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# PROTECTING THE RIGHT TO LIVE IN ISAIAH'S BRAVE NEW WORLD

*Jonathan K. Stubbs\**

## I. PROLOGUE

WRITER: As a concerned human being, the present state of human affairs bothers me. I am convinced that unless we stop choosing war and choose another way of resolving our conflicts, we will eventually blow ourselves to "smithereens." I am convinced that unless we take care of our environment, we will choke ourselves to death on our own filth. I am concerned . . .

READER: Yeah, I got the picture, you are concerned. But what can you do about it? What can I do about it?

WRITER: We can look around ourselves and see what resources exist to deal with our problems.

READER: You mean money?

WRITER: Not necessarily. I mean that we as human beings are empowered to choose between good and evil, better and worse, life and death, and that we can choose life. In fact, there are resources in well known places. Resources exist in law, philosophy, spirituality, in you and in me.

READER: I am listening, but fading fast.

WRITER: Hold on a bit and let me bend your ear. Sit back, relax, and give me a "hear."

Let me tell you a story. It is a story that moves between law and religion, between international relations and moral philosophy, between life and death, between you and me, and all manner of humanity.

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We invite an "old one" to help us tell the story. You may know him from Sabbath and Sunday school, from hearing the rabbi or preacher speak of him. This is, in part, a story about Isaiah, an eighth century B.C.E. prophet/priest of the Southern Kingdom of Israel. Twenty-seven hundred years ago Isaiah's world was in many ways like ours — plagued by war, and oppression of the weak by the strong, and driven by fear rather than faith.

READER: Are you going to get preachy on me?

WRITER: It depends on what you call preachy. I am just trying to make a point by drawing on religious material.

READER: Sounds different. But go on. Just keep your preaching to a minimum. Remember your audience.

WRITER: I am glad that you mentioned the audience. We are considering a dilemma involving protecting human life. Accordingly, my audience includes anyone who is willing and able to read and think about these ideas. Protecting human life concerns people inside and outside the legal community. In these circumstances, I do not wish to get hung up on the "preaching" issue.

In short, Isaiah addressed members of the royal court of the Southern Kingdom and contended that they had lost their way socially, politically and spiritually. Socially, they oppressed the poor;<sup>1</sup> politically, they sought military alliances with undependable partners;<sup>2</sup> and spiritually, they turned from God.<sup>3</sup> Isaiah insisted that they sought material greed in dealing with the lower social classes and glory in their foreign relations.<sup>4</sup> Subsequently, Judah's military alliances failed. The nation became an Assyrian vassal state, and finally its sovereignty was totally destroyed.<sup>5</sup>

READER: So, Judah was overrun. That was then; this is now. So what?

WRITER: So, consider learning from history. So, consider bringing the secular and spiritual insights together. Important similarities exist between Isaiah's circumstances and our own.

1. *Isaiah* 1:15-17.

2. *Id.* 30:1-14.

3. *Id.* 1:21-31.

4. These themes are developed in more detail in Jonathan K. Stubbs, *Reflections on Isaiah's Brave New World* (May 22, 1991) (unpublished manuscript, on file with author).

5. See 5 INTERPRETER'S BIBLE 161-62, 393-97 (1956), for an overview of the historical situation affecting the Middle East generally, and Judah, specifically. See also 1 INTERNATIONAL CRITICAL COMMENTARY (ISAIAH) lxviii-lxxxix (1912).

READER: What do you mean?

WRITER: For instance, despite the talk of a "new world order," billions of dollars in arms continue to pour into volatile regions like the Middle East.<sup>6</sup> Like Isaiah's hearers, we have not yet moved beyond relying upon military alliances and the power of armed violence to "right wrongs." Indeed, more alliances are being created in that region, and prospects are that they will be "armed to the teeth."

As if it were not enough, the unsettled situation in the fragile Commonwealth of Independent States causes concern. This concern is heightened by the existence of a vast nuclear arsenal, ethnic and religious strife, economic turmoil, and a weak "democratic" political infrastructure. The potential for "grave" consequences is sobering.

All of this is occurring in the context of "firepower" spread around the globe sufficient to annihilate humanity. Such firepower is also under the control, in many circumstances, of unstable governments.<sup>7</sup>

In addition, we are witnessing increasing disparities in wealth inequality in many parts of the world, including the United States.<sup>8</sup> The current economic downturn, and the pre-

6. According to James Adams, the Defense Correspondent and Associate Editor of the Sunday Times of London, although the Cold War between the United States and the Soviet Union may be drawing to a close, a new arms race, among developing nations and with a growing black market, is just beginning. He asserts that ideological differences between the United States and the former Soviet Union helped to establish an arms race of unprecedented proportions." As a result, Europe became the:

most militarized piece of territory that the world has ever seen . . . [I]n the course of that militarisation, whole families of weapons have been designed that are more powerful, more precise and kill more people than ever. At the highest level there are enough nuclear missiles to wipe out the world's population several times over, and at the bottom end there is enough conventional artillery to destroy Europe's industrial base in a matter of days. For every weapon that entered the Warsaw Pact or NATO inventories, a gun or missile left those inventories and was sold to other countries in Africa, Asia, or Central and South America. The arms race in the industrialised nations thus created a second arms race in the developing world, . . . and unless new and effective enforcement regimes are introduced, armies in the west and east will be faced with large Third World forces of almost equal firepower.

JAMES ADAMS, *ENGINES OF WAR-MERCHANTS OF DEATH AND THE NEW ARMS RACE* 269-76 (1990).

7. See, e.g., Iraq.

8. See, e.g., RAVI BATRA, *SURVIVING THE GREAT DEPRESSION OF 1990* (1988). Among other things, Batra argues that in the United States wealth is being accumulated in fewer hands, human greed among the materially wealthy is accelerating, and many industries are unproductive. *Id.* at 213-57. These circumstances coupled with over-extended credit institutions help constitute a prescription for economic disaster in the

dictable social unrest and repression likely to flow from a prolonged recession (depression?) do not paint an encouraging picture.<sup>9</sup>

In short, at the dawning of a new century and a new millennium, human life, individually and collectively, remains precarious. In fact, after thousands of years of human history and millions of deaths through homicide and war, one is "tempted" to consider an old theological idea — "repentance."

READER: There you go preaching again. What is your problem?

WRITER: My problem is that there are too many people dead and dying. There are too many people in pain, lost and confused. Stated simply, perhaps as human beings we should consider a change of heart; such a change can (must!) lead to a change of behavior.

READER: But what does this have to do with law? I have had more than I thought I could take of religion and moralizing. How about law?

WRITER: Law? Have you heard of Professor H.L.A. Hart?

READER: Why, yes! But of course! Professor Hart is one of the leading twentieth century legal thinkers. I quite enjoyed reading

western economies — especially the United States.

Furthermore, political economist and Harvard professor Robert Reich notes the trend toward inequality in his most recent book, *The Work of Nations*. He points out that

[b]etween 1977 and 1990 the average income of the poorest fifth of Americans declined by about five percent (5%), while the richest fifth became about nine percent (9%) wealthier. During these years, the average income of the poorest fifth of American *families* declined by about seven percent (7%), while the average income of the richest fifth of American families increased about fifteen percent (15%). That left the poorest fifth of Americans in 1990 with 3.7 percent of the nation's total income, down from 5.5 percent twenty years before — the lowest portion they have received since 1954. And it left the richest fifth with a bit over half of the nation's income — the highest portion ever recorded by the top twenty percent (20%). The top five percent (5%) commanded twenty-six percent (26%) of the nation's total income, another record.

ROBERT REICH, *THE WORK OF NATIONS — PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM* 197 (1991).

Among Blacks, whose earnings at all levels continued to trail whites, the gap is wider still. Between 1978 and 1988, the average income of the lowest fifth of black families declined by 24 percent, while that of the top five percent (5%) increased by almost as much. By the end of the 1980's, the top five percent (5%) of black families received forty-seven percent (47%) of total black income, compared with forty-two point nine percent (42.9%) of total white income received by the top five percent (5%) of white families.

*Id.* at 197 n.2.

9. WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS* 139-41, 163-64 (1963).

his book, *The Concept of Law*.<sup>10</sup> If I may say so, what does Hart have to do with it?

WRITER: Having read *The Concept of Law*, you will remember that one of the important contributions of that work was Hart's notion that law involves a system of rules. There are primary rules which revolve around individuals' obligation to behave or refrain from behaving in certain ways. And there are secondary rules that determine how the primary rules may be created, altered, and abolished.

READER: Yes, and there are also the "infamous" rules of recognition. Among other things, they give actors within the legal system a means of identifying valid rules.<sup>11</sup>

WRITER: Yes, I was coming to that. You beat me to the punch. Hart also argued that actors such as lawyers, judges, and many ordinary people within more advanced legal systems have an "internal point of view." They recognize that rules exist. They also perceive the existence of the rules as reasons for applying their "social pressure" to enhance obedience to the rules.<sup>12</sup> In contrast, there would be some individuals who obeyed the law primarily because of fear of governmental reprisals — for example, imprisonment. Others would do so primarily because they believed it was right.<sup>13</sup>

READER: I am with you. So what's the point?

WRITER: The point is that what is in an individual's heart helps determine the effectiveness of law.<sup>14</sup>

READER: What does this have to do with all of the life affecting issues that you raised earlier like war, environmental desecration, famine . . .

WRITER: As usual, you are at least two steps ahead of me. My point was that over the past thirty years since the publication of

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10. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

11. *Id.* at 92-93.

12. *Id.* at 88.

13. *Id.*

14. For example, people file their taxes on April 15. Some do so because they know that failure to file can lead to unpleasantness from their beloved Uncle Sam. Others file for that reason (fear!) and because they recognize a civic obligation to contribute financially to the government that attempts to furnish collective defense and human services. Yet others, for various reasons, fail to file. They may disagree with governmental policy, or hope that they will not get caught, or are afraid that they will owe more money than they can pay and so "put it off" indefinitely. Nevertheless, even you would agree (I suspect) that if individuals embraced the Internal Revenue Code's filing requirement from an "internal point of view," compliance would go up. In other words, people would see filing as an appropriate legal requirement.

Professor Hart's book, international law has evolved dramatically. Now international law has begun to look increasingly like municipal or national law.

READER: How's that? The United Nations vaguely resembles a legislature, the International Court of Justice has serious jurisdictional limitations, and despite recent events in the Persian Gulf there is no "global police force."

WRITER: I did not say that there exists a fully evolved system of international law. Rather, in light of Hart's concept of law involving a system of rules, the international system has developed tremendously. In the human rights area alone, there are numerous multilateral treaties. They can be viewed as containing both primary and secondary rules. Regarding the primary rules, the treaties say what are state obligations and individual rights and how those obligations and rights are to be respected. In addition, the fact of the treaties having, in some instances, widespread support gives them more weight.

READER: For example?

WRITER: For example, the Chilean Government's (alleged) breach of various human rights obligations under the International Covenant on Civil and Political Rights sparked tremendous international "social pressure" to remedy the breaches.<sup>15</sup>

READER: I wonder about "international 'social pressure.'" Just how effective is it?

WRITER: It depends upon the circumstances. Empirical proof, if that is what you want, would be more difficult to produce, since tyrants rarely say that they "caved in" to international public opinion. Nevertheless, there seems to be a ready analogy between individual behavior and state behavior in response to "peer pressure." How far the analogy reflects reality is, perhaps, another matter.

READER: Explain and defend the contention that individuals and states behave similarly.

WRITER: The clarification and resolution of that issue raises broad concerns beyond the scope of our present conversation.

READER: How about the secondary rules? Those rules govern, among other things, the creation, modification, and abolition of the primary rules.

WRITER: Regarding secondary rules, treaties have internal pro-

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15. See, e.g., [1979-1980] 2 Y.B. of the Hum. Rts. Comm. 470-476, U.N. Doc. CCPR/2/Add.1 (1989) [hereinafter YEARBOOK (79-80)].

visions that help determine how they may be altered, abolished, and enforced. For example, the rule(s) of recognition may include treaty provisions establishing the treaty's effective starting date such that the treaty will go into force when a certain number of signatories have ratified the document.

READER: Can you speed this up?

WRITER: I was simply sharing with you some thoughts about the general area with which we are dealing — that dynamic, evolving field of international law! Putting things in context . . . However, I take it you are hinting at the earlier question of responses to current human dilemmas — specifically, if I may be so bold, how to help save human lives. Let me tell you about an international covenant, which is part of what some people call the International Bill of Rights. The International Bill of Rights includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights.

READER: I have heard something about international human rights treaties. They ring a distant bell in my consciousness.

WRITER: Well, give me a few minutes to chime it a bit louder. I will give an historical overview, and then focus on the ICCPR's right to life provision.

The Allied Powers created the United Nations immediately following one of the greatest catastrophies in human history, World War II. The United Nations Charter (Charter) went into force on October 24, 1945.<sup>16</sup>

The United Nations is an international body of nation states. The United Nations aspires to: "save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ."<sup>17</sup>

Article 1 (3) of the Charter specifically provides that one of the purposes of the United Nations is to "achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ."

The Charter created the Economic and Social Council

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16. U.N. CHARTER *cited in* BASIC DOCUMENTS OF THE UNITED NATIONS 1-20 (Louis B. Sohn ed., 2d ed. 1968.).

17. U.N. CHARTER pmbl.



(ECOSOC) to "make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters . . . ."<sup>18</sup> The recipients of such reports include the General Assembly, the Members of the United Nations, and specialized agencies.<sup>19</sup>

The Charter also required ECOSOC to create a number of commissions, including one on human rights. On February 16, 1946, only a few months after its own inception, ECOSOC created the United Nations Human Rights Commission.<sup>20</sup>

The General Assembly had instructed ECOSOC to have the Human Rights Commission draft an International Bill of Rights. After some preliminary organizational discussions, the Human Rights Commission decided that the international bill of rights should include at least three documents: a declaration of human rights, a covenant on international human rights, and "measures of implementation."<sup>21</sup>

The declaration of human rights would state the international norms to which nations should aspire in their domestic jurisprudence. The covenant would constitute a binding agreement among nations to adhere to agreed human rights standards.<sup>22</sup>

The Human Rights Commission moved forward relatively quickly on drafting the declaration and the covenant.<sup>23</sup>

The Human Rights Commission sought input from governments, non-governmental organizations, and United Nations affiliated agencies.<sup>24</sup> Significant disagreements emerged regarding what the covenant on human rights should include.<sup>25</sup>

READER: Disagreements? What kinds of disagreements?

WRITER: Some states were of the opinion that the covenant should focus on protecting individual civil and political rights from state infringement.<sup>26</sup> Other states felt such protections

18. *Id.* art. 62.

19. *Id.*

20. U.N. GAOR, 10th Sess., Annex 2, Agenda Item 28, at 2, U.N. Doc. A/2929 (1955) [hereinafter U.N. Doc. A/2929].

21. THE INTERNATIONAL BILL OF RIGHTS 37 (Louis Henkin ed., 1981) [hereinafter INTERNATIONAL BILL OF RIGHTS]; U.N. Doc. A/2929, *supra* note 20, at 2.

22. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38.

23. Less than two years after its creation, the Human Rights Committee had drafted and circulated for comment a proposed declaration of human rights and a human rights covenant. U.N. Doc. A/2929, *supra* note 20, at 2.

24. U.N. Doc. A/2929, *supra* note 20, at 2-6.

25. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38-43.

26. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 41.

would infringe upon national sovereignty. They contended that the covenant should focus on the protection of social and economic rights (e.g., the right to work, education, subsistence).<sup>27</sup> These disagreements made it impossible for the Human Rights Commission to quickly complete a draft on the proposed human rights covenant.

However, the Human Rights Commission forwarded the declaration on human rights to ECOSOC which in turn sent it to the General Assembly for discussion and debate.<sup>28</sup> On December 10, 1948, the General Assembly unanimously adopted what has come to be known as the Universal Declaration of Human Rights (Universal Declaration).<sup>29</sup>

READER: You have piqued my curiosity. Tell me more about its provisions.

WRITER: The Universal Declaration proclaims the existence of a number of fundamental human rights. For example, "everyone has the right to life, liberty and the security of person;"<sup>30</sup> "freedom of thought, conscience and religion;"<sup>31</sup> and a "right to a standard of living adequate for" an individual's "health and well-being," as well as that of her family.<sup>32</sup> The Universal Declaration states that member nations have pledged to respect these rights.<sup>33</sup> It was originally contemplated that the Universal Declaration would simply provide aspirational guidance for nations; the covenant would spell out the more obligatory details.<sup>34</sup>

READER: You said that it was contemplated that the Universal Declaration would provide aspirational guidance. That suggests something else happened.

WRITER: In some respects "something else" (unexpected) did happen. In part because of Cold War tensions, ideological divisions, and the Korean conflict, the Human Rights Commission was not able to complete work on the draft human rights covenant until 1954. That was nearly eight years after the creation of the Commission.<sup>35</sup> And it was approximately six years following

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27. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 41-43.

28. U.N. Doc. A/2929, *supra* note 20, at 2-3.

29. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38.

30. The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, art. 3 (1948).

31. *Id.* art. 18.

32. *Id.* art. 25.

33. *Id.* pmbl.

34. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38-39.

35. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 39-43. In the meantime, na-

the passage of the Universal Declaration. In fact, rather than one document as originally contemplated, the Human Rights Commission wound up drafting two. The General Assembly decided that it was better to have two human rights covenants for pragmatic reasons and arguably for doctrinal ones. States from the former "Eastern bloc" and the developing nations seemed more supportive of a covenant protecting economic, social and cultural rights. The developed western democracies were more concerned about first affording protections for civil and political rights.<sup>36</sup>

READER: Sounds familiar. What happened? Could they work something out?

WRITER: They tried the art of compromise. The compromises involved trying to emphasize the unity of the two covenants' purposes. Together, the covenants furnish comprehensive human rights protection. To emphasize unity, the drafters wrote the documents with overlapping, and in some cases identical provisions.<sup>37</sup> The covenants were also to be submitted simultaneously for ratification.<sup>38</sup> In addition, some thought it easier to obtain ratification of two separate documents rather than one all encompassing one.

The report of the Human Rights Commission was forwarded by ECOSOC to the General Assembly, which in turn forwarded it to the General Assembly's own Third Committee.<sup>39</sup> The General Assembly mandated that its Third Committee (Social, Humanitarian, and Cultural) consider the two covenants at the next General Assembly session "article by article."<sup>40</sup>

The Third Committee wrestled with concerns similar to those which confronted the Human Rights Commission. Ideology, historical circumstances, decolonization, and the desire to work towards consensus all contributed to an extended revision stage. In fact, the Third Committee worked on the two covenants for twelve years! It took that long to reach sufficient agreement to forward the covenants to the General Assembly for

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tions of war-ravaged Europe had moved forward and adopted the European Convention on Human Rights four years earlier. *INTERNATIONAL BILL OF RIGHTS*, *supra* note 21, at 40.

36. *INTERNATIONAL BILL OF RIGHTS*, *supra* note 21, at 41.

37. *INTERNATIONAL BILL OF RIGHTS*, *supra* note 21, at 43; U.N. Doc. A/2929, *supra* note 20, at 14.

38. U.N. Doc. A/2929, *supra* note 20, at 5.

39. U.N. Doc. A/2929, *supra* note 20, at 5-6.

40. U.N. Doc. A/2929, *supra* note 20, at 7.

consideration.<sup>41</sup>

READER: Twelve years! Are you serious?

