

ABOLITION OF THE DEATH PENALTY: A PROCESS IN MOTION.

by
Roni Tohme

Faculty of Law
Institute of Comparative Law
McGill University, Montreal
November 2001.

A thesis submitted to the Faculty of Graduate Studies and Research in partial
fulfillment of the requirements of the degree of Master of Laws (LL.M.)



National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-79148-3

Abstract

Following slavery, capital punishment is slowly finding its way toward abolition. This trend is manifested both in international criminal law norms and international human rights norms.

In the international criminal law field, capital punishment, accepted under the Nuremberg and Tokyo Charters, was rejected half a century later in the Statute of the International Tribunal for Former Yugoslavia, then in the Statute of the International Tribunal for Rwanda, and most recently in the Rome Statute.

Parallel to developments in the international criminal law field, a similar evolution was experienced in the area of international human rights. The trend towards abolition in the human rights field began with the restriction of the death penalty application to a certain group of people and crimes. The death penalty application was restricted on the universal scale by the International Covenant on Civil and Political Rights (ICCPR) and on the regional level by the American Convention on Human Rights (ACHR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, a European human rights instrument, Protocol No. 6 to the ECHR, shifted the trend from restriction to abolition of the death penalty. The European abolitionist intentions were echoed on the universal level with the adoption of the Second Optional Protocol to the ICCPR and on the regional level with the adoption of the Additional Protocol to the ACHR. These abolitionist instruments, as well as many accompanying methods, assisted the

abolitionist trend which is today embraced by more than half the countries of the world. The increasing acceptance of the abolitionist trend is paving the way for forming an international customary norm banning capital punishment.

For the abolitionist cause to succeed, the abolitionist trend should be accepted by retentionist countries such as the US and the Islamic states of the Middle East and Africa. In the short term, the possibility of abolishing the death penalty in these countries is slim. The long term perspective, however, suggests there is a chance that the US and Islamic states of the Middle East and Africa would join the one-hundred and nine retentionist countries to form an international customary norm that bans the death penalty.

Résumé

Après l'abolition de l'esclavage, la peine capitale est entrain de subir le même sort. Le courant qui fait appel à l'abolition de la peine de mort est manifesté dans les normes internationales du droit penal ainsi que du droit de l' homme.

Dans le domaine du droit penal international, la peine capitale qui était acceptée sous le Statut du Tribunal de Nuremberg et de Tokyo, fut rejetée un demi siecle après par le Statut du Tribunal Penal International pour l'ex-Yougoslavie (TPIY), et plutard par le Statut du Tribunal International pour le Rwanda (TPIR) et nouvellement par le Statut de Rome de la Cour Penale Internationale.

Parallèlement à ce developpement au sein du droit penal international, un developpement similaire fut experimentée dans le domaine internastional des droits de l' homme. Le courant qui tend à l' abolition dans le domaine des droits de l' homme debutant avec la limitation de l' application de la peine capitale sur un certain groupe de personnes et de delits.

L' application de la peine de mort fut limitée sur le plan international par le Pacte International Relatif aux Drita Civils et Politiques (ICCPR) et sur le plan regional par la Convention Americaine des Droits de L' homme (ACHR) ainsi que par la Convention de la Protection des Droits de L' homme et des Libertés Fondamentales (ECHR). Cependant, le Protocol No. 6 du ECHR a changé de la restriction à l' abolition de la peine de mort.

Les intentions des partisans Européens de l' abolition ont trouvé echo sur le plan universel avec l' adoption du Deuxieme Protocol Optionel du ICCPR et sur le plan regional avec

l'adoption du Protocol Additionel du ACHR.

Tous ces instruments de l'abolition de la peine de mort, aussi bien que beaucoup d'autres méthodes ont aidé ce courant, qui est aujourd'hui adopté par la majorité des pays du monde. L'augmentation du nombre des partisans de ce courant facilite la voie vers l'adoption de normes coutumières internationales qui interdit l'imposition de la peine capitale.

Afin que la cause des partisans de l'abolition trouve un futur plus brillant, il faudra que la peine de mort soit bannie des pays opposant son abolition tel les Etats Unis d'Amerique et les pays Islamiques du Moyen-Orient et d'Afrique. Une possibilité presque nulle à court terme mais dans le long terme, il y aura une chance que ces etats opposants joignent les cent neuf autres pays partisans de l'abolition pour former une loi coutumière internationale qui interdit l'imposition de la peine capitale.

Acknowledgements

Without the support of my parents, I would not be writing these lines today. Thank you Dad, for your invaluable encouragement and guidance throughout the past twenty-two years. Thank you Mom, for all your support and love.

In difficult times, two things are required: joy and wisdom. I wish to thank my sister Rita, for the joy I have felt during this past year has been because of you. Special thanks to my brother Fadi, who generously shared with me his wisdom. Not only are the two of you very special siblings, you are unique friends to me as well.

My thanks goes to God, whose guidance has led me to meet some truly exceptional people. Professor Toope is among these fine people, and I am grateful for his constructive comments and for the support he has shown me throughout my thesis work at McGill University. My appreciation also goes to Nicole Lachance, who has demonstrated true professionalism in editing this work.

I believe that friends are everything in life. During my life, I have been fortunate to always have great friends by my side. I would like to express my deep gratitude to Youssef and Marwan Jabre, who have taught me what true friendship is. In university, the spirit of friendship has linked me with Roula Abou Chabke, Rania Zeidan, Elianna Abou Antoun, Joclyne Zgheib, Mansour Kai and Toni Maalouli. To you, my dearest friends, a mere "thank you" is not enough to express my sincere gratitude. Montreal has been generous in giving me friends from all over the world. From Mexico, Julieta and Maru Uribe have stood by me

all the time. Thanks Julieta and Maru for listening, caring and sharing all your lovely moments with me. From Lebanon, Nisrine Masrouha was always there to listen. Thanks Nisso for the great moments we have had together. My thanks also goes to Carlos Amin Falho, who is a very special friend.

During this past year, I had the opportunity to spend some time with a lovely couple and their little angel. Toni, Victoria and Carl Attalah, you were my family when my parents were far away, and my friends whenever I had something to say.

Next, I would like to thank the person who gave me all the care in the world. Thank you Jamilé Khoury (Abanna). Although you are not here in body, you remain alive in my mind and I see you every time I meet your daughter, May Khoury. Thank you May for the name that you gave me and for your never-ending love. In my last lines, I would like to thank my Aunt Hoda Jabre, who has been my mother, my aunt, and my friend.

Finally, my thanks goes to God for giving me such caring parents, trustworthy friends and the energy to complete this work. Thank you, Father.

Table of Contents

Introduction...	1
Chapter One: The Abolitionist Trend...	6
I. The Trend Towards Abolition in International Criminal Law...	6
A. The International Military Tribunal at Nuremberg...	6
B. The International Tribunal for the Former Yugoslavia...	7
C. The Tribunal for Rwanda...	10
D. The International Criminal court...	12
II. The trend towards abolition in international human rights law...	15
A. The Beginnings of Human Rights Law...	15
B. The ICCPR and the Right to Life...	22
C. The American Human Rights Instruments...	27
D. The European Human Rights Instruments...	31
Chapter Two: The American Case...	44
I. The Death Penalty in the United States of America...	44
II. Room for Change...	48
A. The Right to Court-Appointed Counsel...	48
B. Race and the Death Penalty...	61
1. Discrimination at the Arrest Stage...	61
2. Discrimination in Jury Selection...	63
C. Non-Extradition and the Arbitrary Application of the Death Penalty...	70
Chapter Three: The Islamic Case...	77
I. The Death Penalty in the Islamic Law...	77
II. Room for Change...	81
Conclusion...	88
Bibliography...	90

Introduction

The death penalty has existed since ancient times.¹ In its early days, the death penalty imposed as punishment was a form of private justice. It was not applied by the state, but rather by the family or tribe of the person who had suffered damage.² With the appearance of Gods, the rationale for imposing the death penalty shifted from private revenge to a divine one.³

The first death penalty law was the *lex talonis* of the Code of Hammurabi.⁴ This text, dated 1750 BC, codified the death penalty as the sentence for twenty-five crimes.⁵ Later, in the seventh century BC, the Draconian Code of Athens prescribed death as a punishment for all crimes. Finally, the Roman law of the twelve tablets codified it in the fifth century BC.⁶ As far as 427 BC, the usefulness of the death penalty was questioned. By arguing its non-deterrent effect, Diodotus persuaded the Athenian assembly to reverse its decision to execute all adult males of the city of Mitylene.⁷

¹ G. Rabbah, *Oukoubat Al-Ihdam: Haal Am Mouchkila?* (Beirut: Nawfal Corporation, 1987) at 207.

² *Ibid.*

³ *Ibid.* at 208.

⁴ W.A. Schabas, *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 1997) at 3.

⁵ Frontline-History of the Death Penalty (by M.H. Reggio), online: Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>> (date accessed: 20 September 2001).

⁶ Death Penalty Information Center-History of the Death Penalty-Early Death Penalty Laws, online: Death Penalty Information Center <<http://www.deathpenaltyinfo.org/history2.html>> (date accessed: 20 September 2001).

⁷ *Supra* note 4 at 4.

The death penalty was applied during the Middle Ages in an arbitrary and discriminatory way. The feudal system gave many people, not only the king or emperor, the power to impose capital punishment. This expansion of power led to the arbitrary imposition of the death penalty by the feudatories.⁸ Also in this period, the fusion of political and religious powers led to the imposition of the death penalty for crimes committed against the church.⁹ Methods of applying the death penalty differed for nobility, freemen and slaves. In order to reduce pain, the nobles were executed by cutting off their heads, while the others experienced death by hanging or poison.¹⁰

In the eighteenth century, various philosophers called for the abolition of the death penalty. Montesquieu, for example, called for its restriction to murder, attempted murder, certain types of manslaughter and some offences against property.¹¹ Beccaria, on the contrary, did not call for its limitation but rather for its complete abolition. The writings of Beccaria ended the distinction in the application of the death penalty between poor and nobles,¹² and his ideas led to the promulgation of a penal code in Tuscany that eliminated it entirely.¹³

From that time on, the abolitionist movement has been flourishing. Michigan was the first jurisdiction to abolish the death penalty in 1846. Twenty years later, Venezuela abolished the death penalty, the Netherlands followed suit in 1870 and Costa Rica in 1882.¹⁴ Likewise, Brazil and Ecuador abolished the death penalty in the late 1890s and Panama, which joined

⁸ Think Quest-Death Penalty: When Life Generates Death (legally)-History, online: Think Quest <<http://library.thinkquest.org/23685/data/history.html>> (date accessed: 15 September 2001).

⁹ *Supra* note 1 at 209.

¹⁰ *Ibid.* at 210.

¹¹ *Supra* note 4 at 4.

¹² *Supra* note 1 at 213.

¹³ *Supra* note 4 at 5.

¹⁴ *Ibid.* at 6.

the club of the states of the world in 1903, has joined the abolitionist club since its formation.¹⁵

The progress of the abolitionist movement was temporarily slowed with the rise of totalitarianism in Europe after World War Two, and it was not until 1948 that the abolitionist movement regained its strength. In 1948, the Universal Declaration of Human Rights legitimized the struggle towards abolition of the death penalty.¹⁶ Since World War Two, approximately one state per year has abolished the death penalty.

In his report submitted to the UN, Norvel Morris reported that twelve countries were totally abolitionist by the end of 1965 and eleven were abolitionist for ordinary crimes.¹⁷ Three decades later, Roger Hood reported that the number of abolitionist countries has been on an increase since the last report submitted to the UN by Norvel Morris. In his book, *The Death Penalty. A World-wide Perspective*, Hood stated that fifty-eight countries are totally abolitionist, fourteen are abolitionist for ordinary crimes and thirty *de facto* abolitionists.¹⁸

Over the years, the abolitionist movement has succeeded in persuading many previously retentionist countries that the death penalty is a deadly evil. To date, more than half the countries of the world have abolished the death penalty *de facto* or *de jure*. Amnesty International reported that the number of abolitionist countries had reached one hundred and nine in June 2001. Seventy-five of these one hundred and nine countries have

¹⁵ *Ibid.*

¹⁶ For an explanation of this idea refer to *Supra* note 93.

¹⁷ United Nations, *Capital Punishment, Developments 1961 to 1965*. (Report Presented by N. Morris) 1967

¹⁸ R. Hood, *The Death Penalty: A World-wide Perspective*, 2nd ed. (Oxford: Clarendon, 1996) at 12-13.

completely abolished the death penalty, fourteen are abolitionists for ordinary crimes and twenty are abolitionists in practice.¹⁹

Although an international customary norm that bans the imposition of the death penalty has not yet materialized, the fact is that the abolition of the death penalty is becoming increasingly accepted. This acceptance is paving the way for an international customary norm banning capital punishment altogether. In order for this customary norm to gel, abolitionist efforts should be echoed in the domestic legal systems of the eighty-six retentionist countries. From among these countries, the present author has chosen to study the death penalty systems of the United States of America and Islamic countries of the Middle East and Africa, and their ability and inclination to change from retentionist to abolitionist countries. To this end, this study is divided in three chapters.

Chapter I considers the abolitionist trend manifested in international human rights and international criminal law norms. In its first part, it analyzes the exclusion of the death penalty from the statutes of the international criminal tribunals. Next, it focuses on the shift in the realm of international human rights from limitation to abolition of the death penalty.

Chapter II presents an overview of the application of the death penalty in the US. Next, it examines the possibility of abolishing the death penalty in the US by challenging the constitutionality of its application.

¹⁹ Amnesty International-Current Info-Facts and Figures About the Death Penalty, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).

Finally, Chapter III describes the limits and cases for applying the death penalty under Islamic law. Lastly, it studies the possibility of accepting the abolitionist trend in the Islamic milieu.

Chapter One. The Abolitionist Trend

I. The Trend towards Abolition in International Criminal Law

A. The International Military Tribunal at Nuremberg

The possibility of establishing an international criminal court with jurisdiction over war crimes and crimes against humanity was first considered in the aftermath of World War One.²⁰ However, the first international tribunal was not instituted until after World War Two. This court, the Nuremberg tribunal, was established by the victors of World War Two whose goal was to prosecute any person responsible for atrocities committed during the war. The United States, France, the United Kingdom and the Soviet Union concluded the London agreement in 1945, designed to establish the International Military Tribunal at Nuremberg.²¹

The Nuremberg Charter determined the subject matter jurisdiction of the Nuremberg tribunal, covering crimes against peace, war crimes and crimes against humanity. Its jurisdiction was limited to crimes against humanity committed before the German invasion of Poland of 1939.²² Upon conviction of a defendant, the tribunal was authorized to impose any punishment, including the death penalty.²³ It convicted nineteen out of twenty-two German officials and sentenced to death twelve major war criminals.²⁴

²⁰ V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda*, vol. 1 (New York: Transnational Publishers, 1998) at 2.

²¹ *Agreement for the Prosecution and Punishment of Major War Criminals of The European Axis and The Charter of the International Military Tribunal annexed thereto*, 8 August 1945, 82 U.N.T.S. 279 [hereinafter *London Agreement* and *Nuremberg Charter* respectively].

²² *Supra* note 1 at 6.

²³ *Nuremberg Charter*, art. 27.

²⁴ L. Friedman, ed., *The Law of War, A Documentary History*, 1st ed. (New York: Random House, 1972) at 779.

The establishment of the Nuremberg tribunal legalized the founding of subsequent international criminal tribunals. One year after Nuremberg, the International Military Tribunal for the Far East was established by the Supreme Allied Commander for Japan, General Douglas MacArthur, to try Japanese war criminals.²⁵ Not only did the Nuremberg tribunal pave the way for the creation of the Tokyo tribunal; its Charter also served as a model for the Tokyo Charter, which is similar to that of Nuremberg except for some specific details. For instance, whereas the Nuremberg charter states that the four allied countries will nominate judges, the judges of the Tokyo tribunal were only to be nominated by General MacArthur. One notable similarity is that both the Nuremberg Charter and the Tokyo Charter provided for the imposition of the death penalty.²⁶ At the Tokyo Tribunal, seven defendants were sentenced to death and fifteen were sentenced to life imprisonment.²⁷

B. The International Tribunal for the Former Yugoslavia

The significance of the Nuremberg precedent reverberated not only in the developments that took place during the 1940s in the field of international criminal law. It continues to play a major role in International Criminal Law, for it helped to legitimize new developments such as the International Tribunal for the former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court. Furthermore, in addition to legalizing the establishment of subsequent international criminal tribunals, the principles of international law recognized in the Nuremberg Charter set out the fundamental principles of individual responsibility for crimes under international law.

²⁵ *Charter of the International Military Tribunal for The Far East*, approved by the Supreme Commander for the Allied Powers on 19 January 1946 [hereinafter *Tokyo Charter*].

²⁶ *Tokyo Charter*, art. 16.

In the aftermath of the Nuremberg and Tokyo trials, the international community began, in 1948, its work to establish a permanent international criminal court.²⁸ It took the international community four decades to reach this goal. During this period, the Security Council established on 22 February 1993 an International Tribunal for the former Yugoslavia (ITFY).²⁹ The Security Council took this step in order to try the individuals responsible for the atrocities that had taken place at Serbian internment camps in Bosnia. The jurisdiction of the ITFY is limited to serious violations of international humanitarian law that occurred after the 1st of January 1991.³⁰ Its subject matter jurisdiction covers breaches of the 1949 Geneva Convention,³¹ violations of the laws and customs of war,³² genocide³³ and crimes against humanity.³⁴

Although the Nuremberg Charter was considered in the preparation of a statute for the ITFY,³⁵ the latter differs in many respects from the former. For example, the ITFY was created by the United Nations,³⁶ whereas the International Military Tribunal at Nuremberg was established by the victors of the Second World War.³⁷ In addition, the judges of the Nuremberg Tribunal were appointed by its four founding countries,³⁸ while the judges of the

²⁷ W.A. Schabas, "Symposium on the future of international human rights: international law and the abolition of the death penalty" (1998) 55 Wash & Lee L. Rev. 797.

²⁸ G.A. Res. 260 (B), UN GAOR, 1948, UN DOC A/810 (1948) at 177.

²⁹ *Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia*. SC Res. 808, UN SCOR, 48th Sess., (1993). UN Doc. S/ RES/ 808 (1993).

³⁰ *Statute of the International Tribunal for Former Yugoslavia*, art. 1 & 8.

³¹ *Statute of the International Tribunal for Former Yugoslavia*, art. 2.

³² *Statute of the International Tribunal for Former Yugoslavia*, art. 3.

³³ *Statute of the International Tribunal for Former Yugoslavia*, art. 4.

³⁴ *Statute of the International Tribunal for Former Yugoslavia*, art. 5.

³⁵ *Supra* note 1 at 31.

³⁶ *Supra* note 9.

³⁷ *Supra* note 2.

³⁸ *Nuremberg Charter*, art. 2.

ITFY are appointed by the United Nations General Assembly.³⁹ At first glance, the difference in judicial appointment may not seem significant. However, the differing approaches used to appoint judges, and their selection from countries other than Yugoslavia, supports the objectivity of the ITFY. Thus, it can less easily be described as an instrument of “victor’s justice.”⁴⁰

Finally, in terms of procedure, the ITFY cannot conduct trials in absentia,⁴¹ whereas the international military tribunal had the jurisdiction to do so.⁴² The prohibition of conducting trials in absentia is a safeguard that helps in promoting the fairness of the trial.

One of the most important advancements of the Yugoslavia Tribunal over its predecessor can be seen in the range of sentences the court has the power to hand out upon conviction of individuals responsible for punishable acts. Contrary to the Nuremberg Charter, which gives that tribunal the right to impose any punishment including the death penalty,⁴³ the Yugoslavia Tribunal Statute states that punishments are limited to imprisonment.⁴⁴ Although the statute does not state explicitly that the death penalty is not to be applied, it is implicitly excluded from the scope of punishments envisioned. The significance of this exclusion can be appreciated when one compares the gravity of the crimes punishable by the ITFY to the maximum punishments the tribunal may impose. Even for a serious crime such as genocide, imprisonment is a sufficient penalty.

³⁹ *Statute of the International Tribunal for Former Yugoslavia*, art. 13 (2).

⁴⁰ See L.H. Mc Cormack, “Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International criminal law” (1997) 60 Albany Law Review 681 at 717.

⁴¹ *Statute of the International Tribunal for Former Yugoslavia*, art. 2 (d).

⁴² *Nuremberg Charter*, art. 12.

⁴³ *Nuremberg Charter*, art. 27.

C. The Tribunal for Rwanda

One year after the creation of the ITFY, the Security Council had to address the international humanitarian crisis that occurred in Rwanda. A report conducted by the Special Rapporteur of the Commission on Human Rights on Extra-judicial Summary or Arbitrary Execution, Bacre Waly Ndiaye, stated that members of the Tutsi tribes were subject to continuous massacres that began as early as 1959 and lasted until 1993.⁴⁵ Largely in response to proposals of the representatives of the Tutsi tribes,⁴⁶ the Security Council decided in resolution 955, adopted on 8 November 1994, to establish a tribunal for Rwanda.⁴⁷ Annexed to resolution 955 was the Statute of the Tribunal for Rwanda. This statute limits the jurisdiction of the court to crimes committed between 1 January and 31 December 1994.⁴⁸

The subject matter jurisdiction of the Rwanda tribunal covers people who committed violations of international human rights law⁴⁹, genocide⁵⁰, crimes against humanity⁵¹ and violations of Article three common to the Geneva Convention and the Second Additional Protocol⁵². In terms of territorial jurisdiction, the tribunal can try anyone who committed such crimes within the territory of Rwanda, as well as Rwandan citizens who committed serious violations of international humanitarian law on the territory of neighbouring states.⁵³ After asserting jurisdiction, the tribunal can impose on those responsible punishments limited to imprisonment. The exclusion of the death penalty from the Rwanda statute was

⁴⁴ *Statute of the International Tribunal for Former Yugoslavia*, art. 24 (1).

