
Introduction

This study could not have been written fifty-five years ago because its subject matter did not exist. International norms addressing the limitation and the abolition of the death penalty are essentially a post-Second World War phenomenon. As a goal for civilized nations, abolition was promoted during the drafting of the *Universal Declaration of Human Rights*¹ in 1948, although it found expression only implicitly in the recognition of what international human rights law designated ‘the right to life’. At the time, all but a handful of States maintained the death penalty and, in the aftermath of a brutal struggle which had taken hundreds of millions of lives, few were even contemplating its abolition. When Uruguay objected to inclusion of the death penalty in the *Charter of the Nuremberg Tribunal*,² it was accused of having Nazi sympathies.³ In 1946, a Norwegian court ruled that the death penalty was actually prescribed, by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country’s ordinary criminal law.⁴ The United Nations Command, during the Korean War, formally provided for imposition of the death penalty on prisoners of war for post-capture offences.⁵

The idea of abolition gained momentum over the following decades. International lawmakers urged the limitation of the death penalty, by, for example, excluding juveniles, pregnant women and the elderly from its scope and by restricting it to an ever-shrinking list of serious crimes. Enhanced procedural

¹ GA Res. 217 A (III), UN Doc. A/810 (hereinafter, the *Universal Declaration* or *Declaration*).

² *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, (1951) 82 UNTS 280, art. 27. On the debate about use of the death penalty for war crimes, see: Claude Pilloud, ‘La protection pénale des conventions humanitaires internationales’, [1953] *Revue internationale de la croix-rouge* 842, pp. 862–863.

³ UN Doc. A/C.3/SR.811, para. 28.

⁴ *Public Prosecutor v. Klinge*, (1946) 13 *Ann. Dig.* 262 (Supreme Court, Norway).

⁵ ‘Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command’, in Howard S. Levie, ed., *Documents on Prisoners of War*, Newport, R.I.: Naval War College Press, 1979, p. 592; ‘Regulations Governing the Penal Confinement of Prisoners of War of the United Nations Command’, *ibid.*, p. 614.

2 *The abolition of the death penalty*

safeguards were required where the death penalty still obtained. Eventually, three international instruments were drafted that proclaimed the abolition of the death penalty, the first adopted in 1983 and the others only at the end of the 1980s.⁶ Sixty-eight States are now bound by these international legal norms abolishing the death penalty,⁷ and the number continues to grow rapidly.⁸ Fifty-five years after the Nuremberg trials, the international community has now ruled out the possibility of capital punishment in prosecutions for war crimes and crimes against humanity.⁹

The importance of international standard setting was evidenced by parallel developments in domestic laws. From a handful of abolitionist States in 1945, the list grew steadily until, by 2001, considerably more than half the countries in the world had abolished the death penalty *de facto* or *de jure*. Those that still retain it find themselves increasingly subject to international pressure in favour of abolition, sometimes quite direct, for example, in the refusal to grant extradition where a fugitive will be exposed to a capital sentence. Abolition of the death penalty is generally considered to be an important element in democratic development for States breaking with a past characterized by terror, injustice and repression. In some cases, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty.¹⁰ In others,

⁶ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, ETS 114 (hereinafter *Protocol No. 6*) (see Appendix 15, p. 424); *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, GA Res. 44/128, (1990) 29 ILM 1464 (hereinafter the *Second Optional Protocol*) (see Appendix 4, p. 397); *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OASTS 73, 29 ILM 1447 (see Appendix 21, p. 438). A fourth treaty, the *American Convention on Human Rights*, (1979) 1144 UNTS 123, OASTS 36 (hereinafter the *American Convention*) (see Appendix 20, p. 436), is also an abolitionist instrument because it prevents countries which have already abolished the death penalty from reintroducing it. Thus, a State which has abolished the death penalty at the time of ratification of the *American Convention* is abolitionist from the standpoint of international law.

⁷ Albania, Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkmenistan, Ukraine, United Kingdom, Uruguay, Venezuela and Yugoslavia. These States are abolitionist either *de jure* or *de facto*, and parties to one or more of the abolitionist treaties.

⁸ Several European States have pledged to ratify *Protocol No. 6*, within twelve months as a condition for joining the Council of Europe.

⁹ The Security Council has excluded use of the death penalty by the two international *ad hoc* tribunals created to deal with war crimes in the former Yugoslavia and Rwanda: *Statute of the International Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827 (1993), annex, art. 24 §1; *Statute of the International Tribunal for Rwanda*, UN Doc. S/RES/955 (1994), annex, art. 23 §1. The death penalty is excluded from the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, art. 77.

¹⁰ For example, the Arusha peace agreement of August 1993, which forms part of Rwandan fundamental law, provides for accession to all human rights treaties, and this is generally recognized as including the *Second Optional Protocol*. 'Protocole d'Accord entre le Gouvernement de la République Rwandaise et le

it has been the contribution of the judiciary, of judges applying constitutions that make no specific mention of the death penalty but that enshrine the right to life and that prohibit cruel, inhuman and degrading treatment or punishment.¹¹ Abolition of capital punishment features as one of the criminal law initiatives of the United Nations in its administration of Cambodia,¹² Kosovo¹³ and East Timor.¹⁴ The day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of *jus cogens*, is undeniably in the foreseeable future.