WRITER: I am. In fact, on December 16, 1966, over twenty years after the United Nations created the Human Rights Commission to draft an international bill of rights, the General Assembly passed the International Covenant on Civil and Political Rights (ICCPR).<sup>42</sup> The General Assembly simultaneously adopted the Optional Protocol to the ICCPR, and the International Covenant on Economic, Social and Cultural Rights.<sup>43</sup>

The United Nations laid the covenants before the nations of the world to ratify.<sup>44</sup>

The scope of the ICCPR is broad. Among other rights, it recognizes the right of "[a]ll peoples" to self-determination,<sup>45</sup> the "inherent right to life,"<sup>46</sup> the "right to liberty and security of person,"<sup>47</sup> "the right to freedom of thought, conscience and religion,"<sup>48</sup> and equal protection of the law.<sup>49</sup>

During the first ten years following the passage of the ICCPR, nations seemed to take a cautious approach to ratifying or acceding to its provisions. Czechoslovakia was the thirty-fifth nation to ratify the covenant and on March 23, 1976, the ICCPR took effect *vis-à-vis* the states that had ratified it.<sup>50</sup>

Since 1976, approximately sixty additional nations have ratified the ICCPR, so that now nearly a hundred members of the United Nations are bound by its provisions.<sup>51</sup>

READER: That is a lot of countries. I bet the western democracies are leading the way.

WRITER: Yes and no. In fact, the vast majority of states with

41. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 54-66.

42. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 64.

43. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 64.

44. As a practical matter, during the nearly 20 year period between the proclamation of the Universal Declaration of Human Rights and the passage of the covenants, the Universal Declaration had, in effect, achieved the status of customary international human rights law. U.N. agencies and other international entities looked to the Universal Declaration for guidance in determining what constituted human rights. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38.

45. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171 [hereinafter ICCPR].

46. *Id.* art. 6.

47. *Id.* art. 9.

48. *Id.* art. 18.

49. *Id.* art. 26.

50. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 66.

51. U.N. MULTILATERAL TREATIES, STATUS AS OF Dec. 31, 1989, U.N. Doc. ST/LEG/SER.E/8, U.N. Sales No. E.90.V.6 (1990) [hereinafter U.N. MULTILATERAL TREATIES].

democratic governments have ratified or acceded to the ICCPR, although some of them have done so with reservations and understandings. States which have adopted the ICCPR include the United Kingdom,<sup>52</sup> the Federal Republic of Germany,<sup>53</sup> France,<sup>54</sup> Japan,<sup>55</sup> and India.<sup>56</sup>

Until recently, the United States was one of the few leading democracies in the world which had neither ratified nor acceded to the ICCPR. However, on June 8, 1992, the United States officially ratified the ICCPR.<sup>57</sup> Having passed the treaty, however, the United States adopted a number of understandings and reservations. Arguably, those reservations and understandings essentially preclude the treaty from having any substantial impact upon the domestic jurisprudence of the United States.<sup>58</sup>

The Bush proposals could help the United States join the nations from a broad "spectrum" of the world community which have adopted the ICCPR. Through their governments, many of the people of the world have formally recognized and bound themselves to follow the ICCPR in their domestic jurisprudence. In that sense, the world community is witnessing the strengthening of customary human rights law.

READER: What do you mean by "customary human rights

52. *Id.* at 134. The United Kingdom signed the ICCPR on September 16, 1968 and ratified it on May 20, 1976. *Id.*

53. *Id.* (The Federal Republic of Germany signed the ICCPR on October 9, 1968 and ratified it on December 17, 1973).

54. *Id.* (France acceded to the provisions of the ICCPR on November 4, 1980).

55. *Id.* (Japan signed the ICCPR on May 30, 1978 and ratified it on June 21, 1979).

56. *Id.* (India, the world's largest democracy, acceded to the provisions of the ICCPR on April 10, 1979).

57. The treaty went into force September 8, 1992. *See* U.N. MULTILATERAL TREATIES, SUPP., U.N. Doc. ST/LEG/SER.E/10 (1992).

58. For example, the United States adopted a reservation regarding Article 6 of the ICCPR as follows:

[T]he United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

*Id.* at 2.

With such reservations, one may argue that the treaty's effect could be negligible; a cynic might say "mere window dressing." Nevertheless, a full discussion of the reservations and understandings effecting the treaty falls outside the scope of this essay. For a more detailed discussion of "understandings and reservations" *see* Jonathan K. Stubbs, *The Right to Counsel: Establishing Judgement within the 'International Gate' — Especially in America* 68 (May 22, 1979) (unpublished LL.M. thesis on file with the University of Richmond Faculty Offices).

law"? I have heard of custom and usage in other fields involving commercial transactions for instance.<sup>59</sup>

WRITER: By customary human rights law, I simply mean that it has become (and is increasingly becoming) the international standard or norm to accord human beings rights consistent with widely ratified human rights documents. Such documents include the Universal Declaration, the ICCPR, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>60</sup>

During the legislative drafting process, the Third Committee revised the Human Rights Commission's proposed covenants. The Third Committee expanded the proposed Human Rights Committee from nine to eighteen members; and made it primarily responsible for the implementation of the ICCPR.<sup>61</sup> The Human Rights Committee consists of representatives from nations that have ratified the ICCPR.<sup>62</sup> Geographical, developmental, cultural, religious and other types of representation have been encouraged.<sup>63</sup>

The ICCPR requires ratifying states to submit reports on human rights compliance to the Human Rights Committee.<sup>64</sup> The Committee has the authority to request reports from states which ratified the ICCPR, request follow-up reports, and make "general comments."<sup>65</sup> Nations put forth their best evidentiary "foot." Good faith reporting seems presumed. As I mentioned before, in at least one instance, however, the Committee has rejected self-serving statements of a reporting state and noted facts (outside the "record"). In that case, the Committee accepted facts stated in United Nations resolutions and findings.<sup>66</sup>

59. Harold J. Berman & Colin Kaufman, *Law of International Commercial Transactions (Lex mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

60. For example, over a hundred nations have signed or ratified the following conventions: The Genocide Convention, see U.N. MULTILATERAL TREATIES, *supra* note 51, at 97-105; The International Convention on the Elimination of All Forms of Racial Discrimination; U.N. MULTILATERAL TREATIES, *supra* note 51, at 106-23; and the Convention on the Elimination of All Forms of Discrimination Against Women; U.N. MULTILATERAL TREATIES, *supra* note 51, at 170-84.

61. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 61, 335.

62. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 61, 335.

63. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 338.

64. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 61; ICCPR, *supra* note 45, art. 40.

65. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 350.

66. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 347-48 (discussing the flagrant

READER: Interesting once you got going. Tell me more and I won't bother you. .

WRITER: It's not a "bother." I like sharing this information. For example, take Article 41 of the ICCPR. That article allows ratifying states to recognize the competence of the Human Rights Committee to receive complaints involving alleged human rights violations. Such complaints would be made by other ratifying states.<sup>67</sup> Under Article 41, one state can bring a complaint against another state only if both states have acknowledged the competency of the Human Rights Committee to receive such complaints.<sup>68</sup>

READER: Why did they do that?

WRITER: In part, because it makes sense for parties to an international compact to have reciprocal means of enforcing the agreement. They can "keep each other honest." Nevertheless, relatively few states have "declared" under Article 41.<sup>69</sup> Accordingly, the state to state complaint procedure has not been perceived as a particularly strong enforcement mechanism.<sup>70</sup>

READER: So much for international honesty.

WRITER: Many states take their international obligations seriously and consider well before they decide to bind themselves.

In addition, at the time of the passage of the ICCPR, the General Assembly also passed an Optional Protocol to the ICCPR. The Optional Protocol permits individuals in states who ratify the Protocol to bring individual human rights complaints. The individual's complaints can be brought against the state in which the individual resides. The "accused" state must have ratified the Protocol.<sup>71</sup>

human rights violations associated with former government administrations in Chile).

67. The process basically involves one state claiming that another state is violating the provisions of the ICCPR. The complaining state "may" inform the respondent state, in writing, about the alleged violations. ICCPR, *supra* note 45, art. 41(1)(a). Unless the two states themselves can amicably resolve the situation, either state may bring the matter before the Human Rights Committee. ICCPR, *supra* note 45, art. 41(1)(b).

Except in specified circumstances, the Human Rights Committee requires that the victims of the alleged human rights violations exhaust all domestic remedies. ICCPR, *supra* note 45, art. 41(1)(c). The Committee can use its good offices to attempt reconciliation, request further information, and issue a report. ICCPR, *supra* note 45, art. 41(1)(e)-(h). In the event that the matter is not resolved to the parties' satisfaction, with the parties' consent the Committee may also refer the matter to an ad hoc conciliation Commission. ICCPR, *supra* note 45, art. 42(a).

68. ICCPR, *supra* note 45, art. 41(1).

69. U.N. MULTILATERAL TREATIES, *supra* note 51, at 135-47.

70. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 353.

71. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 353.

Presently, approximately fifty nations have agreed to allow individual complaints from their citizens to be made to the Human Rights Committee.<sup>72</sup> Only one permanent member of the United Nations Security Council has agreed to the Optional Protocol.<sup>73</sup>

Regarding implementation, the Committee seems to have, in large part, a fact-gathering role. To a limited extent, it also has a conciliatory role. Regretably, after filing a report, a state which has not met its obligations under the ICCPR is not required to respond to the Committee's general comments; it may ignore them.<sup>74</sup> In practice, this does not appear to be the pattern.<sup>75</sup> Further, through periodic follow-up reports at five year intervals, the Committee can monitor, on a limited basis, the progress of states which have ratified the ICCPR.

In addition, in more recent years the Committee has issued general comments interpreting various provisions of the ICCPR. We will have an occasion to talk more about that later when we discuss Article 6, the right to life provision.

As a practical matter, with more nations ratifying or acceding to the ICCPR, the light of international public opinion may well create compelling "moral persuasion." This moral force may in part substitute for the lack of other sanctions in this area of international law.<sup>76</sup>

READER: You mentioned Article 6 of the international covenant. What is it?

WRITER: Article 6 is a legal provision reflecting an international attempt to protect human life in the aftermath of the Second World War. It states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the

72. U.N. MULTILATERAL TREATIES, *supra* note 51, at 162.

73. U.N. MULTILATERAL TREATIES, *supra* note 51, at 162 (France).

74. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 351; see Professor A.H. Robertson's incisive comments in INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 350-51.

75. Thus, the Committee has received supplementary reports from a number of states including Chile, see, U.N. GAOR, 40th Sess., Supp. No. 40, at 11-18, U.N. Doc. A/40/40 (1985); Venezuela, *see id.* at 27-31, and *see* [1979-1980] 2 Y.B. of the Hum. Rts. Comm. 194-203, U.N. Doc. CCPR/C/1/Add.28 (1989).

76. *Cf.* HART, *supra* note 10, at 84-88.



commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from the obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. 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.

5. 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.

6. Nothing in the article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant.

Since you like to understand things fully, allow me to fill you in on some of the important legislative background regarding the history of Article 6. In fact, pull your chair closer. After the legislative background, I will give you a paragraph by paragraph analysis of its provisions. Furthermore, I will outline the evolving interpretation of the meaning of the right to life as reflected in reports of the entity primarily responsible for monitoring compliance. That entity is the United Nations Human Rights Committee. This may shed some light on statutory interpretation issues in the international context.

Shortly after its own creation, the United Nations Human Rights Commission requested a drafting committee to prepare a proposed international bill of rights. The Economic and Social Council (ECOSOC) approved the request.<sup>77</sup>

The drafters' first session (June 9-25, 1947) began with several proposed drafts "on the table."<sup>78</sup>

Regarding the right to life, the United Kingdom proposed the following text: "It shall be unlawful to deprive any person of

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77. U.N. Doc. A/2929, *supra* note 20, at 2.

78. U.N. Doc. A/2929, *supra* note 20, at 2. It is unlikely that anyone foresaw that it would take nearly twenty years for agreement on various drafts to evolve to the point that the General Assembly would have final texts upon which to vote. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 38.

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."<sup>79</sup>

The Republic of Lebanon proposed an alternate text: "It shall be unlawful to deprive any person, from the moment of conception, of his live [sic] or bodily integrity, 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."<sup>80</sup>

The drafting committee considered the British and Lebanese drafts and forwarded its recommendations to the Human Rights Commission.<sup>81</sup> The Human Rights Commission directed the drafts to its own "working group" on the human rights covenant.<sup>82</sup> The working group modified the drafting committee's proposals. The working group transmitted the following proposed text to the Human Rights Commission.

1. 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.
2. It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice to prevent the birth of a child of unsound mind to parents suffering from mental disease, or in a case where the pregnancy is the result of rape.<sup>83</sup>

The Human Rights Commission adopted the first paragraph of the working group's proposed draft; it deleted the second paragraph involving abortion.<sup>84</sup> The Human Rights Commission then sought responses from national governments.<sup>85</sup>

In light of the comments from governments, the drafting committee met again and revised the proposed human rights

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79. M.J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 113 (1987) [hereinafter GUIDE].

80. *Id.*

81. U.N. Doc. A/2929, *supra* note 20, at 2-6.

82. U.N. Doc. A/2929, *supra* note 20, at 2.

83. GUIDE, *supra* note 79, at 114.

84. GUIDE, *supra* note 79, at 114. Early in the discussion of the parameters of the right to life, members of the global community were concerned about whether that right should extend to the unborn. See, proposal of Republic of Lebanon, GUIDE, *supra* note 79, at 113; and draft of the Human Rights Commission Working Party, GUIDE, *supra* note 79, at 114. See also *infra* notes 135-47 and accompanying text.

85. U.N. Doc. A/2929, *supra* note 20, at 2.

covenant.<sup>86</sup> The drafters proposed the following one sentence paragraph: "No one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law."<sup>87</sup>

The drafting committee appended a dozen possible exceptions to the revised one sentence draft. Most of the exceptions were proposed by the United States and the Union of South Africa. The exceptions were attempts to justify homicides primarily in military and police related affairs; and medical operations or voluntary medical experiments.<sup>88</sup>

The drafting committee sent the revised, one-sentence draft with the exceptions back to the Human Rights Commission.<sup>89</sup>

READER: What did the Commission do with a one-sentence draft and all of those exceptions?

WRITER: I thought you might be interested to know. Let's take Article 6 paragraph by paragraph. That way we can see how the right to life provision developed.

As your question implied, when the Human Rights Commission began reviewing the proposed human rights covenant, and confronted the right to life article with a dozen possible amendments, debate ensued. Some nations felt that the covenant should state specifically the duties that nations undertook by agreeing to the right to life article. Accordingly, they contended that the exceptions to the article should be precisely outlined.<sup>90</sup>

Other nations felt that the emphasis ought to be on affirming the right and protection of life. Accordingly, any statements that seemed to condone the taking of life ought to be restricted.<sup>91</sup>

In addition, some states argued that a long list of exceptions would tend to convey the impression that the exceptions were more important than the rule.<sup>92</sup>

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86. The second session was held from May 3-21, 1948.

87. GUIDE, *supra* note 79, at 114.

88. GUIDE, *supra* note 79, at 114.

89. That is, "No one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law." GUIDE, *supra* note 79, at 114.

90. GUIDE, *supra* note 79, at 116. Nations expressing this type view included France, the United Kingdom, and India. GUIDE, *supra* note 79, at 116; U.N. Doc. A/2929, *supra* note 20, at 29-30.

91. GUIDE, *supra* note 79, at 115; U.N. Doc. A/2929, *supra* note 20, at 29.

92. GUIDE, *supra* note 79, at 117; U.N. Doc. A/2929, *supra* note 20, at 29-30. Nations adhering to that view included the Philippines, Chile, the Soviet Union, and the United States.

During the course of the debate, a number of amendments to the article were proposed. We will follow the debate taking each paragraph "line by line" and "session by session."

READER: This sounds like too much detail.

WRITER: Bear with me. We are trying to understand the parameters of the right to life article. Accordingly, it makes sense to thoroughly discuss its legislative history. That history has been discussed with relative brevity elsewhere.<sup>93</sup> However, frankly, the right to life is so important that a more comprehensive treatment is warranted.

The first paragraph says: *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*

Let's focus on the first sentence: *"Every human being has the inherent right to life."*

At the beginning of the fifth session of the United Nations Human Rights Commission,<sup>94</sup> the Commission inherited a one-sentence text with twelve exceptions.<sup>95</sup> The Commission considered several proposed amendments to the Covenant's right to life.<sup>96</sup>

One proposed amendment by the United States provoked a lawyerly debate. The debate involved whether paragraph one should use the word "arbitrarily" or "intentionally."

READER: A debate about "arbitrarily" or "intentionally"? Why?

WRITER: On a broader level, the debate involved how far human life would be protected under the right to life article. Accordingly, some states preferred language to the effect that: "No one shall be deprived of his life arbitrarily."<sup>97</sup> The reasons for using the word "arbitrarily" indicated that the protection of the right to life was not absolute.<sup>98</sup> Using "arbitrarily" would "obviate" the necessity of cataloguing a long list of exceptions to the right to life.<sup>99</sup>

Critics of "arbitrarily" countered arguing that the word was

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93. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 114-22.

94. May 9 - June 20, 1949. U.N. Doc. A/2929, *supra* note 20, at 3.

95. GUIDE, *supra* note 79, at 114-15.

96. GUIDE, *supra* note 79, at 115. Nations suggesting amendments included the United Kingdom, France, the Soviet Union, and the Republic of Lebanon. See GUIDE, *supra* note 79, at 115-17.

97. GUIDE, *supra* note 79, at 121. (This position was advanced by the United States)

98. GUIDE, *supra* note 79, at 122; U.N. Doc. A/2929, *supra* note 20, at 30.

99. GUIDE, *supra* note 79, at 122.

ambiguous and open to a number of interpretations.<sup>100</sup> The critics prevailed, temporarily, and the amendment of the United States was defeated.<sup>101</sup>

READER: This was a temporary victory?

WRITER: Yes, we will explore that and the fate of "intentionally" in a moment. Let me continue with the legislative story.

The Republic of Chile offered a proposal that: "No one may deprive another person of his life arbitrarily." The proposal was adopted without the word "arbitrarily."<sup>102</sup>

The Commission forwarded this draft text and other suggested amendments with supporting documents to governments for comments.<sup>103</sup>

At the next session of the Human Rights Commission,<sup>104</sup> France proposed that the right to life article should be amended to read as follows: "Human life is sacred. To take life shall be a crime, save in the execution of a sentence of a court, or in self-defence, or in the case of enforcement measures authorized by the Charter."<sup>105</sup>

The Republic of Lebanon suggested an amendment to the French proposal. As amended, the French proposal would have read: "Human life, from the moment of conception, is sacred. To take life shall be a crime, save in the execution of a sentence of a court, or in self-defence, or in the case of enforcement measures authorized by the Charter."<sup>106</sup>

The French proposal as amended was not voted upon.<sup>107</sup> The Human Rights Commission rejected the first sentence of the original French proposal; namely, that "Human life is sacred."<sup>108</sup>

The Commission adopted the second sentence; that is: "To take life shall be a crime save in the execution of a sentence of a court, or in self-defence, or in the case of enforcement measures

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100. GUIDE, *supra* note 79, at 122.

101. GUIDE, *supra* note 79, at 122.

102. GUIDE, *supra* note 79, at 122. That is: "No one may deprive another person of his life."

103. U.N. Doc. A/2929, *supra* note 20, at 3.

104. The Commission met March 27 - May 19, 1950. U.N. Doc. A/2929, *supra* note 20, at 3.

105. GUIDE, *supra* note 79, at 115.

106. GUIDE, *supra* note 79, at 120.

107. GUIDE, *supra* note 79, at 120.

108. GUIDE, *supra* note 79, at 115.

authorized by the Charter.”<sup>109</sup> The French amendment became the foundation for what later evolved into paragraph two of Article 6.<sup>110</sup>

While meeting during its sixth session, the Human Rights Commission rejected a proposal by India that stated: “Everyone has the right to life.”<sup>111</sup> The Commission also refused to adopt a more detailed British proposal. The British amendment would have made it a “legitimate defense” for a public agent to kill a person in a number of circumstances.<sup>112</sup>

During the sixth session, the United States proposed another article using “arbitrarily.” The provision would have read: “No one shall be arbitrarily deprived of his life.” That amendment was defeated.<sup>113</sup>

In the aftermath of this vote, “intentionally” was suggested as a substitute: “No one shall be deprived of his life intentionally.”<sup>114</sup> This amendment, suggested by the British, fared no better; and was unceremoniously defeated.<sup>115</sup>

Dissatisfaction was expressed with paragraph one as it then read, namely: “No one shall be deprived of his life.” That language was rejected as well.<sup>116</sup>

The Republic of Lebanon proposed an amendment stating: “Everyone’s right to life shall be protected by law.”<sup>117</sup> This particular provision attempted to underline the responsibilities of nations to protect the lives of individuals.<sup>118</sup> Some states emphasized that the provision applied to state protection of individual

109. GUIDE, *supra* note 79, at 115.

110. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. *See infra* notes 139-92 and accompanying text.