⁴⁵ Commission on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights on Extra-judicial, Summary or Arbitrary Executions*, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993, UN DOC, 1994, UN DOC E/CN.4/1994/7 Add. 1. (1993).

⁴⁶ *Supra* note 1 at 62.

⁴⁷ SC Res. 955 (1994), UN SC, 1994, UN Doc. S/RES/955 (1994).

⁴⁸ *Statute of the International Tribunal for Rwanda*, art. 1-7.

⁴⁹ *Statute of the International Tribunal for Rwanda*, art. 1.

⁵⁰ *Statute of the International Tribunal for Rwanda*, art. 2.

⁵¹ *Statute of the International Tribunal for Rwanda*, art. 3.

highly contested. The Rwandan government called for its inclusion among the punishments authorized under the statute, and justified this proposal by citing the Criminal Code of Rwanda, which provides for the imposition of the death penalty.⁵⁴

An opposing position⁵⁵ to that of the Rwandan government was taken by New Zealand. The representative of New Zealand stated:

"[A]s a state party to the Optional Protocol to the International Covenant on Civil and Political Rights, New Zealand could never support an international tribunal that could impose the death penalty. For over three decades, the UN has been trying progressively to eliminate the death penalty. It would be entirely unacceptable-and a dreadful step backwards-to introduce it here. Instead, it would also go against the Arusha Agreements, in which the government of Rwanda has said it will honour and which commit all parties in Rwanda to accept international human rights standards. We do not believe that following the principle of " an eye for an eye" is the path to establishing a civilized society, no matter how horrendous the crimes the individuals concerned may have committed. The objective in Rwanda must be to establish a just and fair society based on respect for life and fundamental human rights."⁵⁶

The controversy provoked as a result of the exclusion of the death penalty from the Rwanda tribunal statute prompted members of the Security Council to explain the reasoning behind the exclusion. In short, the representative of New Zealand as well the European members of the Security Council stated that although Public International Law in general and International Human Rights Law in particular do not prohibit the imposition of the death penalty, the trend is nevertheless heading towards its abolition.

⁵² *Statute of the International Tribunal for Rwanda*, art. 4.

⁵³ *Statute of the International Tribunal for Rwanda*, art. 7.

⁵⁴ UN SC, 49th Sess., 3453 Mtg., UN DOC. S/ PV.3453 (1994) at 16.

⁵⁵ UN SC, 49th Sess., 3453 Mtg., UN DOC. S/ PV.3453 (1994) at 5.

⁵⁶ *Ibid.*

D. The International Criminal Court

Four years after the establishment of the Rwanda tribunal, an International Criminal Court was formed. Once again, the death penalty was excluded from the Statute of the International Criminal Court. The question to be asked here is: what did this exclusion add to its precedents in the Yugoslavia and Rwanda tribunal?

In 1948, the UN General Assembly invited the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes.”⁵⁷ The Commission studied the proposal of the General Assembly and concluded that the establishment of such an organ was both desirable and possible.⁵⁸ In order to establish this court, the General Assembly set up the Committee on International Criminal Jurisdiction. A draft statute for an International Criminal Court was prepared by the Committee in 1951⁵⁹ and was amended by a second committee in 1953.⁶⁰ The absence of a definition of aggression delayed consideration and elaboration of the draft statute by the UN.

Although a definition of aggression was adopted in 1974,⁶¹ it was not until the late eighties that the possibility of establishing an International Criminal Court was reconsidered. In

⁵⁷ GA Res. 260 B, UN GAOR, 1948, UN Doc. A/810 (1948) at 177.

⁵⁸ International Law Commission, *Report of the International Law Commission to the General Assembly*, UN GAOR, 1950, Supp. No. 12, UN Doc. A/1316 (1950) at 16.

⁵⁹ Committee on International Criminal Jurisdiction, *Draft Statute for an International Criminal Court*, UN GAOR, 1952, Supp. No. 12, UN Doc. A/2136 Annex (1952) at 21.

⁶⁰ Committee on International Criminal Jurisdiction, *Revised Draft Statute for an International Criminal Court*, UN GAOR, 1954, Supp. No. 12, UN Doc. A/2645 Annex (1954) at 23.

⁶¹ Definition of Aggression, UN GAOR, 29th Sess., Annexes, Agenda Item 86, UN Doc. A/9890 (1974).

1990, the International Law Commission was asked for a second time to study the possibility of establishing an International Criminal Court. The Commission presented its draft statute to the General Assembly in 1994.⁶² An ad hoc committee revised the draft statute in 1995.⁶³ After its revision by the ad hoc committee, a preparatory committee prepared a “widely accepted consolidated” text of the proposed convention.⁶⁴ After eight years of hard work and discussions, the statute of the International Criminal Court was adopted by an international conference in Rome on 17 July 1998.⁶⁵

The jurisdiction of the International Criminal Court covers genocide⁶⁶, crimes against humanity⁶⁷, war crimes⁶⁸ and the crime of aggression⁶⁹. Unlike its predecessors, the jurisdiction of the International Criminal Court is not temporal. It has jurisdiction with respect to all crimes committed after the entry into force of the statute.⁷⁰ In terms of penalties, the Statute of the International Criminal Court, like the Statute of the ITFY and Rwanda, excludes the death penalty from its sentencing scheme.⁷¹ It states that life imprisonment is the maximum punishment a convict can face.⁷²

The exclusion of the death penalty from the Statute of the International Criminal Court led to a contentious debate. Opinions were divided on the issue of the death penalty. A call for including it in the statute was made by the group of states not parties to any regional and/or

⁶² GA Res. 54, UN GAOR, 46th Sess., UN Doc. A/46/49 (1992) at 286.

⁶³ Commission on Human Rights Report, UN GAOR, 49th Sess., Supp No.10, UN Doc. A/49/10 (1994).

⁶⁴ Ad hoc Committee Report, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

⁶⁵ *Rome Statute of the International Criminal Court*, UN Doc. A/ Conf. 183/9 (1998). [hereinafter *Rome Statute*]

⁶⁶ *Rome Statute*, art. 6.

⁶⁷ *Rome Statute*, art. 7.

⁶⁸ *Rome Statute*, art. 8.

⁶⁹ *Rome Statute*, art. 5.

⁷⁰ *Rome Statute*, art. 11.

⁷¹ *Rome Statute*, art. 77.

⁷² *Rome Statute*, art. 77 (b).

international abolitionist instrument. Countries such as Rwanda, Saudi Arabia, Singapore, Sierra Leone, Trinidad and Tobago, and Jamaica, as well as other Arab countries and Caribbean states, justified their call for inclusion of the death penalty in the Rome Statute by stating that in the absence of an international customary norm that prohibits the death penalty, it is still accepted under international law.⁷³

On the other side of the debate, parties to international and/or regional abolitionist instruments supported the exclusion of the death penalty from the Rome Statute.⁷⁴ The division in opinion is not a novelty, for it had happened also when the Rwanda tribunal was being discussed. What is surprising and noteworthy concerning the exclusion of the death penalty from the Rome Statute, however, is the acceptance of the exclusion by one of the major retentionist countries in the world, the United States of America. The US representative argued that in the presence of an international trend toward abolition, the death penalty should not be included within the sentencing scheme of the court.⁷⁵ Although this statement cannot be construed as a promise to abolish the death penalty in the US, it can be seen as lending support to the abolitionist message contained in the Yugoslavia, Rwanda and Rome Statutes. The US representative's statement may reveal a current American retentionist position matched with future abolitionist hopes, or at least assumptions. The current retentionist position was revealed in the words of the US representative when he said that the exclusion of the death penalty from the Rome statute does not oblige retentionist countries in general and the US in particular to abolish the death penalty. With regard to future abolitionist hopes, these were revealed in the justification

⁷³ R.S. Lee, ed., *The International Criminal Court, the making of the Rome Statute-issues, negotiations, results*, (The Hague: Kluwer Law International, 1999) at 331.

⁷⁴ *Ibid.*

⁷⁵ W.A. Schabas, "Symposium: Religion's Role in The Administration of The Death Penalty: Islam and The Death Penalty" (2000) 9 Wm. & Mary Bill of Rts. J. at 223.

given by the US for the exclusion of the death penalty from the Rome statute. By citing the international trend towards abolition as a justification for the exclusion of the death penalty, the US implicitly admitted that the abolitionist message of the Yugoslavia, Rwanda and Rome Statutes lies on an increasingly firm foundation.

The study of the different statutes of the international criminal tribunals adopted since World War II demonstrates that the abolition of the death penalty in International Criminal Law passed through three stages. The first stage was the Charters of Nuremberg and Tokyo. At that time, little importance was given to possible exclusion of the death penalty, and the penalty was actually applied. In the aftermath of Nuremberg and Tokyo, abolitionist countries stated that in the presence of an international trend towards abolition, the inclusion of the death penalty in the Yugoslavia and Rwanda tribunal charters was unacceptable. The third stage was with the Rome Statute where the US joined abolitionist states in justifying the exclusion of the death penalty by citing the international trend towards abolition. Although the advances in the area of international criminal law have not created any obligation for retentionist countries to abolish the death penalty, they indicate that the international abolitionist trend is growing and that retentionist countries may well join the trend in the future.

II. The Trend towards Abolition in International Human Rights Law

A. The Beginnings of Human Rights Law

It is known that events during World War II were the primary motivation for more serious thinking and international action on human rights. However, human rights are not a product

of World War II alone. Many events taking place before World War II pushed human rights to the forefront of the international scene. The 19th and 20th centuries evidenced the formation of the anti-slavery movement that began with the Treaty of Paris⁷⁶ and culminated in the adoption of the International Slavery Convention in 1926.⁷⁷ During the 1920's, workers' rights became prominent through the creation of the International Labour Organization in 1919⁷⁸. These events, as well as the human rights violations that resulted from World War II, made the states of the world seek a better future, free from crimes against humanity.

In the aftermath of World War II, the states' design to provide a better future began with the creation of the United Nations. The United Nations was created to address many challenges, among which was the promotion and protection of human rights. Although the United Nations Charter⁷⁹ does not present a specific discussion of human rights and their protection, it is important because it legitimized the struggle for human rights. The preamble of the UN Charter⁸⁰ and the third paragraph of Article 1⁸¹ are two of the places where we

⁷⁶ *Treaty of Paris*, 30 May 1814, first Treaty of Paris, between France and the Allies.

See Western and Southern Europe Chronology-Revolutions of Liberal Nationalism (1815-1848), Treaty of Paris, online: <<http://campus.northpark.edu/history/webchron/westeurope/liberalrevs.html>> (date accessed: 11 September 2001).

⁷⁷ *International Slavery Convention*, 25 September 1926, 60 L.N.T.S. 253.

⁷⁸ *Treaty of Versailles*, 28 June 1919.

See the Versailles Treaty, online: <<http://history.acusd.edu/gen/text/versailletreaty/vercontents.html>> (date accessed: 11 September 2001).

⁷⁹ *Charter of The United Nations*, 26 June 1945, Can. T.S. 1945 No.7.

⁸⁰ The preamble of the United Nations Charter reads: "we the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions..."

⁸¹ Article I paragraph 3 of the first chapter of the UN Charter reads: "The purposes of the United Nations are: -to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights." Besides Article 1 many articles of the UN charter talk about human rights. Among these articles we can cite; Article 13 (1) b; Article 55; Article 56; Article 62 (2); and Article 68.

find commitments from the peoples of the United Nations to promote respect for human rights. After the adoption of the UN Charter, there was a need for a document that could provide a detailed discussion and effective ways to protect human rights. This need was initially met by the adoption of the Universal Declaration of Human Rights in 1948.

At the time of its creation in 1948, the Universal Declaration of Human Rights⁸² was the primary human rights instrument in the world. It presented a list of human rights, among which was the right to life. Contrary to the later International Covenant on Civil and Political Rights⁸³, the European Convention on Human Rights⁸⁴ and the American Convention on Human Rights⁸⁵, the Universal Declaration of Human Rights mentioned the right to life in absolute form.⁸⁶ As such, the drafters of the Universal Declaration of Human Rights sought a compromise between two approaches presented when drafting the Universal Declaration by the Commission on Human Rights and the Third Committee of the General Assembly.

The first approach called for inclusion of the death penalty as an exception in the Article dealing with the right to life. Among the states that called for the adoption of this approach were Uruguay, Brazil and New Zealand.⁸⁷ Uruguay stated that Article 3 should provide for the possibility of applying the death penalty whenever punishment is rendered by a court and is in conformity with existing laws.⁸⁸ Adopting the same approach as Uruguay, the

⁸² *Universal declaration of human rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp No. 13, UN Doc A/810 (1948) 71.

⁸³ *International Covenant on Civil and Political Rights*, GA Res. 2200 A (XXI).

⁸⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

⁸⁵ OAS, *American Convention on Human Rights*, OASTS 36 (1979).

⁸⁶ *Universal Declaration of Human Rights*, art. 3.

⁸⁷ We have seen that New Zealand later changed its position fundamentally, becoming a strong proponent of abolition, *Supra* note 55.

⁸⁸ *Supra* note 4 at 33-35.

representative of Brazil stated that the Article dealing with the right to life in the declaration should be similar to the one found in the draft covenant. In the draft covenant, the right to life provision stated that the death penalty could be applied if two conditions were satisfied. First, the punishment would be provided by the law and second, it would be rendered by a court.⁸⁹ When discussions of Article 3 were taking place in the Human Rights Commission, the representative of New Zealand proposed that Article 3 of the draft declaration states that the right to life be subject to deprivation only in cases prescribed by law and after due process.⁹⁰

On the other side of the debate, a group of states called for the introduction of a statement in Article 3 requesting abolition of the death penalty. Before the draft Declaration of Human Rights was submitted to the General Assembly, the representative of Ecuador submitted a draft “Charter of International Human Rights and Duties” to the Human Rights Committee, which provided for the abolition of the death penalty. Article 1 of the draft read:

“ There shall be no death penalty. Mutilation, flogging, and other tortures and degrading procedures are categorically forbidden, whether as penalties, corrective measures, or means of investigating offences.”⁹¹

Contrary to the call for absolute abolition found in the Uruguayan draft charter, the representative of the Soviet Union introduced a proposal limiting abolition to peacetime.⁹²

In an attempt to reach a compromise between the two proposed approaches, the drafters of the Universal Declaration of Human Rights stated the right to life in absolute terms in

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Article 3: “ Everyone has the right to life, liberty and security of the person.” The silence of Article 3 on the death penalty issue has a dual explanation. It can either be seen as supporting the retention of the death penalty or as foreshadowing its eventual abolition. In the midst of this vagueness, both the *travaux préparatoires* and the main reason behind the creation of the Universal Declaration of Human Rights present a clearer picture and a better explanation for the silence of Article 3 on the death penalty issue.

The main reason for the creation of the Universal Declaration of Human Rights was to set goals for humanity⁹³. After striving for the abolition of slavery, one of the main achievements that humanity was reaching for was the abolition of the death penalty. However, the drafters feared that the inclusion of the abolition of the death penalty as a goal for humanity in the Universal Declaration of Human Rights would result in many states not signing it.⁹⁴ Knowing that the abolitionist approach could derail the adoption of a Universal Declaration of Human Rights, we are left to wonder why the drafters did not adopt the second approach, which calls for the inclusion of the death penalty as an exception to the right to life. At the time the possibility of adopting a Universal Declaration of Human Rights was being studied, many factors supported the inclusion of the death penalty as an exception in the Article dealing with the right to life. We have already seen that in 1948, the statute of the military tribunal in Nuremberg accepted the death penalty as a punishment.⁹⁵ Also, at the time of studying the possibility of adopting a Universal Declaration of Human Rights, only

⁹² *Ibid.*

⁹³ *Universal Declaration of Human Rights*, preamble reads: “ Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms...”

⁹⁴ *Supra* note 43 at 24.

⁹⁵ *Nuremberg Charter*, art. 27.

eight countries had abolished the death penalty.⁹⁶ Therefore, there was no fear that these countries would block the adoption of the second approach.

Despite the presence of factors supporting the adoption of an explicit retentionist approach, the drafters adopted a right to life text that neither mentions abolition nor acceptance of the death penalty. Presenting the right to life in absolute form, the drafters implicitly supported the abolitionist movement. This fact can be revealed if one studies the *travaux préparatoires*. The Commission on Human Rights was given the task of drafting an International Bill of Rights. The drafting Committee studied the draft bills submitted by the Secretariat of the Commission on Human Rights⁹⁷, the United Kingdom⁹⁸ and the US.⁹⁹ When the three draft bills which recognized the death penalty as an exception to the right to life were considered by the drafting committee, Eleanor Roosevelt, the US representative, said that it would be better if no mention of the death penalty were included in the draft Article of the right to life. She justified her opinion by stating that there was a movement in some states to abolish the death penalty.¹⁰⁰ The Soviet Union's representative, Kortesky, supported Roosevelt's view and he added that the UN should not in any way show its approval of the death penalty.¹⁰¹ Kortesky's opinion was supported by the Chilean and English representative. The French representative, Cassin, cautioned that retentionist countries should not ignore the abolitionist movement taking place in some countries.¹⁰²

Although still in its first stages, the opinions of members of the drafting committee revealed their readiness to encourage the abolitionist trend. The drafting committee formed a working

⁹⁶ This detailed discussion is taken from *Supra* note 4 at 295.

⁹⁷ UN Doc. E/CN.4/AC.1/3.

⁹⁸ UN Doc. E/CN.4/AC.1/4 at 9.

⁹⁹ UN Doc. E/CN.4/AC.1/8.

¹⁰⁰ UN Doc. E/CN.4/AC.1/SR.2 at 10.

¹⁰¹ UN Doc. E/CN.4/AC.1/SR.2 at 11.

group to study the declaration. The working group nominated the French representative, Cassin, to prepare a draft declaration. The draft prepared by Cassin did not mention the death penalty. The revised draft of Article 3 reads: “ Every human being has the right to life, to personal liberty and to personal security.”¹⁰³ The draft “International Declaration of Human Rights” was submitted to the Economic and Social Council and then to the General Assembly after the ECOSOC’s acceptance. When considering the draft in the 3rd Committee of the General Assembly, lengthy debates took place around draft Article 3 and a number of proposals for amending it were submitted. Similar to the draft Article 3 prepared by Cassin, all the proposals for amendments, except one, neither called for the inclusion of the death penalty as an exception to the right to life, nor for its abolition. They simply stated the right to life in absolute terms.¹⁰⁴ The proposal for amendment submitted by the Soviet Union was the only one to call for the abolition of the death penalty, but only in peacetime.¹⁰⁵ Although an attempt to adopt an explicitly abolitionist right to life was defeated,¹⁰⁶ an implicitly abolitionist draft Article 3, the one prepared by Cassin, was adopted, in a roll-call vote by thirty-five to none with twelve abstentions.¹⁰⁷ The Declaration as a whole was then submitted to the General Assembly and was adopted on 10 December 1948 with no dissenting vote.¹⁰⁸

¹⁰² UN Doc. E/C.4/AC.1/SR.2 at 10.

¹⁰³ UN Doc. E/CN.4/AC.1/W.2 Rev.2.

¹⁰⁴ *Supra* note 4 at 105.

¹⁰⁵ Soviet Union, UN Doc. A/C.3/265.

“Everyone has the right to life. The state should ensure the protection of each individual against criminal attempts on his person. It should also ensure conditions that obviate the danger of death by hunger and exhaustion. The death penalty should be abolished in time of peace.”

¹⁰⁶ The last sentence of the Soviet Union’s proposal was defeated, on a roll-call vote, by 21 votes to nine, with 18 abstentions. See UN Doc. A/C.3/SR.107 at 6.

¹⁰⁷ UN Doc. A/C.3/SR.107 at 16.

¹⁰⁸ *Universal Declaration of Human Rights*, GA Res. 217 A(III), UN Doc. A/810.

The Universal Declaration of Human Rights marked the accomplishment of the first phase of the International Bill of Rights. After the Universal Declaration of Human Rights, the second document to be drafted was a covenant that would provide a detailed and binding explanation of the rights and obligations promulgated in the Universal Declaration of Human Rights.

B. The ICCPR and the Right to Life

In the period between 1949 and 1951, the Commission on Human Rights worked on a single draft covenant.¹⁰⁹ However, ideological differences between western and eastern countries made the drafting of a single draft covenant impossible.¹¹⁰ The west championed civil and political rights and called for limiting the covenants' reach to this category of rights. On the other hand, the eastern states stressed the interdependence of economic, cultural, social, civil and political rights, and called for a single covenant that would include civil and political as well as social, cultural and economic rights.¹¹¹ Under pressure from the western-dominated Commission, the General Assembly retracted from its 1950 resolution¹¹² in which it called upon the Commission on Human Rights to adopt a single covenant. The General Assembly agreed in 1951 to the drafting of two separate covenants.¹¹³ Its work on the two covenants was completed in 1954,¹¹⁴ but it was not until 1966 that the General Assembly approved the International Covenant on Civil and Political Rights (ICCPR)¹¹⁵ and the

¹⁰⁹ *Supra* note 4 at 47.

¹¹⁰ M. Nowak, *UN. Covenant on Civil and Political Rights: CCPR commentary* (Kehl: Arlington, 1993) at XX.

¹¹¹ *Annotations on the Text of the Draft International Covenants on Human Rights*, UN Doc. A/2929 (1955) at 7.

¹¹² GA Res. 421 (V).

¹¹³ GA Res. 543 (VI).

¹¹⁴ *Supra* note 4 at 48.

¹¹⁵ *International Covenant on Civil and Political Rights*, GA Res. 2200 A (XXI).