The death penalty has existed since antiquity. Anthropologists even claim that the drawings at Valladolid by prehistoric cave dwellers show an execution. The death penalty may well have had its origins in human sacrifices. In positive law, capital punishment can be traced back as early as 1750 BC, in the *lex talionis* of the Code of Hammurabi.¹⁵ The Bible set death as the punishment for such crimes as magic, violation of the sabbath, blasphemy, adultery, homosexuality, relations with animals, incest and rape.¹⁶ Yet the Jewish courts developed procedural safeguards for its employment. According to the Talmud, one rabbi called 'destructive' a Sanhedrin who imposed the death sentence once in seven years. Another said 'once in seventy years', and two others said they would never impose a death sentence.¹⁷

Front Patriotique Rwandais portant sur les questions diverses et dispositions finales signé à Arusha', 3 August 1993, *Journal officiel*, Year 32, no. 16, 15 August 1993, p. 1430, art. 15. The *Constitution of Bosnia and Herzegovina*, which forms Annex IV of the 'General Framework Agreement for Peace in Bosnia and Herzegovina', reached at Dayton, Ohio in November 1995, is even more explicit, providing that the new republic respect the protocols to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955) 213 UNTS 221, ETS 5 (hereinafter the *European Convention*), including its *Protocol No. 6* at arts. II§2 and IV§3(c), and the *Second Optional Protocol* at Annex I, §7. See also Annex IV to the Dayton agreement, dealing with human rights, at arts. I and II§2(a) and Appendix §8. The Human Rights Chamber of Bosnia and Herzegovina has declared the death penalty to be unconstitutional: *Damjanovic v. Federation of Bosnia and Herzegovina* (Case No. CH/96/30), 5 September 1997, Decisions on Admissibility and Merits 1996–1997, p. 147.

¹¹ *S. v. Makuranyane*, 1995 (3) SA 391, (1995) 16 HRLJ 154 (Constitutional Court of South Africa); Ruling 23/1990 (X.31) AB, Constitutional Court of Hungary, Judgment of 24 October 1990, *Magyar Közlöny* (Official Gazette), 31 October 1991; Ukraine, Constitutional Court ruling, 30 December 1999; Albania, Constitutional Court ruling 10 December 1999.

¹² 'Provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period,' Supreme National Council decision of 10 September 1992.

¹³ 'Regulation No. 1999/1, on the Authority of the Interim Administration in Kosovo', UN Doc. UNMIK/REG/1999/1.

¹⁴ 'Regulation No. 1999/1, on the Authority of the Transitional Administration in East Timor', UN Doc. UNTAET/REG/1999/1, was promulgated by the United Nations Transitional Administrator on 27 November 1999. Death sentences were pronounced in East Timor in December 1997, apparently the first since the Indonesian occupation in 1975: 'Situation in East Timor, Report of the Secretary-General', UN Doc. E/CN.4/1998/58.

¹⁵ Paul Savey-Casard, *La peine de mort: esquisse historique et juridique*, Geneva: Droz, 1968, at pp. 4–14.

¹⁶ Exodus xxi, 14, xxii, 18; Leviticus xx, 13, 15, xxiv; Deuteronomy xxi, 21, xxii, 11, 25, xxix, 13; Numbers, xiii, 5, xvii, 7, xix, 19, xxii, 23, xxxiii 14, 37. See: Jean Imbert, *La peine de mort*, Paris: Presses universitaires de France, 1989, pp. 7–8.

¹⁷ Charles L. Black Jr, *Capital Punishment: The Inevitability of Caprice and Mistake*, New York: Norton, 1974, at p. 94; F. Frez, 'Thou Shalt Not Execute. Hebrew Law Perspective on Capital Punishment', (1981) 19 *Criminology* 25.

The scourge of the death penalty cut short the life of one of ancient Greece's greatest thinkers, Socrates. Plato discussed the scope of the death penalty at length in his *Laws*.¹⁸ Yet the death penalty had its opponents, even in early times. Thucydides reports a debate between Cleon and Diodotus concerning the implementation of the death penalty to suppress a rebellion of the island of Mitylene: 'We must not, therefore, commit ourselves to a false policy through a belief in the efficacy of the punishment of death, or exclude rebels from the hope of repentance and an early atonement of their error', said Diodotus, whose eloquent words rallied the majority of the Athenian assembly.¹⁹

During the Middle Ages, the death penalty was characterized by particular brutality.²⁰ Its legitimacy was defended by many of the great thinkers of the Renaissance and the Reformation. Grotius considered the issue at some length, finding it to be justified with reference to the Bible and other examples of Christian mores and in fact used the acceptance of capital punishment to justify the legality of warfare.²¹ Both Thomas Hobbes and John Locke admitted that the death penalty was justifiable.²²

Jean-Jacques Rousseau believed that in society man had a right not to be killed as long as he did not kill anyone else.²³ Diderot, too, was in favour of the death penalty: 'Il est naturel que les lois aient ordonné le meurtre des meurtriers.'²⁴ But the Enlightenment also saw the emergence of partial abolitionism. Montesquieu, for example, called for limitation of the death penalty to murder, attempted murder, certain types of manslaughter and some offences against property, although he did not commit himself to full abolition.²⁵

¹⁸ Plato, *The Laws*, Book VIII, Chapter 16, London: Harmondsworth, 1970, at pp. 353–366. Also on the death penalty in ancient Greece, see: P. Gelbert, 'L'exécution des condamnés à mort en Grèce antique', [1948] *Revue internationale de criminologie et de police technique* 38; Irving Barkan, *Capital Punishment in Ancient Athens*, Chicago, 1936; Jan Gorecki, *Capital Punishment, Criminal Law and Social Evolution*, New York: Columbia University Press, 1983, pp. 31–80.

¹⁹ Thucydides, 'The Peloponnesian War', ch. 9, §§38–48, in *The Complete Writings of Thucydides*, New York: Modern Library, 1934, pp. 164–172.

²⁰ Jean Imbert, *La peine de mort*, at pp. 16–24; Richard J. Evans, *Rituals of Retribution, Capital Punishment in Germany 1600–1987*, Oxford: Clarendon Press, 1996.

²¹ H. Grotius, *De jure belli ac pacis libri tres*, trans. Francis W. Kelsey, Oxford: Clarendon Press, 1925, at pp. 66–86. A similar connection between war and the death penalty was made by the Italian criminologist Garofalo: Raffaele Garofalo, *Criminology*, Montclair, N.J.: Patterson Smith, 1968, pp. 51–53.

²² R. Zaller, 'The Debate on Capital Punishment During the English Revolution', (1987) 31 *American J. Legal History* 126.

²³ Jean-Jacques Rousseau, *Le contrat social*, Book II, ch. 5, Paris: Pléiade, Vol. III, pp. 376–377.

²⁴ Quoted in Jacques Goulet, *Robespierre, La peine de mort et la terreur*, Paris: Le Castor Astral, 1983, p. 13.