111. GUIDE, *supra* note 79, at 115.

112. Such circumstances included defense of another, effecting a lawful arrest or preventing an escape, quelling civil unrest, or preventing trespass to property which was important to national security. The amendment would have required the public agent to have been acting within her lawful authority and not to use any more force than “absolutely necessary.” GUIDE, *supra* note 79, at 118-19.

113. GUIDE, *supra* note 79, at 122. The vote was close: six to five with two abstentions.

114. GUIDE, *supra* note 79, at 122.

115. *See* U.N. Doc. E/CN.4/SR.149 § 21 (1949).

116. GUIDE, *supra* note 79, at 122.

117. GUIDE, *supra* note 79, at 120.

118. GUIDE, *supra* note 79, at 120.

life from state interference.<sup>119</sup>

Most states went further. They contended that the provision required state intervention to protect individual life from *private* and state action.

A number of other amendments were proposed during the sixth session of the Human Rights Commission. Many of the amendments were either withdrawn or not voted upon.<sup>120</sup>

READER: The fifth and sixth sessions seemed "active." What noteworthy events followed?

WRITER: The eighth session of the Human Rights Commission<sup>121</sup> witnessed the Soviet Union offer a revised draft of paragraph one as follows: "No one may be deprived of life. Everyone's right to life shall be protected by law."<sup>122</sup> The Soviet proposal seemed to successfully navigate through the uncertain "channels" of Commission concerns, avoiding the rocky shoals of "arbitrarily" and "intentionally." It also seemed to expand the scope of the Lebanese proposal that had been adopted in the sixth session — that is: "Everyone's right to life shall be protected by law."<sup>123</sup>

READER: Is that not redundant? The Soviet proposal said, "No one may be deprived of life," and that "[e]veryone's right to life shall be protected by law."<sup>124</sup> If everyone's life is protected by law, no one may be deprived of life.

WRITER: That is one possible interpretation. On the other hand, the Soviet proposal may have simply emphasized that the state must protect life and not deprive or allow others to deprive individuals of their lives.<sup>125</sup>

The United States and Chile proposed an amendment to the first sentence of the Soviet provision. As amended, the paragraph read: "No one [may] *shall* be *arbitrarily* deprived of his life." The words in italics were added in the Chilean/American amendment; the word in brackets deleted.<sup>126</sup>

119. See, e.g., the position of the United States expressed in GUIDE, *supra* note 79, at 120.

120. See GUIDE, *supra* note 79, at 117-19.

121. The eighth session met April 14 - June 14, 1952. U.N. Doc. A/2929, *supra* note 20, at 5.

122. GUIDE, *supra* note 79, at 120.

123. GUIDE, *supra* note 79, at 120.

124. GUIDE, *supra* note 79, at 120.

125. GUIDE, *supra* note 79, at 120. The Soviet draft passed by a vote of twelve to four with two abstentions.

126. GUIDE, *supra* note 79, at 122.

It was argued, successfully this time, that "arbitrarily" had been used in several provisions of the Universal Declaration; and that "arbitrarily" meant illegally and unjustly.<sup>127</sup> The proposed amendment passed.<sup>128</sup>

After over seven years of diligent effort, the Human Rights Commission recommended to the General Assembly that the first paragraph of Article 6 would have two sentences. They were the following: "No one shall be arbitrarily deprived of his life. Everyone's right to life shall be protected by law."<sup>129</sup>

The General Assembly referred the matter to the Third Committee.

READER: When was that?

WRITER: That occurred during the General Assembly's 682nd plenary meeting on September 20, 1957 — over ten years following the Human Rights Commission's initial drafts.<sup>130</sup>

When the Third Committee met during its twelfth session, many of its members felt that the first paragraph of Article 6 should affirm every human being's right to life.<sup>131</sup> To that end, Colombia and Uruguay proposed to substitute for the existing draft the following language: "Every human being has the inherent right to life. The death penalty shall not be imposed on any person."<sup>132</sup>

READER: Why?

WRITER: During the course of the debate, it was argued that

127. GUIDE, *supra* note 79, at 122; U.N. Doc. A/2929, *supra* note 20, at 30.

128. GUIDE, *supra* note 79, at 122. The vote was ten to five with three abstentions.

129. GUIDE, *supra* note 79, at 125.

130. See U.N. GAOR, 12th Sess., Agenda Item 33, at 1, U.N. Doc. A/3764 (1957) [hereinafter U.N. Doc. A/3764].

131. *Id.* at 12, para. 112.

132. *Id.* at 10, para. 87; GUIDE, *supra* note 79, at 119. The Human Rights Commission's draft of Article 6 which was submitted to ECOSOC for General Assembly action read as follows:

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. Any one 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.

U.N. Doc. A/2929, *supra* note 20, at 29; U.N. Doc. 3764, *supra* note 130, at 10, para. 85.



society did not confer the right to life upon individuals; rather the right was inherent, and society was obliged to protect the right. Accordingly, widespread support existed for the first sentence of the Colombian/Uruguayan amendment, that is, "Every human being has the inherent right to life."<sup>133</sup>

Despite widespread support for the amendment's first sentence, the amendment as a whole failed by a substantial margin.<sup>134</sup>

The Third Committee then voted separately on the statement that "Every human being has the inherent right to life." By a wide margin, this amended statement won acceptance.<sup>135</sup>

We now turn to the second sentence of paragraph one: "*This right shall be protected by law.*"

The second sentence of Article 6's first paragraph<sup>136</sup> had somewhat "smoother sailing" than the first. As stated previously, the Commission's sixth session witnessed the Republic of Lebanon proposal of the following language:

"Everyone's right to life shall be protected by law."<sup>137</sup> The Commission adopted this language by a vote of seven to four with two abstentions.<sup>138</sup>

The Soviet Union incorporated this language in its proposal during the eighth session of the Commission. The Soviet sponsored provision said: "No one may be deprived of his life. *Everyone's right to life shall be protected by law.*"<sup>139</sup> The Human Rights Commission did not amend the second sentence of Article 6: "*Everyone's right to life shall be protected by law.*" The Commission submitted this portion of Article 6 directly to the General Assembly.

133. GUIDE, *supra* note 79, at 119.

134. Fifty-one states voted to reject the proposed amendment; nine voted to accept it and twelve abstained. See GUIDE, *supra* note 79, at 119. The provision prohibiting capital punishment seemed the undoing of the Colombian/Uruguayan amendment.

135. Sixty-five votes were recorded in favor of the statement with only three contrary and four abstentions. GUIDE, *supra* note 79, at 119.

136. That is, "*This right shall be protected by law.*" GUIDE, *supra* note 79, at 120.

137. GUIDE, *supra* note 79, at 120; see *supra* note 129 and accompanying text. Proponents of this text stressed that the language was intended to underscore nations' obligation to protect life. Some states, like the United States of America, contended that a nation's obligation to protect the right to life only extended to situations which involved unwarranted state action. See *supra* note 117. Most states contended, however, that the duty of national governments included protecting individuals' lives from public entities and private individuals. GUIDE, *supra* note 79, at 120.

138. GUIDE, *supra* note 79, at 120.

139. GUIDE, *supra* note 79, at 120. Emphasis supplied. See also *supra* note 122 and accompanying text.

After the General Assembly forwarded the text to the Third Committee, a number of states proposed an amendment to the first paragraph of Article 6. The substituted text would have read as follows: "The right to life is inherent in the human person. From the moment of conception, this right shall be protected by law."<sup>140</sup>

Nations favoring amending the article argued that it was "logical" to protect human life from its beginning.<sup>141</sup> In addition, they argued that the draft Article 6 already provided for the protection of unborn children of mothers sentenced to capital punishment. Such protection existed in what was then paragraph four of Article 6. In relevant part, paragraph four of Article 6 read as follows: "Sentence of death shall not be carried out on a pregnant woman."<sup>142</sup>

A number of objections were raised to this amendment that would have protected life "from the moment of conception." For example, a perception existed that it was impossible to determine the moment of conception; accordingly, a state would not be able to ascertain the time from which it was responsible for protecting the lives of the unborn.<sup>143</sup> In addition, competing rights and duties of medical professionals existed. Moreover, nations applied differing principles in their legislation dealing with abortion. That fact encouraged some nations to oppose this amendment.<sup>144</sup>

The Third Committee decided to first vote on the last sentence of the proposed amendment, that is: "From the moment of conception, this right shall be protected by law."<sup>145</sup> The Committee rejected the sentence.<sup>146</sup>

The Committee then decided to vote on the last clause of the rejected sentence, namely: "This right shall be protected by law." The amended provision was adopted without dissent, and with only one abstention.<sup>147</sup>

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140. GUIDE, *supra* note 79, at 121. The countries proposing the amendment were Belgium, Morocco, Brazil, Mexico, and El Salvador. U.N. Doc. A/3764, *supra* note 130, at 11, para. 97.

141. GUIDE, *supra* note 79, at 121.

142. U.N. Doc. 3764, *supra* note 130, at 10, para. 85.

143. GUIDE, *supra* note 79, at 121.

144. GUIDE, *supra* note 79, at 122.

145. GUIDE, *supra* note 79, at 121.

146. The voting results were 31 opposed, 20 in favor and 17 abstentions. GUIDE, *supra* note 79, at 121.

147. GUIDE, *supra* note 79, at 121.

READER: So the second sentence of paragraph one "started" stating "*Everyone's right to life shall be protected by law.*"; and ended saying, "*This right shall be protected by law.*"

WRITER: That is correct. We now turn to the last sentence in paragraph one: "*No one shall be arbitrarily deprived of his life.*"

The Human Rights Commission adopted the italicized text during its eighth session.<sup>148</sup> The text was submitted to the General Assembly which forwarded it to the Third Committee. We have previously considered the "roller coaster" legislative history of the word "arbitrarily" in paragraph one.<sup>149</sup> Predictably during the debate, the inglorious history of *arbitrarily* was recounted in some detail; and arguments renewed about its vagueness and imprecision. Some states (again) took the position that "arbitrarily" meant "illegally," others that it meant "unjustly," and yet others argued that it meant both.<sup>150</sup>

In the Committee, some states argued that "arbitrarily" meant that a state could not end a person's life except "in accordance with law."<sup>151</sup> Some representatives argued that the correct understanding of "arbitrarily" was that it meant "fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause upon law; not governed by any fixed rule or standard."<sup>152</sup> In addition, it was argued that "arbitrarily" meant "without due process of law."<sup>153</sup> Accordingly, the right to a fair trial and freedom from false arrest were implicated.<sup>154</sup>

The Third Committee voted<sup>155</sup> upon this last sentence<sup>156</sup> by roll call at Syria's request.<sup>157</sup> The Third Committee adopted the provision by a wide margin.<sup>158</sup>

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148. GUIDE, *supra* note 79, at 120.

149. See *supra* notes 97-127 and accompanying text.

150. See U.N. Doc. A/3764, *supra* note 130, at 17, para. 114.

151. See U.N. Doc. A/3764, *supra* note 130, at 12.

152. See U.N. Doc. A/3764, *supra* note 130, at 12.

153. See U.N. Doc. A/3764, *supra* note 130, at 12; GUIDE, *supra* note 79, at 124.

154. GUIDE, *supra* note 79, at 124.

155. GUIDE, *supra* note 79, at 123.

156. That is, "No one shall be arbitrarily deprived of his life."

157. GUIDE, *supra* note 79, at 123.

158. GUIDE, *supra* note 79, at 123. The vote was forty-six to twelve with fourteen abstentions. A Costa Rican amendment would have replaced Article 6 with a brief relatively open ended provision reading as follows: "Every human being shall have the inalienable right to his life and to the security of his person." That amendment was overwhelmingly defeated. GUIDE, *supra* note 79, at 123. Similarly, the Third Committee

So much for paragraph one. We now shift attention to the second paragraph of Article 6:

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

Early in developing Article 6, the Human Rights Commission proposed a single sentence provision, namely: "No one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law."<sup>159</sup> Remember that this provision had twelve specific exceptions appended to it and that much debate ensued.<sup>160</sup> Part of the reason for the debate was that this statement contemplated the existence of capital punishment. The fact of a human being's execution following a criminal conviction concerned some nations. They were especially alarmed that a document that purported to protect human lives would seem to sanction capital punishment.<sup>161</sup> In fact some states were convinced that the human rights covenant ought to provide for the abolition of capital punishment.<sup>162</sup>

In contrast, other nations argued that capital punishment was, pardon the expression, a fact of life. They contended that safeguards should exist to prevent capricious or unjust imposition of the death penalty.<sup>163</sup> In addition, it was argued that the death penalty should be reserved for the most serious crimes, should be imposed only by a competent court, and should be consistent with the principles of the Universal Declaration and

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handily defeated an amendment by the Netherlands that would have replaced Article 6 with a provision modeled on the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. The proposed amendment would have stated more specifically the circumstances in which homicide would be lawful. The vote was nine in favor of the amendment and fifty against with eleven abstentions. *GUIDE*, *supra* note 79, at 124.

159. *GUIDE*, *supra* note 79, at 126; *see also supra* text pp. 429-31.

160. *GUIDE*, *supra* note 79, at 114, 126.

161. *GUIDE*, *supra* note 79, at 126.

162. *GUIDE*, *supra* note 79, at 126.

163. *GUIDE*, *supra* note 79, at 126.

the Genocide Convention.<sup>164</sup>

During the fifth session of the Human Rights Commission a number of proposals for amending the right to life article were suggested. One of those proposed amendments was submitted by the Republic of Chile. The Chilean proposal included a number of provisions. The second paragraph of that proposal read as follows: "[1] In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes [2] under ordinary law [3] and never for political offenses." The first part of the Chilean proposal was adopted by the Human Rights Commission.<sup>165</sup> The second part of the Chilean proposal was rejected and the third part was withdrawn.<sup>166</sup>

In addition, the Chilean representative proposed to further amend the right to life article as follows: "No one may be executed save in virtue of the sentence of a competent court and in accordance with a law in force and prior to the commission of the crime so punished."<sup>167</sup> The Human Rights Commission amended this phrase by deleting the clause starting with "and prior to." The text as adopted read as follows: "No one may be executed save in virtue of the sentence of a competent court and in accordance with a law in force." As amended, the Chilean proposal was adopted.<sup>168</sup>

At the beginning of the sixth session, in relevant part the Human Rights Commission had the following text with which to work:

Paragraph 2. In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes.

Paragraph 3. No one may be executed save in virtue of the sentence of a competent court and in accordance with a law in force and not contrary to the principles expressed in the Universal Declaration of Human Rights.<sup>169</sup>

The United States suggested that paragraphs two and three be merged to read as follows:

164. GUIDE, *supra* note 79, at 126-27.

165. That is, "In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes . . ." GUIDE, *supra* note 79, at 129.

166. GUIDE, *supra* note 79, at 129.

167. GUIDE, *supra* note 79, at 134.

168. GUIDE, *supra* note 79, at 134.

169. U.N. ESCOR, 5th Sess., at 18, U.N. Doc. E/1371 (1949).

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.<sup>170</sup>

The Human Rights Commission decided to adopt the proposed United States amendment.<sup>171</sup>

The first part of the proposed United States amendment stated: "In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes . . . ." <sup>172</sup> This proposal provoked some criticism. Some Commission members criticized the phrase "most serious crimes." Reasons for criticizing the "most serious crimes" language included the phrase's lack of precision. In addition, the concept of serious crimes differed from country to country.<sup>173</sup>

The United States amendment was further modified with the following language: "Not contrary to the Universal Declaration of Human Rights."<sup>174</sup> This language was appended to the United States provision so that the final provision read as follows: "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 Universal Declaration of Human Rights."<sup>175</sup>

During the eighth session, the Soviet Union initially proposed a draft article concerning the right to life which read in relevant part as follows: "2. In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes."<sup>176</sup> This provision deleted certain language from the United States draft which was carried over from the sixth session of the Human Rights Commission.<sup>177</sup>

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170. GUIDE, *supra* note 79, at 126-27.

171. GUIDE, *supra* note 79, at 126-27.

172. GUIDE, *supra* note 79, at 129.

173. GUIDE, *supra* note 79, at 129.

174. GUIDE, *supra* note 79, at 131-32.

175. GUIDE, *supra* note 79, at 132. The U.S. provision as modified was adopted with twelve affirmative votes and three abstentions. There were no dissents.

176. GUIDE, *supra* note 79, at 130.

177. U.N. ESCOR, 6th Sess., Annex 1 at 15, U.N. Doc. E/1681 (1950). "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 Universal Declaration of Human Rights.*" The language in italics was deleted by the Soviet proposal.

The United States and Chile proposed to amend the Soviet provision. They sought to reintroduce the language which the Commission had adopted in the sixth session, but which the Soviet proposal omitted.<sup>178</sup>

Accordingly, the following language was added to the Soviet provision: "pursuant to the sentence of a competent court and in accordance with law not contrary to the Universal Declaration of Human Rights." The Human Rights Commission accepted the American/Chilean amendment.<sup>179</sup>

Thus amended, the provision once more read: "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 Universal Declaration of Human Rights*," (emphasis added).

The Republic of Yugoslavia proposed an amendment to the (amended) Soviet proposal. The Yugoslav provision added the following language: "or the Convention on the Prevention and Punishment of the Crime of Genocide."<sup>180</sup>

Accordingly, the final version passed by the eighth session of the Human Rights Commission read as follows:

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.<sup>181</sup>

When the United Nations Third Committee considered the draft of Article 6 submitted by the Commission on Human Rights, it had before it the text cited above. It will be recalled that a number of countries proposed amendments to Article 6. Some of those amendments attempted to abolish capital punishment.<sup>182</sup> Other countries attempted to amend the right to life article by protecting the rights of the unborn.<sup>183</sup> And yet other

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178. GUIDE, *supra* note 79, at 130.

179. GUIDE, *supra* note 79, at 130. The vote was ten to five with three abstentions.

180. GUIDE, *supra* note 79, at 130. The commission accepted the Yugoslav amendment by a vote of thirteen to two with three abstentions. The Soviet proposal as amended was accepted by a vote of fourteen to one with three abstentions.

181. GUIDE, *supra* note 79, at 135.

182. GUIDE, *supra* note 79, at 127. See *supra* notes 159-62 and accompanying text.

183. GUIDE, *supra* note 79, at 121. See *supra* notes 143-47 and accompanying text.

countries attempted to make the right to life article conform more closely to certain regional agreements, for example, the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in November, 1950.<sup>184</sup> As noted previously, all of these proposed amendments were defeated.<sup>185</sup> The Third Committee appointed a working party to draft an acceptable revision of paragraph two of the Human Rights Commission's draft.<sup>186</sup>

Several amendments to the working party draft were suggested. One of those from the United Kingdom involved deleting the words "which is" following the word "law." In addition, the United Kingdom sought to delete the words "that is" before the word "contrary."<sup>187</sup> The working party adopted the proposed amendments of the United Kingdom.<sup>188</sup>

As amended the text read:

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

The words in brackets were deleted.

In addition, Poland suggested an amendment to the text of the working party's draft. That amendment would have struck the words "in force at the time of the commission of the crime and" from the text submitted by the working party.<sup>189</sup> The proposed Polish amendment would have read:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law not contrary to the provisions of this Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered

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184. GUIDE, *supra* note 79, at 124.

185. See *supra* notes 84, 134, 146 & 166 and accompanying text.

186. U.N. Doc. 3764, *supra* note 130, at 29, para. 97.

187. GUIDE, *supra* note 79, at 129.

188. GUIDE, *supra* note 79, at 129.

189. GUIDE, *supra* note 79, at 131; U.N. Doc. A/3764, *supra* note 130, at 14, para. 120.



by a competent court.