International Covenant on Economic, Social and Cultural Rights (ICESR).¹¹⁶ The ICESR entered into force on 3 January 1976 and the ICCPR entered into force on 23 March 1976. Although the right to life has an economic and social dimension¹¹⁷, it was only included in the ICCPR.

Article 6 of the ICCPR enshrines the right to life,¹¹⁸ but unlike the Universal Declaration of Human Rights, the ICCPR mentions the death penalty as an exception to the right to life. When reading Article 6, one can notice that the application of the death penalty, although accepted, was restricted to certain crimes and certain groups of people were excluded from its ambit.

The second paragraph of Article 6 limits the application of the death penalty to the most serious crimes. The same paragraph states that the death penalty can be carried out if two conditions are satisfied: (a) the punishment is provided by law; and (b) the punishment is carried out as a result of a judgment rendered by a court. In addition to restricting the application of the death penalty to a certain group of crimes, Article 6 of the ICCPR

¹¹⁶ *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 A (XXI).

¹¹⁷ Committee on Human Rights, *General Comment on article 6 of the International Covenant on Civil and Political Rights (General Comment 6(16))*, UN ESCOR, 1982.

¹¹⁸ Article 6 of the ICCPR reads:

“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 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 judgement 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 any 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.

excludes persons below 18 years of age and pregnant women from the ambit of this punishment.¹¹⁹

Although the ICCPR accepted the death penalty as an exception to the right to life with some restrictions on its application, it also contemplated its abolition. In Article 6 of the ICCPR, the word abolition is mentioned twice. The second paragraph of Article 6 reads: "in countries which have not abolished the death penalty,...". The second place where the word abolition is mentioned in Article 6 is in Paragraph 6. Paragraph 6 states: "nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant."

While Paragraph 6 can be clearly understood as promoting the abolition of the death penalty, Paragraph 2 does not reflect explicitly the abolitionist intention of the drafters of the ICCPR. The report of the working party set up in the Third Committee of the General Assembly, however, explains that the phrase at the beginning of paragraph 2 was "intended to show the direction in which the drafters of the covenant hope the situation would develop."¹²⁰ Besides the report of the working party, the General Comment 6 (16) adopted by the Human Rights Committee in 1982 states that Paragraph 2 of Article 6 suggests that "abolition is desirable."¹²¹

One hundred and forty-seven states¹²² are now obliged under international law to at least limit their application of the death penalty. In addition to this commitment, states that

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

¹¹⁹ *International Covenant on Civil and Political Rights*, art. 6 (5).

¹²⁰ *Supra* note 4 at 101.

¹²¹ *Ibid.*

¹²² Status of Ratifications of the International Covenant on Civil and Political Rights, online: office of the high commissioner for human rights <[http:// www.unhchr/html/menu3/b/a_ccpr.htm](http://www.unhchr/html/menu3/b/a_ccpr.htm)> (date accessed: 3 September 2001).

ratified the ICCPR without lodging any reservation to paragraph 2 and 6 have tacitly accepted that the abolition of the death penalty is desirable. Only three states lodged reservations to Article 6. Norway lodged a reservation to paragraph 4 of Article 6¹²³, Ireland lodged a reservation to paragraph 5 of Article 6¹²⁴ and the US lodged a reservation to Article 6 as all ¹²⁵(except the limitation on pregnant women). A close examination of these reservations reveals that two of them have accepted implicitly the fact that abolition of the death penalty is desirable. Both the Norwegian and the Irish reservations were limited to the restrictive provisions found in Article 6 and they did not touch on the two paragraphs, Paragraph 2 and 6, which contemplate abolition. Only the US cannot be said to have accepted implicitly the desirability of abolishing the death penalty. Although a part of its reservation was deemed to be invalid,¹²⁶ the remaining scope of the reservations lodged against paragraph 2 and 6 by the US is valid.

This approach, which calls for restricting the application of the death penalty and reflects the desirability of its abolition, predated the coming into force of the ICCPR. Since 1968, resolutions adopted by the UN had sought to narrow the scope of the application of the death penalty and revealed a desire for its abolition. A resolution adopted by the General

¹²³ UN Doc. CCPR/C/2 & Add. 1.

¹²⁴ UN Doc. ST/LEG/SER.E/13(1995) at 152.

¹²⁵ UN Doc. ST/LEG/SER.E/13 (1995) at 127-130.

¹²⁶ Upon examination of the report submitted by the United States in April 1995, the Human Rights Committee affirmed that the US reservation to Article 6(5) of the ICCPR is contrary to the object and purpose of the treaty and therefore invalid. See Consideration of reports submitted by states parties under Article 40 of the covenant, comments of the H.R. Committee, 53rd Session, 1413th mtg. Para 14, at 4. UN Doc CCPR/C/79/Add. 50 (1995). Also the reservation lodged by the US to Article 6(5) of the ICCPR can be shown to be invalid because it is contrary to an international customary norm that prohibits the execution of the juveniles. The emergence of the prohibition of the execution of the juveniles as an international customary norm can be traced in a series of international instruments explicitly forbidding the use of capital punishment for juveniles. These instruments include: the ICCPR, the American Convention, the Fourth Geneva Convention, the Convention Relative to the Protection of Victims of International Armed Conflicts (Protocol I), Protocol II and the Convention on the Rights of the Child. A study of the

Assembly in 1968 listed a series of guarantees that should be granted to a convict facing the death penalty. A convict facing the death penalty was said to have rights to adequate legal assistance, to appeal, pardon and commutation of sentence, and to delay his execution until the exhaustion of his right to appeal and pardon. The resolution also observed that “the major trend among experts and practitioners in the field is towards the abolition of capital punishment.”¹²⁷ Four years later, a General Assembly resolution stated that “the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing the punishment in all countries.”¹²⁸

Resolutions adopted since the mid-eighties and through to the end of the nineties have more and more sought to narrow the possibility of applying the death penalty. In 1984, a resolution entitled “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty” expanded the restrictions on the use of the death penalty found in Article 6 of the ICCPR. The safeguards added “new mothers” and “persons who become insane” to the category of people excluded from the application of the death penalty.¹²⁹ The safeguards defined the term “serious crimes” found in the ICCPR as one limited to “intentional crimes, with lethal or other extremely grave consequences.”¹³⁰

Five years later, a new resolution adopted by the ECOSOC strengthened the 1984 resolution by expanding the list of limitations on the application of the death penalty. Among the limitations added by the resolution was the prohibition of the execution of the mentally

ratifications of these instruments reveals that all the countries of the world, except the United States and Somalia, have committed themselves to an obligation not to execute people who are under 18 years of age.

¹²⁷ GA Res. 2393, UN GAOR, 23rd Sess., Supp. No. 18, UN Doc. A/7218 (1968) at 41-42.

¹²⁸ GA Res. 2857, UN GAOR, 26th Sess., Supp. No. 29, UN Doc. A/8429 (1972) at 94.

¹²⁹ *Safeguards Guaranteeing Protection of The Rights of Those Facing the Death Penalty*, ESC Res. 1984/50, UN ESCOR, 1984.

handicapped.¹³¹ The ECOSOC also endorsed a 1996 resolution in which it calls upon member states that have not abolished the death penalty to apply the safeguards enshrined in the resolutions of 1984 and 1988.¹³²

United Nations instruments, whether the ICCPR or the various resolutions adopted by UN bodies, showed that despite the acceptance of the death penalty as an exception to the right to life, its abolition was and is widely viewed as desirable. Revealing the longing of more than two-third the states of the world¹³³ to abolish the death penalty, the United Nations' instruments pave the path towards complete abolition.

C. The American Human Rights Instruments

Like the ICCPR and various UN resolutions, human rights instruments adopted at the regional level have accepted the death penalty as an exception to the right to life while promoting its eventual abolition. The task of drafting a "Declaration on the Fundamental Rights and Duties of Man" was given to the Inter-American Council of Jurists.¹³⁴ The first draft declaration prepared by the council mentioned the death penalty as an exception to the right to life.¹³⁵ One year later, in 1946, a second draft was submitted to the Inter-American

¹³⁰ *Ibid.*

¹³¹ *Implementation of The Safeguards Guaranteeing Protection of The Rights of Those Facing The Death Penalty*, ESC Res. 1989/64, UN ESCOR, 1989.

¹³² *Safeguards Guaranteeing Protection of The Rights of Those Facing the Death Penalty*, ESC Res. 1996/5, UN ESCOR, 1996.

¹³³ *Supra* note 4 at 263.

¹³⁴ *Draft Declaration of the International Rights and Duties of Man*, 31 December 1945, (1946) AJIL Supp. 93.

¹³⁵ Resolution 40 in *International Conferences of American States, Second Supplement, 1942-1954*, Washington: Pan American Union, 1958 at 93-94.

Council of Jurists. Similar to the first draft of 1945, the second draft mentions the death penalty as an exception to the right to life.

The same resolution¹³⁶, which entrusted the Inter-American Council of Jurists to prepare a draft declaration, stated that the draft declaration would be considered by a conference of American jurists. When the conference was never held, the Ninth International Conference of American States replaced the Conference of American Jurists in considering the draft declaration.¹³⁷ Upon consideration of the two draft declarations, the International Conference received a third draft declaration from the Inter-American Judicial Committee.¹³⁸

A working group at the Ninth International Conference studied the three declarations and gave Article 1 a final version that is different from the three declarations. Contrary to the three draft declarations, the version adopted by the working group does not mention the death penalty as an exception to the right to life. Like the Universal Declaration of Human Rights, the Declaration mentions the right to life in absolute form. Article 1 of the Declaration, adopted by the sixth committee of the conference at its fifth session and by the plenary¹³⁹, reads: "Every human being has the right to life, liberty, and security of his person." A detailed explanation of the general listing of rights promulgated in the declaration, including Article 1, was to follow the declaration in the form of a convention or a covenant.

Work on the American Convention on Human Rights lasted ten years. The mission of adopting a convention began in 1959, when the American Council of Jurists was mandated

¹³⁶ OAS, Inter-American Commission on Human Rights, *Resolution XL*, 'International protection of the essential rights of man.' The resolution is mentioned in *Supra* note 4 at 263.

¹³⁷ *Ibid.* at 264.

¹³⁸ *Ibid.*

¹³⁹ OAS, *American Declaration of the Rights and Duties of Man*, OR OEA/Ser.L/V/I.4 (1948).

to prepare a draft.¹⁴⁰ Ten years later, the American Convention on Human Rights was signed, and it came into force on 18 July 1978.¹⁴¹ Like the ICCPR, the convention mentions the death penalty as an exception to the right to life, with certain limitations on its application.¹⁴²

A close examination of the right to life provision found in the convention shows that the drafters wanted Article 4 to have an abolitionist spirit. The third paragraph of Article 4 states that the death penalty cannot be re-established in states that have abolished it.¹⁴³ When explaining this provision, the Inter-American Court of Human Rights stated “a decision by a state party to the convention to abolish the death penalty, whenever made, becomes *ipso jure*, a final and irrevocable decision.”¹⁴⁴ This provision in Article 4 supports the abolition of the death penalty in general, and the formation of an international customary norm that bans capital punishment in particular. This helps in providing consistency, one of the primary elements for the formation of an international customary norm. To date, of the twenty-five

¹⁴⁰ *Supra* note 4 at 273.

¹⁴¹ OAS, *American Convention on Human Rights*, OASTS 36 (1979).

¹⁴² Article 4 of the convention, dealing with the right to life, reads:

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

2-In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3-The death penalty shall not be re-established in states that have abolished it.

4-In no case shall capital punishment be inflicted for political offences or related common crimes.

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

6-Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.”

¹⁴³ *American Convention on Human Rights*, art. 4(3).

¹⁴⁴ *Restrictions to The Death Penalty* (1983), Advisory Opinion, OC-3/83 (Ser. A) No.3.

countries that have ratified the convention, eighteen are abolitionist by virtue of Article 4 (3).¹⁴⁵

Although accepted as an exception to the right to life under Article 4, the application of the death penalty is restricted to a certain group of crimes and people.¹⁴⁶ The limitations found in Article 4 of the American Convention on Human Rights went a step further than those found in Article 6 of the ICCPR. In addition to limiting the application of the death penalty to the most serious crimes, this convention excludes political crimes from the ambit of capital punishment.¹⁴⁷ Article 4 of the Convention also adds to the group of people excluded from the ambit of application of the death penalty under the ICCPR¹⁴⁸, those above the age of seventy.¹⁴⁹

The full significance of these additions can be seen if the text of the ACHR is compared to the texts of human rights instruments adopted in the 1950s.

Looking back to the 1950's, one can see that human rights instruments which accepted the death penalty did not have a lengthy list of limitations. The European Convention on Human Rights (ECHR), which served as a model to the ICCPR, listed only two limitations with respect to the application of the death penalty. In order to comply with the latest international legal thinking on the issue of human rights, the ICCPR adopted the limitations found in the ECHR and added to them a list of limitations restricting the application of the

¹⁴⁵ These countries are: Argentina; Bolivia; Brazil; Costa Rica; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Uruguay; Venezuela.

¹⁴⁶ *American Convention on Human Rights*, art. 4 (2).

¹⁴⁷ *American Convention on Human Rights*, art. 4 (4).

¹⁴⁸ *International Covenant on Civil and Political Rights*, art. 6(5) excludes people under 18 years of age and pregnant women from the application of the death penalty.

¹⁴⁹ *American Convention on Human Rights*, art. 4(5).

death penalty *ratione materiae and ratione personae*. Adopted in 1969, the text of the ACHR mirrored the limitations found in the ICCPR and added two new restrictions.

The obvious question is whether, in the presence of a short list of limitations in the ECHR, one can say that the death penalty was widely accepted in that fundamental European human rights instrument? Below, the present author will seek to answer this question by demonstrating that the limitations found in the ICCPR and the ACHR are also implicitly present in the ECHR.

D. The European Human Rights Instruments

Work on the ECHR began in 1949.¹⁵⁰ Following a short period of drafting, the European Convention for Protection of Human Rights and Fundamental Freedoms was signed in Rome in 1950.¹⁵¹ The ECHR entered into force on 3 September 1953, and as of 2 September 2001 had been ratified by 41 states,¹⁵² and signed but not ratified by two states.¹⁵³

The right to life provision in the ECHR resembles its counterparts in the ICCPR and the ACHR by presenting the death penalty as an exception to the right to life.¹⁵⁴ On the other hand, the second Article of the ECHR differs from its compeers by specifying exceptions

¹⁵⁰ *Supra* note 4 at 222.

¹⁵¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

¹⁵² *Convention for the Protection of Human Rights and Fundamental Freedoms-Chart of signatures and ratifications*, online: Council of Europe <<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>> (date accessed: 3 September 2001).

¹⁵³ The two states that signed but did not ratify the convention are Austria and Armenia. See *Ibid.*

¹⁵⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 2 (1) states: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

other than the death penalty to the right to life.¹⁵⁵ A comparison between the right to life provision found in the ECHR and the one present in the ICCPR and the ACHR reveals that the limitations on the application of the death penalty found in the ECHR are fewer than those found in the other two human rights instruments. Article 2 of the ECHR mentions two limitations on the application of the death penalty. First, the sentence should be rendered by a court and second, the punishment should be accepted by law.¹⁵⁶

In the absence of limitations in the ECHR that could restrict the application of the death penalty *ratione materiae* and *ratione personae*, the Strasbourg organs tried to meet the advances of the ICCPR and the ACHR in the field of limiting the application of the death penalty by stating that they are implicitly present in Article 2 of the ECHR. In *Soering v. United Kingdom and Germany*, the European Court of Human Rights stated that limitations found in the ICCPR and the ACHR, like the prohibition of executing people who are under eighteen years of age, are implicitly found in the ECHR.¹⁵⁷

The Strasbourg organs went a step further than the ICCPR and the ACHR by trying to repeal the application of the death penalty under Article 3¹⁵⁸ of the ECHR. The possibility of repealing the death penalty under the prohibition of torture found in Article 3 was first brought to the European Commission of Human Rights in the case of *Kirkwood v. United*

¹⁵⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 2 (2) states: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

A- in defence of any person from unlawful violence.

B- in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

C- in action lawfully taken for the purpose of quelling a riot or insurrection.”

¹⁵⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 2 (1).

¹⁵⁷ *Soering v. United Kingdom & Germany*, (1989), 161 Eur. Ct. H.R. (Ser. A), 11 E.H.R.R. 439.

¹⁵⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Kingdom.¹⁵⁹ Kirkwood's application was declared inadmissible because of his failure to demonstrate that detention on death row was inhuman and degrading within the meaning of Article 3.

Five years after the *Kirkwood* decision, the European Commission again studied "the possibility of repealing the death penalty" in the case of *Soering v. United Kingdom and Germany*.¹⁶⁰ After having murdered his girlfriend's parents in Virginia, Jens Soering, a national of the Federal Republic of Germany, fled to the UK. After two extradition requests for Soering, from the US and the Federal Republic of Germany, Soering was arrested in the UK and was to be extradited to the US. Having exhausted his remedies in UK courts, Soering presented his case to the European Commission on Human Rights stating that his extradition to the US violated the prohibition of torture found in Article 3. Similar to its decision in *Kirkwood*, the Commission declared Soering's argument to be inadmissible. After that, the European Court of Human Rights considered Soering's case, and concluded that a lapse of time between sentence and execution does not amount to a violation under Article 3 of the ECHR. However, the Court stated that some aspects of the death penalty might raise issues regarding the prohibitions of torture and degrading treatment present in Article 3. An exhaustive list of these circumstances was not presented by the Court, which only listed four circumstances: length of detention prior to execution; conditions on death row; age and mental state of the applicant; and, in the case of Soering, the competing extradition request from Germany.

¹⁵⁹ *Kirkwood v. United Kingdom* (1985), App. No. 10308/83 Eur. Comm. H.R.D.R. 37 DR 158-229.

¹⁶⁰ *Soering v. United Kingdom & Germany* (1988), 161A Eur. Comm. HR. D.R 231 App. No. 14038/88.

Three of the above circumstances were found in the case of *Soering*. If extradited to Virginia, *Soering* had to wait a minimum period of six to eight years before being executed. In addition, the court took into consideration both *Soering*'s age at the time he committed the crime (he was then eighteen years old) and his mental capacity. The Court refused *Soering*'s extradition to the US unless it received an assurance that the death penalty would not be employed.

Although the test adopted by the court in *Soering* provided for the possibility of repealing the application of the death penalty under Article 3 in the presence of certain conditions, the application of the death penalty was still acceptable under Article 2. The acceptance of the death penalty in principal and the prohibition of its application only in limited cases did not reflect the emerging European sentiment, which was against any application of the death penalty. In order for the ECHR to be compatible with the legal conscience and practice of contemporary Europe, an additional protocol that would abolish the death penalty was needed. In 1983, an optional protocol to the ECHR was adopted that called for the abolition of the death penalty.

A shift in human rights instruments, from ones that accepted the death penalty to ones that favoured its abolition, first took place on a regional level with Protocol Number 6 to the ECHR. Protocol 6 served as a model for two subsequent abolitionist protocols. Protocol 6

to the European Convention on Human Rights entered into force on 1 March 1985¹⁶¹, following long discussions on the issue of the death penalty that had begun in 1962¹⁶².

Article 1 of this protocol establishes three principles: the death penalty shall be abolished; no one may be condemned to death and no one may be executed. After reading Article 1, one is left with the idea that Protocol 6 provides for the total abolition of the death penalty. However, neither Article 1 nor the title of the protocol refer to the scope of abolition. Yet Article 2¹⁶³ states that the protocol shall apply only in peacetime, leaving to states the possibility of making provisions for the application of the death penalty in respect to acts committed in times of war or of imminent threat of war. Still, no provision for the death penalty could be made in respect of acts committed in any public emergency threatening the life of the nation. This restriction, found in Article 3, narrows the scope of derogations under Article 15 of the ECHR.¹⁶⁴

To date, this binding legal instrument has been signed by thirty-nine states.¹⁶⁵ It is signed but not ratified by Russia and is neither signed nor ratified by Turkey¹⁶⁶, one of the founding members of the Council of Europe. The wide ratification of Protocol 6 is linked to various

¹⁶¹ *Protocol # 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, 28 April 1983, ETS 114. In force since 1 March 1985. [Hereinafter *Protocol 6*]

¹⁶² *Supra* note 4 at 238.

¹⁶³ *Protocol 6*, art. 2 states: "A state may make provisions in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war..."

¹⁶⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, art. 15.

¹⁶⁵ Amnesty International-Ratifications of International Treaties to Abolish the Death Penalty, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).

¹⁶⁶ Turkey is a de facto abolitionist state. No one has been executed in Turkey since 1984: See *Supra* note 18 at 12-13.

measures previously adopted by various European states to extend the abolitionist trend not only within Europe but also beyond its borders.

In 1994, the Parliamentary Assembly made it a condition that any country wishing to enter the Council of Europe should first adopt a moratorium on executions and second, sign and ratify Protocol 6.¹⁶⁷ As the Council of Europe's Secretary General Daniel Tareschys stated on 20 January 1998, the "abolition of the death penalty became the litmus test for belonging to a civilized Europe."¹⁶⁸ The desire to become a member of the European Council led to the abolition of the death penalty in countries such as Czechoslovakia and Ukraine. Upon its accession to the Council of Europe in 1995, Ukraine committed itself to sign and ratify Protocol 6 within three years, but by the deadline of November 1998 it had still not done so. Although a moratorium on executions was introduced in March 1997, executions continued to be carried out secretly.¹⁶⁹ In 1999, the Council of Europe's Parliamentary Assembly threatened to annul the credentials of the Ukrainian delegation.¹⁷⁰ Afraid of losing its credentials, on 22 February 1999 the Ukrainian government removed the death penalty from its Criminal Code and replaced it with a maximum sentence of life imprisonment.¹⁷¹ Ukraine also ratified Protocol 6 to the ECHR.¹⁷²

Abolition of the death penalty was one element the European Union took into consideration when recognizing new member states. When issuing its opinion on the recognition of

¹⁶⁷ Council of Europe, P.A., 25th Sitting., Res. 1044 (1994) on the abolition of capital punishment.