²⁵ Montesquieu, *De l'esprit des lois*, Paris: Société des belles lettres, 1950, pp. 159–161. See J. Graven, 'Les conceptions pénales et l'actualité de Montesquieu', [1949] *Revue de droit pénal et de criminologie* 161; Jean Imbert, 'La peine de mort et l'opinion au XVIII^e siècle', [1964] *Revue de science criminelle et de droit pénal comparé* 521; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol. I, London: Stevens and Sons, 1948, pp. 268–284.

The modern abolitionist movement establishes its paternity with the great Italian criminologist, Cesare Beccaria. His work, *Dei delitti et delle pene*,²⁶ convinced such statesmen as Voltaire, Jefferson, Paine, Lafayette and Robespierre of the uselessness and inhumanity of capital punishment²⁷ and even led to ephemeral measures abolishing the death penalty in Austria and Tuscany.²⁸

During debate on the adoption of the French *Code pénal* in 1791, Robespierre argued vigorously for the abolition of the death penalty.²⁹ He failed to convince the majority of the National Assembly, and the death penalty was retained, although in the relatively humane form proposed by his colleague, Dr Joseph-Ignace Guillotin. Robespierre later had a change of heart, calling for the execution of Louis XVI as a ‘criminel envers l’humanité’,³⁰ something that Thomas Paine, also an abolitionist, deemed a betrayal.³¹ But the abolitionist ideal had not been completely obscured, and the Convention, in its final session, following the execution of Robespierre, decreed: ‘À dater du jour de la publication générale de la paix, la peine de mort sera abolie dans la République française.’³²

The abolitionist movement grew during the nineteenth century, rallying the support of such important English jurists as Bentham and Romilly.³³ In 1846, Michigan became the first jurisdiction to abolish capital punishment permanently.³⁴ Venezuela and Portugal abolished the death penalty in 1867,

²⁶ Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci, Indianapolis: Bobbs-Merrill, 1963.

²⁷ Steven Lynn, ‘Locke and Beccaria: Faculty Psychology and Capital Punishment’, in William B. Thesing, *Executions and the British Experience from the 17th to the 20th Century: A Collection of Essays*, Jefferson, N.C.: McFarland, pp. 29–44; Robert Badinter, ‘Beccaria, l’abolition de la peine de mort et la Révolution française’, [1989] *Revue de science criminelle et de droit pénal comparé* 245; Mireille Delmas-Marty, ‘Le rayonnement international de la pensée de Cesare Beccaria’, [1989] *Revue de science criminelle et de droit pénal comparé* 252; Jean Imbert, *La peine de mort*.

²⁸ Marcello Maestri, *Cesare Beccaria and the Origins of Penal Reform*, Philadelphia: Temple University Press, 1972; Radzinowicz, *A History*, pp. 290–293.

²⁹ Maximilien Robespierre, *Œuvres*, VII, Paris: Presses universitaires de France, 1952, pp. 432–437. See: Savy-Casard, *La peine de mort*, pp. 70–75; Goulet, *Robespierre*.

³⁰ Maximilien Robespierre, *Œuvres*, IX, Paris: Presses universitaires de France, 1952, p. 130.

³¹ Thomas Paine, ‘Preserving the Life of Louis Capet’, in Michael Foot, Isaac Kramnick, *The Thomas Paine Reader*, London: Penguin, 1987, pp. 394–398.

³² Decree of the fourth brumaire, year IV, quoted in Savy-Casard, *La peine de mort*, p. 80. It was not, however, until 1981 that France consigned its guillotine to the museum. On the history of capital punishment in France, see: Jean-Claude Chesnais, *Histoire de la violence en Occident de 1800 à nos jours*, Paris: Robert Laffont, 1981, pp. 138–154; Daniel Arasse, *La Guillotine et l’imaginaire de la terreur*, Paris: Flammarion, 1987.

³³ Radzinowicz, *A History*, pp. 497–525; Hugo Adam Bedau, ‘Bentham’s Utilitarian Critique of the Death Penalty’, (1983) 74 *J. Criminal Law and Criminology* 1033; James E. Crimmins, ‘“A Hatchet for Paley’s Net”: Bentham on Capital Punishment and Judicial Discretion’, (1988) 1 *Canadian J. Law and Jurisprudence* 63. For the history of the English abolitionist movement during the nineteenth century, see Leon Radzinowicz, Roger Hood, *A History of English Criminal Law and its Administration from 1750*, Vol. V, London: Stevens and Sons, 1986, pp. 661–688.

³⁴ D. B. Davis, ‘Movement to Abolish Capital Punishment in America, 1787–1861’, (1957) 63 *American Historical Rev.* 23; Louis Filler, ‘Movements to Abolish the Death Penalty in the United States’, (1952) 284 *Annals of the American Academy of Political and Social Science* 124.

followed by the Netherlands (1870), Costa Rica (1882), Brazil (1889) and Ecuador (1897). Panama, created in 1903, never enacted the death penalty.³⁵ But abolition suffered a setback in the first decades of the twentieth century. Part of this was due to the influential criminological doctrines of Garofalo, Lombroso and Ferri, who argued that the death penalty was scientifically necessary as a social measure.³⁶ The rise of totalitarianism in Europe after the First World War was also responsible for a resurgence of the death penalty. Hitler, an enthusiast of the death penalty from his earliest days, wrote casually about the execution of 10,000 people in *Mein Kampf*.³⁷ Nazi use of the death penalty against prisoners and civilians was cited in the final judgment of the international war crimes tribunal at Nuremberg,³⁸ and Nazi judges and prosecutors were themselves punished by post-war tribunals for their cavalier resort to capital punishment.³⁹

The international experts who assembled in the aftermath of the Second World War with the mission of enumerating fundamental rights and freedoms included in their lists a 'right to life'. As obvious as the right's importance appeared, its content was far from evident. Central to the preoccupations of these drafters was the issue of the death penalty. The post-war context had sensitized them to the terrible abuses of the death penalty prior to and during the armed conflict. Furthermore, they were conscious of giving effect to an abolitionist movement that had been gaining support, albeit with sporadic reversals, for the past two centuries. At the same time, the death penalty was almost universally applied, and even many of the most steadfast opponents of capital punishment were tempted to make exceptions in the cases of war criminals and collaborators. This was the dialectic that confronted those who first proclaimed, in international law, a 'right to life'.

