available in LEXIS, Nexis Library, MONGAZ File (Quoting President F.W. de Klerk as saying, "The wave of cruel murders and manslaughter, the prevailing disrespect for human lives and the delays in negotiation make it very difficult for the government to allow the moratorium to continue indefinitely"); John Carlin, *Hanging Debate to Mollify SA Right*, THE INDEPENDENT, June 18, 1993, at 13; *S. Africa's Parliament Votes to Reinroduce Hanging*, AGENCE FRANCE PRESSE, June 17, 1993 available in, LEXIS, Nexis Library, AFP File.

419. Holt, *supra* note 415, at 315.

420. Paul Stober, *South Africa: Executions Unlikely as Opposition Mounts*, INTER PRESS SERVICE, June 22, 1993 available in LEXIS, Nexis Library, INPRES File.

421. *South Africa: Voices on the Death Penalty*; DEATH PENALTY NEWS Feb. 1992 (available from Amnesty Int'l, New York, N.Y., AI Index: ACT 53/01/92) (a radio call-in show in November 1991 aimed at township residents attracted a majority of callers favoring retention of hanging in a newly democratic South Africa).

actors in the constitutional negotiations appear adamant that abolition be one of the prices for transition to democracy.⁴²²

IX. CONCLUSION

The death penalty as a concept is dependent upon the construct of the "state" and a set of assumptions about the state's power over individuals. The state's emergence and displacement of pre-existing mechanisms of vengeance or recompense created the death penalty.⁴²³ As long as the state has existed and assumed the power to exterminate—deliberately, upon reflection, and without immediate danger—those who have transgressed its laws, people have debated the proper grounds, and the very legitimacy, of this punishment. The retention or abolition of the death penalty necessarily conveys the lawgivers' assumptions about the relationship between the state and those subject to its penal authority.

Why is the death penalty a human rights issue? When participants to the discourse analyzed here talk about the death penalty as a human rights issue, they are often speaking of very different things. Is the death penalty a human rights issue because it is another, particularly terrible, tool of political repression? The Latin American abolitionist tradition has clearly been influenced by this perception, and the American

422. The Information Chief of the African National Congress (ANC) reacted to de Klerk's speech by complaining that his examples of rampant crime concerned only white property owners and not black commuters victimized by the "national scandal of train violence." Ferreira, *supra* note 418. He did not suggest imposition of the death penalty, however, and asserted that the contours for a Bill of Rights must be negotiated and not legislated by the existing government. Michael Hamlyn, *De Klerk Urges Democracy to Prevent War*, THE TIMES, Jan. 30, 1993 available in LEXIS, Nexis Library, TTIMES File. Matthew Phosa, head of the ANC's legal department, reacted to the vote to lift the moratorium by stressing the ANC's strong opposition to the death penalty. Stober, *supra* note 420.

423. Draco, the earliest known legislator of Athens, is largely remembered for the severity of his criminal laws, including the prescription of the death penalty for many forms of homicide and even for trivial thefts. DIAMOND, *supra* note 413, at 149-52 (noting Draco's influence on the transformation of homicide from a private civil wrong into a criminal offense against the community, subject to sanctions by government authority).

Convention specifically prohibits capital punishment for political offenses.⁴²⁴ International attention to summary and arbitrary executions emanated largely from a concern that repressive governments were slaughtering their citizens to achieve certain political aims. The ends sought, as well as the means used, by these oppressor governments raised human rights concerns. Abolition by newly democratic states signals their repudiation of a tool tainted by its misuse for purposes of political repression.

But human rights are not simply about the enjoyment of political freedoms. They embody a concept of what it means to be human, and of what that simple human status implies. Central to the concept of universal human rights is the assumption that the life and dignity of each individual human being have value, even for those individuals least valued within their own societies. For many, acceptance of this fundamental principle leads inexorably to the conclusion that the state cannot deliberately take life, even to accomplish important social goals. These assumptions reflect a view of the state as limited in the scope of its legitimate power against the dignity claims of individual human beings.

The postwar concept of universal human rights also reflects the inheritance of Western thought from the Enlightenment period, an optimism about the possibility of steady progression toward a more humane and peaceful society. Abolitionist movements at the national as well as international level have been profoundly influenced by these assumptions, so clearly embedded in the UN's commitment to gradual abolition. When optimism about, and commitment to, social progress is at a high point, frequently movements toward the abolition of the death penalty also achieve their zenith.⁴²⁵

Disillusionment and fear feed retentionist impulses. The death penalty becomes for many a positive symbol of state power, not of political repression or absolutism but of compe-

424. O.A.S.T.S. No. 36, *supra* note 17, art. 4(4).

425. See BEDAU, *supra* note 289.

tence, strength and reassurance.⁴²⁶ In unstable societies with newly unleashed populist demands, the death penalty can become a tempting device for demonstrating the regime's responsiveness to the immediate concerns of the vocal citizenry. The death penalty then takes on a positive human rights aura, as a policy of direct democracy and a means to insure the basic rights and security of those threatened by crime or insurgency.

The religious aspect of recent international discourse on the death penalty reflects many of these same factors. The death penalty on the national level embodies the regime's commitment to bind together the community by infusing the laws with religious values and by eliminating nonconforming elements within the society.

At the international level, the death penalty becomes a rallying point for the developing world in its struggle for power against the traditionally dominant actors on the international stage. While still seeking to "develop" economically and thus tied to the Western notion of "progress," they bristle at suggestions that their penal practices are socially backward or barbaric, or that there is a universal goal of gradual abolition as part of a general progress toward greater humaneness in government. The death penalty, with its apparent link to specific cultural values, figures as an element in the growing challenge by developing countries to the very idea of universal human rights.

Insulating themselves from criticism for retaining the death penalty becomes part of a broader agenda for raising the barrier of domestic sovereignty against human rights scrutiny of any kind. In this, the retentionists in the developing world are joined by retentionists from the developed world, especially the United States and Japan.⁴²⁷ The latter appear to be motivated by cynicism about international human rights rather than by religious fervor or smoldering resentment against second class status. Their retentionist policies are driven more

426. See BEDAU, *supra* note 289, at 246.

427. See *supra* note 366.

by reaction to public opinion polls⁴²⁸ than by any enduring cultural values or assessment that capital punishment is a concretely valuable penological tool.

The lessons for the future of abolitionist efforts on the international level are not greatly encouraging. While abolition has not lost its rhetorical force as a symbol of respect for human dignity and constraint upon the often-abused powers of the state, societies responding to its call will likely remain limited in number. Backsliding from heady abolitionist commitments is likely to recur in the highly unstable conditions confronted by many states. The recourse to public opinion without a concomitant effort to educate the public about the actual operation of the death penalty contributes to this backsliding. The abolitionist protocols do not seem capable of serving as a vehicle for a radical transformation in a process that has been underway for at least the last two hundred years.

428. See BEDAU, *supra* note 289, at 145-65; AMNESTY INTERNATIONAL, *THE DEATH PENALTY IN JAPAN* 19 (1983).