¹⁶⁸ Amnesty News-Amnesty International News June 2000, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).

¹⁶⁹ *Ibid.*

¹⁷⁰ Council of Europe, P.A., Res. 1179 (1999) on the honoring of obligations and commitments by Ukraine.

¹⁷¹ Council of Europe, *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Pub., 1999) at 11.

¹⁷² *Supra* note 27.

Slovenia in 1992, the arbitration commission took into consideration the abolition of the death penalty in the Constitution of Slovenia.¹⁷³

Also in 1994, the Parliamentary Assembly of the Council of Europe recommended the establishment of an additional protocol to the ECHR, which would provide for the complete abolition of the death penalty with no possibility of reservations. Under this protocol, the death penalty would no longer be accepted in times of war or in times of imminent threat of war.¹⁷⁴ It can therefore be concluded that the European abolitionist philosophy is not limited to the abolition of the death penalty in peacetime; its ambition is the complete abolition of the death penalty.

Since the adoption of Protocol 6 by nearly all European states, the prohibition on the application of the death penalty has been invoked in many cases before the European Commission of Human Rights and in domestic courts to refuse extradition to retentionist countries. In 1994, the European Commission of Human Rights studied the application of an individual subject to extradition to the US.¹⁷⁵ The applicant stated that despite assurances from the Dallas County Prosecutor that the death penalty would not be employed, she could still be executed. She justified her claim by saying that since the assurances were furnished by federal authorities, they did not bind the executive and/or judicial authorities of the state of Texas. The Commission rejected her claim, declaring it inadmissible. In the same year, the Commission studied the application of an individual subject to extradition from Austria to the Russian Federation.¹⁷⁶ After reviewing the Penal Code of the Russian Federation, the

¹⁷³ Council of Europe, P.A., 25th sitting, Recommendation 1246 on The Abolition of Capital Punishment (1994). See also *Supra* note 171 at 13.

¹⁷⁴ *Supra* note 171 at 75.

¹⁷⁵ *Aylor-Davis v. France* (1994), App. No. 22742/93 Eur. Comm. H.R. D.R., 76B D.R. 164-237.

¹⁷⁶ *Raidl v. Austria* (1995), App. No. 2534/94 Eur. Comm. H.R. D.R., 82A D.R. 134-254.

Commission found that there was no possibility that the applicant would face the death penalty. The Commission explained its view by stating that the crime committed was punishable by a maximum sentence of ten years under the Russian penal code.

The prohibition of applying the death penalty, found in Article 1 of Protocol 6, was also used by domestic courts in Europe to refuse extradition requests to retentionist countries. Relying on the prohibition of the application of the death penalty found in Protocol 6, the French Conseil d'état has refused two extradition requests.¹⁷⁷ Another request for extradition was refused by the Constitutional Court of Italy. Despite assurances from American prosecutors that Pietro Venezia would not face the death penalty if extradited, the Constitutional Court of Italy refused extradition to the US.¹⁷⁸ Finally, in *Short v. Netherlands*, the Supreme Court of the Netherlands refused the extradition of a US serviceman, despite a request from NATO for extradition.¹⁷⁹

Non-extradition was one of the far-reaching measures used by the European continent to export its abolitionist beliefs outside its borders, but not the only one. The Parliamentary Assembly adopted various measures to end this form of barbarism in states that have observer status with the Council of Europe and in other countries. There is a view within the Parliamentary Assembly that capital punishment should be abolished in states with observer status. Two states granted observer status with the Council of Europe, Japan and the US, still employ the death penalty. In a motion referred to the Committee on Legal Affairs and

¹⁷⁷ *Fidan*, (1987) II Recueil Dalloz-Sirey 305 (conseil d'état)-221,254; Gacem, (1998) I Semaine Juridique IV-86 (conseil d'état)-221,254.

¹⁷⁸ *Venezia v. Ministero Di Grazia E Giustizia*, [1996] 79 Rivista di Diritto Internazionale 815.

Human Rights, the Parliamentary Assembly was asked to consider states with observer-status that still apply the death penalty as violating their commitments under Statutory Resolution (93) 26 and therefore violating human rights standards.¹⁸⁰ Statutory Resolution (93) 26 reads: "any state willing to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...may be granted...observer status with the organization."

On different occasions, European states have brought the death penalty debate to retentionist countries, such as the US, through the Organization for Security and Co-operation (OSCE). Unfortunately, their calls never became binding due to the fact that the OSCE documents are adopted by consensus.¹⁸¹ As stated before, European efforts to abolish the death penalty were not limited only to the European continent and to countries that maintain legal ties with it, but Europe also exported its abolitionist philosophy to countries that are neither European nor maintain legal ties with the European continent.

A recent policy adopted by fifteen members of the EU targets the death penalty in non-European countries. On 29 June 1998, fifteen members of the European Union adopted a policy titled "Guidelines to European Union Policy Towards Third Countries on the Death Penalty." This policy calls for the progressive restriction of the use of the death penalty. In order to promote its policy, the EU will offer bilateral and multilateral co-operation with the

¹⁷⁹ *Short v. Netherlands*, [1990] 29 I.L.M (1378) 221, 254.

¹⁸⁰ *Supra* note 173 at 75.

¹⁸¹ *Supra* note 4 at 256-257.

aim of establishing a fair and impartial judicial process in criminal cases. The EU will also consider making representations in specific death penalty cases.¹⁸²

Alongside the European struggle for abolition, the UN adopted an abolitionist protocol supported by different resolutions aiming to universally abolish the death penalty. Seven years after the adoption of Protocol 6, an abolitionist seed was planted in the UN's agenda. On 29 December 1989, the General Assembly adopted the Second Optional Protocol to the ICCPR, which entered into force on 11 July 1991.¹⁸³ This abolitionist instrument updated the death penalty provisions found in the ICCPR. In its first Article¹⁸⁴, unlike Protocol 6, it calls for the total abolition of the death penalty, in peacetime and in times of war. However, this protocol allows reservations to be entered against the bar on the application of the death penalty in times of war.¹⁸⁵ Another difference between the Second Optional Protocol and Protocol 6 is the explanation given to the term “in time of war”. The phrase as found in the Second Optional Protocol encompasses an internal armed conflict. The process of abolition, which began with the ICCPR and was advanced through the adoption of the Second Optional Protocol in 1989, is being completed by various developments under the auspices of the UN.

At the forty-ninth session of the General Assembly in 1994, a draft resolution sponsored by an Italian non-governmental organization, Hands off Cain, called for a moratorium on

¹⁸² Amnesty News-Report of September 1998, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).

¹⁸³ *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, GA Res. 44/128, UN GAOR, 44th Sess., UN Doc. A/Res/44/128. (1989).

¹⁸⁴ *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, art. 1.

¹⁸⁵ *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, art. 2.

executions.¹⁸⁶ The resolution called upon states that continue to administer the death penalty to restrict its use to the group of crimes and people mentioned in the ICCPR. It also encouraged states that still retain the death penalty to adopt a moratorium on pending executions. The Italian government, which supported the resolution, obtained forty-nine co-sponsors. However, a group of retentionist states headed by Singapore blocked the adoption of the resolution.

Three years later, the Commission on Human Rights passed a resolution in which it asked member states to suspend all executions.¹⁸⁷ The 1997 resolution revealed the importance of abolishing the death penalty by stating that abolition “contributes to the enhancement of human dignity and the progressive development of human rights.” The resolution was approved by a vote of twenty-seven in favour, eleven in opposition and fourteen abstentions. The terms of the 1997 resolution required that the matter be brought before the commission again the following year.

In 1998, the Commission on Human Rights passed another resolution calling for a moratorium on executions.¹⁸⁸ The resolution, which sought to limit the administration of the death penalty and considered a moratorium on executions, was signed and co-sponsored by nineteen more countries than the preceding year (sixty-five countries signed the resolution). The 1998 resolution was approved by a vote of twenty-six in favour, thirteen against and twelve abstentions. The 1998 resolution, similar to the 1997 resolution, required that the

¹⁸⁶ UN GAOR, 49th Sess., UN Doc. A/49/234, A/49/234/Add. 1 (1994) 1-4.

¹⁸⁷ *Status of The International Covenants on Human Rights, Question of The Death Penalty*, U.N. ESCOR, Commission on Hum. Rts., 53rd Sess., Agenda Item 14, U.N. Doc. E/CN.4/1997/L.20 (1997).

¹⁸⁸ *Status of The International Covenants on Human Rights, Question of The Death Penalty*, U.N. ESCOR, Commission on Hum. Rts., 54th Sess., Agenda Item 13, U.N. Doc. E/CN.4/1998/L.12 (1998).

question of the death penalty be considered in the next session of the commission. The increase in the number of co-sponsors and signatures in the 1998 resolution reveals the growing acceptance of the abolitionist trend. From the European continent, Great Britain co-sponsored the 1998 resolution after abstaining on the 1997 version. Votes in favour of the 1998 resolution were received from Armenia, Azerbaijan, Georgia and Russia. From the African continent, support for a moratorium on executions was echoed from three countries, Angola; Cape Verde and Mali, that joined South Africa, which had been the only African country to vote in favour of an abolitionist resolution the previous year. Support for the 1998 resolution also came from Argentina, Mexico and Panama.

In the spring of 1999, the Commission on Human Rights passed a resolution in which it called for a moratorium on executions with the view of abolishing the death penalty.¹⁸⁹ The 1999 resolution, which reaffirmed and reinforced the 1997 and 1998 resolutions, was approved by a vote of thirty in favour, eleven against and twelve abstentions. During its 56th and 57th session, the Commission on Human Rights continued its consideration of the question of the death penalty and it adopted two resolutions¹⁹⁰ that reaffirmed the calls for a moratorium echoed in the previous resolutions.

The UN and European efforts to abolish the death penalty were joined by an American effort for abolition in 1990. The Second Optional Protocol and Protocol 6 served as a model for the creation of the Protocol to the American Convention on Human Rights. The trend to abolish the death penalty on the international and regional level was cited by the Inter-

¹⁸⁹ ESC Res. 1999/61, UN ESCOR, 55th Sess., UN Doc. E/CN.4/RES/1999/61.

¹⁹⁰ ESC Res. 2000/65, UN ESCOR, 56th Sess., UN Doc. E/CN.4/RES/2000/65; ESC Res. 2001/68, UN ESCOR, 57th Sess., UN Doc. E/CN.4/RES/2001/68.

American Commission in 1986, when it broached the idea of an Additional Protocol to the American Convention on the abolition of the death penalty. An additional Protocol containing a preamble and four Articles was adopted by the General Assembly of the Organization of American States in 1990 and came into force in 1991.¹⁹¹

Similar to the UN's abolitionist Protocol and contrary to the European one, the Protocol to the Inter-American Convention on Human Rights provides for the total abolition of the death penalty, but allows state parties to retain the death penalty in wartime. To date, the Protocol to the ACHR is ratified by seven countries and it is signed but not ratified by one country, Paraguay. The ratifications are mainly from Latin American countries that have played a role within the UN in abolishing the death penalty.

The three abolitionist Protocols have played a great role in abolishing the death penalty in different parts of the world. The abolitionist movement has taken giant strides since the 1940s. When the UN Charter was adopted in 1948, only eight countries had abolished the death penalty. Now more than half¹⁹² of the countries in the world have abolished the death penalty *de facto* and *de jure*.

Over the years, the abolitionist movement has succeeded in persuading many pre-retentionist countries that the death penalty belongs to a primitive and uncivilized past. As a result, the number of retentionist countries decreased but application of the death penalty

¹⁹¹ *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OASTS 73.

¹⁹² Amnesty International-Current Info-Facts and Figures About the Death Penalty, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).

did not cease entirely. In order to form an international customary norm, abolitionist efforts should be echoed in the domestic legal systems of the eighty-six retentionist countries.

From among the retentionist countries, the present author has chosen to study the death penalty systems of the US and the Islamic states of the Middle East and Africa, and their ability and inclination to change from retentionist to abolitionist in character.

Chapter Two. The American Case

I. The Death Penalty in the United States of America

The application of the death penalty in the United States of America dates back to the colonial period.¹⁹³ The first person executed in the US was Captain George Kendall in 1608. Executed in the Jamestown colony of Virginia, Kendall was charged with spying for Spain.¹⁹⁴ In the 17th century, the common law of England, which prevailed in the new colonies, stated that public hanging was the obligatory punishment for crimes committed against the state, the person and property.¹⁹⁵ Thirteen crimes were punished by death in the US: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, man stealing, perjury in a capital trial and rebellion.¹⁹⁶ Following the American Revolution, the death penalty retained the obligatory nature that it had under the British colony.¹⁹⁷

Over the years, and perhaps ironically, the mandatory nature of the death penalty proved to be one of the ways by which criminals could escape punishment. In the absence of jury discretion, juries preferred to acquit a person whom they believed to be guilty yet not deserving of death.¹⁹⁸ This problem found its solution in statutes that allowed a discretionary

¹⁹³ K. T. Prinzo, "The United States – 'Capital' of the World: An Analysis of why the United States practices capital punishment while the international trend is towards its abolition" (1999) 24 Brooklyn J. Int'l L. 855.

¹⁹⁴ Introduction to The Death Penalty-The Death Penalty in America, online: Death Penalty Information Center <<http://deathpenaltyinfo.org/history1.html>> (date accessed: 11 September 2001).

¹⁹⁵ *Supra* note 193.

¹⁹⁶ *Ibid.*

¹⁹⁷ T J. Walsh, "On The Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty" (1996) 44 Cleveland State Law Rev. 23.

¹⁹⁸ *Ibid.*

death penalty. The first state to enact such a statute was Tennessee in 1838.¹⁹⁹ Now, all thirty-eight American states²⁰⁰ that award the death penalty have statutes providing for discretion in its application.

In addition to reforms introduced by enacting new statutes that allowed for a discretionary death penalty, the 19th and 20th centuries carried also the hope of abolishing it. There were two attempts made to abolish the death penalty in the US. The first abolitionist round took place between the years 1897 and 1917. During that time, ten states abolished the death penalty, and the main factor that enhanced this abolitionist trend was the improvement in socio-economic conditions across the country. The same factor that led to the abolition of the death penalty in these ten states, however, also led to its reinstatement in eight of them when socio-economic conditions once again deteriorated.²⁰¹

The beginning of the 1970s introduced a second abolitionist round. Contrary to the first round, this abolitionist course was enhanced by factors of a legal nature. In 1972 the US Supreme Court ruled in *Furman v. Georgia*,²⁰² in a five-to-four decision, that the death penalty as administered under existing statutes was unconstitutional. In that case, the judges ruled that in the absence of any guidance to juries in the statutes of Georgia, there was a substantial risk that the death penalty would be imposed in an arbitrary and discriminatory manner. To declare the death penalty practice unconstitutional, the majority in *Furman* relied on the Eighth Amendment prohibition of cruel and unusual punishment and the Fourteenth

¹⁹⁹ *Ibid.*

²⁰⁰ The Death Penalty in America, online: Amnesty International
<<http://www.amnesty-usa.org/rightsforall/dp>> (date accessed: 3 September 2001).

²⁰¹ *Ibid.*

²⁰² *Furman v. Georgia*, 408 U.S. 238 (1972).

Amendment requirement of equal protection under the law.²⁰³ The justices who based their argument on the prohibition of cruel and unusual punishment were Brennan and Marshall JJ.²⁰⁴ Brennan J. argued that the death penalty violated the concept of human dignity, and Marshall J. stated that the death penalty served no legitimate penal purpose. Douglas, Marshall, and Stewart JJ. based their argument on both the Eighth and Fourteenth Amendments.²⁰⁵ These three judges wrote that the unlimited discretion of juries led to discrimination against the poor, powerless and black.

As a result of *Furman*, death penalty statutes in thirty-nine states were invalidated.²⁰⁶ The next step was thought to be the abolition of the death penalty. However, *Furman* instead led to the adoption of new death penalty statutes that limited the discretion of juries by presenting mitigating and aggravating circumstances. Most of the thirty-nine states responded to *Furman* by enacting new death penalty statutes. One year later, twenty states had enacted new death penalty statutes.²⁰⁷

In 1976, the Supreme Court ruled on the constitutionality of the new death penalty statutes in *Gregg v. Georgia*.²⁰⁸ The "guided-discretion" statutes provide that all capital trials must proceed in two stages.²⁰⁹ In the first stage, the jury decides the guilt or innocence of the defendant. In the case of guilt, the trial will proceed to the second step, the penalty stage. During the second step and before reaching its decision, the jury considers the aggravating

²⁰³ D. Cole, *No Equal Justice: Race and Class in the American Justice System* (New York: The New Press, 1999) at 226-227.

²⁰⁴ *Ibid.* at 226.

²⁰⁵ *Ibid.* at 227.

²⁰⁶ *Supra* note 18 at 150.

²⁰⁷ *Supra* note 203 at 226-227.

²⁰⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁰⁹ *Supra* note 203 at 228

and mitigating circumstances. A decision to sentence the defendant to death can be reached if at least one aggravating circumstance is present. If a defendant is sentenced to death, the decision will be automatically appealed to the State Supreme Court, which must: (a) see if the punishment is proportional to the crime committed by the defendant; (b) make sure that the jury's finding of an aggravating circumstance is supported by reliable evidence; and (c) determine if the sentence reached was influenced by any arbitrary factors.

The majority²¹⁰ of the Court in *Gregg* found that the "guided-discretion" statutes removed the possibility of rendering arbitrary and discriminatory death sentences. It stated: "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."²¹¹ Two judges in *Gregg* dissented. Brennan J. stated in his dissent²¹² that "evolving standards of decency" should make the Court get rid of the death penalty because it is no longer accepted in our time. Brennan added that the death penalty violates the Eighth and Fourteenth Amendments. The second dissent²¹³ was pronounced by Marshall J., who refused the death penalty by stating that it is not necessary to promote any legitimate notion of retribution and such a penalty has no deterrent effect. Similar to Brennan J., Marshall J. affirmed that the death penalty violates the Eighth and Fourteenth Amendments.

²¹⁰ Mr. Justice Blackmun, Mr. Justice White, Mr. Justice Rehnquist, Mr. Justice Stewart, Mr. Justice Powell, Mr. Justice Stevens and Chief Justice Burger stated that the punishment of death for the crime of murder does not, under the guided discretion statute, violate the Eighth and Fourteenth Amendments; *Gregg v. Georgia*, 428 U.S. 153 (1976) at 158-228.

²¹¹ *Supra* note 203 at 206-207.

²¹² *Gregg v. Georgia*, 428 U.S. 153 (1976) at 228-231.

²¹³ *Gregg v. Georgia*, 428 U.S. 153 (1976) at 231-241.

Following the reinstatement of executions as a result of the decision in *Gregg*, the number of executions has continuously increased. From twenty-one executions in 1984,²¹⁴ the number rose to thirty-eight in 1993²¹⁵ and eighty-five in 2000²¹⁶, the highest figure since the death penalty was reinstated. The continuous increase in the number of executions can be understood as an assertion of its constitutionality. In other words, an observer may be convinced that due to the impossibility of a constitutional challenge, courts apply the death penalty whenever they feel that the gravity of the crime deserves such a punishment. A closer look at the number of people executed and their cases shows that the death penalty practice can still be challenged under the Sixth and the Fourteenth Amendment. The present author will argue in the next section that the death penalty practice in the US violates the constitution and therefore presents a solid basis for an abolitionist claim.

II. Room for Change

A. The Right to Court-Appointed Counsel

The Sixth Amendment to the U.S. Constitution, adopted in 1791, guarantees the right to counsel in a criminal trial.²¹⁷ Prior to the Supreme Court decision in *Powell v. Alabama*,²¹⁸ the right to counsel meant that a defendant could make use of the services of an attorney

²¹⁴ *Supra* note 193 at 75.

²¹⁵ S. H. Jupiter, "Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty In American Democracy" (1996) 23 Fordham University School of Law Urban Law Journal 437 at 438.

²¹⁶ Amnesty International, Current Information on the Death Penalty-Death Sentences and Executions in 2000, Online: Amnesty International<<http://www.amnesty.org>> (date accessed: 10 August 2001).

²¹⁷ U.S. Const. amend. VI.

²¹⁸ *Powell v. Alabama*, 287 U.S. 45 (1932).

whenever he had one.²¹⁹ In 1932, the US Supreme Court in *Powell*²²⁰ established the right of indigent criminals to court-provided counsel in capital cases.

In *Powell*, nine young black men were charged with raping two young women and as a result, the men were sentenced to death. The incident took place on a train travelling from Chattanooga to Memphis. The sentence was imposed on the nine black men, aged thirteen to twenty, in the absence of any legal assistance due to their poverty. Although the judge appointed the whole bar of Scottsboro to defend them, only one attorney agreed, and he had no time to prepare the case and to conduct investigations, for he had agreed to represent the defendants only on the morning of the trial. After the failure of this first attempt to provide legal assistance, a second attempt was made, this time not by the Court but by a group of concerned citizens. They hired a Tennessee lawyer to represent the defendants, but two factors resulted in the failure of this second attempt. The privately sponsored counsel failed to fulfill his duty as he was not schooled in Alabama law and, similar to the first counsel, he did not have the necessary time to conduct his own investigations. The failure of these two attempts led to the sentencing of the eight defendants by an all-white jury. The case was appealed to the Supreme Court under the assistance of Walter H. Pollak, a lawyer appointed by the Communist Party. The Supreme Court reversed the convictions, basing its decision on the denial of legal assistance, and held that whenever a defendant in a capital case is poor, counsel should be provided at the state's expense.²²¹

²¹⁹ S. Walker, C. Spohn & M. DeLone, *The Color of Justice-Race, Ethnicity, and Crime in America*, 2d ed. (Ontario: Wadsworth, 2000) at 128.