The *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on 10 December 1948, declared the right to life in absolute fashion, any limitations being only implicit.⁴⁰ The same approach was taken in the *American Declaration on the Rights and Duties of Man*, adopted 4 May 1948.⁴¹ In several subsequent international human rights instruments,

³⁵ See: Ricardo Ulate, 'The Death Penalty: Some Observations on Latin America', (1986) 12–13 *United Nations Crime Prevention and Criminal Justice Newsletter* 27.

³⁶ Raffaele Garofalo, *Criminology*, pp. 104–105, 376, 410; Cesare Lombroso, *Crime, Its Causes and Remedies*, Montclair, N.J.: Patterson Smith, 1968, pp. 426–428; Enrico Ferri, *Criminal Sociology*, New York: Agatha Press, 1967, p. 527.

³⁷ Adolf Hitler, *Mein Kampf*, Boston: Houghton Mifflin, 1943, p. 545.

³⁸ *France et al. v. Goering et al.*, (1946) 22 IMT 203.

³⁹ *United States of America v. Alstötter et al.* ('Justice trial'), (1948) 3 TWC 1, 6 LRTWC 1, 14 ILR 278 (United States Military Commission).

⁴⁰ Art. 3 (see Appendix 1, p. 379).

⁴¹ OAS Doc. OEA/Ser.L./V/1.4, art. I (hereinafter, the *American Declaration*) (see Appendix 19, p. 435).

notably the *International Covenant on Civil and Political Rights*,⁴² the *European Convention on Human Rights*⁴³ and the *American Convention on Human Rights*,⁴⁴ the death penalty is mentioned as a carefully worded exception to the right to life. In other words, from a normative standpoint, the right to life protects the individual against the death penalty unless otherwise provided as an implicit or express exception. The right to life in international law also ensures that the death penalty cannot be imposed without rigorous procedural safeguards, or against certain protected categories of persons, such as juveniles, pregnant women and the elderly.

There are some rather obvious exceptions to the right to life, indeed so obvious that there is really no need to make explicit mention of them in the international norms. An individual has the right to self-defence, including the right to take another's life where his or her own life is threatened by that person. In recognizing a defence of self-defence in its criminal legislation, the State breaches the right to life of the attacker. It is an exception that all but the most suicidal would quarrel with, and one that can also be justified in the name of the right to life, for it protects the right to life of the victim. The international law of armed conflict protects enemy combatants from criminal charges if captured, providing they bear arms, wear uniforms and meet the other requirements of the third *Geneva Convention*⁴⁵ and the *Protocol Additional I*.⁴⁶ Yet such protection, by tolerating the 'accidental' killing of civilians caught in the armed conflict, violates the right to life of these innocent victims. Here too, the exception to the right to life is an implicit one.

The *European Convention on Human Rights* is the only instrument to attempt an exhaustive list of exceptions to the right to life. The United Nations and the Inter-American systems chose to avoid such an approach, and instead declared simply that life could not be taken 'arbitrarily', leaving the scope of such exceptions to the interpreter. But all three instruments list separately what is the most striking exception to the right to life, the death penalty. Even the *European Convention* sets the death penalty apart from the other exceptions, dealing with it in a distinct paragraph. This is because, while the other exceptions are logical and self-evident, there is something contradictory and incompatible about recognizing a right to life and at the same time permitting

⁴² (1976) 999 UNTS 171, art. 6 (hereinafter, the *Civil Rights Covenant* or *Covenant*) (see Appendix 2, p. 380).

⁴³ (1955) 213 UNTS 221, ETS 5, art. 2§1 (hereinafter the *European Convention*) (see Appendix 14, p. 423).

⁴⁴ See Appendix 20, p. 436.

⁴⁵ *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135.

⁴⁶ *Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 3.

capital punishment. The drafters of the various instruments, intuitively, knew this.

The 'right to life' has been described at various times as 'the supreme right',⁴⁷ 'one of the most important rights',⁴⁸ 'the most fundamental of all rights',⁴⁹ 'the primordial right',⁵⁰ 'the foundation and cornerstone of all the other rights',⁵¹ 'le droit suprême, . . . la condition nécessaire à l'exercice de tous les autres',⁵² 'le noyau irréductible des droits de l'homme',⁵³ the 'prerequisite for all other rights',⁵⁴ and a right which is 'basic to all human rights'.⁵⁵ Basic as it appears, it is at the same time intangible in scope, and vexingly difficult to define with precision. The French scholar Frédéric Sudre describes it as an 'uncertain' right.⁵⁶ Perhaps more than any other, it is a right whose content is continuously evolving, in step with the hegemony of ever more progressive attitudes to capital punishment, nuclear arms, abortion and euthanasia, to mention only a few of the many issues that interpreters of the right to life have addressed.

There are two contending schools on the interpretation of the 'right to life'. The more restrictive school, one of narrow construction, would limit its scope to those issues considered by the drafters of the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.⁵⁷ The narrow view confines the protection offered by the right to life to such matters as capital punishment, abortion, disappearances, non-judicial executions and other forms of intentional or reckless life-taking by the State.

⁴⁷ *General Comment 6(16)*, UN Doc. CCPR/C/21/Add.1, also published as UN Doc. A/37/40, Annex V, UN Doc. CCPR/3/Add. 1, pp. 382–383 (see Appendix 5, p. 402). See also, *de Guerrero v. Colombia* (No. 45/1979), UN Doc. C/CCPR/OP/1, p. 112, p. 117.

⁴⁸ *Stewart v. United Kingdom* (App. No. 10044/82), (1985) 7 EHRR 453.

⁴⁹ Theo C. Van Boven, 'The Need to Stop Deliberate Violations of the Right to Life', in Daniel Prémont, ed., *Essais sur le concept de 'droit de vivre' en mémoire de Yougindra Khushalani*, Brussels: Bruylant, 1988, pp. 285–292, p. 285.