One possible interpretation of the Polish amendment is that the state could execute a person who committed a non-capital crime. For example, imagine a situation where a defendant committed a non-capital offense. Later the state made the criminal activity "capital." One could interpret the text to mean that in those circumstances the state could lawfully execute the defendant. It is not entirely clear whether this was the intent of Poland's proposed amendment. The Polish amendment would allow execution "for the most serious crimes in accordance with the Law." It did *not* say that the state could execute criminals for violations of "the law . . . in force at the time of the commission of the crime." The Third Committee rejected that amendment by a vote of 29 to 25, with 16 abstentions.<sup>190</sup>

A number of other amendments were suggested during the twelfth session of the Third Committee. However, most of these proposed amendments were withdrawn in favor of the working party's draft.<sup>191</sup>

By roll call vote, the Third Committee adopted the working committee's draft as revised by the British amendment.<sup>192</sup> We now pass on to the third paragraph of Article 6.

*3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from the obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*

Whereas the legislative histories of paragraphs one and two of the right to life article are relatively long, that of paragraph three is abbreviated. Paragraph three was proposed in draft form for the first time by Brazil, Panama, Peru and Poland during the twelfth session of the Third Committee.<sup>193</sup> These states were concerned about protecting the lives of members of partic-

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190. GUIDE, *supra* note 79, at 131.

191. See e.g., proposed amendment of Panama, GUIDE, *supra* note 79, at 128; proposed amendment of the Philippines, GUIDE, *supra* note 79, at 131; proposed amendment of France, GUIDE, *supra* note 79, at 133; proposed amendment of Australia, GUIDE, *supra* note 79, at 133.

192. GUIDE, *supra* note 79, at 135. The vote was 46 to 7 with 19 absentions.

193. GUIDE, *supra* note 79, at 136.

ular groups that were threatened with extinction.<sup>194</sup> These nations realized that without adequate protection for the group in which a person lived, her individual life would be meaningless. In addition, these "four powers" were concerned to limit the scope of capital punishment.<sup>195</sup> Accordingly, the four powers urged adoption of the following provision: "When deprivation of life constitutes the crime of genocide, the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide shall apply fully."<sup>196</sup>

This proposed amendment provoked some debate because there were a number of states that believed it was unnecessary to add a provision on genocide. They argued that the right to life article and the Genocide Convention did not conflict.<sup>197</sup> In addition, they were convinced that Article 5 of the Covenant addressed the issue of preventing genocide. That provision prohibited states from derogating from the human rights protected to individuals by other conventions like the Genocide Convention.<sup>198</sup>

The working party suggested an amendment to the four power provision. "When deprivation of life constitutes the crime of genocide, the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide should apply fully *in the states that are parties thereto*."<sup>199</sup>

The four powers then submitted a further amendment to the working party draft. The four power amendment read as follows: "When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide."<sup>200</sup>

Australia also introduced a proposed amendment to the four power draft.<sup>201</sup> The Australian amendment was not voted upon.

194. U.N. Doc. A/3764, *supra* note 130, at 13, para. 117.

195. U.N. Doc. A/3764, *supra* note 130, at 13, para. 117.

196. U.N. Doc. A/3764, *supra* note 130, at 10, para. 92.

197. U.N. Doc. A/3764, *supra* note 130, at 35-36, para. 116.

198. U.N. Doc. A/3764, *supra* note 130, at 35-36, para. 116.

199. GUIDE, *supra* note 79, at 136. The language in italics constitutes the proposed amendment.

200. GUIDE, *supra* note 79, at 136-37; U.N. Doc. A/3764, *supra* note 130, at 12, para. 109.

201. GUIDE, *supra* note 79, at 136 (The Australian article provided as follows: "Nothing in this article shall authorize any states parties to derogate in any way from

The four power amendment "borrowed" language from the working party draft and incorporated the proposed Australian amendment.

Canada proposed that the Third Committee vote separately on the following language: "When deprivation of life constitutes the crime of genocide, it is understood that . . . ." The Third Committee approved this clause.<sup>202</sup> The Third Committee then voted on the four power amendment in its entirety. The amendment passed. It is now paragraph three.<sup>203</sup>

We now come to paragraph four:

4. *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.*

Like paragraphs one and two of the right to life article, paragraph four has a relatively long legislative history. In that respect it is unlike paragraph three which was added during the Third Committee deliberations.

Paragraph four was a response to concerns by members of the international community who felt that for "humanitarian reasons" the effect of the death penalty ought to be mitigated. Accordingly, during the fifth session of the Commission on Human Rights, the Republic of Chile proposed the following provision: "Amnesty, pardon or commutation of the sentence of death may be granted in all cases."<sup>204</sup> The Chilean proposal was accepted by the Commission.<sup>205</sup>

However, some nations felt the need to curb the likelihood of death penalty imposition so strongly that during the Commission's sixth session an amendment to the Chilean provision was proposed. The Republic of Lebanon proposed adding a sentence to the beginning of the Chilean provision. As amended the provision would have read as follows: "*Anyone sentenced to death shall have the right to seek amnesty, or pardon, or commutation of the sentence. Amnesty, pardon or commutation of the*

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any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.").

202. GUIDE, *supra* note 79, at 137. The vote was 37 in favor, 14 against, with 19 absentions.

203. GUIDE, *supra* note 79, at 137. The vote was 49 in favor, 5 against, with 18 absentions.

204. GUIDE, *supra* note 79, at 138.

205. GUIDE, *supra* note 79, at 138.

sentence of death may be granted in all cases."<sup>206</sup>

The Lebanese proposal emphasized that individuals who were sentenced to death would not necessarily be killed. Avenues for clemency existed. Such avenues included possible amnesties, pardons, or commuted sentences. The Commission adopted the Lebanese amendment.<sup>207</sup>

During the eighth session of the Human Rights Commission, the Soviet Union proposed a right to life article which had as one of its paragraphs identical language with that of the Lebanese provision.<sup>208</sup> France suggested an amendment to the Soviet provision whereby the word "amnesty" would be deleted from the first sentence of the fourth paragraph.<sup>209</sup>

READER: Deleting "amnesty" from the first sentence was an interesting suggestion. What was the rationale behind it?

WRITER: The reason the French suggested the "amnesty" deletion was that amnesties were granted by governments to large groups of individuals. It would not be expected that individuals would apply for amnesties from a death sentence. A pardon or commutation would be a more appropriate remedy.<sup>210</sup> The Human Rights Commission accepted the French amendment.<sup>211</sup>

The text of paragraph four as thus amended was forwarded to the General Assembly. Both the Human Rights Commission and the Third Committee agreed that it was appropriate to retain the reference to amnesty in the second sentence of paragraph four. Circumstances might arise in which a collective pardon or amnesty would be appropriate to mitigate a punishment of death.<sup>212</sup>

When the Third Committee took up Article 6 during its twelfth session in 1957, the Belgian representative requested that the words in the second sentence "in all cases" be voted

206. GUIDE, *supra* note 79, at 139 (emphasis supplied).

207. GUIDE, *supra* note 79, at 139. The Commission vote was thirteen to one with no abstentions.

208. GUIDE, *supra* note 79, at 139.

209. As amended, the Soviet proposal would have read: "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." GUIDE, *supra* note 79, at 139.

210. GUIDE, *supra* note 79, at 138; U.N. ESCOR, 14th Sess., Supp. No. 4, at 26, paras. 171-72, U.N. Doc. E/2256 (1952) [hereinafter U.N. Doc. E/2256].

211. GUIDE, *supra* note 79, at 139. The vote was 11 in favor, 4 against the amendment, with 3 abstentions.

212. U.N. Doc. E/2256, *supra* note 210, at 26, paras. 171-72; GUIDE, *supra* note 79, at 138.

upon. The Third Committee adopted the words "in all cases."<sup>213</sup> Paragraph four was then adopted by a unanimous vote of the Third Committee with only two absentions.<sup>214</sup>

Paragraph five is next on our agenda:

5. "*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.*"

This provision applies to three categories of individuals: first, individuals below 18 years of age; second, pregnant women; and, third the unborn life within them. The provisions dealing with individuals under 18 years of age will be considered separately from those dealing with pregnant women and their children.

*Sentence of death shall not be imposed for crimes committed by persons below 18 years of age . . . .*

During the sixth session of the Human Rights Committee, Egypt proposed an amendment to the right to life article that addressed capital punishment for individuals under 17 years of age. The Egyptian provision read as follows: "Offenders under the age of 17 years shall not be sentenced to death or to imprisonment with hard labour for life."<sup>215</sup> The Egyptian proposal would have prohibited both capital punishment and lifetime imprisonment with hard labor. The Human Rights Commission did not vote on that provision.<sup>216</sup>

The issue of juvenile capital punishment remained dormant, but resurfaced during the Third Committee's analysis of the right to life article seven years later. A number of states felt that because nations gave preferential treatment to juveniles and because juveniles could be rehabilitated under "firm moral and intellectual guidance" that it was inappropriate to impose the sentence of death upon juveniles.<sup>217</sup> Accordingly, the Republic of Guatemala proposed an amendment to what was then paragraph

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213. GUIDE, *supra* note 79, at 139. "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*." (emphasis supplied). The Third Committee vote was 57 in favor, 1 against, with 13 abstentions.

214. GUIDE, *supra* note 79, at 139. The vote was 69 to 0, with 2 absentions.

215. GUIDE, *supra* note 79, at 141.

216. GUIDE, *supra* note 79, at 141.

217. GUIDE, *supra* note 79, at 141; U.N. Doc. A/3764, *supra* note 130, at 13, para. 119.

four of the right to life article.<sup>218</sup> Paragraph four then read as follows: "Sentence of death shall not be carried out on a pregnant woman."<sup>219</sup> The amended text would have read: "Sentence of death shall not be carried out on minors or on a pregnant woman."<sup>220</sup>

The Guatemalan representative withdrew his country's proposal in favor of an amendment by the Japanese representative. The Japanese amendment read: "Sentence of death shall not be imposed for crimes committed by minors and shall not be carried out on a pregnant woman."<sup>221</sup> The Japanese representative agreed to a modification of his country's provision to delete the word "minors" and replace that word with "children and young persons."<sup>222</sup> That is, the Japanese amendment would have read: "The sentence of death shall not be imposed for crimes committed by children and young persons, and shall not be carried out on a pregnant woman."

Some states objected to the language "children and young persons" because it did not adequately address the situation of a person who committed a crime as a juvenile but who was arrested and convicted as an adult.<sup>223</sup> In addition, some objected to amending paragraph four because it was directed towards protecting the lives of unborn children of mothers who had been sentenced to death.<sup>224</sup> Opponents of the Japanese provision argued that if minors were protected from capital punishment, then the protection could logically be extended to those who were insane or elderly.<sup>225</sup> Furthermore, they argued that this provision would be unsatisfactory for countries where age at sentencing was relevant to the punishment.<sup>226</sup>

Not surprisingly, the Working Party could not come up with an agreed text. Rather than using the words "children and young persons," the Working Party suggested as alternatives, "minors," "persons below 18 years of age," or "juveniles."<sup>227</sup>

The Third Committee rejected the amendment by the

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218. U.N. Doc. A/3764, *supra* note 130, at 10, para. 90.

219. U.N. Doc. A/3764, *supra* note 130, at 10, para. 85.

220. U.N. Doc. A/3764, *supra* note 130, at 10, para. 90.

221. GUIDE, *supra* note 79, at 141.

222. GUIDE, *supra* note 79, at 141.

223. GUIDE, *supra* note 79, at 142.

224. GUIDE, *supra* note 79, at 143.

225. U.N. Doc. A/3764, *supra* note 130, at 13, para. 119.

226. U.N. Doc. A/3764, *supra* note 130, at 13, para. 119.

227. U.N. Doc. A/3764, *supra* note 130, at 13, para. 119.

United Kingdom which would have read in relevant part: "Sentence of death shall not be imposed on children and young persons . . . ." <sup>228</sup> The Third Committee then voted on the Japanese amendment proposing to substitute the following language for "children and young persons": namely, "persons below 18 years of age." By a very narrow margin, 21 votes to 19, with 28 abstentions, the Third Committee approved the amendment. <sup>229</sup>

As amended, the text read in pertinent part: "The sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ."

We now focus attention on the rest of paragraph five, namely: "*Sentence of death shall not be . . . carried out on pregnant women.*"

The provisions prohibiting capital punishment of pregnant convicts had their origin during the eighth session of the Human Rights Commission. <sup>230</sup> The Yugoslav representative proposed an amendment which, after a drafting revision suggested by Great Britain, read as follows: "Sentence of death shall not be carried out on a pregnant woman." <sup>231</sup> This provision had as its inspiration humanitarian concerns about the welfare of the unborn child of a pregnant woman sentenced to death. The orientation of the provision seems to be that sentence of death ought not to be imposed against a pregnant criminal at all. That is, even after birth of the child it ought not to be imposed. <sup>232</sup> The Human Rights Commission accepted the Yugoslav provision. <sup>233</sup>

The Commission forwarded it with the rest of the Covenant to the Third Committee for consideration. During the Third Committee's review of this provision, some nations argued it applied solely to pregnant women before the birth of their children. <sup>234</sup> Other countries were of the opinion that the sentence of death ought not to be carried out against pregnant women at all, either before or after the birth of their children. The reason was that the death of the mother would likely have a tremendous adverse effect upon the development of the child. <sup>235</sup>

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228. GUIDE, *supra* note 79, at 142. The vote was 41 opposed to the amendment, 12 in favor with 19 abstentions.

229. GUIDE, *supra* note 79, at 142.

230. GUIDE, *supra* note 79, at 142.

231. GUIDE, *supra* note 79, at 142.

232. GUIDE, *supra* note 79, at 142.

233. GUIDE, *supra* note 79, at 142. The vote was 12 to 1 with 5 abstentions.

234. GUIDE, *supra* note 79, at 143.

235. GUIDE, *supra* note 79, at 143; U.N. Doc. A/3764, *supra* note 130, at 13, para.

Japan proposed an amendment providing that the words, "a pregnant woman," in the Yugoslav provision, be changed to "pregnant women."<sup>236</sup> As amended, the Third Committee adopted paragraph five.<sup>237</sup> We now focus attention on the sixth and last paragraph of Article 6.

*Nothing in the article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant.*

Like paragraph three, paragraph six made a relatively late entrance into legislative consideration.

READER: How late is relatively late?

WRITER: The draft provision that later became paragraph six was not introduced until the Third Committee considered the right to life article in 1957. A number of nations wished to ensure that Article 6 did not appear to sanction capital punishment. However, the issue of capital punishment and its abolition was "highly controversial."<sup>238</sup>

To ensure that the right to life article did not sanction capital punishment, Panama proposed an amendment as follows: "The right to life is inherent in the human person. The States Parties to the Covenant recognize the propriety of promoting the abolition of the death penalty."<sup>239</sup> During Working Party deliberations, the Panamanian representative withdrew his nation's proposed amendment.<sup>240</sup>

In lieu of the Panamanian amendment, the Working Party suggested the following: "Nothing in this article shall be invoked to retard or to prevent any State Party to the Covenant from abolishing capital punishment."<sup>241</sup> The Working Party text was revised orally, and the following language adopted by the Third Committee: "Nothing in this article shall be invoked to delay or

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236. GUIDE, *supra* note 79, at 143 (Accordingly, the Japanese amendment would have read in pertinent part as follows: "Sentence of death . . . shall not be carried out on pregnant women.").

237. GUIDE, *supra* note 79, at 143. The vote was 53 in favor, 5 against, with 14 abstentions.

238. GUIDE, *supra* note 79, at 144; U.N. Doc. A/3764, *supra* note 130, at 12, para. 111.

239. GUIDE, *supra* note 79, at 144.

240. GUIDE, *supra* note 79, at 144.

241. GUIDE, *supra* note 79, at 144.



to prevent the abolition of capital punishment by any State Party to the Covenant."<sup>242</sup>

We now return to your earlier concerns regarding the interpretation of statutes, especially those in the international human rights context.

READER: I am glad you have laid out the background for an analysis of the meaning of this text. Statutory analysis should be straightforward. Look at the words of the text; "hear" the "voice" of the legislator; and give effect to the legislative intent. As simple as one, two, three! Right?!

WRITER: I suspect that there is a bit more to it than that. The ICCPR is an international treaty. Its interpretation must depend in part on reference to evolving international standards on treaty interpretation. For example, a number of states have ratified the Vienna Convention on the Law of Treaties.<sup>243</sup> Among other things, that convention sets forth internationally agreed standards for interpreting treaties. For instance, under Article 31 of the Vienna Convention, it is stated: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

READER: What does that mean?

WRITER: That means, in part, the following. States which make a treaty must interpret that treaty in good faith and follow the ordinary meaning given to the treaty terms. However, the ordinary meaning must be considered in "context." According to Article 31, "context" includes a treaty's preamble and annexes "in addition to the text." Context also encompasses "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty . . ."<sup>244</sup> Thus the Vienna Convention gives "context" a broad definition.

Moreover, the interpretation of a treaty involves recognizing the object and purpose of the treaty. So, for instance, the object and purpose of the International Covenant on Political and Civil Rights embraces the creation of a comprehensive framework for the international protection of human rights. The more specific

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242. GUIDE, *supra* note 79, at 144. The Third Committee adopted paragraph 6 by a vote of 54 in favor, 4 against and with 1 abstention.

243. U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969). The Vienna Convention was concluded at Vienna on May 23, 1969. The Convention became effective on January 27, 1980.

244. *Id.* art. 31, § 2a.

object and purpose of Article 6 was to protect the right to life.

In addition, Article 31 of the Vienna Convention provides: "3. There shall be taken into account together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ." Thus the convention contemplates using the parties' subsequent behavior as an aid to properly interpreting it.

Furthermore, Article 32 of the Vienna Convention says that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article thirty-one; or to determine the meaning when the interpretation according to article thirty-one:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

In short, the Vienna Convention allows treaty interpretation to embrace a wide range of factors. They include the ordinary meaning of treaty provisions, the context in which the treaty was adopted, the object and purpose of the treaty in that particular context, and the treaty's legislative history. Further, treaty interpretation may encompass the subsequent practice of parties to the provision. Such practice may be relevant to the extent that it helps establish what parties agree is the treaty's meaning.<sup>245</sup>

You mentioned that statutory interpretation was "statutory interpretation."

To some extent the Vienna Convention suggests that many of the traditional canons of statutory interpretation are applicable here. Let me illustrate.<sup>246</sup> A distinguished American jurist has said: "The Court no doubt must listen to the voice of Congress. But often Congress cannot be heard clearly because its speech is muffled."<sup>247</sup> In addition, one confronts the issue of how

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245. Other considerations which may impact treaty interpretation include whether the parties have made a "subsequent agreement" regarding its meaning or application, whether other international law rules are relevant to the parties' relationship, and whether the parties intended that treaty provisions would have a "special meaning." *Id.* art. 31, §§ 3a, 3c, and 4.

246. Portions of this section appeared in Stubbs, *supra* note 58.

247. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 2 RECORD OF

to "master" the words of a statute so that they make sense. That is what the process of statutory interpretation involves.

Some may object to formulating the question like this, i.e. in terms of mastering the statutes' words. One rather fundamental objection is that the words need no master. The words need a reasonable interpretation.

READER: Amen! In fact the Vienna Convention says as much when it states that we interpret treaties by giving them their ordinary meaning.

WRITER: I agree with you that treaties must be interpreted in part by giving the treaty terms their ordinary meaning. No one disputes that. However, we need a more comprehensive interpretive theory. Particularly in the human rights area, there are some pragmatic, theoretical and institutional considerations that need to be addressed. I will briefly explore them after dealing in more detail with some of what you referred to as "established, hornbook law."

You seem in agreement with the proposition that the words of a treaty need no master — just a reasonable interpretation.

READER: Yes.

WRITER: I suppose your argument would essentially contend that the statutes were drafted by literate intelligent persons; and therefore no great difficulty should plague their interpretation.