²²⁰ *Supra* note 218.

²²¹ *Ibid.*

Three decades after *Powell*, in *Gideon v. Wainwright*,²²² the Supreme Court extended the right to court-provided counsel to all felony cases. *Gideon* was the case of a poor Florida man, Clarence Earl Gideon, who was charged with breaking and entering a poolroom. At trial, Gideon claimed that he had a constitutional right to court-appointed counsel because he could not afford one. His request was denied and he was sentenced to a term in prison. Gideon addressed a letter to the Supreme Court from prison asking it to hear his case. The Supreme Court accepted Gideon's request and appointed Abe Fortas, one of the nation's premier lawyers, to argue his appeal. In the end, Gideon was acquitted and the Supreme Court ruled that the Sixth Amendment guarantees indigent defendants the assistance of a lawyer in all felony cases.²²³

Both *Powell* and *Gideon* were thought to be victories for the indigent defendants, for the right to court-appointed counsel established in *Powell* and expanded in *Gideon* is central to realizing equality before the law. Unfortunately, the victory did not last for long. The failure to remedy systematic problems in the period after *Gideon* led to the provision of court-provided counsel whose assistance was ineffective. In *Powell*, the first case in which the Court ruled that the constitution required appointment of counsel for an impoverished defendant, the Court stated that it was not sufficient to appoint counsel at the state's expense but that such legal assistance must be meaningful and effective.²²⁴ Since *Powell*, the jurisprudence of the Court is constant on the effectiveness issue. In *Mc Mann v. Richardson*²²⁵, a case that took

²²² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²²³ *Supra* note 203 at 63.

²²⁴ *Supra* note 203 at 67.

²²⁵ *Mc Mann v. Richardson*, 397 U.S. 759, 771 and n. 14 (1970).

place four decades after *Powell*, and in *Strickland v. Washington*²²⁶, decided in 1984, the court held that legal assistance must be "effective".

Nevertheless, an examination of the court-appointed counsel system currently in operation reveals ineffectiveness that results in inequality before the law. Both *Powell* and *Gideon* failed to address systematic problems in the indigent defense system. In these two cases, the Court did not set methods for compensation, nor did it set the quality and quantity of experience needed for a counsel to be appointed.²²⁷ The task of adopting compensation systems and adequate methods for the provision of counsel was left to individual states.²²⁸ States use one of three approaches²²⁹ when appointing counsel: assigned counsel, the contract system, or public defenders.²³⁰ One common characteristic of all three approaches is the notorious under-compensation of court-provided counsel.²³¹ Their compensation is usually limited to a certain amount of money that turns out to be insufficient to even cover expenses. The maximum allowance for a court-appointed lawyer ranges from \$ 100 to \$ 5000. Studies conducted since 1965 have shown that there is a strong correlation between compensation of counsel and effective representation of the poor.²³²

²²⁶ *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

²²⁷ *Supra* note 203 at 78,79, 87.

²²⁸ A. L. Vreeland, "The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation" (1991) 90 Michigan L. Rev. 626 at 627.

²²⁹ A. M. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance" (1999) 99 Columbia L. Rev. 1103 at 1120; *Supra* note 228 at 627; S. B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer" (1994) 103 Yale L. Journal 1835 at 1849,1850.

²³⁰ A survey conducted in 1986 found that 37% of the U.S prosecutorial districts used a public defender program, 52% used an assigned counsel system, and 11% used a contract attorney system. See A. M. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance" (1999) 99 Columbia L. Rev. 1103 at 1120

²³¹ *Supra* note 230; Michigan L. Review 626 at 627; and *Supra* note 203 at 83.

²³² After the decision in *Gideon*, different studies evaluated the indigent-defense systems. The first was a two-year comprehensive study conducted by the American Bar Foundation. A decade later, the study done by the American Bar Foundation, was followed by a report submitted by the National Defender Survey.

In sum, studies have demonstrated that under-compensation affects the quality and skill of counsel and therefore affects the quality of the defense that the defendant receives.

Under-compensation discourages seasoned attorneys from accepting appointments. As a result, death penalty cases are given to young lawyers who are unfamiliar with trial procedure, criminal procedure and court practice.²³³

Furthermore, under-compensation results in the failure of counsel to investigate and research relevant laws. Death penalty cases need expert witness as well as investigations in order to collect facts that could help in obtaining a more lenient verdict. Investigations in death penalty cases are three to five times larger than in other cases, and the length of the trial as a whole is over three times that of a non-capital murder case.²³⁴ These complicated investigations and the lengthy trial demand more money to appoint expert witnesses and to conduct investigations. A 1991 estimate of the expenses of a capital case set the average cost at \$106,350.²³⁵ Comparing the quality and quantity of work needed to the amount of money paid to defense lawyers, it is not surprising that many counsel refuse to work vigorously for such a meagre amount of money.

Another reason for the failure to investigate and research relevant laws is due to the courts' refusal to authorize funds for counsel in most cases. Although the Supreme Court states that expert assistance should be provided in certain circumstances,²³⁶ lawyers do not always seek expert assistance for fear of refusal of their demand by the court. *Nelson v. Zant*²³⁷ is a

Assessments of court-provided defense services continued with a study conducted by the ABA in 1979. For a discussion of these studies, see *Supra* note 228 at 639-641.

²³³ *Supra* note 214 at 643-644.

²³⁴ *Ibid.* at 645, 646, and 648.

²³⁵ *Ibid.* at 649.

²³⁶ S.B. Bright, "The Death Sentence Not for the Worst Crime but for the Worst Lawyer" (1994) 103 Yale L. Journal 1835 at 1847.

²³⁷ *Nelson v. Zant*, 405 S.E. 2d 250 (Ga 1991).

case in which counsel did not seek funds for an expert because of his prior knowledge that his request would be rejected. At his capital trial in Georgia in 1980, Gary Nelson was represented by a lawyer who had never before tried a capital case. When the outcome of his case depended on finding evidence concerning a hair found on the victim's body and it was thought that the hair belonged to Nelson, expert evidence was needed. Figuring that a request for additional funds would be rejected, Nelson's counsel did not seek funds to pay an expert. The court authorizes funds only when counsel shows that he is in serious need of an expert witness. Even when funds are authorized, the amount is so small that few experts are willing to co-operate with court-appointed counsel.²³⁸

Besides the Court's failure to set compensation schemes, its failure in *Gideon* to establish the qualities and skills needed for an attorney to be accepted as a court-appointed representative also harmed the interests of the indigent defendant. Due to the Court's neglecting to ask for experiential qualifications, lawyers were usually appointed without even minimum specialized qualifications.

Donald Paradis, convicted in a capital murder case, was represented by an attorney who was not actually schooled in criminal law; his attorney had never studied criminal law, criminal procedure or trial advocacy in law school. Besides a flagrant lack of theoretical background, Paradis's attorney lacked experience in criminal trials due to the short period since passing his bar exam and his appointment as counsel.²³⁹ The case of Bill Sunday Birt²⁴⁰ is yet another example of the lack of experiential qualifications of court-provided counsel. Birt, convicted of murder, was represented by an attorney who was entirely unfamiliar with criminal cases.

²³⁸ *Supra* note 236 at 1846.

²³⁹ *Paradis v. Arave*, 954 F. 2d 1483, 1490-1491 (9th Circ. 1992).

²⁴⁰ *Birt v. Montgomery*, 725 F. 2d 587, 598 n.25 (11th Circ.), cert. denied 469 U.S. 874 (1984).

At trial, Birt's lawyer was asked to name any criminal law decisions with which he was familiar. In response, he was able to name only two cases, *Miranda v. Arizona*²⁴¹ and *Dredd Scott v. Sandford*²⁴². Only the former is a criminal case.

When economic constraints and the lack of relevant qualifications render appointment of talented and qualified counsel impossible, the only hope for impoverished defendants is that capable lawyers will volunteer to take on their cases, whether or not they can be adequately paid. However, this hope may fade due to a judge's discretion when appointing counsel. In many cases, skillful lawyers ready to take the case of indigent defendants have been barred from doing so. After winning a new trial for his client by demonstrating that court-provided assistance on the first trial was ineffective, an expert capital litigator from the NACCP Legal Defense and Educational Fund was barred by a local judge in Fayette county, Georgia, from continuing to represent his client Victor Roberts.²⁴³

In another Georgia case, the bid made by two qualified and talented lawyers to continue representing their client was rejected by the trial court. After the appointment of two lawyers with no experience in capital litigation, the two qualified lawyers appealed the appointment decision to the Supreme Court and succeeded in having it reversed.²⁴⁴

These two above cases show that even when capable lawyers are willing to represent indigent defendants, the judge's discretion can stop them from acting. They may be replaced by lawyers who lack adequate skills. The outcome of judicial discretion can be better

²⁴¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁴² *Dredd Scott v. Sandford*, 60 U.S. 393 (1856).

²⁴³ *Roberts v. State*, 438 S.E. 2d 905, 906 (Ga. 1994).

understood if one examines the motivating factors that make the judge use his discretion in this way. When elected-court judges depend on pro-death penalty ideas for re-election, they prefer not to appoint skillful lawyers who may successfully bring constitutional challenges to the application of the death penalty.²⁴⁵ As a result of this discretion, the indigent defendant may in many cases lose his last hope of being represented by a skillful lawyer.

Under-compensation, the lack of experiential qualifications and the politics of indigent defense appointments lead to deficiencies in evidence. As a result, the outcome of a case may be prejudiced. Finding evidence concerning the mental ability of the accused, his academic background and his family may serve as mitigating factors that can change the outcome of a case from sentencing the defendant to death to his imprisonment for life. The importance of evidence and its effect on the outcome of a trial can be tested if one cites cases that were first dealt with in the absence of detailed evidence concerning the life of the accused, but were later reconsidered in the presence of such evidence.

When the cases of Holloway²⁴⁶, Smith²⁴⁷ and Thomas²⁴⁸ were decided in the absence of evidence, the result was imposition of the death penalty. However, when reconsidered in the presence of new evidence, the disposition changed. New evidence concerning the mental incapacity of the three convicted, Jerome Holloway, William Alvin Smith and Donald Thomas, convinced the juries that the death penalty should be replaced by life imprisonment. Investigations demonstrated that both Holloway and Smith had low IQ scores. For instance, Holloway had an IQ of 49 and the intellectual capacity of a 7-year old

²⁴⁴ *Amadeo v. State*, 384 S.E. 2d 181,181 (Ga. 1989).

²⁴⁵ *Supra* note 203 at 89.

²⁴⁶ *Holloway v. State*, 361 S.E. 2d 794, 796 (Ga. 1987).

²⁴⁷ *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987).

²⁴⁸ *Thomas v. Kemp*, 796 F. 2d 1322, 1324 (11th Circ. 1986).

child. Smith had an IQ of 65. Finally, Thomas was found to be schizophrenic.²⁴⁹ In short, the failure to deal with systematic problems made *Gideon*'s seeming victory a threat to the constitutional right of indigent defendants under the Sixth Amendment. Four decades after *Gideon*, solutions have not yet been adopted to remedy the systematic problems that *Gideon* failed to address. Studying the efforts of the American judiciary over the past four decades, one can notice that instead of extending the scope of the right to counsel and rendering it more effective, some judicial efforts have been directed towards blocking its effectiveness by decreasing the chances of winning a so-called ineffective counsel claim.

Two studies conducted by the American Bar Association (ABA), one in 1982 and another in 1993, stated that the post-*Gideon* era did not provide solutions; on the contrary it led to a crisis.²⁵⁰ To understand what the ABA meant by crisis, one must study the efforts of the judiciary to remedy the situation. One way to protect a person's constitutional rights is through the courts. If a defendant is successful in an ineffective counsel claim, then he has succeeded in showing that his right under the Sixth Amendment was not fulfilled and therefore the death penalty is unconstitutional. Before 1984, lower courts accepted the claim of the defendant only when counsel's performance shocked the conscience of the Court.²⁵¹ In *Strickland v. Washington*²⁵², the Supreme Court adopted a two-pronged test to study an ineffective counsel claim. In order to succeed in his claim under the test adopted in *Strickland*, the defendant must display two things. As a first step, the defendant has to show that counsel's performance was below an objective standard of reasonableness. As a second

²⁴⁹ *Supra* note 238 at 1837.

²⁵⁰ *Ibid.* at 1866.

²⁵¹ A.M. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance" (1999) 99 Columbia L. Rev. 1103 at 1123.

²⁵² *Strickland v. Washington*, 466 U.S. 688 (1984).

step, he must indicate that counsel's ineffectiveness harmed his interests because it resulted in an unfair outcome. In the same decision, the Supreme Court stated that the failure to meet the first of the two steps would dismiss the consideration of the second.

The fulfillment of the first step of the *Strickland* test depends on the efforts of the defendant and the decision of the court. The defendant must first identify the acts or omissions of counsel that are deemed not to have been the result of reasonable judgment. Here, many impediments may block the way of the defendant's arguments. When courts refuse to address constitutional violations that were not preserved by counsel, the absence of acts and omissions from the records due to counsel's negligence can impede the defendant's claim. In addition to the acts absent from the trial record due to counsel's negligence, some acts, which may have a significant influence on the outcome of the defendant's claim, do not appear in the trial record. Acts such as poor negotiating skills, which may result in a failure to bring a favorable plea argument, and the failure to question the defendant's family and friends who may be able to provide information on the defendant's life, never appear on the trial record. As a result, it is difficult for the defendant to detect the effect of these failings. Another reason that may block the way of the defendant's argument is counsel's threat of a malpractice suit. State Courts hold that the denial of an ineffective assistance claim collaterally prevents a defendant from suing for malpractice.²⁵³ In the presence of this collateral estoppel rule, it is obvious that counsel will be uncooperative with the defendant in proving an ineffective assistance claim.

²⁵³ A. M. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance" (1999) 99 Columbia L. Rev. 1103 at 1126.

If a defendant were to overcome these impediments, the court would have to determine whether the identified acts or omissions were outside the range of professionally competent assistance. Starting from a presumption of reasonableness, it is always difficult to motivate a court to find that the second step is satisfied. Adopting a presumption of reasonableness, the court has placed the *Strickland* argument in an exceptional position. In ordinary cases, a defendant has to prove only the presence of a constitutional violation and after that it is the duty of the government to prove that the error did not lead to any harm.²⁵⁴

Whenever step one has been fulfilled, the Court turns to test the presence of the conditions needed for the second step to be satisfied.

The presence of error alone is not enough to show incompetence of counsel. The defendant has to demonstrate that there is a relation between the error made and the outcome of the trial. Only in exceptional cases will prejudice be presumed by the court.²⁵⁵ Normally, a defendant must show that counsel's mistakes deprived him of a fair and reliable result, not only of a better result. Even when the two steps are fulfilled, the consequences that the attorney may face are not severe enough to deter him from repeating his failures in the future, because not all states have indicated that findings of ineffective assistance of counsel must be reported to the states bars.²⁵⁶

²⁵⁴ *Supra* note 203 at 78.

²⁵⁵ Prejudice is presumed if the incompetence of counsel was due to the state's interference with the counsel or through counsel own conflict of interest. See *Supra* note 253 at 1125.

²⁵⁶ Arizona is one of the states that indicated that findings of ineffective assistance of counsel should be reported to the state bar. In Illinois, contrary to Arizona, a public defender is not obliged to report a finding of ineffective assistance to the Attorney Registration and Discipline Committee: See *Ibid.* at 1126.

The Supreme Court's effort to narrow the possibility of accepting an ineffective counsel claim can be seen in the procedural obstacles adopted by the Court. In *Wainwright v. Sykes*,²⁵⁷ the Court stated that ineffective assistance claims should be raised in state court or else barred from collateral federal review. One decade after *Gideon*, the Court adopted even more unforgiving procedural rules when it rendered its decision in *Murray v. Gianatarro*²⁵⁸ in 1989. In this case, the Supreme Court stated that the defendant had no right to court-provided counsel after his first appeal. Keeping in mind that in some states there are nine stages of review after the first appeal, the provision of counsel for the indigent defendant only on his first appeal leaves the defendant with the task of representing himself on state and federal post-conviction review. The assistance of counsel in post-conviction review is much more important than in the initial trial and direct appeal. It is important because counsel in post-conviction review must address issues and deal with problems that were not confronted before. The novelty issues and the demand for new facts reduces the chances of a defendant defending his claim successfully because he cannot rely on the trial record or the initial appeal briefs.²⁵⁹

Owing to procedural rules and the high bar of *Strickland*, few ineffective counsel claims succeed. For example, over a period of seven years, from 1 January 1989 through 21 April 1996, the Supreme Court of California received 103 ineffective assistance claims. In only six of the 103 cases, the defendant's claim for ineffective representation was accepted.²⁶⁰

Four decades following *Gideon*, the Supreme Court introduced minimal reforms to the indigent-defense system. In Louisiana, South Carolina and Mississippi, the Court struck

²⁵⁷ *Wainwright v. Sykes*, 433 U.S. 72 (1977).

²⁵⁸ *Murray v. Gianatarro*, 492 U.S. 1, 10 (1989).

²⁵⁹ *Supra* note 203 at 74.

down limits on compensation. However, even with these reforms the Supreme Court capped the wages of counsel at the minimum wages an ordinary lawyer may receive.²⁶¹

In sum, it can be contended that over the course of four decades the Supreme Court has failed to deliver *Gideon's* and *Powell's* promise. In the initial right to counsel cases,²⁶² the Supreme Court explained the right to counsel found in the constitution and stated that whenever a defendant is poor, states have an obligation to provide counsel at the state's expense. Although these cases were initially viewed as promoting the defendant's constitutional right to counsel and assuring provision of this right equally to the poor and the rich, in reality they did the contrary.

The failure and reluctance of the Supreme Court to deal with *Gideon's* systematic problems has resulted in a constitutional right that is empty in practice. A closer examination of the right to counsel provision reveals the presence of inequality between the rich and the poor. Although the poor have the right to court-appointed counsel, this right is often ineffective. Over the years, the Supreme Court's jurisprudence has legitimized inequality as opposed to equality between the rich and the poor. Instead of promoting the right to counsel, the Supreme Court's efforts have violated it and thus give rise to a challenge of the constitutionality of the death penalty that may ultimately lead to its abolition. Apart from the defendant's constitutional right under the Sixth Amendment, the death penalty practice may be found to violate other constitutional rights provided to the defendant under the Fourteenth Amendment Equal Protection clause.

²⁶⁰ *Ibid.* at 80.

²⁶¹ *Supra* note 238 at 1866-1867.

²⁶² *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

B. Race and the Death Penalty

The purpose of this section is to assess the validity of the Supreme Court's assumption that the guided discretion statutes enacted since 1976 have removed arbitrariness and discrimination from the capital sentencing practice.²⁶³ To do this, the present author will question the neutrality of the death penalty practice in both its arrest and trial stages.

1. Discrimination at the Arrest Stage

Although the court in *Gregg*²⁶⁴ succeeded in limiting jury discretion that may lead to the arbitrary and discriminatory imposition of the death penalty, this is not the only form of discretion that may lead to the arbitrary and discriminatory imposition of the death penalty. Another place where discretion is found is at the arrest stage. The wide discretion that police officers have results most of the time in the arrest of more black people than white. An incident that took place in Prince George County, Maryland, explains the injuries that police discretion can cause to minorities. During a two-week special operation in Prince George County, seventy-six adults were arrested. All of the black adults caught with crack cocaine were arrested. All white suspects were released.²⁶⁵

The following question is obvious: was the non-arrest decision based on the absence of evidence of actual criminal liability or simply on the exercise of police discretion? An incident that took place during the two-week special operation helps provide an answer. In December 1995, members of the Prince George County police department observed three adults smoking crack cocaine in a car in the presence of a child. Although during the special

²⁶³ See *Supra* note 210.

²⁶⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁶⁵ C. Milloy, "Unequal Justice in P.G?" *Washington Post* (25 February 1996) B1.

operation, the police arrested people suspected of drug activities, the officers did not arrest the three adults and the child in this case. Rather, they simply escorted them to a local substation and then allowed them to go home. Although this scene involved actual criminality, the white officers chose not to arrest three white crack smokers.²⁶⁶ This example does not deal with a crime punishable by death, but it helps to illustrate rather vividly what different statistical studies indicate when studying the neutrality of the criminal justice system in general and that of death penalty application in particular.

In a 1984 study that analyzed police acts in twenty-four police departments, Smith, Visher and Davidson found that "race does matter" at the arrest stage. They explained their finding by stating that police officers were more likely to arrest when the victim was white and the suspect black. Their analysis indicated also that police officers were more likely to comply with white victims' requests to arrest a suspect.²⁶⁷ Three years later, a study conducted in California reached the same conclusion. Tillman's study of police-citizen encounters in California found that sixty-six percent of all African American men were likely to be arrested before the age of thirty, compared with only thirty-four percent of white men.²⁶⁸

Following these studies conducted by non-official bodies, a study conducted by the United States Congress General Accounting Office confirmed the results of all studies completed after the watershed case of *Furman*.²⁶⁹ After surveying all twenty-eight post-*Furman* studies of race, the US Congress General Accounting Office found that the "race of victim" influence

²⁶⁶ *Ibid.*

²⁶⁷ D. A. Smith, C. Visher & L.A. Davidson, "Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions" (1984) 75 *Journal of Criminal Law and Criminology* 234-249.

²⁶⁸ R. Tillman, "The Size of The Criminal Population: The Prevalence and Incidence of Adult Arrest" (1987) 25 *Criminology* 561-579.