⁵⁰ Bertrand G. Ramcharan, 'The Concept and Dimensions of the Right to Life', in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1985, pp. 1–32, p. 12; René Brunet, *La garantie internationale des droits de l'homme d'après la Charte de San-Francisco*, Geneva: Grasset, 1947, p. 211.

⁵¹ Inter-American Commission of Human Rights, *Diez Años de Actividades, 1971–1981*, Washington, D.C.: Organization of American States, 1982, p. 339; *Annual Report of the Inter-American Commission on Human Rights, 1986–1987*, OAS Doc. OEA/Ser.L/V/II.71 doc. 9 rev. 1, p. 271.

⁵² Frédéric Sudre, *La Convention européenne des droits de l'homme*, Paris: Presses universitaires de France, 1990, p. 87.

⁵³ A.-C. Kiss, J.-B. Marie, 'Le droit à la vie', (1974) 7 HRJ 338, p. 340.

⁵⁴ 'Initial Report of Uruguay', UN Doc. CCPR/C/1/Add.57.

⁵⁵ *General Comment 14(23)*, UN Doc. A/40/40, Annex XX, UN Doc. CCPR/C/SR.563, para. 1.

⁵⁶ Frédéric Sudre, *La Convention européenne*, pp. 87–88.

⁵⁷ Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York: Columbia University Press, 1981, pp. 114–137, p. 115; J. E. W. Fawcett, *The Application of the European Convention on Human Rights*, 2nd ed., Oxford: Clarendon Press, 1987, p. 37; F. Przetacnik, 'The Right to Life as a Basic Human Right', (1976) 9 HRJ 585.

The broader view of the right to life is considerably more recent and attempts to introduce an economic and social content, a 'right to live', as it is sometimes called.⁵⁸ According to this approach, the right to life includes a right to food, to medical care and to a healthy environment. This is the outlook that has been adopted by the Human Rights Committee in the interpretation of article 6 of the *International Covenant on Civil and Political Rights*⁵⁹ and is shared by some of the States parties.⁶⁰

However, both schools agree that the issue of the death penalty is at the core of the right to life, and this is confirmed by an historical approach to the definition of the right. The early international instruments, notably the *Universal Declaration of Human Rights*, drew heavily on national declarations of fundamental rights that were inspired by the *Magna Carta*, the United States *Bill of Rights*, and the French *Déclaration des droits de l'homme et du citoyen*. There was nothing absolute about these early statements of the right to life; it was a right to protection of one's life from arbitrary deprivation by the State, in reality more of a licence to the State to execute, providing that procedural guarantees were observed. The earliest recognition of this protection is *Magna Carta*, whose chapter 26 provides:

No freedman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.⁶¹

Declarations of the right to life appear in a number of pre-revolutionary American documents, authored by Puritans who had fled religious persecution in England. For example, the *Massachusetts Body of Liberties*, dated 10 December 1641, proclaims:

No mans life shall be taken away . . . unlesse it be by bertue or equitie of some expresse law of the country narrating the same, established by a generall Cort and sufficiently published . . .⁶²

⁵⁸ Bertrand G. Ramcharan, 'The Right to Life', (1983) 30 *NILR* 297; Ramcharan, 'The Concept', p. 6; Hector Gros Espiell, 'The Right to Life and the Right to Live', in Prémont, ed., *Essais*, pp. 45–53; Mikuin Leliel Balanda, 'Le droit de vivre', in Prémont, *ibid.*, pp. 31–41; Yougindra Khushalani, 'Right to Live', in Prémont, *ibid.*, p. 283; Thomas Desch, 'The Concept and Dimensions of the Right to Life – As Defined in International Standards and in International and Comparative Jurisprudence', (1985–86) 36 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 77.

⁵⁹ *General Comment* 6(16); *General Comment* 14(23).

⁶⁰ E.g. 'Initial Report of Canada', UN Doc. CCPR/C/1/Add.43. See also: UN Doc. CCPR/C/SR.205, para. 26 (Opsahl).

⁶¹ 6 Halsbury's Statutes (3rd edn) 401.

⁶² Richard L. Perry, John C. Cooper, *Sources of Our Liberties*, Washington, D.C.: American Bar Association, 1952, p. 148.

10 *The abolition of the death penalty*

The *Virginia Bill of Rights*, drafted by George Mason at the dawn of the American revolution, referred to ‘inherent rights’ to ‘the enjoyment of life’.⁶³ The *Declaration of Independence*, which followed by a few weeks, stated:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.

The fifth amendment to the United States *Constitution* specifically provides for procedural guarantees in cases of ‘a capital or otherwise infamous crime’, adding that no person shall:

... be deprived of life, liberty, or property, without due process of law.

The fourteenth amendment, adopted on 28 July 1868, extended this protection to legislation of the States.

The drafters of the French *Déclaration des droits de l’homme et du citoyen* did not include the right to life, an omission that one scholar has explained with the observation that it is unnecessary to state a right without which all others have no *raison d’être*.⁶⁴ The *Déclaration* enumerates, at article 2, the ‘inalienable rights of man’ as being ‘liberty, property, security, and resistance to oppression’. The Marquis de Lafayette, who had been inspired by American models and assisted by Thomas Jefferson, included the right to life in his drafts of the *Déclaration*,⁶⁵ as did Marat and others.⁶⁶

Several national constitutions of the nineteenth and early twentieth century recognized the right to life, generally associated with a phrase acknowledging the exception of capital punishment. For example, Sweden’s 1809 *Constitution* states: ‘The King . . . shall not deprive anyone or permit anyone to be deprived of life without legal trial and sentence.’⁶⁷ In a study prepared by the Secretariat of the Commission on Human Rights in early 1947, twenty-six such provisions in various national constitutions were identified.⁶⁸

The right to life is implicit in the early international humanitarian conventions. The random and arbitrary execution of prisoners of war was proscribed by article 23§c of the Hague *Regulations* of 1907,⁶⁹ an interdiction that codified

⁶³ *Ibid.*, p. 311. See also: *Constitution of Pennsylvania*, *ibid.*, p. 329; *Constitution of Massachusetts*, *ibid.*, p. 374; *Constitution of New Hampshire*, *ibid.*, p. 382.