READER: Certainly the drafting was done by reasonably literate *people*. Whether a legislature or institution possesses intelligence is a matter for debate. In addition, one presumes a reasonably literate and intelligent reader or interpreter of the document.

WRITER: Perhaps that is where the reasonable person "comes in." But even in favorable circumstances involving reasonable

N.Y.C.B.A. 213, 224 (1947) cited in, Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W.L. REV. 128, 134 (1972) [hereinafter Nunez].

Lewis Carroll made the point differently in THROUGH THE LOOKING GLASS:

"And only *one* is for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master that's all."

LEWIS CARROLL, THE COMPLETE WORKS OF LEWIS CARROLL 186 (1960).

legislators and interpreters, history teaches us that problems *may* arise.

For example, even twenty four hundred years ago, the problem of statutory interpretation reared its head in one of Plato's dialogues. In *The Laws*, Plato discussed the judge's role in furthering the legislator's intent when imposing a sentence under the criminal laws:

[T]he law must take careful aim at its mark; it must be exact in determining the magnitude of the correction imposed on the particular offense, and . . . the judge must have the same task before him, and lend his services to the legislator, when the law leaves it to his discretion to a defendant's fine or sentence; the legislator . . . is like a draftsman who must design the outlines of cases which answer to the code.<sup>248</sup>

Thus, Plato at least implicitly recognized the existence of a dynamic relationship between the legislature and the judiciary in the creation of the law and administration of justice. The judge's role involved furthering the will of society as expressed through the legislature's enactments.

Similarly, during the time of Jesus of Nazareth the issue of the proper construction of law "waxed" most volatile. For example, one Sabbath his disciples were hungry and while walking through the fields "plucked the ears of corn, and did eat, rubbing them in their hands."<sup>249</sup> Of course taking what did not belong to you was against the law.<sup>250</sup> And to make it worse, the disciples committed the offense on the Sabbath — the day one was to remember "to keep it holy."<sup>251</sup>

When confronted with these facts, Jesus first cited the precedent of David eating the "shewbread" which was only lawful for the priests to eat; and secondly asserted that He (Jesus) was "Lord also of the Sabbath."<sup>252</sup> By saying He was Lord of the Sabbath, Jesus called attention to His authority — that is he represented the First Century basic norm or rule of recognition.<sup>253</sup>

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248. THE COLLECTED DIALOGUES OF PLATO 1484 (Edith Hamilton & Huntington Cairns eds., 1961).

249. *Luke* 6:1.

250. "Thou shalt not steal." *Exodus* 20:15.

251. *Exodus* 20:8.

252. *Luke* 6:5.

253. See generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE 110-24 (1945) (the basic norm stemmed from the fact that Jesus had been delegated this duty to create

And secondly, the example of plucking one's neighbor's corn on the Sabbath is an early example of the application of statutory interpretation's golden rule. This is not the Golden rule with which we are familiar: "[A]ll things whatsoever ye would that men should do to you, do ye even so to them."<sup>254</sup>

Rather this rule may be stated as follows:

It is a very useful rule, in [statutory construction], to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that [militates against the legislature's intent] . . . or leads to . . . manifest absurdity . . . in which case the language may be varied or modified . . .<sup>255</sup>

This case was one in which it could not be said that the legislator intended for his disciples to perish, and since statutes must be construed as speaking in the present: the legislator was present.<sup>256</sup>

Statutory interpretation's golden rule is reflected in the text of Article 32 of the Vienna Convention. That article says in relevant part: "Recourse may be had to supplementary means of interpretation . . . to determine the meaning when the interpretation according to [A]rticle [31] . . . (b) leads to a result which is manifestly absurd or unreasonable."

More recently, another canon of statutory construction has been adopted. It is the so-called "mischief rule," and as a matter of Anglo-American common law, antedates the golden rule. In *Heydon's case*,<sup>257</sup> decided in 1584, the Barons of the Exchequer lucidly stated the mischief rule:

And it was resolved by them that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and ap-

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this norm). Cf., HART, *supra* note 10, at 92.

254. *Matthew* 7:12.

255. *Becke v. Smith* 2 M. & W., 191, 195, *cited in*, SIR RUPERT CROSS, STATUTORY INTERPRETATION 16 (J. Bell & G. Eagle eds., 1987) [hereinafter CROSS].

256. *The Longford* (1889) 14 P.D. 34 (1888) (Lord Esher) *cited in* CROSS, *supra* note 255, at 49.

257. 3 Co. Rep. 7 (1584).

pointed to cure the disease of the Commonwealth, and 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.<sup>258</sup>

The mischief rule has been frequently applied in American courts — see for example *Powell v. Alabama*,<sup>259</sup> *Jones v. Alfred Mayer*,<sup>260</sup> and *Boyd v. United States*<sup>261</sup> — and the rule has been the subject of substantial academic commentary.<sup>262</sup>

The mischief rule's "imprint" is found in the Vienna Convention too. For example, Article 31 says that nations must interpret treaties "in light of [their] object and purpose." That is another way of saying that the law must be expounded to eliminate "mischief" which the legislature has recognized.

A third canon of statutory construction is the "literal rule." The literal rule has frequently endeared itself to the English courts:

The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver . . . .<sup>263</sup>

In more recent years, the mischief rule has made something of a "comeback."<sup>264</sup>

258. *Id.* at 7a, quoted in CROSS, *supra* note 255, at 9.

259. 287 U.S. 45 (1932).

260. 392 U.S. 409 (1968).

261. 116 U.S. 616 (1886).

262. CROSS, *supra* note 255, at 10-11. For a provocative discussion see LORD ALFRED THOMPSON DENNING, *THE DISCIPLINE OF LAW* 9-22 (1979) [hereinafter DISCIPLINE]; G.C. MacCallum, Jr., *Legislative Intent*, in *ESSAYS IN LEGAL PHILOSOPHY* 237-74 (Robert Summers ed., 1968); Nunez, *supra* note 247, at 128-34. See also the helpful discussion in D.N. McCORMICK & R.S. SUMMERS, *INTERPRETING STATUTES* 511-15 (1991).

263. *Sussex Peerage Claim*, 11 Cl. & Fin. 85, 143 (1844), quoted in CROSS, *supra* note 255, at 14; see DISCIPLINE, *supra* note 262, at 11-16; see also *Roberts v. Hopwood*, All E.R. (H.L.) 24, 33-36 (1925), per Lord Atkinson.

264. See, e.g., *Ealing L.B.C. v. Race Relations Board*, [1972] App. Cas. (H.L.) 342, 360-61 (1971); see also *Bushell v. Faith*, 1970 App. Ca. 1099, 1108 (1969). In elucidating a section of the Company Act of 1948, Lord Upjohn said: "[W]hen construing an Act of

The literal rule manifests itself in Article 31 of the Vienna Convention. The article mandates a good faith interpretation of the document. That interpretation is based in part on giving the text or "terms" of the treaty their "ordinary meaning."

Thus the Vienna Convention encompasses the literal, golden and mischief rules. When applied complementarily, the rules work as follows. First, one looks at the plain and ordinary meaning of the words of the statute and "sees" what kind of result would flow from applying the words in that fashion. Second, one attempts to ascertain whether the result is an absurd one through using common sense or if one is still at a loss, through looking at the treaty's "object and purpose" to see what mischief the parties tried to eradicate. Then one construes the statute so as to "suppress the mischief and advance the remedy."<sup>265</sup>

Many other sub-rules and presumptions concerning statutory interpretation exist. It is beyond the scope of our conversation to discuss them in detail.<sup>266</sup> Suffice it to say that they are essentially unnecessary for the analysis of the right to life provisions of Article 6.

However, one other rule of statutory interpretation deserves brief notice before we pass on to analyze Article 6. That is the rule concerning the analysis of the structure and relationship of the parts of the document to the whole.<sup>267</sup> Stated simply the theory of structure and relationship is this. First, you analyze the words of the section of the statute in their context. Next, see what the draftsman intended (generally) to do, how the related sections of the statute further that intent and then give the section under your scrutiny a meaning which furthers the legislature's general intent. In ascertaining that intent: "[N]o one should profess to understand any part of a document until he has read the whole of it."<sup>268</sup> Thus, having read the entire doc-

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Parliament it is a canon of construction that its provisions must be construed in the light of the mischief which the Act was designed to meet." *Id.*

265. *Heydon's Case*, (1584) 3 Co. Rep. 7a.

266. These rules and presumptions are admirably collected and discussed in CROSS, *supra* note 255; cf. DISCIPLINE, *supra* note 262, at 9-22; see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

267. This theory of statutory interpretation is brilliantly expounded in CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) [hereinafter BLACK].

268. *The Prince of Hanover Case*, 1957 A.C. 436, 463 (House of Lords) (per Lord Simonds).

ument and seen how the parts relate to the whole, one can say whether any particular part has a meaning which is "clear and unambiguous."<sup>269</sup> Of course, "the entire document" here should be read as meaning all the relevant portions of it.<sup>270</sup>

Furthermore, in a penetrating analysis of the theory of structure and relationship, Professor Charles L. Black, Jr. has demonstrated that the theory goes even further. One may apply the theory to constitutional controversies. The theory may apply even when no particular provision of the Constitution says anything specific about the disputed issue.<sup>271</sup>

The way one applies the "enlarged" theory of structure and relationship is this. First, read the Constitution to ascertain generally what the Framers intended. Then, in the particular case presented, reach a result which is consonant with that intent.<sup>272</sup>

So, for example, imagine a case in which a United States citizen satisfies all the requirements to vote in a state election except that he is a "member of the Armed Forces of the United States." For that reason alone the state denies him the right to vote.<sup>273</sup>

Applying the principles of Professor Black's structure and relationship theory, one can analyze this case by saying that the Framers intended to create a federal union under which the States and federal government cooperated to achieve objectives essential to their joint survival. Further, the Framers did not intend for the States to interfere with federal agents engaged in performing functions vital to the nation's existence, e.g. serving in the armed forces; therefore, the State acted outside its constitutional jurisdiction in denying a federal official the right to vote.<sup>274</sup>

Thus applying the theory of structure and relationship, one may reach the same conclusion as the Court, but on different grounds.<sup>275</sup>

269. *Id.*

270. For example, in order to construe § 117 of the Internal Revenue Code concerning tax exemptions for fellowships, I.R.C. §§ 117 (1988), one would not need to — or care to — read the hundreds (thousands) of sections of the entire Code.

271. BLACK, *supra* note 267, at 3-32.

272. BLACK, *supra* note 267, at 7-12.

273. *Carrington v. Rash*, 380 U.S. 89 (1965), cited in BLACK, *supra* note 267, at 8.

274. BLACK, *supra* note 267, at 10-11. Professor Black states his conclusion as thus: "[I]t ought to be held that no state may annex any disadvantage simply and solely to the performance of a federal duty." BLACK, *supra* note 267, at 11.

275. The Court decided the case on the grounds that the Texas statute violated the



READER: Or one can reach a conclusion different than that of the Court.

WRITER: That is true. It is worthwhile pointing out that the theory of structure and relationship may be applicable in instances where the other rules of statutory interpretation are not. The mischief, literal and golden rules are particularly applicable when one is attempting to extract some meaning from a legislative or constitutional text. However, one may use the structure and relationship theory to reach an interpretive decision where the statute or constitutional provision says nothing about the precise legal dispute before the reader.

The rules of statutory interpretation and the theory of structure and relationship may merge. This can happen when the courts attempt to apply the rules of statutory interpretation to cases where the statute or authoritative text is not directly applicable.<sup>276</sup> *Carrington v. Rush* is a good example. The Equal Protection Clause of the Fourteenth Amendment says nothing about states regulating the right of the national government's soldiers to vote in state elections. Nonetheless, concerning the exercise of the franchise, States must treat federal soldiers like other State citizens and allow them to vote.

The Court's analysis implicitly adopts the mischief rule approach in that the Court attempts to identify the "defect" in the law which the Equal Protection Clause sought to remedy. That Clause attempts to eradicate invidiously discriminatory state actions. Such a state action existed in that case, i.e. preventing otherwise qualified state citizens from voting because they were also members of the United States Armed Forces.

Had the Court adopted the structure and relationship analytical framework the Court would have perceived the relationship between the state and the national government in addition to the relationship of the individual and the State. Merging the mischief rule with the theory of structure and relationship gives us a broader, clearer perception of laws.

The structure and relationship theory seems implicit in the Vienna Convention's interpretive approach. That is, the convention expressly invites interpretations based on considering the text and the context. Among other things that requires analyz-

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Equal Protection Clause of the Fourteenth Amendment of the Constitution. *Carrington*, 380 U.S. at 96.

276. Or is only arguably applicable. See Professor Black's criticism of the Court's Equal Protection approach. BLACK, *supra* note 267, at 9-10.

ing the relationship of relevant parts of a legislative provision to one another. Structure and relationship theory requires the same type analysis.

At this stage, one may ask the question, "What does Article 6 mean?" The answer to that question depends on a number of factors. What a legislative provision means is impacted by the literal text, the legislative history, and the structure and relationship of the parts of the document to the whole. We will address those concerns momentarily. After briefly addressing those issues, we will examine the practice of the Human Rights Committee. That should give us a better sense of what the text means from a practical perspective.

Finally, the subject matter of the text influences the construction that it should receive. For instance, criminal statutes should be construed narrowly and human rights statutes broadly. Criminal statutes often restrict and may extinguish life and liberty; human rights statutes seek to expand and protect life and liberty.

READER: I am not sure that I buy the argument that human rights statutes should receive some special consideration. It seems to me that statutes are statutes regardless of the subject matter!

WRITER: "Statutes are statutes" is true. However, statutes which deal with the preservation of human life, liberty and dignity ought to receive a sympathetic interpretation. So much is at stake — quite literally the survival and progress of the human species.

READER: But that is in part a value judgment. Moreover, I sense an element of melodrama creeping into the conversation. We are dealing with a legal text. Rhetoric cannot substitute for reason!

WRITER: The argument, as most arguments, includes underlying "values." An important "value" or good is human life. It is my judgment that such life should be protected. Even as we speak, millions are dying from war, disease and famine. Those are facts. And those facts constitute a sad part of the *drama* of the human condition. This is not melodrama. It is reality played out on the stage of history.

Thousands of people have been convicted of crimes and sit on Death Rows around the globe. Many face death principally for "speaking truth to power." How is taking an adversarial posture on their behalf an unfair use of rhetoric?

We do have a legal text — that is true. Nevertheless, one must *choose* an interpretive framework for understanding this statute. The best framework is one that allows development of the drafters' general intent to protect life.

READER: Why?

WRITER: Because history is full of ambiguities. Legislative history is no exception. A more "human rights friendly" interpretive approach would facilitate protecting the lives of individuals in controversial cases. That is more appropriate than leaving them without legal "cover." A narrower view will allow despotic states wider latitude to legally destroy life. A narrow view means the right to life is less likely to apply. The despot's acts escape legal sanction.

To some a broader more inclusive framework may be the "obvious" interpretive approach. To others such a framework may seem based on "conjecture" and even, deadliest of all sins, could be labelled "*liberal*." I think it is fair and that there is ample support for the position.

We must never forget that we are talking about living breathing human beings — like you and me!

READER: Calm down! You are getting emotional on me. We are talking about law and the proper construction of it. I am not convinced that there is ample support for your expansive interpretation theory.

WRITER: I am not sure what you mean by an "expansive interpretation theory." But I take your concern to be that an expansive interpretation theory as you call it or a general intent theory as I view it would go beyond the creators' intent when they drafted the document.

READER: And that would allow subsequent interpreters to rewrite the document in their own philosophical image.

WRITER: In interpreting any document, that is a danger. Just look at what happens to the Supreme Court's interpretation of the United States Constitution as the Court's membership changes. In this case, my argument is that the general intent of the document is to protect human life in a broad manner, and in a number of circumstances. The ample support that I find for this position involves history, common sense, legal theory and Human Rights Committee practice.

From an historical perspective, when writing the ICCPR, the drafters presumed that states would take affirmative steps to ensure human life.

The drafters started their work only six months after the nuclear attacks on Hiroshima and Nagasaki.<sup>277</sup> The victorious powers created the United Nations to help save "succeeding generations from the scourge of war."<sup>278</sup> Accordingly, the drafters refrained from spending much time dealing with what for them was obvious: Article 6 assumed that armed conflict among nations was minimal. In light of then recent history, namely World War II, extensive warfare would have contradicted protecting the right to life. Accordingly, there seemed no compelling reason to explicitly address the issue of war and protecting life.

Similarly, it seemed unnecessary for the drafters to state that Article 6 presumed that human beings had the means of subsistence such as food, water, shelter, and health care. Unless the drafters assumed such necessities existed, the discussion of the right to life would have been at best academic. One may argue that this is speculative, that the drafters should have written concerns about larger issues like war and human survival into the ICCPR. In interpreting historical circumstances, an element of speculation is mixed with the interpreter's conclusions. Undoubtedly the drafters could have explicitly included more right to life concerns in the text. Whether political considerations played a part larger than is immediately obvious is unclear.

In this historical context, the text of Article 6 deals generally with protecting the "inherent right to life." In addition, it focuses on narrower issues, like capital punishment. The drafters did not need to write, "We contemplate no major wars." Neither did they have to say, "[W]e presume that nations will make their best efforts to ensure that individuals within their borders will be fed, clothed, sheltered, and furnished health care." Those are assumptions fundamental to the existence of human civilization.

READER: That may or may not be true. The point is, we have a text and that is what we construe. We must not get bogged down in the metaphysical speculations of what was in the minds of the drafters. The important aspect of what was in their minds is on paper.

WRITER: I agree in part. Important aspects of what the drafters thought has been written. It is reflected in the current text of Article 6. But all that the drafters contemplated is not reflected

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277. August 6 and August 9, 1945.

278. U.N. CHARTER pmbl.

in the text. The drafters are not required to state the obvious. It makes little sense to talk about the right to life if we presume a world in which major wars are common and the norm is for governments to neglect basic necessities like providing food for the materially needy. Common sense requires that we not separate the text from its historical context.

Furthermore, regarding interpretive theory, the literal and mischief rules of statutory construction apply. That is the literal text itself protects the inherent right to life, meaning the "natural" or "God-given" right, of human beings to live. The mandate is a general one — directed to the survival and preservation of the human species. The text itself says that "Every human being has the inherent right to life."

Moreover, the text of the ICCPR is directed generally towards the historical mischief of massive deprivation of human rights associated with the Axis Powers. That tyranny plunged the world into the Second World War. The deprivation of human rights included the deprivation of the right to life on a large scale.

I recognize that cynics or "realists" may disagree. But I choose neither cynicism nor "realism" in the sense of being pessimistic about the nature of humanity.

It is in this broad historical context that the text of Article 6 also implicitly acknowledges the existence of capital punishment.

With these comments, let us refocus attention on the (written) text of Article 6:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

The drafters of Article 6 recognized that the right to life is an essential part of what it means to be a human being.<sup>279</sup> Most drafters took a "natural rights" position regarding protecting life. The right to life was not conferred upon human beings by the state.<sup>280</sup> The right originated independently of human institutions. The right "dwells" — inheres in the essence of human being (existence!).

To give some "teeth" to the provision protecting human life,

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279. GUIDE, *supra* note 79, at 119.

280. GUIDE, *supra* note 79, at 119.

paragraph one of Article 6 commands that states protect the right to life legally. The state must protect "[t]his right . . . by law." States must protect the right to life not only from public officials, but also from private persons.<sup>281</sup>

The drafters recognized nevertheless, that circumstances existed in which an individual's life may be extinguished. Paragraph one states that "No one shall be arbitrarily deprived of his life." That suggests that an individual may not have his life terminated unjustly or illegally.<sup>282</sup> Implicitly, however, paragraph one recognizes that a human being may be "deprived" of her life. The questions become by whom and under what circumstances.

This is where paragraph one and paragraph two overlap in some respects. Paragraph two addresses these issues. The drafters of Article 6 recognized that the death penalty was a reality. Nations may kill their citizens for criminal behavior.