²⁶⁹ For an explanation of the decision in *Furman* see *Supra* note 202.

was consistent in all state capital sentencing systems and was found at all stages of the criminal justice system.²⁷⁰ One year after the issuance of this report, a study conducted in 1991 by an independent study commission set up by the Florida Supreme Court reached the same conclusion.²⁷¹ The results of the previously mentioned empirical studies show that more black people than white²⁷² are arrested. After the arrest stage, the convicts are transferred to the trial stage where racial discrimination is also present.

2. Discrimination in Jury Selection

The long history of the Supreme Court fighting racial discrimination, from 1880 until 1986, may leave one with the impression that the Supreme Court has closed all doors on racial discrimination in jury selection. A closer observation, however, reveals the fact that racial discrimination is still prevalent in jury selection and even supported by the Supreme Court.

The first case to condemn racial discrimination in jury selection was *Strauder v. West Virginia*²⁷³ in 1880. The Supreme Court used the Fourteenth Amendment to challenge the exclusion of blacks from jury composition. In another case, *Neal v. Delaware*²⁷⁴, decided in the same year as *Strauder*, the Supreme Court invalidated a conviction on grounds of jury discrimination. For over a century, the Supreme Court's jurisprudence was not consistent²⁷⁵

²⁷⁰ United States General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5, reprinted in 137 Cong. Rec. S82713 (Daily Edition June 20, 1991.)

²⁷¹ K. Reed, R. Wilson & J. Fitzpatrick, "Race, Criminal Justice and The Death Penalty" (1994) 15 Whittier L. Rev. 395.

²⁷² When explaining discrimination in arrests in their book, *The Color of Justice: Race, Ethnicity and Crime in America*, Walker, Spohn and Delone stated that although African Americans are only 12% of the population, in 1995 they represented 30.9 % of all arrests; See *Supra* note 219 at 99.

²⁷³ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

²⁷⁴ *Neal v. Delaware*, 103 U.S. 370 (1880).

²⁷⁵ Claims of racial discrimination were not always accepted by the court. For example, the court in the case of *Akins v. Texas*, decided in 1945, rejected a claim that stated that the jury selection in one Dallas county is racially biased. The claim was rejected even though the jury in that county adopted a practice of placing only one black juror on each grand jury. See *Akins v. Texas*, 325 U.S. 398 (1945).

concerning discrimination in jury selection, yet it has taken measures to get rid of such racial discrimination. In *Scottsboro*²⁷⁶, a 1935 case, the Supreme Court stated that statistical studies showing that blacks are excluded from the jury are enough to prove the presence of discrimination. The *Scottsboro* case is significant, because in the period preceding it the defendant had to show a direct racist motive in order to prove discrimination. Before *Scottsboro*, there was a presumption of good faith on the part of government officials.

If the *Scottsboro* case marked an advancement in the fight to eliminate racial discrimination from jury selection, *Taylor v. Louisiana*²⁷⁷ was thought to be the last time a US court would ever have to address discrimination in jury selection. In that case the Supreme Court stated that the number of people in jury rolls and venires should be proportional to their number in the state. For example, if there are 100,000 blacks in a certain state and 50,000 white persons, the number of blacks in jury rolls and venires should be double the number of white jurors. Although the decision in this case was supposed to render racial discrimination a mere relic from the past, these hopes were not met. Racial discrimination was still detected in jury selection even after the decision in *Taylor v. Louisiana*, for the non-extension of the decision of this case to small juries led to the continuity of racial discrimination via peremptory challenge. Under the peremptory challenge rule, a party can strike any potential juror from the trial jury without offering any explanation. This rule was often used to strike black jurors, thereby constructing an all-white jury. This situation endured until 1986, when in the case of *Batson v. Kentucky*²⁷⁸ the Court ruled that race-based peremptory challenges were unconstitutional. When the nature of peremptory challenges allowed for no

²⁷⁶ *Norris v. Alabama*, 294 U.S. 587 (1935).

²⁷⁷ *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

²⁷⁸ *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986).

explanations, prosecutors, even after the *Batson* decision, used simple and sometimes silly reasons to strike jurors. Since 1986, the courts have accepted reasons related to the age of the juror or to his social and economic status in order to strike him from the jury.²⁷⁹

In addition to the under-enforcement of *Batson*, the Supreme Court has encouraged the use of race-based peremptory strikes under the guise of age, education, unemployment and failure to make eye contact. In *Purkett v. Elem*,²⁸⁰ the Supreme Court stated: "any racially neutral reason, no matter how fantastic, silly or superstitious, is sufficient to satisfy the prosecutor's burden, provided that the trial court finds the reason genuine."

Both the Supreme Court's failure to adopt a means of enforcement for the decision in *Batson* and its support for covert race-based selection has led to a violation of US obligations under Article 14 of the ICCPR,²⁸¹ and also resulted in the sentencing of minorities at disproportionately high rates. Studies conducted by social scientists and commissions have found that defendants who kill white people are much more likely to receive the death penalty than those whose victims are black.²⁸² In order to mount constitutional challenges to the imposition of the death penalty under the Fourteenth Amendment Equal Protection Clause, defendants may use empirical evidence of racial discrimination in the capital

²⁷⁹ *Supra* note 203 at 120.

²⁸⁰ *Purkett v. Elem*, 115 S. Ct. 1769 (1995).

²⁸¹ Article 14(1) of the ICCPR reads: "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing of a competent, independent and impartial tribunal established by law." See *International Covenant on Civil and Political Rights*, art.14 (1).

²⁸² David C. Baldus, George Woodworth & Charles A. Pulsaki, Jr., "Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection, and Correction," 51 Wash. & Lee L. Rev. 359, 386 n.115 (1994); United States, General Accounting Office, *Death Penalty Sentencing: Research indicates pattern of racial disparities*, (United States: General Accounting Office, 1991); Committee on Human Rights, *Report of the Special Rapporteur on Extra-judicial Summary or Arbitrary Executions*, UN ESCOR, 1998, UN Doc. E/CN.4/1998/68 add. 3.

sentencing process. The first case in which the defendant argued by using statistical studies that the death penalty was racially administered was the case of *Martinsville Seven*.²⁸³

Since *Martinsville*, the jurisprudence of state and federal appellate courts has remained consistent in this matter.²⁸⁴

The courts have denied constitutional challenges to the death penalty based on empirical evidence citing two reasons. First, courts have stated that the empirical studies did not consider variables that may justify the differences in sentencing results. Second, courts have stated that the evidence presented by the appellants did not demonstrate that his/her sentence was a product of discrimination. Four decades after the first case in which empirical evidence was used to show the effect of racial discrimination in sentencing, the Supreme Court was asked in 1987 to consider the constitutional significance of a new statistical study, the Baldus study.

Warren McCleskey, an African American, was convicted and sentenced to death in Fulton county, Georgia, for killing a white police officer, during the course of an armed robbery.²⁸⁵ After receiving a sentence to life imprisonment for the robbery and a death sentence for the murder, McCleskey sought *habeas corpus* relief from the Federal District Court. McCleskey claimed that the Georgia capital sentencing system was racially administered. To support this claim, McCleskey used empirical evidence found in the Baldus study.²⁸⁶ Similar to the

²⁸³ For a detailed explanation of the *Martinsville Seven* case see E.W. Rise, *The Martinsville Seven: Race, Rape and Capital Punishment* (Charlottesville: University of Virginia Press, 1995).

²⁸⁴ See, for example, *Maxwell v. Bishop*, F.2d 138 (8th Cir.1978); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978); *Shaw v. Martin*, 733 F.2d 304 (4th Cir. 1984); and *Prejean v. Blackmun*, 743 F.2d 1091 (5th Cir. 1984).

²⁸⁵ *McCleskey v. Zant*, 580 F. Supp. 338, 345-346, 369 (N.D Ga. 1984).

²⁸⁶ In the Baldus study, Professors Baldus, Woodworth, and Pulaski studied more than 2,000 murder cases in Georgia in the 1970s in order to examine the effect of race on the death penalty. Following their

fate of previous claims²⁸⁷ of racial discrimination, McCleskey's claim was rejected at all levels of federal review. Although the Supreme Court accepted the validity of the statistical study on which McCleskey's claim was based, it rejected his claim that empirical studies constitute enough evidence to show that his sentence was imposed discriminatorily.

The court's decision in *McCleskey v. Kemp*²⁸⁸ received a great deal of criticism. The author of a survey in the Harvard Law Review described the Court's decision as "logically unsound, morally reprehensible, and legally unsupportable."²⁸⁹ Articles published in newspapers described the decision in much the same way. In a New York Times article, Anthony Lewis stated that the Court in *McCleskey* had "effectively condoned the expression of racism in a profound aspect of our law."²⁹⁰

Legal scholars have likewise expressed their rejection to the Court's ruling in *McCleskey*. Anthony Amsterdam²⁹¹ asserted his outrage at the Court's ruling with the following words:

"I suggest that any self-respecting criminal justice professional is obliged to speak out against this Supreme Court's conception of the criminal justice system. We must reaffirm that there can be

exhaustive study, they found that defendants charged with killing white victims received the death penalty eleven times more than those charged with killing black victims. Knowing that other non-racial factors could result in this difference in sentencing results, they subjected their findings to a sophisticated analysis to see if nonracial factors can explain the differences. After accounting for thirty-nine nonracial factors (such as the depravity of the crime or previous criminal record of the defendant), they found that defendants who kill white victims receive the death penalty 4.3 times more than defendants charged with killing black victims; See David C. Baldus, G. Woodworth & C.A. Pulsaki, Jr., "Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection, and Correction," 51 Wash. & Lee L. Rev. 359, 386 n.115 (1994).

²⁸⁷ *Supra* note 284.

²⁸⁸ *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987).

²⁸⁹ The Supreme Court, "1986 Term-Leading Cases" (1987) 101 Harvard Law Review 119 at 158.

²⁹⁰ A. Lewis, "Bowing to Racism" New York Times (28 April 1987) A31.

²⁹¹ An attorney who had represented an African American man who challenged his death sentence for the rape of a white woman in 1968.

no justice in a system which treats people of color differently from white people, or treats crimes against people of color differently from crimes against white people."²⁹²

Examining the ruling of the Court in *McCleskey*, one can understand why this decision was highly criticized. Moreover, a closer look will show that although the Court repressed the truth of the racially administered death penalty system, in an admittedly indirect way it nonetheless demonstrated that racial discrimination could bring a constitutional challenge to the death penalty practice.

The court in *McCleskey* stated that statistical studies alone are not enough to show that decision makers acted in a discriminatory way, or to adopt a presumption of discrimination.²⁹³ In order to show that the prosecution and the trial procedures are biased, the defendant should prove the racial bias of the juror and/or the prosecutor. In the presence of rules that bar the defendant from inquiring into jury deliberations and the prosecutor's motives, it is so difficult to reveal that the decision makers acted in a discriminatory manner.²⁹⁴ In this case, the defendant is left with one option. He can show by the help of statements and acts obtained during the trial from the jury and/or prosecutor that they indeed acted with discrimination. After the *McCleskey* decision, Willburn Dobbs tried to indicate the jury's and prosecutor's bias using this method.²⁹⁵

Dobbs referred to use of the word "nigger" by two of the jurors and by his court-appointed counsel. Also, he pointed out that the word "colored" was used by the judge as well as other members of the jury. His evidence was found to be insufficient. In their decision in *Dobbs*,

²⁹² Quoted from *Supra* note 219 at 251.

²⁹³ *McCleskey v. Kemp*, 107 S. Ct. 1756, 1769 (1987).

²⁹⁴ These bars are explained in *Supra* note 203 at 135.

²⁹⁵ *Dobbs v. Zant*, 506 U.S. 357 (1993).

the Federal District Court and the Federal Court of Appeals used the standard adopted in *McCleskey* to show that evidence pointing to racial bias in the jury's deliberation and motives of the prosecutor was insufficient. When stating that statistical studies are not enough to adopt a presumption of discrimination, the Court contradicted its ruling in other cases. In other aspects of the criminal justice system where racial discrimination has proven to affect the functioning and neutrality of the procedure, the Court has adopted a presumption of discrimination when statistical studies reveal the presence of bias. In *Norris v. Alabama*²⁹⁶, the Court stated that when statistical studies reveal the presence of discrimination in the jury selection procedure, a presumption of discrimination shall be adopted. Another reason that informed the Court's decision was its concern that accepting *McCleskey*'s claim would encourage other groups to bring similar claims.²⁹⁷ Afraid of facing a flood of cases challenging the racially administered criminal justice system, the Court preferred that *McCleskey*'s claim be considered by the appropriate legislative body.

Ironically, by rejecting *McCleskey*'s claim, the Court was in essence giving it more resonance. When the Court shifted the challenge from the judicial to the legislative forum, it suggested that if *McCleskey*'s claim had succeeded it would have ended the death penalty in Georgia and in other states as well. Without the possibility of studying the claim by the courts, abolitionists presented their claim to legislatures. Abolitionists called for the adoption of bills that would make the Court adopt a presumption of discrimination whenever statistical studies reveal the presence of racial disparity.²⁹⁸ In order to overcome the presumption found in these bills, the government should use a race-neutral explanation. The US House

²⁹⁶ *Norris v. Alabama*, 294 U.S. 522 (1975).

²⁹⁷ *McCleskey v. Kemp*, 107 S. Ct. 1756, 1779 (1987).

²⁹⁸ *Supra* note 203 at 140.

of Representatives responded to these claims by adding the Racial Justice Act to the Omnibus Crime Bill of 1994. Unfortunately, the abolitionist's efforts failed, and the explanation given for the rejection of these bills reveals continued presence of racial discrimination. The claim of the opponents of these bills was that the bills should not be adopted because their adoption would end the death penalty.²⁹⁹ One can wonder how these bills will end the death penalty, when politicians, opponents of the bills, said that discrimination is not found. As explained before, bills work only when statistical studies reveal the presence of racial disparity. By stating that the bills will end the death penalty, retentionist politicians are saying indirectly that racial discrimination is present.

An examination of the death penalty practice at both the arrest and trial stage reveal that the Supreme Court was overly optimistic in predicting that the statutory reforms adopted since *Furman* would eliminate racial discrimination. Closer scrutiny of *McCleskey* shows that racial disparity detected by different studies gives rise to serious challenges to the constitutionality of the death penalty. Besides challenging its constitutionality, the presence of racial discrimination may also demonstrate that the US is in violation of its commitments under Article 26 of the International Covenant on Civil and Political Rights.³⁰⁰

C. Non-Extradition and the Arbitrary Application of the Death Penalty

In order to display how non-extradition may lead to the possibility of bringing a constitutional challenge to death penalty practice in the US, three questions should be posed.

²⁹⁹ For instance, Senator Orrin Hatch, one of the opponents of these bills, stated: "the so-called Racial Justice Act has nothing to do with racial justice and everything to do with abolishing the death penalty." Congressional Record, S 4602 (April 21, 1994).

³⁰⁰ W. Allmand, S. B. Bright, R. Carter, D. M. Koenig, W. Schabas and W. L. Seriti, "Panel Discussions: Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?" (1999) 67 Fordham L. Rev. 2793.

First, how are abolitionist countries narrowing the possibility of extradition to retentionist countries such as the US? Second, how can non-extradition affect the constitutionality of the death penalty in the US? Third, how can the US escape such a challenge to the constitutionality of its death penalty practice?

In order to demonstrate the trend of abolitionist states increasingly refusing extradition requests, we must study both the efforts of countries party to and those which are not party to international or regional treaties with abolitionist intent.

European abolitionist countries relied first on the prohibition of torture found in Article 3 of the ECHR to refuse extradition. In *Soering v. United Kingdom and Germany*,³⁰¹ the European Court refused the extradition of Soering to the US on the basis of the prohibition found in Article 3 of the ECHR. As Soering would have remained for a minimum of eight years on death row in Virginia, and because of his mental instability, the court refused his extradition.

Although the test in *Soering* was indeed a way to refuse extradition, its application demanded showing the presence of elements other than simply a long stay on death row. As a result, the *Soering* test accepted non-extradition only in limited cases and only when certain conditions were satisfied. Under the *Soering* test, proof that the defendant will face the death penalty does not necessarily lead to non-extradition, for while torture is unacceptable under the ECHR, the death penalty is accepted. In order to escape extradition, the defendant must show that in the period preceding his execution there is a real possibility of being tortured, raped, humiliated, etc. This limited scope for refusal under the *Soering* test was expanded after the ratification of Protocol # 6 by almost all European countries.

³⁰¹ *Soering v. United Kingdom and Germany* (1989) 161 Eur. Ct. H.R. (Ser. A) 439.

Protocol 6 created the possibility of refusing extradition to retentionist countries. The test for refusing extradition under Protocol 6 requires only that one condition be satisfied: the defendant is going to face the death penalty. Under the new test, the defendant does not need to prove that he will be tortured, raped, humiliated, etc.³⁰² This new test was used by the High Court of the Netherlands to refuse the extradition of a US staff sergeant, Charles Short, to the US.³⁰³

The new test is significant because, contrary to the test under *Soering*, no person can be extradited to the US or to any other retentionist country if he may be sentenced to death. Extradition will be granted only when the requesting country issues guarantees that the death penalty will not be applied. Similar to the trend in countries party to international and regional abolitionist protocols, the trend in abolitionist countries that are not parties to international and regional treaties is narrowing the possibility of extradition.

Canada is among the countries that receives many US convicts who flee the US to escape the threat of a death sentence. First, Canada used to extradite people without even asking for assurances that the death penalty would not be imposed. In *Kindler*³⁰⁴ and *Ng*³⁰⁵, the Canadian Supreme Court justified its decision for extraditing without seeking assurances by citing two main reasons. First, extradition without assurances did not violate the provisions of the Canadian Charter which prohibit cruel and unusual punishment. Second, in the absence of a customary norm that prohibits the imposition of the death penalty, and despite

³⁰² *Cinar v. Turkey* (1994), 79A Eur. Comm. H.R. D.R. 5.

³⁰³ *Short v. Netherlands*, [1990] 76 Rechtspraak van de Week 358.

³⁰⁴ *Kindler v. Canada*, [1991] 2 S.C.R. 779.

the trend among western countries to abolish the death penalty, the Canadian Supreme Court is free to extradite without assurances.

Ten years after its decisions in *Kindler* and *Ng*, the Supreme Court stated in the case of *Burns and Raffay*³⁰⁶ that even in the absence of an international customary norm, the international trend towards abolition was enough to refuse extradition. The significance of the case of *Burns and Raffay* is that the Canadian Supreme Court, even when Canada is not a party to international and regional abolitionist protocols, has used the prohibition of applying the death penalty found in these protocols to narrow the possibility of extradition. The trend in both countries that are and those that are not parties to international and regional abolitionist protocols is heading towards less possibility that extradition be granted without assurances.

The question that can be asked now is: how does this affect the constitutionality of the death penalty in the US? In *Gregg v. Georgia*³⁰⁷, *Woodson v. North Carolina*³⁰⁸ and *Lockett v. Ohio*³⁰⁹ the Court stated that in order for the death penalty to be administered fairly, only aspects related to the character of the defendant and to the nature of the crime committed should be taken into account when the death penalty is decided. The Court in *Gregg* limited the jury's discretion by adopting new statutes that stated the mitigating and aggravating factors that may be taken into consideration to decide if the death penalty is to be imposed or not.³¹⁰ The

³⁰⁵ *Ng v. Canada*, [1991] 2 S.C.R. 858.

³⁰⁶ *United States v. Burns*, [2001] 1 R.C.S. 283.

³⁰⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976).

³⁰⁸ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³⁰⁹ *Lockett v. Ohio*, 438 U.S. 586 (1978).

³¹⁰ In *Gregg*, the court stated that jury's discretion should be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. In order to know the specific circumstances of the crime, the following questions should be asked: (a) was it considered in the course of

court affirmed that whenever the jury acted within these limits, the application of the death penalty can never be found arbitrary.

However, when factors not related to the character of the defendant and the nature of the crime committed are used to decide if the death penalty should be imposed or not, then in this case the death penalty practice may be found to be arbitrary. The following example will help to explain this type of situation. Let us suppose that we have two people (X and Y) who have committed a crime punishable by death in the US. X was lucky enough to flee to Canada (or a European country), while Y remained in the US. The US sentenced Y to death and requested the extradition of X. Canada refused extradition, and asked for assurances that the death penalty would not be applied. In this case, if the US were to accept Canada's request, it would be discriminating between two people because the person who fled to Canada would receive a sentence other than the death penalty, while the other one would be executed. As a result, one could bring a constitutional challenge to the death penalty on the grounds that it is arbitrarily inflicted.

How might the US escape such a challenge to the constitutionality of its death penalty practice? The United States could use abduction as a measure to assert jurisdiction, so that one could not say that a court was imposing different sentences on people who have succeeded in fleeing the country. The US has used abduction before in cases that were to

another felony? ; (b) was it committed for money?; (c) was it committed upon a police officer or judicial officer?; and (d) was it committed in a particular heinous way or in a manner that endangered the lives of many persons?