⁶⁴ Brunet, *La garantie*, p. 211.

⁶⁵ Stéphane Rials, *La déclaration des droits de l’Homme et du citoyen*, Paris: Hachette, 1988, pp. 528, 567, 590; Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, Vol. XIV, Princeton: Princeton University Press, 1958, pp. 438–440; *ibid.*, Vol. XV, pp. 230–233.

⁶⁶ Rials, *La déclaration*, p. 736 (Marat), p. 726 (Boislandry), pp. 717–718 (Pison de Galland), p. 707 (Georges-Cartou).

⁶⁷ Quoted in UN Doc. E/CN.4/AC.1/3/Add.1, p. 18. ⁶⁸ *Ibid.*, pp. 15–19.

⁶⁹ *Convention Regulating the Laws and Customs of Land Warfare (Hague Convention No. IV), Regulations Concerning the Laws and Customs of Land War*, 3 Martens (3rd) 461, 2 *AJIL Supp.* 2, [1910] TS 9.

customary international law and that, by the effect of the so-called ‘Martens clause’, extended to conflicts not covered by the *Regulations*. A ‘right to life’ *per se* probably first appeared in international law in an article by Antoine Rougier, published in 1910 in the *Revue générale de droit international public*. Rougier contemplated the question from the standpoint of humanitarian intervention, which he considered would be justified where a State violated the right to life of its subjects by wholesale massacres or even negligence in the provision of basic health care during an epidemic.⁷⁰

The idea of an international declaration of human rights can be traced to 1929, with a document adopted by the International Law Institute at its meeting held at Briarcliff Manor, New York. Article 1 of that declaration recognized the right to life:

It is the duty of every State to recognize the equal right of every individual to life, liberty and property, and to accord to all within its territory the full and entire protection of this right, without distinction as to nationality, sex, language, or religion.⁷¹

René Cassin credited the International Law Institute with playing an important role in the history of the *Universal Declaration of Human Rights*, noting in particular that the right to life was included as part of its 1929 declaration.⁷² Hector Gros Espiell cited the International Law Institute declaration as ‘the earliest recognition of the equal right to life of individuals’.⁷³ Already the implications that such an affirmation of the ‘right to life’ might have for the death penalty were evident. One participant at the 1929 session asked the *rapporteur*, André Mandelstam, for a declaration that the article be interpreted ‘de façon raisonnable’, suggesting it could not be used to suggest such ‘extremes’ as the

⁷⁰ Antoine Rougier, ‘La théorie de l’intervention d’humanité’, [1910] *Revue générale de droit international public* 468, at pp. 517–518.

⁷¹ *Annuaire de l’Institut de droit international*, 1929, Vol. II, Brussels: Goemaere, 1929, pp. 118–120; the original is in French, but an English version was published many years later: Institut de droit international, ‘Declaration of International Rights of Man’, (1941) 35 *AJIL* 663.

⁷² René Cassin, ‘La déclaration universelle et la mise en oeuvre des droits de l’homme’, (1951) 79 *RCADI* 237, p. 272. This Declaration was also examined by the drafters of the *American Declaration: Inter-American Council of Jurists, Recomendaciones e Informes, Documentos Oficiales, 1945–1947*, Washington, D.C.: Organization of American States, 1948, pp. 18–19. On the drafting of the declaration, see: John Herman Burgers, ‘The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century’, (1992) 14 *HRQ* 447.

⁷³ Espiell, ‘The Right to Life’, p. 50. In fact, the right to life was also recognized in several of the post-World War I minority treaties. Article 2 of the *Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland*, [1919] TS 8, states: ‘Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.’ Similar provisions appear in the *Treaty between the Principal Allied and Associated Powers and Roumania*, (1921) 5 LNTS 336, art. 1; *Treaty between the Principal Allied and Associated Powers and Czechoslovakia*, [1919] TS 20, art. 1; *Treaty between the Principal Allied and Associated Powers and the Serb–Croat–Slovene State*, [1919] TS 17, art. 1. The *Treaty of Saint-Germain-en-Laye*, [1919] TS 11, article 63, protects ‘life and liberty, without distinction of birth, nationality, language, race or religion’.

12 *The abolition of the death penalty*

abolition of the death penalty.⁷⁴ Mandelstam replied that the article's intention was certainly not to offer 'impunity' for breaches of law, yet addition of a phrase suggesting that the right to life be assured 'within the limits of the law' would only invite abuse.⁷⁵

A resolution adopted the same year, on 8 November 1929, by the Académie diplomatique internationale also stated the right to life in absolute terms, with no suggestion of capital punishment as an exception:

Tous les habitants d'un État ont le droit à la pleine et entière protection de leur vie et de leur liberté.⁷⁶

The 1930 Hague Conference on the codification of international law adopted a resolution aimed at elaboration of a 'Declaration on the Leading Principles of International Law', and this led to the drafting of the 'Declaration on the Foundation and Leading Principles of Modern International Law', which was approved in 1936 by the International Law Association, the Académie diplomatique internationale and the Union juridique internationale. Its article 28 states:

Tout État doit assurer à tout individu sur son territoire la pleine et entière protection du droit à la vie, à la liberté et à la propriété, sans distinction de nationalité, de sexe, de race, de langue ou de religion.⁷⁷

Professor Hersch Lauterpacht, in his book *An International Bill of the Rights of Man* published in 1945, did not expressly include the right to life in the substantive provisions of his draft declaration. However, the preamble stated:

Whereas the United Nations have decided that they were waging war for the defence of life, liberty, independence and religious freedom . . .⁷⁸

Lauterpacht revised his draft for the 1948 Brussels conference of the International Law Association. Article 1 of the new draft stated: 'The life and liberty of the person shall be inviolate within the limits of the law', and it was submitted to the United Nations for consideration during the drafting of the *Universal Declaration of Human Rights*.⁷⁹ Recognition of the right to life in domestic constitutions followed much the same pattern; rarely recognized prior

⁷⁴ *Annuaire de l'Institut de droit international*, 1929, Vol. II, pp. 118–119. ⁷⁵ *Ibid.*, p. 119.