The drafters found themselves wrestling with how they might curb capital punishment. Paragraph two addresses that dilemma by recognizing that the death penalty only applies in nations which have not yet abolished it. In such nations, the state can kill individuals only for the most serious crimes. Even in those circumstances, the death penalty can only be implemented under a law existing at the time the crime was committed. The drafters circumscribed the death penalty even further by mandating a final judgment of a competent court. In this respect, paragraphs one and two recognize the sanctity of life, but at the same time the reality that many countries have the death penalty.

Paragraph three of the article further restricts capital punishment so that states may not impose it contrary to the Genocide Convention. States which have ratified the ICCPR and the Genocide Convention may not commit genocide against individuals.

Paragraph four recognizes that even where the state decrees the death penalty, it has limited application. Any individual sentenced to death may seek a pardon or a commutation of the sentence. Furthermore, the article specifically provides for an amnesty in circumstances where that is appropriate for classes of

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281. Most states were in favor of imposing upon the national government responsibility for protecting individual human life against both the state and private individuals. GUIDE, *supra* note 79, at 120.

282. GUIDE, *supra* note 79, at 122.

individuals as distinguished from a particular person.

The drafters further limited the scope of the death penalty by outlawing its application in circumstances where individuals are under 18 years of age or in cases where a convicted person is pregnant. The drafters' intent was to avoid imposition of the death penalty against young people who might be "saved" through rehabilitation measures. In addition, they sought to spare the unborn child from either death or life as an orphan.<sup>283</sup>

Finally, Article 6 explicitly sent a signal to the international community that it was not intended to delay or prevent the abolition of capital punishment. The final paragraph of Article 6 says so: "Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the Present Covenant."<sup>284</sup> In fact, the structure of the text indicates that Article 6 is directed towards encouraging nations to protect the right to life and to abolish capital punishment.

While the text does not focus expressly on the measures that states must take to protect life, Article 6 contemplates that states must give wide ranging support to human life.

Moreover, the general intent interpretation theory that you find objectionable has strong support in the writings of some well respected academic lawyers. Some of these themes are reflected in an excellent collection of essays on protecting the right to life at international law.<sup>285</sup> These interpretations of Article 6 are consistent with a proper construction of human rights statutes.

As you read the text in its context, you can see that the scope of its coverage is broad. Moreover, from a "practice" standpoint, a "thumbnail sketch" of the first thirteen years of Human Rights Committee interpretation of Article 6 reveals the following cause of events.<sup>286</sup>

During the first year, Human Rights Committee members requested the reporting nations to furnish information regarding offenses for which the death penalty could be imposed, the frequency of the death penalty, and how such sentences were car-

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283. GUIDE, *supra* note 79, at 142-43.

284. GUIDE, *supra* note 79, at 144.

285. See THE RIGHT TO LIFE IN INTERNATIONAL LAW (B.G. Ramcharan ed., 1985).

286. Obviously, it is beyond the scope of this discussion to independently evaluate the "truth" of national representatives' assertions made in response to Committee questions.

ried out.<sup>287</sup> Committee members also requested data regarding the reduction of one nation's (Ecuador's) infant mortality rate.<sup>288</sup>

These inquiries suggest that at an early stage the Human Rights Committee believed that the right to life encompassed state action affecting capital punishment and infant mortality. Committee questions assumed the existence of a (civilized) world order characterized by governmental concern for the lives of its children. In addition, the Committee recognized the political reality of capital punishment's existence.

The second annual Human Rights Committee report reflected similar questions regarding the categories of crimes that were punishable by death. In addition, countries were asked to furnish statistics regarding their application of the death penalty over the past several years.<sup>289</sup> In a noteworthy development, the Committee requested that the Danish representative furnish information regarding what was being done to combat infant mortality, maternal mortality, and drug abuse.<sup>290</sup>

Thus, in practice, the Committee reaffirmed the view that the right to life involved not just the death penalty, but also encompassed the issues of infant mortality and life expectancy.<sup>291</sup> Furthermore, the Human Rights Committee seemed to believe that the right to life encompassed state action to combat not only infant mortality but also maternal mortality, and chemical dependency.

Moreover, Committee practice was remarkable because the Committee explored the circumstances in which the police and security forces in several nations could use their weapons.<sup>292</sup>

In at least one case involving a nation that had abolished the death penalty (The Federal Republic of Germany), the Human Rights Committee broadened its inquiry. The Commit-

287. See e.g., [1977-1978] 2 Y.B. of the Hum. Rts. Comm. 229 (1986) [hereinafter YEARBOOK (77-78)], questions asked of the Syrian Arab Republic; and at 232, questions asked of Tunisia.

288. *Id.* at 234.

289. *Id.* at 256 (Committee questions directed to Libya.)

290. *Id.* at 259. No death sentence had been carried out in Denmark since 1946.

291. *Id.*

292. The former German Democratic Republic, *id.* at 264, Czechoslovakia, *id.* at 261, and Iran, *id.* at 275, were asked questions along these lines.

In addition, the Committee requested information regarding whether political offenses in Iran were punishable by death; the number of executions performed in recent years; and whether Iran had considered abolishing the death penalty.



tee asked how the Federal Republic protected the right to life as it related to the murder rate, the safety of laborers, industrial accidents and the higher rate of infant mortality among migrant workers. In addition, the Committee was concerned about the infant mortality rate among the poor, the safeguards regarding arbitrary use of force by police and military personnel in case of riot or escape from prison or arrest,<sup>293</sup> and the prevention of drug abuse.

The Committee also asked state representatives of Yugoslavia,<sup>294</sup> the former Soviet Union,<sup>295</sup> Mauritius,<sup>296</sup> and the former Byelorussian Soviet Socialist Republic<sup>297</sup> whether their countries had considered the possible abolition of the death penalty.

Thus, the second annual report expanded the scope of inquiry to include maternal mortality, drug abuse, police violence, the circumstances in which a woman could obtain an abortion, worker safety, capital punishment for political offenses, and state plans to abolish the death penalty. Committee questions often depended upon the steps that nations had taken to protect life. For example, where nations had abolished the death penalty, questions focused more on the preservation of life in other areas like infant health and employee safety.<sup>298</sup>

The third annual report of the Human Rights Committee found Committee members asking about capital punishment for economic crimes (e.g., "misuse of public funds and embezzlement").<sup>299</sup> In addition, in at least one case, the question was raised regarding how often capital punishment had been imposed since the state (Bulgaria) had adopted the ICCPR.<sup>300</sup>

The Committee (Romania) pointed out that Article 6 requires states to take necessary measures to reduce infant mortality, but that the protection of adult life was equally important.<sup>301</sup>

In another case (Spain), some Committee members expressed concern that the death penalty had been replaced by

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293. *Id.* at 278.

294. *Id.* at 281.

295. *Id.* at 285.

296. *Id.* at 289.

297. *Id.* at 294.

298. *Id.* at 278 (inquiries made of the Federal Republic of Germany's government).

299. YEARBOOK (79-80), *supra* note 15, at 481. These inquiries flowed from Romania's initial report.

300. YEARBOOK (79-80), *supra* note 15, at 476.

301. YEARBOOK (79-80), *supra* note 15, at 481.

long prison sentences of between thirty and forty years.<sup>302</sup> The Committee asked regarding the possibilities existing for pardon or appeal of a sentence of capital punishment<sup>303</sup> and how one state (the former Ukrainian S.S.R.) could reconcile its policy of reforming and re-educating convicts while continuing to execute some of them.<sup>304</sup>

In another report involving human rights protection in the dependent territories of a nation (the United Kingdom), the Committee asked about comparative rates of infant mortality for the territories and the "metropolitan" state.<sup>305</sup> Committee members wanted information involving the prospects for abolishing the death penalty in the territories and clarification on possible capital punishment of juveniles.<sup>306</sup> Finally, the Committee wanted to know information concerning territorial laws affecting genocide.

In at least one instance (Cyprus) the report indicated that the death penalty could not be imposed upon persons under the age of sixteen.<sup>307</sup> Implicitly, it seems that for individuals who were over sixteen the state could impose such a penalty.<sup>308</sup>

In another context (Finland's first report), the Committee asked questions involving national measures to protect life through enhancing maternity benefits and facilities, maintaining adequate nutrition levels for children and adults, protecting the environment, and supporting the right to work.<sup>309</sup> This inquiry provoked a response from the affected country that the nation had extensive legislation protecting the social welfare and providing for medical care; but that the government felt that these issues fell within the purview of articles nine through twelve of the International Covenant on Economic, Social and Cultural Rights.<sup>310</sup> Further, apparently for the first time, a question was raised involving the transplant of human tissue, for the Finnish representative said that it was "expressly prohibited" to take

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302. YEARBOOK (79-80), *supra* note 15, at 486.

303. YEARBOOK (79-80), *supra* note 15, at 495.

304. YEARBOOK (79-80), *supra* note 15, at 495.

305. YEARBOOK (79-80), *supra* note 15, at 503.

306. YEARBOOK (79-80), *supra* note 15, at 503.

307. YEARBOOK (79-80), *supra* note 15, at 196.

308. The state representative said that where the Covenant conflicted with the penal code of the Republic, the Covenant provisions prevailed. This suggested that in some states, the ICCPR is the "supreme" human rights protection for citizens.

309. YEARBOOK (79-80), *supra* note 15, at 514.

310. YEARBOOK (79-80), *supra* note 15, at 516.

medical measures against the will of a patient.<sup>311</sup>

These initial reports indicate that some Human Rights Committee members' broad interpretation of Article 6 met early "state resistance" in areas affecting economic and social rights. While this is understandable, one also is reminded that the ICCPR and the International Covenant on Economic, Social and Cultural Rights overlap in many respects, share some identical provisions and have a common origin.<sup>312</sup>

During the fourth annual report of the Human Rights Committee, states were asked what were becoming routine questions regarding the types of offenses for which capital punishment could be imposed, against whom capital punishment could be imposed, and whether the particular country had considered abolishing capital punishment.<sup>313</sup> In addition, the Committee frequently raised concerns about steps taken to reduce the infant mortality rate, the nation's legal position regarding abortion, and regulation of police use of firearms.<sup>314</sup>

The Committee also requested information concerning measures protecting the right to life as a "social value." Such measures were contrasted with criminal sanctions for protecting the right to life.<sup>315</sup>

Some Committee members also commented on a Mongolian law exempting women from the imposition of the death penalty and expressed hope that that "humanitarian exclusion" would apply to men as well.<sup>316</sup>

In addition, members also asked the representative of one state (Iraq) whether the death penalty applied to certain non-violent offenses, for example, membership in more than one political party.<sup>317</sup>

In one case (Senegal), the Committee asked what was meant by the statement that a minor who was above the age of thirteen would be sentenced to ten to twenty years imprisonment if the

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311. YEARBOOK (79-80), *supra* note 15, at 517.

312. See INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 41-43.

313. See YEARBOOK (79-80), *supra* note 15, at 542 (Mongolia); at 545-46 (Iraq); at 556 (Senegal).

314. See, e.g., questions put to the representative of Canada, YEARBOOK (79-80), *supra* note 15, at 550.

315. These comments were made in the context of Poland's report. YEARBOOK (79-80), *supra* note 15, at 536.

316. YEARBOOK (79-80), *supra* note 15, at 542.

317. YEARBOOK (79-80), *supra* note 15, at 546.

death penalty were pronounced.<sup>318</sup> The Committee also wanted information regarding whether pregnant women were executed.

In a move reflecting Committee sensitivity and flexibility involving the circumstances of individual states, the Committee took a somewhat advisory role regarding Suriname's report. The Committee noted that it was dealing with a new government which was creating a new constitution and laws.<sup>319</sup> Concerning the right to life, the Committee members requested information about the public health insurance system that had been promised for Suriname's economically disadvantaged residents and for public civil servants.

The Committee also requested information regarding legislation which gave a state's (Columbia's) security forces immunity involving operations which resulted in the death of individuals.<sup>320</sup> Committee members re-emphasized that the right to life meant more than avoiding death at the hand of another human being, but also involved the necessity of creating appropriate economic and social conditions.<sup>321</sup> This emphasis implies a general process of social, political and economic development.

Similar concerns involving protecting the right to life in the context of developing societies were reflected in the summaries of the Committee's fifth annual report. The Committee pointed out that the right to life protection extended beyond the arbitrary deprivation of individual life and placed upon authorities an affirmative duty to take measures that would help enhance the likelihood of individuals having safe, productive lives. Thus, for example, the Committee asked about national efforts to reduce infant mortality, illiteracy, unemployment and the risk of individuals falling prey to either common law murder or political murder.<sup>322</sup>

Several national representatives were asked specifically about measures taken to improve their countries' public health systems. For instance, Committee members requested data regarding Tanzanian government steps to protect life in rural areas by improving public health.<sup>323</sup>

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318. YEARBOOK (79-80), *supra* note 15, at 556.

319. YEARBOOK (79-80), *supra* note 15, at 565.

320. YEARBOOK (79-80), *supra* note 15, at 561.

321. YEARBOOK (79-80), *supra* note 15, at 561.

322. See, e.g., [1981-1982] 2 Y.B. OF THE HUM. RTS. COMM. 247-48, U.N. Doc. CCPR/3/Add.1 (1989) [hereinafter YEARBOOK (81-82)], discussing Venezuela's report.

323. *Id.* at 266. Similarly, Committee members requested that Mali's representative

Committee members emphasized that the right to life was inherent, its protection extended beyond penal laws,<sup>324</sup> and its protection should be manifest in social and humanitarian law.<sup>325</sup> It is not surprising, therefore, that Committee concern for protecting life would encompass public health issues including programs to deal with drug abuse. An example of such concern involved the Committee's request for information concerning Portugal's laws prohibiting drug dependency.<sup>326</sup>

Nevertheless, the Committee maintained its steadfast concern for matters involving capital punishment and governmental use of armed force against private persons. Accordingly, the Committee requested information concerning government regulation of the use of firearms by public officials,<sup>327</sup> the circumstances in which pregnant convicts could be executed,<sup>328</sup> governmental plans for abolishing the death penalty,<sup>329</sup> and the frequency of commuted capital sentences.<sup>330</sup> Members of the Committee noted that the ultimate aim of the Covenant was to convince countries to abolish the death penalty.<sup>331</sup>

The representative of Mali made the interesting observation that his nation would conform its behavior to that taken at the regional level in Africa regarding human rights. This suggests that the evolution of international law right to life standards

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furnish information concerning governmental measures to promote improved public health. *Id.* at 270.

324. *Id.* at 261 (discussion of the report of Barbados).

325. *Id.*

326. *Id.* at 278.

327. *Id.* at 256 (questions raised with the Italian representative). Similarly, in considering Jamaica's report, the Committee requested information concerning what steps were taken to control the police use of firearms. *Id.* at 273.

328. *Id.* at 261 (Barbados); and *id.* at 270 (Mali).

329. For example, the Committee requested what consideration the governments of Mali, *id.* at 270; Tanzania, *id.* at 266; Norway, *id.* at 282; and Jamaica, *id.* at 273, had given to the possible abolition of the death penalty. The Jamaican representative was asked whether the Jamaican Parliament had made progress in considering legislation which would have abolished the death penalty. *Id.* Furthermore, the Committee requested information about the circumstances in which the Governor General could exercise the prerogative of commuting a sentence. Moreover, in response to a Committee request for information concerning whether the death penalty had been abolished in Norway, the Norwegian representative stated that public opinion was deeply split on the abolition of the death penalty and that its abolition had just barely passed in Parliament.

330. For instance, the Tanzanian representative was asked for information about the number of death sentences that had been commuted following the adoption of the Covenant. *Id.* at 266.

331. *Id.* at 270 (discussion with state representative of Mali).

could be influenced profoundly by regional practice.

The Sixth Annual Human Rights Committee report raised some of the same questions as before especially regarding capital punishment, infant mortality, and abortion.<sup>332</sup>

Further, the Committee explored some noteworthy new issues reflecting the evolution of the scope of Article 6. Thus, Committee members asked for information concerning the economic, social and administrative measures taken to ensure the quality of life, protect workers' health,<sup>333</sup> safeguard the environment, and regulate food and pharmaceutical products.<sup>334</sup> Committee members were also concerned about national drug abuse policy. Accordingly, they questioned the Netherlands' state representative regarding Dutch legislation which seemed lenient, and perhaps conflicted with the aim of protecting the right to life.<sup>335</sup>

The Committee reaffirmed that Article 6 requires states to take "affirmative action" to protect human beings against crimes, epidemics and infant mortality.<sup>336</sup> Moreover, the Committee continued pressing for information regarding the rules concerning the use of force by police and security forces.<sup>337</sup> For example, the Committee asked about Guyana's investigation of the mass deaths occurring at Jonestown, as well as the assassination of a leading political activist and scholar (Walter Rodney).<sup>338</sup>

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332. For example, one state's (Japan) representative said that a large majority of citizens favored retaining the death penalty and accordingly, its abolition was not contemplated. *Id.* at 342. Part of the reason for continued public support for capital punishment seemed to be the existence of recurrent brutal crimes. *Id.* at 342. On the other hand, the Committee noted with approval that the Netherlands intended to abolish the death penalty. *Id.* at 344.

See also the Committee questions to the Moroccan representative regarding the circumstances in which the death penalty could be applied for "crimes against the internal and external security of the state," and the fact of the death penalty still being allowed for persons below 18 years of age, and for pregnant women who had given birth forty days prior to the imposition of the penalty. *Id.* at 350.

Similarly, regarding infant mortality, the Committee expressed continuing concerns about comparative rates of infant mortality in metropolitan and dependent territories. Thus, in regard to Committee inquiries the Dutch representative said that the infant mortality rate in the Netherlands was 8.6 per 1,000 in 1980 compared with 15.5 per 1,000 in 1979 in the Netherlands Antilles. *Id.* at 347.

333. *Id.* at 339 (inquiries raised in response to Japan's report).

334. *Id.*

335. *Id.* at 344.

336. *Id.* at 360 (response to Rwanda's report).

337. *Id.* at 364 (Guyana's report).

338. *Id.*

Committee attention also focused on whether capital trials were conducted with procedural safeguards contemplated by the Covenant,<sup>339</sup> and whether the death penalty had been imposed for charges such as "war on God" and "war on God's property."<sup>340</sup>

In addition, the Human Rights Committee in its general comments following the sixth report interpreted Article 6 broadly. Committee general comment 6(16) stated that Article 6 applies to curbing war, state violence, disappearances and poor health conditions.<sup>341</sup> This interpretation was built in part upon Committee questions during the first six years of its reports. Such questions involved steps that individual states had taken to protect human life in areas including health care, environmental protection, reduction of infant mortality, and even working conditions. The Committee "linked" protecting life under penal statutes and through governmental social and economic policy.

Moreover, the Committee made it plain that Article 6 was directed towards the eventual abolition of the death penalty. For example, the Committee annual reports repeatedly manifested concern with gathering information involving what states are doing to abolish the death penalty.<sup>342</sup> In a similar vein, the Committee sought information concerning the circumstances in which the death penalty is imposed upon individuals under eighteen or pregnant women. The Committee also raised the "cross-over" issue of national laws affecting genocide.

In short, the first six years of the Committee practice indicate that the right to life was given a general (and perhaps generous!) interpretation.

The seventh annual report of the Human Rights Committee demonstrated continued concern involving capital punishment imposition, reducing infant mortality, regulating abortion, limiting governmental firearm use against civilians, and curbing disappearances.

More specifically, the Committee asked what were the "grave military offenses" and "highway robbery" to which the

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339. *Id.* at 371-72 (report of Iran).

340. *Id.* at 372.

341. *Id.* at 382-83.