In order to know the characteristics of the person who committed the crime, the following questions should be asked: (a) does he have a record or prior convictions for capital offences? ; and (b) are there any special facts about this defendant that mitigate against imposing capital punishment? (his youth, emotional state at the time of commitment of the crime.). See *Gregg v. Georgia*, 428 U.S. 153 (1976).

result in the death penalty. For example in *State v. Salcido*³¹¹, Ramon Salcido was turned over to US law enforcement officials in Mexico and flown back to California in handcuffs after the Mexican government's extradition request had failed. Although asserting jurisdiction by unlawful means is one way to escape a challenge to the constitutionality of the death penalty under national laws, abduction will lead to challenging the fairness of the death penalty under international obligations. Although the Human Rights Committee did not rule on the case of Salcido, a comparison with two other similar cases³¹² on which the Human Rights Committee has ruled reveals that when the US uses unlawful means to assert jurisdiction it violates Article 9 of the ICCPR³¹³. The ruling of the Human Rights Committee is important, because if the pattern of non-extradition increases, the US may increase its use of illegal ways to assert jurisdiction. As a result, challenges to its practice under the Covenant will increase. The increasing challenge of US practices under the Covenant could prompt the US to depart from illegal means of asserting jurisdiction, and ultimately abolish the death penalty. How might this happen? The failure of the US to assert jurisdiction in legal ways³¹⁴ (because of refusal of harboring states to extradite) and in illegal ways (due to the challenge of its practice on the international level) will result in inequality and discrimination between people who

³¹¹ *State v. Salcido*, US Dist. Lexis 419 (1989).

³¹² The cases are *Celebrity v. Uruguay* and *Lopez Burgos v. Uruguay*. See *Lilian Celiberti de Casariego v. Uruguay* (Comm. no. R. 13/56), Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981); *Lopez Burgos v. Uruguay* (Comm. no. 12/52), Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981). See also M. Mcham, "All well that ends well; a pragmatic look at international criminal extradition" (1998) 20 Hous. J. Int'l L. 419.

³¹³ Article 9(1) of the ICCPR reads: "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." See *International Covenant on Civil and Political Rights*, art. 9(1).

³¹⁴ Over the years, Harboring states are making it more difficult to extradite a person. For instance, Canada narrowed down the possibility of extradition over the years. After extraditing without assurances in *Kindler* and *Ng*, Canada in *O' Bomsawin* and in *United States v. Burns* accepted extradition but in the presence of assurances. See *Supra* notes 175-179.

have fled the country and others who were not able to flee. This form of discrimination may become cognizable by the courts.

Besides non-extradition, an examination of the court-appointed counsel system revealed ineffectiveness that results in inequality before the law. Inequality before the law was also revealed when questioning the neutrality of the death penalty practice in both its arrest and trial stages.

Inequality, present in three aspects of the American death penalty system, amounts to a constitutional violation under the Sixth and Fourteenth Amendments and therefore presents solid basis for an abolitionist claim.

Similar to the American case, the Islamic case, when examined thoroughly, shows that there is room for rejecting the death penalty in the future.

Chapter III. The Islamic Case

I. The Death Penalty in Islamic Law

Islamic law emerged in the seventh century, when the Prophet began to receive God's revelation in the year 610.³¹⁵ This body of law, which is formed of two elements: the *Shari'a* and the *Fiqh*, developed in the seventh and the eight-century.³¹⁶ Four elements form the *Shari'a*: the *Koran*,³¹⁷ the spoken word of Allah; the *Summa*,³¹⁸ the words and actions of the Prophet and his companions; the *Qiyas*,³¹⁹ analogous reasoning; and finally the *Ijmaa*,³²⁰ the consensus of Muslim scholars. *Fiqh*, a source of secondary importance, constitutes Islamic jurisprudence and represents the legal rulings of Muslim scholars.³²¹ Keeping in mind this general structure of Islamic law, we may next turn our attention primarily to the Islamic penal system in order to present a clear picture of the application of the death penalty under this system of laws.

Penalties under the Islamic penal system are divided into four categories: *Houdoud*, *Qisas*, *Diya*, and *Taazir*.³²² Crimes under *Houdoud* are sanctioned by punishments determined by the *Koran* and the *Summa*.³²³ When the *Shari'a* dictates the punishments for *Hadd* crimes, the judge

³¹⁵ A.A. Na'im, *Nahwa Tatwir Al-Tashri' Al-Islami* (Cairo: Sina Lil-Nacher, 1994) at 40

³¹⁶ I. Edge, ed., *Islamic Law and Legal Theory* (Aldershot: Dartmouth Publishing Company Limited, 1996) at 515.

³¹⁷ I. Khan, "Islamic Human Rights: Islamic Law and International Human Rights Standards" (1999) 5 Appeal 74 at 76.

³¹⁸ *Supra* note 315 at 49.

³¹⁹ *Ibid.* at 52.

³²⁰ *Ibid.*

³²¹ D. A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order" (1993) 33 Va. J. Int'l. Law 819 at 826.

³²² N. Hosni, "La Peine de Mort en Droit Egyptien et en Droit Islamique" (1987) 58 Revue Internationale de Droit Penale 408 at 416.

³²³ A. Wazir, "Quelques Aspects de la Peine de Mort en Droit Penal Islamique" (1987) 58 Revue Internationale de Droit Penale 421 at 424.

cannot exercise any discretion and there is no possibility of granting pardon.³²⁴ *Hadd* is a punishment for the acts that harm society in its very existence or at its fundamental bases. The scope of *Houdoud* penalties includes adultery, defamation, theft, robbery, rebellion, drunkenness, and apostasy.³²⁵ Death is a punishment for three *Houdoud* crimes: robbery (accompanied by death), adultery (if the person who committed the act is married) and apostasy.³²⁶

The second category of punishments is *Qisas*. Qurani'c *Qisas* penalties, like *Hadd* penalties, are determined by a text of Islamic law.³²⁷ However, unlike *Hadd* sanctions, *Qisas* sentences foresee the possibility of the accused being pardoned by the victim or his relatives.³²⁸ The scope of the *Qisas* penalties covers intentional crimes against the person.³²⁹ Death is a punishment prescribed by *Qisas* penalties for intentional homicide. The third category of penalties, *Diya*, does not require the death penalty for crimes covered within its scope.³³⁰

The last category of penalties under Islamic penal law is *Taazir*. This class of sentences differs from the first and second categories (*Houdoud* and *Qisas*) in two ways. Unlike the *Houdoud* and *Qisas* penalties, *Tazir* sanctions are dictated by public authorities rather than by Islamic religious texts. Therefore, as the *Tazir* penalties are not governed by religious text, judicial discretion may be exercised.³³¹

³²⁴ *Supra* note 322 at 416.

³²⁵ *Supra* note 323 at 423-424.

³²⁶ *Ibid.* at 424.

³²⁷ *Supra* note 322 at 417

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.* at 418.

³³¹ *Ibid.*

In accordance with the Islamic penal system, execution is generally carried out by sword, or by lapidation for the crime of adultery.³³² The promptness of death and the infliction of minimal pain are two reasons for choosing death by sword as a method of execution.³³³ Under Islamic penal law, executions are to be carried out in public, by public authorities, with a view to realizing their deterrent effect.³³⁴ Exceptionally, in the case of *Quisas* penalties, the parents of the victim may execute the convicted.³³⁵ In short, it may be asserted that the application of the death penalty is legitimized by the religious texts of the *Koran* and the *Summa*. For Muslim officials, these texts bear the word of God, and any possibility of amending them is inconceivable.

On different occasions, Muslim officials in a variety of states have expressed rejection of the abolition of the death penalty by relying on the immutability of these religious texts. The Islamic states' reliance upon religious sources in the fight against abolition began in the 1980s. Preparing for a debate on the possibility of adopting an abolitionist protocol to the ICCPR, the General Assembly in 1981 asked member states to submit their opinions on the subject.³³⁶ In response to the demand of the General Assembly, Pakistan submitted its opinion stating that abolition of the death penalty was inconsistent with Islamic law.³³⁷ The

³³² *Supra* note 323 at 428. Lapidate is stoning to death. See the *Shorter Oxford English Dictionary*, 4th ed., s.v. "lapidate". Stoning (or lapidation) is a method of execution designed to cause a protracted death. The wording of Article 119 of the Islamic penal code of Iran explains the term "protracted death". Article 119 reads: "in the punishment of stoning to death, the stones should not be too large so that the person dies on being hit by one or two of them; they should not be so small either that they could not be defined as stones." See Amnesty International, *When the State Kills...The Death Penalty v. Human Rights* (United Kingdom: Amnesty International Pub., 1989) at 13.

³³³ *Supra* note 322 at 419.

³³⁴ *Supra* note 323 at 428.

³³⁵ *Ibid.*

³³⁶ U.N. Doc. A/C.3/36/L.33, Rev. 1.

³³⁷ U.N. Doc. A/37/407, Add.1.

Islamic states' rejection of abolition is not a novelty, yet religious sources have never before been explicitly used to justify this rejection.

Before the 1980s, Islamic countries, primary of the Middle East and Africa, rejected abolition without referring to religious texts which legitimize the application of the death penalty. When the ICCPR was being drafted in the 1950s, some Latin American countries wanted the "right to life" provision to explicitly express condemnation of the death penalty.³³⁸ The Latin American proposal was rejected by all Islamic countries in the General Assembly.³³⁹ At that time Iran, Iraq, Jordan, Morocco, Saudi Arabia, Sudan, Syria, Tunisia, and Yemen failed to invoke Islamic law as a justification for their position. Prior to the 1980s, Islamic countries had justified their rejection of abolitionist claims by citing their unpreparedness to abolish capital punishment.³⁴⁰

In the period following the 1980s, the use of Islamic sources to reject the abolition of the death penalty became a common feature in debates in international fora. In 1994, Islamic states played an important role in defeating an Italian project for a draft declaration³⁴¹ calling for the abolition of the death penalty. The opposition of Islamic countries to this initiative was based on the legitimacy of the death penalty application under the *Shari'a*. One of the principal opponents of the Italian initiative, Sudan, stated that capital punishment is "a divine right according to some religions, in particular Islam."³⁴² More recently, Islamic states

³³⁸ U.N. GAOR, U.N. Doc. A/C.3/SR.817, para 29.

³³⁹ U.N. GAOR, U.N. Doc. A/C.3/SR.811, para 20.

³⁴⁰ When the Latin American proposal was being discussed, Saudi Arabia stated that the "right to life" provision can not explicitly condemn the death penalty because some countries, contrary to the case of Uruguay and Colombia, find it so difficult to abolish the death penalty. See *Ibid.*

³⁴¹ UN GAOR, 49th Sess., UN Doc. A/49/234/Add. 1(1994) 1-4.

³⁴² U.N. Doc. A/37/407, Add. 1.

employed the same religious justification to argue against the exclusion of the death penalty from the Rome Statute.³⁴³

Aside from the rejection of abolition by Muslim state officials, Muslim intellectuals have also expressed their hostility toward abolition. Ghazali, an Egyptian Sheikh³⁴⁴, not only opposed abolition in the Muslim milieu; he went further by criticizing the acceptance of abolition by Jewish and Christian authorities in Europe. He accused them of acting contrary to the Ten Commandments of the Law of Moses, which he argued supported the death penalty.³⁴⁵ He also used biblical verses to remind Christians that God came to apply the law and not to abolish it.³⁴⁶ In sum, Muslim officials and intellectuals have relied on the immutability of their religious texts to reject the abolition of the death penalty. Yet, by examining reforms introduced into Islamic law, it is possible to determine that the *Shari'a* is not an immutable text.

II. Room For Change

Over the years, reforms have been introduced to different fields of Islamic law. Polygamy and young marriage, for example, widely practiced in early times, have been restricted with the help of procedural rules and legislative texts. Syria was the first country to introduce restrictions on plural marriages. The Syrian Law of 1953 states that a man who already has

³⁴³ In an attempt to include the death penalty in the Rome Statute, sixteen Islamic countries tabled a proposal calling for the adoption of the death penalty as a punishment under the Statute of the International Criminal Court. See U.N. Doc. A/Conf.183/C.1/WGP/L.11 (1998), revised by U.N. Doc.A/Conf.183/C.1/WGP/L.11/Corr.2 (1998).

³⁴⁴ Sheikh is the supreme Muslim authority in matters relating to religion and sacred law. See the *Shorter Oxford English Dictionary*, 4th ed., s.v. "Sheikh".

³⁴⁵ S.A. Aldeeb Abu-Sahlieh, *les Musulmans Face aux Droits de L'homme-Religion et Droit et Politique-Etude et Documents* (Bochum: Winkler, 1994) at 69-70.

³⁴⁶ To support his claim, he referred to Mathieu 5:17.

one wife should, in order to be granted permission to marry another, convince the court that his financial status allows him to have more than one wife.³⁴⁷ In 1963, polygamy was restricted in Iraq. Under the Iraqi code of 1963, a polygamous marriage, performed without a court's consent, subjects the person to criminal sanctions.³⁴⁸ Tunisia went a step further, when in 1956 under President Bourguiba plural marriages were totally prohibited. A dual explanation was given for the prohibition of plural marriages in Tunisia. The first explanation was that polygamy, though common in earlier times, was no longer acceptable in modern society. The temporal aspect played an important role in the second explanation too, which was that time has proven that no person other than the Prophet can treat two or more wives equally well.³⁴⁹ Procedural devices were also used to introduce reforms to another aspect of family law. To discourage child marriage, the Registrars of marriages in Egypt were prohibited from registering a contract between two parties who had not yet reached the minimum age required.³⁵⁰ Reforms were also introduced to another aspect of family law, intestate succession. In principal, orphaned grandchildren are excluded from any share in their grandparents estate if a son of such grandparents also survives. To overcome this obstacle without affecting the structure of the Islamic intestate succession law, a bequest is usually done in favor of those orphaned children.³⁵¹

Islamic law has revealed its acceptance of reforms in the sphere of international law as well. Formerly, the law of Islam had refused to recognize legal systems other than its own. In fact, one of the goals of the *Shari'a* was to convert the world to Islam. To reach its theory

³⁴⁷ *Supra* note 316 at 554.

³⁴⁸ *Ibid.* at 555.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.* at 559.

³⁵¹ *Ibid.*

of a universal state, the Islamic states' legal obligation was to spread Islam in non-Muslim parts of the world, known as *Dar Al Harb*. The method to be used was *Jihad* -- also known as the "holy war", which did not always mean real war. The equivalent of *Jihad* in Western thinking was non-recognition. This situation of non-recognition lasted until the traditional law that governed foreign relations was replaced by a secular one.³⁵² Now, both Islamic countries that have been completely secularized in their internal legal structure, such as Turkey, and others that still reject the secularization of their internal law, such as Saudi Arabia, have accepted a secular approach to the conduct of foreign relations.³⁵³

In the human rights field, another major change has taken place. Slavery, which was and is still accepted in theory under the *Shari'a*, is no longer accepted in practice. Explicit reference to the possibility of enslavement cannot be found in the *Koran*.³⁵⁴ However, many verses of the *Koran* reveal implicitly the legitimacy of slavery.³⁵⁵ The *Shari'a* states that there are two reasons for enslaving an otherwise free person: military defeat in a war legitimized by the *Shari'a* and, when a child is born from a relationship between two slaves.³⁵⁶ Although

there is no absolute opinion on the subject,³⁵⁷ some sources state that even the prophet and his companions had slaves.³⁵⁸

³⁵² M. Khadduri, "Islam and Modern Law of Nations" (1956) 50 Am. J. Int'l. L. 358 at 358.

³⁵³ *Ibid.* at 370.

³⁵⁴ *Supra* note 315 at 219.

³⁵⁵ For verses dealing with the emancipation of slaves see: Sura 9, Verse 60; Sura 2, Verse 177; Sura 4, Verse 92; Sura 58, Verse 3; Sura 9, Verses 11-13; and Sura 24, Verse 33. For the recognition of slavery as an institution under Islamic law see: C. Kurzman, ed., *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998) at 228; F. Rahman, *Islam* (Chicago: Chicago University Press, 1979) at 38.

³⁵⁶ *Supra* note 315 at 219-220.

³⁵⁷ In his book, *Islam and Human Rights*, Rahman states that the Prophet never owned slaves. See, M.Z. Khan, *Islam and Human Rights* (Islamabad: Islam International Publications Limited, 1988) at 66-67.

Throughout the years, voices calling for the abolition of slavery have echoed in international conventions.³⁵⁹ By ratifying international conventions abolishing slavery in the early 1960s, Muslim officials effectively muted the religious verses accepting slavery by lay norms. When asked about the reason for the abolition of slavery, Muslim intellectuals say that slavery was accepted in the *Koran* because at the time of the revelation it was a common practice among all countries of the world.³⁶⁰ By explaining the verses of the *Koran* that accepted slavery in their historical context, Muslim officials showed that *Shari'a* is not entirely rigid. Similar to slavery, the death penalty is accepted under the *Shari'a*. Although slavery is gone, the death penalty is still accepted in the Islamic milieu. The question to pose here is whether the death penalty will receive the same fate as slavery.

To argue that the death penalty could be abolished even if still accepted by the *Shari'a*, one would need to apply the historical context approach leading up to the abolition of slavery,³⁶¹ and use this to justify future changes. In other words, one could say that the verses of the *Koran* that accept the imposition of capital punishment are not applicable today, for the death penalty, widely accepted at the time of the revelation, is no longer acceptable

³⁵⁸ Reference stating that the Prophet and his companions owned slaves is found in the writing of the leading scholar, Majid Khadduri, who states that the Prophet had enslaved the Arabs of *Banu Mustaliq* and many members of the tribe of *Hawazin*. Khadduri adds that the caliphates (successors) of the Prophet also took people as slaves. See M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955) at 131.

³⁵⁹ Reviewing the ratifications of the two conventions for abolition of slavery of 1926 and 1956, one can notice that almost all Islamic countries of the Middle East and Africa have ratified these conventions. This implies that they are obliged under international law to abolish slavery. See *Supplementary Convention on The Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 226 U.N.T.S 3 (entered into force 30 April 1957); *Slavery Convention*, 25 September 1926, 60 L.N.T.S. 253 (entered into force 9 March 1927).

³⁶⁰ M. Al-Ghazali, *Huquq Al-Insan*, 2nd ed. (Cairo: Dar Al-Kutub Al-Hadithah, 1965) at 125-149.

³⁶¹ The same approach was used by Mouhammad Mahmoud Taha. Taha argues that inequality between men and women should be rejected in our time. He explained his opinion by stating that the reason for its acceptance historically was that women were economically dependant on men. As this dependence is no more necessary in our time, he argued that both men and women should be equal in rights and obligations.

by most countries of the world³⁶². In an attempt to block the abolitionist path that might succeed by adopting the historical-context approach, Muslim officials have stated that unlike slavery, the death penalty could not be abolished because it constitutes a main objective of Islam, while slavery did not.³⁶³

Even if one were to study Islam in light of its stated objectives and not against the background of its historical-social milieu, the abolitionist trend may still be affirmed by the *Shari'a*. A study of Islamic objectives for punishing should begin by examining the aim of sentencing murderers to death. The *Shari'a* states that murder is a crime against society, rather than simply a private crime against one person.³⁶⁴ This means that the imposition of the death penalty is not based on revenge; rather, it is a punishment aiming to preserve the welfare of society.³⁶⁵ Nevertheless, various studies³⁶⁶ conducted all over the world, as well as

For a detailed explanation of Taha's argument, see C. Kurzman, ed., *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998) at 231-234.

³⁶² See *Supra* note 19.

³⁶³ In an interview with Sheikh Mouhammad Lakhoua, a journalist asked him if the death penalty can be abolished by the same method that was used to abolish slavery. The Chaikh answered: 'J'ai dit que la difference est grande entre l'application des peines islamiques et l'esclavage. L'application des peines islamiques fait partie des objectifs de la loi islamique et non pas l'esclavage.' Quotation taken from S.A. Abu-Sahlieh, *Les Mouvements Islamistes et Les Droits de L'homme* (Bochum: Winkler, 1998) at 105.

³⁶⁴ Sura 5, Verse 32 of the Koran reads: "whosoever kills a person unrightfully or without a mischief (that is, a war) on earth. It is as though he has killed all humanity; while he who saves one person, it is as though he has saved all humanity. See also A. Alayle, *Ain Al-khata? Tashih Mafahim Wa Nazra Jadida* (Beirut: Dar Il Ilm Lil-Malayin, 1978) at 74; see the opinion of Sheikh Hasan Tamim and that of Sheikh Abdallah Al-Alayli in G. Rabbah, *Oukoubat Al-Ihdam: Hal Am Mouchkila* (Beirut: Mousasat Nawfal, 1978) at 378 and 385 respectively.

³⁶⁵ C. Kurzman, ed., *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998) at 226.

³⁶⁶ Since 1962, studies prepared for the UN have showed that there is no relation between capital punishment and deterrence. A recent survey of research findings on the relation between the death penalty and homicide rates, which was conducted for the UN in 1988 and updated in 1996, has concluded that "this research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment, such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis." See United Nations, *The Question of The Death Penalty and The New Contributions of The Criminal Sciences to The Matter, a Report to The UN Committee on Crime Prevention and Control*, (Vienna: United Nations Social Affairs Division, Crime Prevention and Criminal Justice Branch, 1988) at 110 and updated in 1996.

Also the experience of abolitionist countries should be convincing proof in and for itself on the non-existence of the deterrent effect of the death penalty. For example, homicide statistics released for 1998 by

statements of Islamic officials,³⁶⁷ demonstrate that the death penalty does not have a deterrent effect. This means that the same posited good that the death penalty is thought to provide to society may be achieved by an alternative that does not lead to the deprivation of life. When the objective of punishing the crime of murder by death under the *Koran* is to guarantee the welfare of society, and when studies have consistently shown the death penalty's non-deterrent effect, this new knowledge acquired can be used to repeal the practice of capital punishment for the crime of murder. Yet, this new knowledge will be of no value unless its acceptance is legitimized by the *Shari'a*. The *Koran*, in Sura 39, verse 18 states that Muslims "should give their ears to ideas and follow the best of them."³⁶⁸ Now that there is a possibility of abolishing the death penalty as a punishment for the crime of murder, we should also consider the possibility of abolishing the death penalty for apostasy, robbery and adultery, all punishable by death under the *Shari'a*.