⁷⁶ André N. Mandelstam, 'La protection internationale des droits de l'homme', (1931) 38 *RCADI* 129, at p. 218.

⁷⁷ Alejandro Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne*, Paris: Editions Internationales, 1936, pp. 10–11; an English translation of the text appears in [1956] II *Yearbook of the International Law Commission* 230.

⁷⁸ H. Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945, p. 69.

⁷⁹ UN Doc. E/CN.4/89.

to the Second World War, it began to appear frequently in the years following 1945.⁸⁰

Even if the right to life was present in these preliminary efforts to enumerate an international declaration of human rights, little thought had yet gone into the complex issues involved in defining the content of such a right. The brief discussion in 1929, at the time of adoption of the declaration of the International Law Institute, captures the problem in a nutshell. A right to life that allowed exceptions was of little value, yet the logical consequence of a right to life without exceptions, that is, abolition of the death penalty, was too radical for jurists of the time. This enigma confronted the members of the United Nations Commission on Human Rights, as well as their counterparts in the European and American human rights systems. To some extent, it has yet to be fully resolved, despite more than fifty years of development in international norms of human rights.

Our study of international norms dealing with abolition of the death penalty begins with the *Universal Declaration of Human Rights*,⁸¹ a document that has served as a touchstone for all subsequent international instruments dealing with human rights and fundamental freedoms. Although silent on the subject of the death penalty, its consideration was nevertheless a focal point of debate during the drafting of article 3, which proclaims the right to life. The *Universal Declaration* was conceived as a 'common standard of achievement' and not as a binding legal norm. Indeed, even prior to its completion, the drafters of the *Universal Declaration* had commenced work on a second instrument that was to constitute a formal multilateral treaty, the *International Covenant on Civil and Political Rights*.⁸² Article 6 of the *Covenant*, whose drafting was completed in 1957, recognizes the right to life in terms similar to those of the *Declaration*. However, it also provides for the death penalty as an exception to the right to life, and accompanies the provision with a substantial number of restrictions and safeguards on its use. In a final compromise with growing abolitionist sentiment, the drafters of the *Covenant* agreed to conclude article 6 with a call for the abolition of capital punishment.

Subsequent to 1957, and with the recognition that abolition of the death penalty was not on the immediate international agenda, the United Nations focused its energy on limiting its scope by, for example, reducing the number of capital offences, and by excluding certain groups from its ambit, and requiring strict procedural controls when it was still used. This study describes the elaboration of resolutions and other initiatives from various United Nations bodies, including the Commission on Human Rights, the Economic and Social Council, the General Assembly, the Committee on Crime Prevention and Control, and the

⁸⁰ Kiss, Marie, 'Le droit à la vie', p. 340.

⁸¹ See n. 1 above.

⁸² See n. 42 above.

Congresses on the Prevention of Crime and the Treatment of Offenders. These activities demonstrate a significant and constant evolution towards the goal envisaged in the final paragraph of article 6 of the *Covenant*. Indeed, they culminated, during the 1980s, in the elaboration of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*,⁸³ a multilateral treaty which creates an international norm of abolition of the death penalty.

This volume proceeds to examine parallel developments within three regional human rights systems. The Council of Europe's *European Convention on Human Rights*⁸⁴ was the first international human rights treaty, completed in 1950. As such, it predates article 6 of the *Covenant* by seven years⁸⁵ and is not therefore as advanced in its approach to the death penalty. Article 2 of the *Convention* provides for the death penalty as an exception to the right to life but makes little provision for safeguards or limitations on its use and does not envisage abolition. In practice, by the late 1950s most European States were well on the way to abolition in their domestic law. *De facto* abolition of the death penalty soon became the rule within Western Europe⁸⁶ and, by 1980, the European institutions, notably the Council of Europe, were at work drafting a protocol to the *European Convention* abolishing the death penalty in peacetime.⁸⁷ *Protocol No. 6* came into force in 1985 and has been ratified by almost all of the forty-three members of the Council of Europe. The Council of Europe requires new members to undertake to ratify the *Protocol*, a condition that has resulted in abolition of the death penalty throughout Eastern Europe and deep into Asia.

Latin American States were pioneers in the abolition of the death penalty, and several of them promoted the ideal of abolition both within the United Nations and within their own regional system, under the aegis of the Organization of American States. The *American Convention on Human Rights*,⁸⁸ adopted in 1969 and in force since 1978, came the closest to actual abolition, before a last-minute change of heart that resulted in a text quite similar to that of article 6 of the *Covenant*. The *American Convention* does, however, go further in the provision of safeguards and limitations on the death penalty, excluding its use for political crimes and for the elderly. The notion that a State which has abolished the death penalty cannot reinstate it, something which some

⁸³ See Appendix 4, p. 397. ⁸⁴ See n. 42 above.

⁸⁵ The final version of article 6 of the *Covenant* was adopted in 1957 by the Third Committee of the General Assembly, although the complete instrument was not adopted by the Assembly until 1966.

⁸⁶ Of the original members of the Council of Europe, Turkey was the last to stop executions. It last imposed the death penalty on 25 October 1984.

⁸⁷ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*.

⁸⁸ See Appendix 20, p. 436.

have argued is implicit in the *Covenant on Civil and Political Rights*, is stated expressly in the *American Convention*. As a result, the *American Convention* is an abolitionist instrument, at least for the many States parties that no longer have legislation providing for capital punishment.