342. See, e.g., reports of Soviet Union, YEARBOOK (77-78), *supra* note 287, at 285; Mauritius, YEARBOOK (77-78), *supra* note 287, at 289; Senegal, YEARBOOK (79-80), *supra* note 15, at 556; and Morocco, YEARBOOK (81-82), *supra* note 322, at 350.

death penalty could be imposed,<sup>343</sup> what was meant by the assertion that a person's life could be taken by "necessity," and whether such necessity might include abortion and euthanasia.<sup>344</sup> Furthermore, the large gap in life expectancy between aboriginal and settler populations drew continuing Committee attention. In one case (Australia), Committee members pointed out that the infant mortality rate was three times higher for the aboriginal population.<sup>345</sup> In another case, Committee members requested information concerning the measures that the French had taken to reduce infant mortality both in metropolitan France and in the territories.<sup>346</sup>

Regarding abortion, questions were asked concerning the severity of penalties for violating abortion law,<sup>347</sup> the legislative protection of fetuses,<sup>348</sup> and applicable provisions involving "voluntary abortion."<sup>349</sup>

Similarly, as to states' use of arms against their civilians, Committee members inquired concerning deaths of Miskito Indians in Nicaragua,<sup>350</sup> Peruvian regulation of force by governmental or police agencies,<sup>351</sup> and the use of force by French security forces and police.<sup>352</sup>

The Committee also queried concerning the jurisdiction of civilian versus military courts in cases involving "treason in a foreign war."<sup>353</sup>

In keeping with the Committee's longstanding concern about protecting human life through social and humanitarian law, the Committee requested information regarding steps taken to meet people's need for food, improved public health and general standards of living.<sup>354</sup> Furthermore, Committee members requested information concerning what measures had been taken to protect individuals from criminality and to check both rising delinquency and unemployment. The Committee considered

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343. U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40, U.N. Doc. A/38/40 (1983) (Mexico's Report).

344. *Id.* at 22 (Iceland's report).

345. *Id.* at 29.

346. *Id.* at 71.

347. *Id.* at 29 (Committee questions involving Australia's report).

348. *Id.* at 41 (Austria's report).

349. *Id.*

350. *Id.* at 50.

351. *Id.* at 61.

352. *Id.* at 71.

353. *Id.* at 61.

354. *Id.*



these phenomena as threats to the lives of both families and individuals.<sup>355</sup>

The Committee also confronted the extraordinarily complex and tragic human situation reflected in conditions existing among the hapless inhabitants of Lebanon. The Committee faced a number of dilemmas. One was that the Lebanese report did not reflect the state of affairs of Lebanon; the government did not have control over much of the country.<sup>356</sup>

The Committee raised questions concerning the massacres in the Palestinian refugee camps of Sabra, and Shatila,<sup>357</sup> steps taken to protect the lives of Palestinians and Lebanese citizens who had been kidnapped or who had disappeared, the continued existence of a tradition of "vendetta" to protect family honor,<sup>358</sup> and limitations placed on the use of armed force by the police and security forces.<sup>359</sup>

The eighth annual report of the Human Rights Committee included for the first time several second periodic reports. The second periodic reports were an update on the progress which nations had made after filing their first report. The second reports included information concerning the specific implementation of various provisions of the ICCPR.<sup>360</sup> The eighth report witnessed the Committee's continued questions involving capital punishment, abortion, governmental violence against civilians, and improving public health.<sup>361</sup>

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355. *Id.* at 71 (France's report).

356. *Id.* at 79.

357. *Id.* at 81.

358. *Id.* at 82.

359. *Id.*

360. Yugoslavia had the distinction of being the first nation to file a second periodic report. U.N. GAOR, Hum. Rts. Comm., 39th Sess., Supp. No. 40, at 48, U.N. Doc. A/39/40 (1984) [hereinafter U.N. Doc. A/39/40]. The Yugoslav delegation had agreed to an "experiment" suggested by the Human Rights Committee, whereby there was an exchange of questions and answers between the Committee and the Yugoslav delegation before the official meetings. This helped facilitate the discussion at the meetings. *Id.* at 48.

361. Thus for example, the Committee requested information involving the frequency of capital punishment imposition under Indian law, *id.* at 50, the high infant mortality rate in rural areas, and whether the government had planned to extend medical care to such areas. *Id.* Further information concerning Indian police use of firearms and prosecution for improper use of such firearms was requested. *Id.*

Similarly, in examining the first report of Egypt, the Committee noted with regret that measures had not been taken to abolish capital punishment. *Id.* at 56. In addition, members of the Committee requested information concerning life expectancy and infant mortality. *Id.*

Likewise, Committee members requested information concerning whether the Gam-

READER: What about further developments in the evolving interpretation of Article 6?

WRITER: One example is the Committee acknowledgement that social, economic and political forces all impacted the protection of human rights including the right to life. Accordingly, a different method had to be used in approaching the Salvadorian situation. In that regard, the Committee requested information concerning the tremendous number of civilians killed in the Salvadorian civil war and whether the mass killings reflected government policy.<sup>362</sup> In addition, the Committee asked whether the government had effectively investigated and prosecuted individuals (including security forces) responsible for taking lives. Questions were also raised concerning the precise number of individuals who had disappeared and whether individuals under sixteen years of age could be the victims of capital punishment.<sup>363</sup>

Another noteworthy case reflecting Committee concerns involved Sri Lanka. Issues raised included government protection of children from epidemics and hunger, the reduction of people killed during "intercommunal clashes," and police regulations allowing police to take possession of bodies, and bury and cremate them without witnesses.<sup>364</sup>

Further, the Committee requested comparative information about infant mortality among ethnic communities like the Maoris of New Zealand.<sup>365</sup> This question reflected the Committee's continuing concerns involving protecting minority group members' lives in diverse societies.

Furthermore, members wanted to know what was being done to alleviate the continuing tragedy of immolation and self-immolation, particularly among young Islamic women in India who are unable to pay a required marital dowery.<sup>366</sup>

The Committee also raised a constitutional law "checks and balances" question regarding the relationship between an independent Gambian judiciary and an executive branch with the

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bian authorities had considered the abolition of the death penalty, *id.* at 61, data involving infant birth and death rates and what was being done to improve life expectancy in the villages. *Id.* at 61-62. Finally, a question was asked concerning the legality of abortion in Gambia.

362. *Id.* at 14.

363. *Id.*

364. *Id.* at 22.

365. *Id.* at 34.

366. *Id.* at 50.

perogative to commute death sentences.<sup>367</sup>

In the context of the Democratic People's Republic of Korea initial report, the Committee sought further clarification regarding what was meant by "international murder."<sup>368</sup>

A Committee member also requested information concerning Panamanian agricultural development plans because Article 6 also involved the elimination of hunger and malnutrition.<sup>369</sup>

In reviewing additional information submitted by the Republic of Chile, the Committee asked whether links existed between non-official groups of citizens and the public authorities. Such citizens sometimes claimed to be assistants of the police in maintaining law and order.<sup>370</sup> The Committee also asked about numerous other issues including legislation to protect the lives of mine workers, information on public health and government measures to reduce unemployment.<sup>371</sup>

In a rather dramatic development . . .

READER: Dramatic?!

WRITER: Yes, I would say "dramatic development," the Committee asked the representative of the former German Democratic Republic (G.D.R.) about his country's attitude toward nuclear disarmament in Europe.<sup>372</sup> Accordingly, the Committee had raised, apparently for the first time in an annual report, the question of nuclear disarmament as an important aspect of the protection of the right to life. This question probably flowed from the Committee's adoption approximately a year and a half before of general comment 6(16).<sup>373</sup> The Committee also requested information about the G.D.R. position concerning the so-called "principle of unilateral renunciation of military force."<sup>374</sup>

In an interesting reply, the G.D.R. representative asserted: that the right to life and the right to peace were inextricably linked; that the death penalty was imposed only in circumstances of very serious crimes, and then only rarely; and that to preserve peace and save millions of lives from nuclear war, the

367. *Id.* at 61.

368. *Id.* at 69.

369. *Id.* at 74.

370. *Id.* at 84.

371. *Id.* at 84-86.

372. *Id.* at 94-95.

373. YEARBOOK (81-82), *supra* note 322, at 382-83.

374. U.N. Doc. A/39/40, *supra* note 360, at 95.

death penalty was excusable.<sup>375</sup>

Moreover, in comments that suggest the issues of euthanasia and organ transplantation had been broached, the G.D.R. representative said that legislation proscribed active assistance in ending a person's life and provided for the punishment of medical personnel who actively participated. The G.D.R. had developed a practice regarding organ transplants which required the consent of both parties and their relatives; however, no legislation regulating such transplanting existed.<sup>376</sup>

At the beginning of its deliberations for the ninth annual reporting period, the Human Rights Committee issued another general comment on the right to life. General comment 14(23) noted that "weapons of mass destruction" threaten human life, drained vital resources from crucial "economic and social purposes" and fostered fear and suspicion among states.<sup>377</sup> Accordingly, the Committee called for a ban on the "production, testing, possession, deployment and use of nuclear weapons."<sup>378</sup>

General comment 14(23) provoked intense discussion within the United Nation's Third Committee regarding protecting life.<sup>379</sup> Nevertheless, within the Human Rights Committee, members seemed convinced it was within their Committee's mandate to appeal to states acceding to the ICCPR for a nuclear weapons ban. Such a ban would preserve human life.<sup>380</sup> However, some Committee members seemed to feel that their mandate did not extend to discussing details of removing threats of war.<sup>381</sup>

The Human Rights Committee also considered recurrent themes involving types of capital offenses, the infant mortality rate, the regulation and investigation of firearm use by police, the likelihood of abolishing the death penalty,<sup>382</sup> abortion and

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375. U.N. Doc. A/39/40, *supra* note 360, at 95.

376. U.N. Doc. A/39/40, *supra* note 360, at 96.

377. U.N. GAOR, Hum. Rts. Comm., 40th Sess., Supp. No. 40, at 162, U.N. Doc. A/40/40 (1985).

378. *Id.*

379. *Id.* at 6.

380. *Id.*

381. *Id.*

382. For instance, one state representative (Trinidad and Tobago) stated that a lively debate existed with regard to the abolition of the death penalty; and that the government was seeking a broader consensus. *Id.* at 22.

Similarly, Committee members requested information regarding whether Afghanistan was inclined to abolish capital punishment, the frequency with which it was imposed, and statistics including how many death sentences had been executed, and the

disappearances of human beings.<sup>383</sup>

Committee members seemed especially interested in states' views on the Committee's published general comments about the scope of Article 6.<sup>384</sup> Responding to Committee members' requests for information regarding the Soviet Union's perspective, the Soviet representative stated that their delegation "welcomed and fully supported" the Committee's general comments regarding the scope of Article 6. The Soviet Union sanctioned the view that preventing war, acts of genocide and other acts of "mass destruction," were the highest duties of the state.<sup>385</sup>

In contrast, when the Committee inquired concerning "positive measures" that the United Kingdom may have taken to avert the "danger of thermonuclear war,"<sup>386</sup> the representative said that his government greatly respected the Committee's position on the general interpretation of Article 6. Nevertheless, the government "did not necessarily agree wholeheartedly" with all that the Committee had said.<sup>387</sup> Further, the representative said that in his opinion the proper forum to discuss disarmament was not the Human Rights Committee; however, his government's allegiance to protecting human rights and especially the right to life, was firm.<sup>388</sup>

Accordingly, it seemed that ideological differences between free market and (state) socialist nations may have effected their "official" views on nuclear disarmament and on the interpretative scope of Article 6.

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number of people who had been pardoned. The Committee also wanted to know what were the "unforgiveable crimes" for which death might be imposed. *Id.* at 119. Committee members sought information regarding whether the court could impose the death penalty, the appellate process, and what government mechanisms were available to investigate alleged arbitrary killings. *Id.*

383. For example, in the Dominican Republic's report, Committee members noted their concern about the disappearance of a number of individuals and requested follow-up information about investigations of alleged disappearances. *Id.* at 73. Committee questions also focused on alleged police excessive use of force; and whether such use had been investigated and the results of the investigation. In addition, information concerning the growth rate of the Dominican Republic's population, as well as its infant mortality rate, was solicited. Committee members also wanted to know whether abortion was legal. *Id.*

384. *See, e.g.,* Committee questions posed to the Soviet Union. *Id.* at 50.

385. *Id.* Likewise, when asked for reactions to the Committee's general comments on Article 6, *id.* at 127, the Ukrainian representative said that his government fully supported the views of the Committee in its general comments 6(16) and 14(23). *Id.* at 128.

386. *Id.* at 106.

387. *Id.*

388. *Id.*

In an interesting remark, one Committee member pointed out that a connection existed between the need to prevent thermonuclear war and the adoption of laws prohibiting "propaganda for war" under Article 20 of the ICCPR.<sup>389</sup> Thus the development of Article 6 seemed inevitably to "push" it into the "territory" of other articles of the ICCPR. In so doing the Committee continued a trend of interpreting Article 6 as a vital part of an "organically" whole document. The ICCPR is organically whole in the sense that it fits together in an organized manner for the common purpose of protecting human beings.

In another development involving protecting the right to life in the context of civil wars, the Afghan representative was asked whether his government shared the view that the "substance" of Article 6 was reflected in the 1949 Geneva Convention and Additional Protocol No. II concerning "minimum guarantees in armed conflict not of an international character."<sup>390</sup> In addition, Committee members wanted to know whether foreign troops in Afghanistan complied with the state's obligation under the ICCPR.<sup>391</sup>

During the tenth annual reporting period, Committee members continued their quest for governmental responses to protecting life in light of general comments 6(16) and 14(23).<sup>392</sup> For example, in response to Committee questions, Luxembourg's representative said that Luxembourg neither possessed nor manufactured nuclear armaments<sup>393</sup> and that Luxembourg had signed the treaty on the non-proliferation of nuclear weapons.<sup>394</sup>

Likewise, many Committee members asked what practical steps Sweden had taken regarding the Committee's general comments 6(16) and 14(23).<sup>395</sup> Replying to the Committee questions, the Swedish representative said, among other things, that Sweden had conducted a national study on disarmament and development focusing on the social and economic effects of converting from military to civilian production.<sup>396</sup>

The Finnish representative stated in response to similar

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389. *Id.*

390. *Id.* at 119.

391. *Id.*

392. U.N. GAOR, Hum. Rts. Comm., 41st Sess., Supp. No. 40, Annex 8, U.N. Doc. A/41/40 (1985).

393. *Id.* at 16.

394. *Id.*

395. *Id.* at 24.

396. *Id.*

questions that Finnish legislation was not inconsistent with either general comment 6(16) or 14(23).<sup>397</sup>

On a different note, Committee members indicated their regret that the Federal Republic of Germany's Government had seemed to disregard the Committee's general comment 6(16) and 14(23). The German representative commented that his government could agree with the Committee's general comment 6(16) as far as that comment involved preventing war.<sup>398</sup> The representative said that his government viewed the Committee's general comment 14(23) as a deviation from the Committee's "mandate."<sup>399</sup> The questions involved under comment 14(23) fell within the "competence" of other international or United Nations bodies.<sup>400</sup>

At the conclusion of the German report, Committee members rejected the German government's interpretation of the legitimate scope of the Committee's inquiry.<sup>401</sup> The Committee's view was that the German government had adopted a "principle of *lex generalis* and *lex specialis*." That principle, as applied by the German government, was that the Committee ought not to involve itself in the details of preventing nuclear war. The German government's position seemed to be that other international documents covered such issues.<sup>402</sup> The Committee said that it adopted the general comments to avoid attempts to narrowly interpret the right to life.<sup>403</sup>

In contrast to the German response, the Czechoslovak representative asserted that his government supported the conclusions that the Committee made in its general comments 6(16) and 14(23). Czechoslovakia believed that the production, testing, possession and deployment of nuclear weapons constituted "crimes against humanity."<sup>404</sup>

Another interesting case involved possible "conflict" of international and domestic laws. In response to Committee concerns, Luxembourg's representative said that the death penalty could not be reintroduced in his country after the Sixth Protocol

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397. *Id.* at 38.

398. *Id.* at 61.

399. *Id.*

400. *Id.*

401. *Id.* at 70.

402. *Id.*

403. *Id.*

404. *Id.* at 74.

to the European Convention on Human Rights had been adopted. This was because international norms had primacy over national ones.<sup>405</sup>

In a different context, a rather novel question arose involving state policy affecting the sentencing of insane people.<sup>406</sup> In response to Committee concerns, the Mongolian representative indicated that those who committed "socially dangerous acts," but who lacked mental capacity, were subject to compulsory psychiatric intervention.<sup>407</sup>

In addition, on a different topic, at least one Committee member thought that the Mongolian governmental statutes might be inconsistent with Article 6 paragraph two of the Covenant because offenses for misappropriation "or theft of property" could result in capital punishment.<sup>408</sup>

Moreover, one governmental response reflected the increased "linkages" that the Committee developed between the protection of the right to life and the right to freedom from torture. In Finland's second periodic report, the state representative noted in the context of police abuse issues that torture was a criminal offense.<sup>409</sup>

As in previous reports, the Committee requested nations to furnish information concerning the criminal offenses for which the death penalty could be imposed and the frequency with which it had been carried out,<sup>410</sup> governmental education efforts to reduce crimes involving drugs, infant mortality rate information, and the consequences of police officers killing civilians.<sup>411</sup>

Furthermore, Committee members asked questions involving how police had been trained to treat prisoners and whether environmental pollution was "punishable."<sup>412</sup>

The eleventh annual reporting period witnessed the Committee's continued evolution of the scope and meaning of Article 6. Committee attention embraced the familiar issues involving capital punishment, abortion, regulation of governmental deadly

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405. *Id.* at 16.

406. This question arose in the context of Mongolia's second periodic report. *Id.* at 49-50.

407. *Id.* at 50.

408. *Id.*

409. *Id.* at 38-39.

410. *Id.* at 86 (questions posed during Hungary's second periodic report).

411. *Id.* at 60 (inquiries made in context of Federal Republic of Germany's second periodic report).

412. *Id.* at 38 (Finland's second periodic report).



force against civilians, disappearances, and improving public health. For instance, the Committee asked the representative of Tunisia concerning what had Tunisia done to reduce infant mortality, the number of state sanctioned executions since 1985, and whether persons who obtained or helped in the obtaining of abortions could be punished under Tunisian law.<sup>413</sup> Some Committee members wanted to know the state's position regarding whether life existed from conception or from birth and, if from conception, then whether aborted fetuses were free from medical experimentation.<sup>414</sup> Questions were also asked concerning the number of people whom security forces had killed during demonstrations.<sup>415</sup>

Attention was drawn to Committee general comment 6(16) stressing that the wording of Article 6 "strongly suggested" that states should abolish the death penalty.<sup>416</sup>

In addition, there were some new "variations" on the usual "themes." Some of the more notable ones follow.

In one rather remarkable exchange, again involving Tunisia, the state representative acknowledged that with the increased emancipation of women, violence against them had also accelerated. The government had imposed the death penalty in cases of rape as a deterrent.<sup>417</sup> Thus, to protect a social value involving equality, the Tunisian government asserted that capital punishment was in effect a shield. Capital punishment protected society's (more important?) interests.

Furthermore, the Committee continued to see the rights to life and freedom from torture as interrelated. In response to a right to life related query, the Tunisian representative said that governmental officials who were guilty of torture had been sentenced to hard labor.<sup>418</sup> Interestingly, the representative asserted that members of the security forces were given a special course involving human rights legislation.<sup>419</sup>

Committee attention also focused on a state's action to establish independent investigatory bodies to help curb and pun-

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413. U.N. GAOR, Hum. Rts. Comm., 42nd Sess., Supp. No. 40, U.N. Doc. A/42/40 (1987).

414. *Id.* at 30-31.

415. *Id.* at 31.

416. *Id.*

417. *Id.* at 32.

418. *Id.*

419. *Id.*

ish the perpetration of high levels of political violence (e.g., disappearances and assassinations).<sup>420</sup>

In another case (Congo), the Committee asked for further information regarding the circumstances required for an individual under the age of sixteen to be "acquitted and handed over to his parents." Committee members also sought information concerning how responsibility for correcting the child was transferred to the parents and what the practice of the Congolese courts was.<sup>421</sup>

The Committee also confronted a situation (Iraq) involving a long list of offenses for which the death penalty could be imposed. Committee members requested clarification regarding what constituted political offenses subjecting individuals to death, the frequency of the penalty's imposition over the past seven years, and whether individuals could be put to death for insulting the Iraqi President under aggravating circumstances.<sup>422</sup> Committee members were also concerned by possible retroactive death penalty legislation.<sup>423</sup>

The twelfth annual Human Rights Committee report involved many of the issues previously discussed and a few more "developments." For instance, the Committee continued pressing for information concerning the measures taken to prevent epidemics and to reduce infant mortality<sup>424</sup> and how police were regulated in their use of firearms.<sup>425</sup> In addition, the Committee asked a number of nations their responses to the Committee

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420. These concerns were raised in the context of El Salvador's supplementary report. *Id.* at 42.