Ratifying Article 6(2)³⁶⁹ of the ICCPR without any reservation, Islamic countries have committed themselves under international law to restrict the application of the death penalty to the most serious crimes.³⁷⁰ An explanation to the term "most serious crimes" was given

Statistics Canada show the lowest murder rate in thirty years. The rate is 1.83 homicides per 100,000 people compared with 3.02 homicides per 100,000 in 1975, the year prior to the abolition of the death penalty in Canada. See Amnesty International-Amnesty International News June 2000, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 2 September 2001).

³⁶⁷ In February 2000, the official news agency IRNA quoted Mahmoud Alizadeh Tabatabai, the representative on drug issues of President Mouhamad Khatami, as saying: "executing drug smugglers is not a suitable way to fight drugs and our ten-year experience shows that this has not been a solution." See Amnesty International-Amnesty International News Report 2000, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 2 September 2001).

³⁶⁸ See *Supra* note 365 at 288.

³⁶⁹ Article 6(2) of the ICCPR states that the application of the death penalty should be confined to the most serious crimes. See International Covenant on Civil and Political Rights, art. 6 (2).

³⁷⁰ The ICCPR is ratified without any reservation to Article 6(2) by most Islamic countries of the Middle East and Africa. The reservations lodged by Iraq, Libyan Arab Jamahiriya, Syria, and Yemen state that accession shall in no way signify recognition of Israel. See Refworld-International Covenant on Civil and Political Rights, online: United Nations Commission on Human Rights

by the Human Rights Committee, which stated that capital punishment could be applied only for crimes that result in the loss of life.³⁷¹ According to the explanation of the Committee, the application of the death penalty for crimes such as apostasy, adultery and robbery is not acceptable per Article 6(2) of the ICCPR.

Although Islamic countries still employ the death penalty for apostasy, robbery and lapidation, their ratification without reservations of Article 6 (2) reveals a readiness to confine its application in the future to the most serious crimes. Under the “most serious crimes” scale adopted by the H.R Committee, death will be accepted as a punishment by Muslim states only for murder. However, the study of the objectives of punishing by death for murder has revealed that capital punishment is not the appropriate solution to decrease the rate of murder and therefore it can be replaced by a punishment that does not result in the taking of life.

A study of the objectives of punishing by death for murder and the international commitments of Islamic states shows that there does exist the possibility of abolishing the death penalty in the future.

<[http:// www.unchr.ch/refworld/legal/instruments/detention/civpot_e.htm](http://www.unchr.ch/refworld/legal/instruments/detention/civpot_e.htm)> (date accessed: 30 September 2001).

³⁷¹ U.N Doc.CCPR/C/79/Add. 25, para 8.

Conclusion

One hundred and fifty years ago, a person who thought that there existed the possibility of abolishing the death penalty worldwide would have been called a dreamer. At that time, abolitionist instruments banning the imposition of the death penalty had not yet been adopted and very few countries had abolished the death penalty.

Now, at the beginning of the twenty-first century, the suggestion that worldwide abolition of the death penalty is closer to becoming reality may be more plausible than it was one hundred and fifty years ago. New facts related to methods of execution, the possibility of executing innocent people, the deterrent effect of the death penalty and its discriminatory application have convinced more than half the countries of the world that the death penalty is a deadly evil. These countries have transformed their beliefs to commitments under universal and regional abolitionist instruments. Accompanied by various measures, universal and regional abolitionist instruments have assisted the abolitionist trend in its struggle towards ultimate elimination of the death penalty. As a result, more than half the countries of the world have abolished the death penalty, yet seventy-eight countries still employ this deadly punishment.

The twenty-first century promises a brighter future for the abolitionist cause. As illustrated in the second and the third chapters of this work, even nations that at present strongly reject the abolition of the death penalty may in the future accept it, for in both the American and Islamic penal systems, "room for change" exists. "Room for change" in both these systems

will always exist, but will be without merit if not used to promote the abolition of the death penalty.

Hope of using the "room for change" will never fade, especially when one remembers that in the late 1990s South Africa, formerly a strong supporter of the death penalty, changed its position to become a supporter of abolition. Inspired by the worldwide trend towards abolition, South Africa used the "room for change"³⁷² found in its system to reject continued application of the death penalty.³⁷³

The day when capital punishment will be rejected worldwide is approaching. The current worldwide trend towards abolition will likely inspire change in retentionist penal systems such as the American and Islamic systems. As a result, the "room for change" present in these systems, as well as in the remaining retentionist systems in the world, will be used to promote abolition of the death penalty.

³⁷² In the South African context, "room for change" is present in the constitutionality of the death penalty application. Similar to the American case, the capital punishment in South Africa was found to be applied arbitrary and discriminatorily. The arbitrary and discriminatory aspects of the death penalty application render this practice unconstitutional. Inspired by the worldwide trend towards abolition, the South African Constitutional Court used the unconstitutionality of the death penalty (the room for change) to abolish capital punishment.

³⁷³ In June 1995, eleven members of South Africa's Highest Court unanimously ruled that capital punishment is unconstitutional. The South African court cited the international trend towards abolition to reject the continued imposition of the death penalty. The court stated that "capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half of the countries of the world including the democracies of Europe and our neighbouring countries Namibia, Mozambique and Angola. In most of these countries where it is retained...it is seldom used." See *S v Makwanyane and Another*, [1995] 6 BCLR 665 (CC); [1995] SACLR Lexis 218.

BIBLIOGRAPHY

JURISPRUDENCE

Canada.

- Kindler v. Canada*, [1991] 2 S.C.R. 779.
Ng v. Canada, [1991] 2 S.C.R. 858.
United States v. Burns, [2001] 1 R.C.S. 283.

European Commission of Human Rights

- Aylor-Davis v. France* (1994), App. No. 22742/93 Eur. Comm. H.R. D.R., 76B D.R. 164-237.
Cinar v. Turkey (1994), 79A Eur. Comm. H.R. D.R. 5.
Kirkwood v. United Kingdom (1985), App. No. 10308/83 Eur. Comm. H.R.D.R. 37 DR 158-229.
Raidl v. Austria (1995), App. No. 2534/94 Eur. Comm. H.R. D.R., 82A D.R. 134-254.
Soering v. United Kingdom & Germany (1988), 161A Eur. Comm. HR. D.R 231 App. No. 14038/88.

European Court of Human Rights.

- Soering v. United Kingdom & Germany*, (1989), 161 Eur. Ct. H.R. (Ser. A), 11 E.H.R.R. 439.

France.

- Fidan*, (1987) II Recueil Dalloz-Sirey 305 (conseil d'état).
Gacem, (1998) I Semaine Juridique IV-86 (conseil d'etat).

Human Rights Committee.

- Lilian Celiberti de Casariego v. Uruguay* (Comm. no. R. 13/56), Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981).
Lopez Burgos v. Uruguay (Comm. no. 12/52), Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, UN. Doc. A/36/40 (1981).
-

Italy

Venezia v. Ministero Di Grazia E Giustizia, [1996] 79 Rivista di Diritto Internazionale 815.

Netherlands.

Short v. Netherlands, [1990] 29 I.L.M (1378) 221,254.

South Africa.

S v. Makwanyane and Another, [1995] 6 BCLR 665 (CC); [1995] SACLR Lexis 218.

United States of America.

Akins v. Texas, 325 U.S. 398 (1945).

Amadeo v. State, 384 S.E. 2d 181,181 (Ga. 1989).

Batson v. Kentucky, 476 U.S.79, 85 n.6 (1986).

Birt v. Montgomery, 725 F. 2d 587, 598 n.25 (11th Circ.), cert. denied 469 U.S. 874 (1984).

Dobbs v. Zant, 506 U.S. 357 (1993).

Dredd Scott v. Sandford, 60 U.S. 393 (1856).

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

Gideon v. Wainwright, 372 U.S. 335 (1963).

Gregg v. Georgia, 428 U.S. 153 (1976).

Holloway v. State, 361 S.E. 2d 794, 796 (Ga. 1987).

Lockett v. Ohio, 438 U.S. 586 (1978).

Maxwell v. Bishop, F.2d 138 (8th Cir.1978).

McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

McCleskey v. Zant, 580 F. Supp. 338, 345-346, 369 (N.D Ga. 1984).

Mc Mann v. Richardson, 397 U.S. 759,771 and n. 14 (1970).

Miranda v. Arizona, 384 U.S. 436 (1966).

Murray v. Gianatarro, 492 U.S. I, 10 (1989).

Neal v. Delaware, 103 U.S. 370 (1880).

Nelson v. Zant, 405 S.E. 2d 250 (Ga 1991).

Norris v. Alabama, 294 U.S. 587 (1975).

Paradis v. Arave, 954 F. 2d 1483, 1490-1491 (9th Circ. 1992).

Powell v. Alabama, 287 U.S. 45 (1932).

Prejean v. Blackmun, 743 F.2d 1091 (5th Cir. 1984).

Purkett v. Elen, 115 S. Ct. 1769 (1995).

Roberts v. State, 438 S.E. 2d 905,906 (Ga. 1994).

Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984).

Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987).

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Strauder v. West Virginia, 100 U.S. 303 (1880).

Strickland v. Washington, 466 U.S. 688 (1984).
Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
Thomas v. Kemp, 796 F. 2d 1322, 1324 (11th Circ. 1986).
Wainwright v. Sykes, 433 U.S. 72 (1977).
Woodson v. North Carolina, 428 U.S. 280 (1976).

SECONDARY MATERIAL: MONOGRAPHS

Abu-Sahlieh, S.A., *Les Mouvements Islamistes et Les Droits de L'homme* (Bochum: Winkler, 1998).
 Abu-Sahlieh, S.A., *les Musulmans Face aux Droits de L'homme-Religion et Droit et Politique-Etude et Documents* (Bochum: Winkler, 1994).
 Al-Armanazi, N., *Al-Shareh Il Douwali Fil Islam* (London: Riad El-Rayes Books, 1990).
 Alayle, A., *Ain Al-khata? Tashih Mafahim Wa Nazra Jadida* (Beirut: Dar Il Ilim Lil-Malayin, 1978).
 Al-Ghazali, M., *Huquq Al-Insan*, 2nd ed. (Cairo: Dar Al-Kutub Al-Haditha, 1965).
 Amnesty International, *When the State Kills... The Death Penalty v. Human Rights* (United Kingdom: Amnesty International Pub., 1989) at 13.
 Bedau, H.A., ed., *The Death Penalty in America*, 3d ed. (Oxford: Oxford University Press, 1982).
 Cole, D., *No Equal Justice: Race and Class in the American Justice System* (New York: The New Press, 1999).
 Cotran, E., & Sherif, A.O., eds., *Democracy, The Rule of Law and Islam* (London; Boston: Kluwer Law International, 1999).
 Edge, I., ed., *Islamic Law and Legal Theory* (Aldershot: Dartmouth Publishing Company Limited, 1996).
 Friedman, L., ed., *The Law of War, A Documentary History*, 1st ed. (New York: Random House, 1972).
 Hood, R., *The Death Penalty: A Worldwide Perspective*, 2nd ed. (Oxford: Clarendon, 1996).
 Hussain, S.S., *Human Rights in Islam* (New Delhi: Kitab Bhavan, 1990).
 Kaminer, W., *It's All the Rage: Crime and Culture* (Massachusetts: Addison-Wesley Publishing Company, 1995).
 Khadduri, M., *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955).
 Khan, M.Z., *Islam and Human Rights* (Islamabad: Islam International Publications Limited, 1988) at 66-67.
 Kurzman, C., ed., *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998).
 Lee, R.S., ed., *The International Criminal Court, the making of the Rome Statute-issues, negotiations, results*. (The Hague: Kluwer Law International, 1999).
 Mayer, A.E., *Islam and Human Rights* (London: Pinter Publishers, 1991).
 Megivern, J.J., *The Death Penalty: An Historical and Theological Survey* (New Jersey: Paulist Press, 1997).
 Morris, V., & Scharf, M.P., *The International Criminal Tribunal for Rwanda*, vol. 1 (New York: Transnational Publishers, 1998).
 Na'im, A.A., *Nahwa Tatwir Al-Tashri' Al- Islami* (Cairo: Sina Lil-Nacher, 1994).
 Nowak, M., *UN. Covenant on Civil and Political Rights: CCPR commentary* (Kehl: Arlington, 1993).
 O'shea, K.A., *Women and the Death Penalty in the United States* (Westport: Praeger Publishers, 1999).

- Rabbah, G., *Oukoubat Al-Ihdam: Hal Am Mouchkila?* (Beirut: Nawfal Corporation, 1987).
- Rahman, F., *Islam* (Chicago: Chicago University Press, 1979).
- Rise, E.W., *The Martinsville Seven: Race, Rape and Capital Punishment* (Charlottesville: University of Virginia Press, 1995).
- Sarat, A., ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (Oxford: Oxford University Press, 1999).
- Schabas, W.A., *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 1997).
- Schmale, W., ed., *Human Rights and Cultural Diversity* (Goldbach: keip Publishing, 1993).
- Tushnet, M., *Constitutional Issues: The Death Penalty* (New York: Facts on File, 1994).
- Walker, S., Spohn, C., & DeLone, M., *The Color of Justice-Race, Ethnicity, and Crime in America*, 2d ed. (Ontario: Wadsworth, 2000).

SECONDARY MATERIAL: ARTICLES

Articles in Journals

- Allmand, W., Bright, S.B., Carter, R., Koenig, D.M., Schabas, W., and Seriti, W.L., "Panel Discussions: Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?" (1999) 67 Fordham L. Rev. 2793.
- Bright, S.B., "The Death Sentence Not for the Worst Crime but for the Worst Lawyer" (1994) 103 Yale L. Journal 1835.
- Hosni, N., "La Peine de Mort en Droit Egyptien et en Droit Islamique" (1987) 58 Revue Internationale de Droit Penale 408.
- Jupiter, H., "Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty In American Democracy" (1996) 23 Fordham University School of Law Urban Law Journal 437.
- Khadduri, M., "Islam and Modern Law of Nations" (1956) 50 Am. J. Int'l. L. 358.
- Khan, I., "Islamic Human Rights: Islamic Law and International Human Rights Standards" (1999) 5 Appeal 74.
- Mc Cormack, L.H., "Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International criminal law" (1997) 60 Albany Law Review 681.
- Mcham, M., "All well that ends well; a pragmatic look at international criminal extradition" (1998) 20 Hous. J. Int'l L. 419.
- Prinzo, K.T., "The United States - 'Capital' of the World: An Analysis of why the United States practices capital punishment while the international trend is towards its abolition" (1999) 24 Brooklyn J. Int'l L. 855.
- Quigley, J., "Criminal law and Human Rights: implications of the United States ratification of the International Covenant on Civil and Political Rights" (1993) 6 Harvard Hum. Rts. J. 59.
- Reed, K., Wilson, R., & Fitzpatrick, J., "Race, Criminal Justice and The Death Penalty" (1994) 15 Whittier L. Rev. 395.
- Smith, D.A., Visser, C., & Davidson, L.A., "Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions" (1984) 75 Journal of Criminal Law and Criminology 234-249.

- The Supreme Court, "1986 Term-Leading Cases" (1987) 101 Harvard Law Review 119.
- Tillman, R., "The Size of The Criminal Population: The Prevalence and Incidence of Adult Arrest" (1987) 25 Criminology 561-579.
- Voigts, M., "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance" (1999) 99 Columbia L. Rev. 1103.
- Vreeland, A.L., "The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation" (1991) 90 Michigan L. Rev. 626.
- Walsh, T.J., "On The Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty" (1996) 44 Cleveland State Law Rev. 23.
- Wazir, A., "Quelques Aspects de la Peine de Mort en Droit Penal Islamique" 1987) 58 Revue Internationale de Droit Penale 421.
- Westbrook, D.A., "Islamic International Law and Public International Law: Separate Expressions of World Order" (1993) 33 Va. J. Int'l. Law 819.

SECONDARY MATERIAL: ARTICLES

Articles in Newspapers

- Lewis, A., "Bowling to Racism" New York Times (28 April 1987) A31.
- Milloy, C., "Unequal Justice in P.G?" Washington Post (25 February 1996) B1.

OTHER MATERIAL

Internet Sources

- Amnesty International-Amnesty International News Report 2000, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 2 September 2001).
- Amnesty International-Current Info, Facts and Figures About the Death Penalty, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).
- Amnesty International- Current Information on the Death Penalty, Death Sentences and Executions in 2000, Online: Amnesty International <<http://www.amnesty.org>> (date accessed: 10 August 2001).
- Amnesty International-Ratifications of International Treaties to Abolish the Death Penalty, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).
- Amnesty International-The Death Penalty in America, online: Amnesty International <<http://www.amnesty-usa.org/rightsforall/dp>> (date accessed: 3 September 2001).
- Amnesty News-Amnesty International News June 2000, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).
- Amnesty News-Report of September 1998, online: Amnesty International <<http://www.amnesty.org>> (date accessed: 3 September 2001).
- Council of Europe-Convention for The Protection of Human Rights and Fundamental Freedoms, Chart of signatures and ratifications, online: Council of Europe <<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>> (date accessed: 3 September 2001).

- Death Penalty Information Center-History of the Death Penalty-Early Death Penalty Laws, online: Death Penalty Information Center
<<http://www.deathpenaltyinfo.org/history2.html>> (date accessed: 20 September 2001).
- Death Penalty Information Center-Introduction to The Death Penalty, The Death Penalty in America, online: Death Penalty Information Center
<<http://deathpenaltyinfo.org/history1.html>> (date accessed: 11 September 2001).
- Frontline-History of the Death Penalty (by M.H. Reggio), online: Frontline
<<http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.htm>> (date accessed: 20 September 2001).
- Refworld-International Covenant on Civil and Political Rights, online: United Nations Commission on Human Rights<http://www.unhcr.ch/refworld/legal/instruments/detention/civpot_e.htm> (date accessed: 30 September 2001).
- Think Quest-Death Penalty: When Life Generates Death (legally), History, online: Think Quest <<http://library.thinkquest.org/23685/data/history.html>> (date accessed: 15 September 2001).
- UNCHR-Status of Ratifications of the International Covenant on Civil and Political Rights, online: office of the high commissioner for human rights
<http://www.unhchr/html/menu3/b/a_ccpr.htm> (date accessed: 3 September 2001).

International Legal Sources

- Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OASTS 73.
- Agreement for the Prosecution and Punishment of Major War Criminals of The European Axis and The Charter of the International Military Tribunal annexed thereto*, 8 August 1945, 82 U.N.T.S. 279[hereinafter London Agreement and Nuremberg Charter respectively].
- American Declaration of the Rights and Duties of Man*, OAS, OR OEA/Ser.L/V/I.4 (1948).
- Charter of the International Military Tribunal for The Far East*, approved by the Supreme Commander for the Allied Powers on 19 January 1946 [hereinafter Tokyo Charter].
- Charter of The United Nations*, 26 June 1945, Can. T.S. 1945 No.7.
- Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.
- Draft Declaration of the International Rights and Duties of Man*, 31 December 1945, (1946) AJIL Supp. 93.
- Draft Statute for an International Criminal Court, Committee on International Criminal Jurisdiction*, UN GAOR, 1952, Supp. No. 12, UN Doc. A/2136 Annex (1952).
- Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia*, SC Res. 808, UN SCOR, 48th Sess., (1993). UN Doc. S/ RES/ 808 (1993).
- General Comment on article 6 of the International Covenant on Civil and Political Rights (General Comment 6(16))*, Committee on Human Rights, UN ESCOR, 1982.
- Implementation of The Safeguards Guaranteeing Protection of The Rights of Those Facing The Death Penalty*, ESC Res. 1989/64, UN ESCOR, 1989.
- International Covenant on Civil and Political Rights*, GA Res. 2200 A (XXI).

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200 A (XXI).
International Slavery Convention, 25 September 1926, 60 L.N.T.S. 253.
Protocol # 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 28 April 1983, ETS 114. In force since 1 March 1985.
 [Hereinafter Protocol 6]
Restrictions to The Death Penalty (1983), Advisory Opinion, OC-3/83 (Ser. A) No.3.
Revised Draft Statute for an International Criminal Court, Committee on International Criminal Jurisdiction, UN GAOR, 1954, Supp. No. 12, UN Doc. A/2645 Annex (1954).
Rome Statute of the International Criminal Court, UN Doc. A/ Conf. 183/9 (1998). [hereinafter Rome Statute]
Safeguards Guaranteeing Protection of The Rights of Those Facing the Death Penalty, ESC Res. 1984/50, UN ESCOR, 1984.
Safeguards Guaranteeing Protection of The Rights of Those Facing the Death Penalty, ESC Res. 1996/5, UN ESCOR, 1996.
Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, GA Res. 44/128, UN GAOR, 44th Sess., UN Doc. A/Res/44/128. (1989).
Statute of the International Tribunal for Rwanda, SC Res. 955 (1994), UN SC, 1994, UN Doc. S/RES/ 955 (1994), Annex.
Supplementary Convention on The Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 U.N.T.S 3 (entered into force 30 April 1957).
Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp No. 13, UN Doc. A/810 (1948)71.

Reports

Commission on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights on Extra-judicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, UN DOC, 1994, UN DOC E/CN.4/1994/7 Add. 1. (1993).
 Committee on Human Rights, *Report of the Special Rapporteur on Extra-judicial Summary or Arbitrary Executions*, UN ESCOR, 1998, UN Doc. E/CN.4/1998/68 add. 3.
 International Law Commission, *Report of the International Law Commission to the General Assembly*, UN GAOR, 1950, Supp. No. 12, UN Doc. A/1316 (1950).
 United Nations, *Capital Punishment, Developments 1961 to 1965*. (Report Presented by N. Morris) 1967.
 United Nations, *The Question of The Death Penalty and The New Contributions of The Criminal Sciences to The Matter, a Report to The UN Committee on Crime Prevention and Control*, (Vienna: United Nations Social Affairs Division, Crime Prevention and Criminal Justice Branch, 1988) and updated in 1996.