421. *Id.* at 61.

422. These issues flowed from the circumstances surrounding Iraq's second periodic report. *Id.* at 91.

423. *Id.* at 92.

424. For example, the Committee asked for information involving measures taken to reduce the Ecuadorian infant mortality rate and to expand health services for women and children. U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 74, U.N. Doc. A/43/40 (1988) [hereinafter U.N. Doc. A/43/40]. Similarly, the Committee wanted to know what was the latest information regarding Belgium measures taken to increase life expectancy, reduce infant mortality, deter epidemics, and counter malnutrition. *Id.* at 111.

425. Questions of this nature arose in Denmark's second periodic report. *Id.* at 36-37. Similarly, questions were raised regarding Columbia's regulation of police and security forces' use of firearms and whether or not, if violations had occurred, steps had been taken to prevent their recurrence. *Id.* at 122. Likewise, the Committee sought information on the Barbadoan regulation of police use of firearms and whether the government investigated and prosecuted individuals who had violated the regulations. *Id.* at 131.

general comments: Trinidad and Tobago,<sup>426</sup> Denmark,<sup>427</sup> Rwanda,<sup>428</sup> Ecuador,<sup>429</sup> Barbados,<sup>430</sup> and Japan.<sup>431</sup>

Venturing into somewhat less well trod territory, the Committee inquired whether a government (Trinidad and Tobago) was planning to develop special courses for law enforcement personnel to help prevent abuse of authority.<sup>432</sup>

The Committee members also seemed concerned by the length of time that people in a number of countries spent on death row. For instance, in evaluating Rwanda's second periodic report, the Committee asked for information involving how long some individuals had been on Death Row, and why such a large number of death sentences existed given the improved law and order situation in the country.<sup>433</sup>

In one interesting case, Committee members also asked whether individuals between the ages of thirteen and eighteen could be executed. This question arose following a comment in the Guinean report which indicated that youngsters under the age of thirteen could not be executed.<sup>434</sup>

In another case (Central African Republic) involving capital punishment, some members noted that the death penalty seemed to apply to cases involving unlawful arrests or detention and that if that were the case, the punishment was disproportionate to the crime.<sup>435</sup>

Questions continued to arise regarding certain alleged forced disappearances,<sup>436</sup> and assaults associated with para-military organizations. Thus, in one case (Colombia), the Committee requested information involving general comment 6(16), especially paragraph four relating to the disappearance of individuals, and general comment 14(23).<sup>437</sup>

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426. *Id.* at 15.

427. *Id.* at 36.

428. *Id.* at 50.

429. *Id.* at 74.

430. *Id.* at 131.

431. *Id.* at 141.

432. *Id.* at 15.

433. *Id.* at 50. Similar questions were asked of Japan, *Id.* at 141.

434. *Id.* at 59.

435. *Id.* at 65.

436. *Id.*

437. *Id.* at 122. In addition, information was requested involving measures taken to combat the so-called "death squads" and other private vigilante groups. *Id.* Members wanted to know what the government planned to do to combat the problem of involuntary disappearances, especially the steps being taken to deal with missing individuals. *Id.*

In a rather frank dialogue, Committee members requested information regarding France's response to the Committee's general comments 6(16) and 14(23). The French representative asserted the right of his nation to defend itself and claimed that its nuclear arsenal was for deterrent purposes.<sup>438</sup> He also said that only when disarmament had been achieved would requests for the banning of nuclear tests be "significant."<sup>439</sup>

In addition, information was asked about the infant mortality rate in France, as well as its overseas territories and departments.<sup>440</sup> Further, the Committee asked for information concerning whether different regulations applied to regular police activities versus police anti-terrorist responses.<sup>441</sup>

Committee members encountered a different response when they asked for Australia's views on Committee general comments 6(16) and 14(23). The Australian representative said that his country supported a comprehensive test ban on nuclear weapons and global nuclear disarmament.<sup>442</sup> His government's armed forces were defensive in nature and Australia had supported the declaration of the South Pacific as a nuclear free zone in 1985.

As in the French case, the Committee requested similar information concerning the infant mortality rate of the Aboriginal population as compared with the rest of the Australian populus. This was a follow-up query from Australia's first periodic report.<sup>443</sup>

In an intriguing line of questioning, Committee members sought clarification regarding the overlap of Aboriginal customary law with Australian criminal law; and whether the Aboriginal population was exposed to double jeopardy.<sup>444</sup>

Regarding the continuing capital punishment dilemma, Committee members asked one state (Belgium) representative whether minors over sixteen could receive the death penalty. The representative said that since the death penalty was not carried out in Belgium, it had not been contemplated to repeal the provisions affecting minors who were over the age of

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438. *Id.* at 87.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 100.

443. See *supra* notes 343-46 and accompanying text.

444. U.N. Doc. A/43/40, *supra* note 424, at 100.

sixteen.<sup>445</sup>

Some Committee members requested information involving whether the armed forces of Colombia applied the 1949 Geneva Convention when fighting against guerilla groups. Questions were raised concerning how human rights could be protected given the pervasive violence in the Colombian society.<sup>446</sup>

In a different vein, a question was raised whether a doctor in Columbia could be found guilty of a crime for ordering an abortion to save the mother's life.<sup>447</sup> The Colombian representative said that for cultural reasons, in part involving Catholicism, individuals who procured an abortion still were guilty of a crime.<sup>448</sup> Thus, Committee members confronted the reality of culture and religion's frequent pervasive effects on law.<sup>449</sup>

In a response similar to Tunisia's during the previous annual reporting period,<sup>450</sup> the Columbian representative also said that an educational campaign to sensitize the police and soldiers to human rights concerns had been conducted.<sup>451</sup>

The overviews of the first twelve annual reports demonstrate that the Committee interpreted Article 6 broadly. The thirteenth annual Human Rights Committee report followed those precedents.

Accordingly, in addition to the "standard" questions involving capital punishment,<sup>452</sup> abortion,<sup>453</sup> infant mortality,<sup>454</sup> gov-

445. U.N. Doc. A/43/40, *supra* note 424, at 116.

446. U.N. Doc. A/43/40, *supra* note 424, at 122-23.

447. U.N. Doc. A/43/40, *supra* note 424, at 123.

448. U.N. Doc. A/43/40, *supra* note 424, at 123.

449. U.N. Doc. A/43/40, *supra* note 424, at 123.

450. *See supra* note 419 and accompanying text.

451. U.N. Doc. A/43/40, *supra* note 424, at 124.

452. Committee members asked for information involving the possibility of the Mexican government abolishing the death penalty since it was not used anymore. U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 24, U.N. Doc. A/44/40 (1989). Similarly, members of the Committee asked whether the United Kingdom had considered abolishing capital punishment in any of the dependent territories. *Id.* at 36. Members also wanted to know whether the government had decided to abolish the death penalty for treason in New Zealand. *Id.* at 86.

In addition, the Committee questioned the Bolivian representative regarding the circumstances in which capital punishment could be imposed, the meaning of the term "homicide committed . . . for motives of honor," the definition of political offenses, and the identity of the authorities who could grant amnesty for political offenses. *Id.* at 95.

In the case of Cameroon, Committee members asked for which crimes a person could be sentenced to death in the Cameroon, the applicability of the death penalty to minors, and the number of persons on death row. In addition, they asked the number of executions that had been commuted and the number that had been carried out in recent years. *Id.* at 104. The Committee requested further information involving the president's criteria for exercising a pardon.

453. For example, Committee members asked the Uruguayan representative

ernmental violence against civilians,<sup>455</sup> and the more recent thermonuclear concerns,<sup>456</sup> the Committee asked about a number of interesting "life issues." For example, the question was raised regarding whether Norway planned measures to regulate the transportation and dumping of poisonous waste.<sup>457</sup> Similar questions were raised involving the steps Italy had taken to prevent toxic waste dumping.<sup>458</sup>

Furthermore, Mexico's representative was questioned re-

whether abortion was legal under any circumstances. *Id.* at 66.

Similarly, Members also wanted to know what Bolivian legislative enactments affected abortion. *Id.* at 95.

Regarding the status of Italian law affecting abortion, Committee members asked whether the fetus was considered a human being having the inherent right to life, the circumstances in which a fetus could be aborted on the grounds that she might suffer an abnormality, and the stage in the pregnancy in which a fetus obtained the status of a human being with the right to life. *Id.* at 125. The Italian representative said, in an interesting reply, that women could freely abort their fetuses during the first ninety days of pregnancy. *Id.* at 126. However, such individuals had to inform their physicians of the reason for the decision. Following the ninety days, abortions could be performed only if the mother's life was seriously endangered or if there were serious pathological abnormalities reflected in an examination of the mother. Physicians were not required to assist with abortions because of the large degree of public opposition to it. *Id.* The representative said that the law did not decide at what point a fetus became a human being.

454. *Id.* at 24 (Mexico); *id.* at 65 (Uruguay); *id.* at 86 (New Zealand).

455. For instance, members asked what were the rules governing Mexican police use of firearms, whether those rules had been violated, and if so, what measures had been taken to prevent future violations. In addition, some members asked whether alleged disappearances and deaths at the hands of the police or security forces had occurred during the reporting period, and if so, whether such accusations had been investigated and for the results of the investigation. *Id.* at 24.

In another context, questions were asked involving the Mauritian police's use of sophisticated firearms; and whether citizens could carry firearms to protect themselves. *Id.* at 113. In yet another case, the Committee asked about the nature of Italy's rules applicable to police and security forces' use of firearms; and what, if any, violations of the police and security force regulations involving firearms existed. *Id.* at 125.

456. For example, the Norwegian representative stated that Norway supported a comprehensive nuclear test ban treaty vis a vis the Committee's general comments 6(16) and 14(23). *Id.* at 14-15.

Similarly, the New Zealand representative noted that his government supported a comprehensive nuclear test ban treaty. Further, under the New Zealand Nuclear Free Zone and Disarmament and Army Control Act of 1987, New Zealand had banned nuclear weapons from its territory. *Id.* at 86.

Likewise, the Italian representative said that Italy had adopted a number of non-proliferation treaties and that it did not stockpile nuclear weapons. *Id.* at 125. He also stated that his country did not have nuclear weapon bases, and that countries with weapons on Italian soil could not use them without first obtaining Italian governmental permission. *Id.*

457. *Id.* at 14.

458. *Id.* at 125.

garding steps taken to curb death flowing from conflicts over land, clarification of why so many journalists seemed to have died mysteriously,<sup>459</sup> the regulation of new techniques for artificial fertilization, and the detention and murder of indigenous peoples and peasants.<sup>460</sup>

A Committee member also asked the state representative of one nation (the Netherlands) whether the right to life provision of the Covenant was being considered in the context of an ongoing debate regarding euthanasia.<sup>461</sup>

The Committee again drew the connection between the right to life and the right to freedom from torture as it asked the Uruguayan representative whether individuals had died recently due to police or military torture.<sup>462</sup>

Regarding the related issues of "disappearances" of individuals and government agents' abuse of civilians, the Committee asked questions involving disappearances flowing from illegal activities of Phillipines armed forces police and vigilantes.<sup>463</sup>

In a different area, Committee members asked the Phillipines representative whether a simple ban upon parents who killed their minor daughters or lovers caught in the sexual act was "overly lenient."<sup>464</sup>

Committee members asked several reporting states about the infant mortality rates of individuals from minority ethnic groups vis a vis the majority population. Thus, for example, the question was raised regarding why the infant mortality rate was about twice as high among the Maori population of New Zealand as compared to other groups.<sup>465</sup>

In addition, information was requested concerning the comprehensive accident compensation scheme that New Zealand had mentioned in its report.

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459. *Id.* at 24.

460. *Id.*

461. *Id.* at 47.

462. *Id.* at 65.

463. *Id.* at 73. Similar questions were asked in the Uruguayan context regarding the status of fifty-six alleged unresolved disappearances. *Id.* at 65-66. In addition, members sought information regarding alleged disappearances in Bolivia and the part that the National Commission for Investigation of Disappearances played vis a vis such disappearances. *Id.* at 95.

464. *Id.* at 73.

465. *Id.* at 86. Similarly, the Committee sought information regarding the infant mortality rate among the general population versus smaller ethnic groups within the Mexican population. *Id.* at 24. And in yet another context, information was requested regarding comparative infant mortality rates in the Netherlands and Aruba. *Id.* at 47.

In one case (Cameroon), Committee members asked why the mother was more severely punished for abortion than others who were involved and what limitations were placed on the ability of women to obtain abortions.<sup>466</sup>

In a capital punishment related query, the Committee asked the Togolese representative about the meaning of the terms "offense against morality" and "action threatening the external or domestic security of the state."<sup>467</sup> Similarly, in another case, the Committee expressed concern regarding the decision of Mauritius to reintroduce the death penalty for drug traffickers following a twenty-three year moratorium.<sup>468</sup>

Committee members also sought information involving whether deaths had occurred in Italian prisons. Moreover, apparently the Committee asked a question involving *in vitro* fertilization for the Italian representative said that the use and preservation of human embryos was prohibited under Italian law and accordingly the status of embryos resulting from *in vitro* fertilization was not a legal question that had arisen in his country.<sup>469</sup>

It may also interest you to know that on December 15, 1989 the United Nations General Assembly adopted a proposed "Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty."<sup>470</sup> The Second Optional Protocol entered into force on July 11, 1991; and affects over a dozen nations that ratified it.<sup>471</sup>

466. *Id.* at 104.

467. *Id.* at 55.

468. *Id.* at 113. Using the death penalty for the sale and consumption of "un-processed coca leaves," and issues of procedural fairness, in those circumstances troubled some Committee members. *Id.*

469. *Id.* at 126.

470. See Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, entered into force July 11, 1991, U.N. Doc. A/RES/44/128 (1989) [hereinafter Second Optional Protocol].

471. U.N. MULTILATERAL TREATIES, SUPP., U.N. Doc. ST/LEG/SER.E/9.

The Second Optional Protocol to the ICCPR tries to abolish the death penalty in states which have ratified the protocol. See Second Optional Protocol, *supra* note 470. Accordingly, Article 1 of the protocol states that "[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed." Second Optional Protocol, *supra* note 470, art. 1. In addition, that article provides that each state must take all necessary steps to abolish the death penalty within its borders. Second Optional Protocol, *supra* note 470, art. 1(2). The Second Optional Protocol is made specifically subject to a "no reservation" provision. That is, under Article 2 of the protocol, that ratifying states may not take a reservation to the protocol except for application of the death penalty in war time "pursuant to a conviction for a most serious crime of a military nature." Second



## II. ANALYSIS OF THE HUMAN RIGHTS COMMITTEE'S INTERPRETATION OF THE RIGHT TO LIFE IN LIGHT OF CONCERNS OF STATUTORY INTERPRETATION

During the first thirteen years of its annual reports, the Human Rights Committee has interpreted the right to life to encompass a number of issues. Those issues involve capital punishment, infant mortality, working conditions, toxic waste dumping, nuclear proliferation, prevention of war, police and military use of force against civilians, the enhancement of human life expectancy, abortion and numerous other concerns. Each issue is, however, related to preserving and enhancing human life.<sup>472</sup>

In addition, the Human Rights Committee has issued two general comments on the protection of the right to life, specifically general comment 14(23) and general comment 6(16). Those general comments affirm that the protection of the right to life goes beyond merely carefully circumscribing the circumstances in which the death penalty may be applied. In fact, the right to life encompasses freedom from "war and other acts of mass violence" and involves the obligation of states to take measures to enhance the prospects of life through reducing infant mortality and increasing life expectancy.<sup>473</sup> In addition, general comment 14(23) embraced the abolition of the use and possession of nuclear weapons. That comment marked a further development of Committee understanding regarding the meaning of protecting the right to life.<sup>474</sup>

The Committee questions and general comments regarding the right to life indicate that the Committee took seriously the general legislative history of the ICCPR.

READER: That is your point of view; but don't you think they went too far?

WRITER: Perhaps in a few instances, but generally not. Remember, the ICCPR began as part of a general international bill of rights. For political and historical reasons, that bill of rights was divided into two.<sup>475</sup> Nevertheless, when the ICCPR and the

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Optional Protocol, *supra* note 470, art. 2. Thus the Second Optional Protocol to the ICCPR recognizes the continuing trend in international human rights law toward the abolition of the death penalty — and tries to facilitate that trend.

472. See *supra* notes 287-469 and accompanying text.

473. YEARBOOK (81-82), *supra* note 322, at 382.

474. U.N. GAOR, Hum. Rts. Comm., 40th Sess., Supp. No. 40, at 162, U.N. Doc. A/40/40 (1985).

475. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 41-43.

International Covenant on Social, Economic, and Cultural Rights were adopted by the General Assembly, they shared many provisions identically,<sup>476</sup> and they were to be interpreted together.

The general legislative intent of the drafters of the document was to provide a wide protection for human rights and human life. In the drafting process, great defenders of human freedom like Eleanor Roosevelt explicitly and implicitly championed the notion that life must receive wide protection.<sup>477</sup>

Having said that, it can be argued that the actual words of the text suggest a narrower interpretation. Such an interpretation would focus primarily on the abolition of the death penalty. Unbridled statutory interpretation based on a so-called "spirit of the document" can lead to the creation of laws "knowing no boundary."

However, Article 6 must be viewed in the context of the ICCPR's overall structure. Moreover, one must bear in mind the ICCPR's relationship to the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights. These documents try to ensure human survival and freedom. Accordingly, a strong case exists for the Committee's comprehensive interpretation of Article 6. A myopic, narrow and grudging interpretation of the scope of the right to life would cripple the drafters' general intent to protect human life. That would be a regrettable result. Surely the benefit of any "doubt" should be resolved in favor of protecting life. Surely there has been enough death to go around in human history.

### III. EPILOGUE

WRITER: Human rights documents, especially those dealing with the most precious right of all, the right to life, should be broadly construed to protect life. Without life, what is there?

READER: Probably not much. But there really is not much we can really do about it. Human beings are not much good anyhow.

WRITER: Frankly, I beg to differ on that. I grant we have not done as much good as we should. But I do take Genesis 1:27 seriously when it states that we are made in the image of God —

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476. INTERNATIONAL BILL OF RIGHTS, *supra* note 21, at 41-43.

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not physically, but spiritually. For we are told that God is spirit, and they that worship God must do so in spirit and truth.<sup>478</sup> It is a great paradox of life that while we have good within, we tend to do evil.

So in that regard it does matter how we interpret and apply this statute. As a species, the human race is worth saving and every little bit helps. That is why I have spent so much of myself arguing for a "life friendly" interpretive approach. I recognize that you may argue with the result of this analysis. Nevertheless, one can learn from the religious context this lesson — namely, that the letter of the law "killeth." In other words, literalist interpretations can destroy the vitality and the intent of those who drafted the document.<sup>479</sup>

While the specific intent of some drafters may have been more narrow, we ought to give force, in this case, to the general intent. That intent allows the law to become more of a life saver — a force for progressive human development, rather than a jurisprudential "ball and chain" or anchor around our collective necks.

In closing, we are pushed back, or led forward if you like, to the interpretive insight from the biblical context that the letter of the law killeth but the spirit gives life.<sup>480</sup> Article 6 can, if appropriately *interpreted and applied*, give life.

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478. *John* 4:24.

479. In the religious context, this point is incisively argued by Bishop John Shelby Spong in his recent work *RESCUING THE BIBLE FROM FUNDAMENTALISM* (1991).

480. *2nd Corinthians* 3:6 ("[F]or the letter killeth, but the spirit giveth life.").