The third of the major regional human rights systems still sends out ambiguous signals on capital punishment. Unlike the other general human rights treaties in the universal and regional systems, the *African Charter of Human and Peoples' Rights*, adopted in 1981 by the Organization of African Unity, makes no mention of the death penalty. It does, on the other hand, provide for an unqualified right to life. There is a paucity of interpretative material on the *African Charter*, making construction of the scope of its right to life provision difficult. The African Commission on Human and Peoples' Rights has issued decisions in a few contentious cases dealing with the imposition of the death penalty, and in November 1999 it adopted a resolution calling for a moratorium on the use of capital punishment.⁸⁹

In 1996, a meeting of thirty Asian governments held under United Nations auspices concluded that 'it was premature, at the current stage, to discuss specific arrangements relating to the setting up of a formal human rights mechanism in the Asian and Pacific region'.⁹⁰ As a region, Asia has made the least progress in terms of abolitionist practice. This does not mean that international legal norms on capital punishment do not reach into that continent. Not only are many Asian states active participants in the universal human rights system, there have also been important international initiatives aimed at restriction and abolition of the death penalty. For example, China is struggling with the limitations imposed on capital punishment as it prepares to ratify the *International Covenant on Civil and Political Rights*. European parliamentarians have threatened to withdraw Japan's observer status with the Council of Europe if it does not take steps to comply with international legal standards.⁹¹

A portion of Asia is covered by the Arab and Islamic systems, which are themselves very underdeveloped. In 1981 the Islamic Council adopted a *Universal Islamic Declaration of Rights*, which states:

(a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law.⁹²

⁸⁹ 'Resolution Urging States to Envisage a Moratorium on the Death Penalty, Thirteenth Activity Report of the African Commission on Human and People's Rights', OAU Doc. AHG/Dec.153(XXXVI), Annex IV.

⁹⁰ 'Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region', UN Doc. HR/PUB/96/3 (1996).

⁹¹ Philippe Pons, 'Au Japon, il ne faut pas "troubler l'âme" des condamnés à mort', *Le Monde*, 9 March 2001, p. 4.

⁹² *Universal Islamic Declaration of Rights*, (1982) 4 EHRR 433.

The final phrase appears to permit capital punishment and is in any case consistent with the practice of all Islamic states. The Organisation of the Islamic Conference has prepared a document on human rights and Islam, article 2 of which guarantees the right to life to 'every human being', and adds:

il appartient aux individus, sociétés et Etats de protéger ce droit contre toute violation éventuelle, et il est interdit de mettre fin à une vie quelconque, sauf lorsque cela est en accord avec la *chari'a*.⁹³

The Islamic system of human rights, still very rudimentary in comparison with the other regional systems, does not even contemplate abolition of the death penalty.

The more recent *Arab Charter of Human Rights*, adopted on 15 September 1994 but as yet ratified by only one of the members of the League of Arab States, proclaims the right to life in the same manner as the other international instruments. However, three distinct provisions, articles 10, 11 and 12, recognise the legitimacy of the death penalty in the case of 'the most serious crimes', prohibit the death penalty for political offences, and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers, for a period of up to two years following childbirth.⁹⁴ In international fora such as the United Nations, Arab (and, more generally, Islamic) nations have been among the most aggressive advocates of the retention of the death penalty, often defending its use in the name of obedience to Islamic law and the strictures of the *chari'a*.⁹⁵

A number of provisions exist in the related field of international humanitarian law, concerning imposition of the death penalty upon prisoners of war and civilians. Analysis of the provisions and of their *travaux préparatoires* shows that their goal is not only to limit and control the use of the death penalty but also to promote its abolition. Because the humanitarian treaties are much

⁹³ Organisation of the Islamic Conference, Secretary General, Doc. OIC/POL/MD/82-83/7, Djeddah, 25 April 1982.

⁹⁴ *Arab Charter on Human Rights*, (1997) 18 *HRLJ* 151.

⁹⁵ For example, during debate at the 1994 session of the General Assembly, the Sudanese delegate noted that 'capital punishment was a divine right according to some religions, in particular Islam . . . [C]apital punishment was enshrined in the Koran and millions of inhabitants of the Muslim world believed that it was a teaching of God' (UN Doc. A/BUR/49/SR.5, para. 13). Reynaldo Galindo Pohl, Special Rapporteur of the Commission on Human Rights on Iran, has observed that 'there are groups of Islamic legal scholars and practitioners who recommend the abolition of the death penalty for political crimes on the ground that it is contrary to Islamic law. They state that the number of crimes punishable by death is limited': UN Doc. E/CN.4/1989/26, para. 36. On capital punishment in Islamic law, see A. Wazir, 'Quelques aspects de la peine de mort en droit pénal islamique', (1987) 58 *Revue internationale de droit pénal* 421; Centre des Études de Sécurité (Arabie Saoudite), 'L'égalité et commodité de la peine de mort en droit musulman', (1987) 58 *Revue internationale de droit pénal* 431; N. Hosni, 'La peine de mort en droit égyptien et en droit islamique', (1987) 58 *Revue internationale de droit pénal* 407; M. Cherif Bassiouni, 'Death as a Penalty in the Shari'a', in International Commission of Jurists, *The Death Penalty: Condemned*, Geneva, 2000, pp. 65-84; William A. Schabas, 'Islam and the Death Penalty', (2000) 9 *William & Mary Bill of Rights Journal* 223.

more widely ratified than the human rights treaties, and because they apply in the extreme conditions of wartime, they provide guidance as to the core values of the international community with respect to the death penalty. The death penalty is also considered within the norms of international criminal law. Though once a punishment imposed by international tribunals for the most heinous crimes of international concern, it is now no longer so. The debate within the Security Council, the International Law Commission and the various bodies involved in establishing the International Criminal Court is also germane to the identification of customary legal rules whose implications go well beyond the specific tribunals that are involved.

Two challenges to the use of the death penalty within the United States have been brought before the International Court of Justice, one by Paraguay, the other by Germany, in cases concerning nationals of these states. The issue of capital punishment arises only indirectly, in that the matter in dispute involves notification of the right to seek consular assistance, as required by article 36(1)(b) of the *Vienna Convention on Consular Relations* of 24 April 1963.⁹⁶ Paraguay filed its application in April 1998, obtaining a provisional measures order from the International Court of Justice requiring the United States to stay the execution of Angel Breard until the merits of the matter had been examined.⁹⁷ The United States Supreme Court refused to intervene to enforce the order,⁹⁸ and the Governor of Virginia proceeded with the execution. Some months later, Paraguay discontinued its application. In March 1999, Germany filed a similar application with respect to the death sentence imposed upon two German nationals, Karl and Walter LaGrand, in the state of Arizona. Once again, the International Court of Justice requested a stay of the United States.⁹⁹ It noted cautiously that the case did not concern 'the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes',¹⁰⁰ although it seemed obvious to all that the subtext of the litigation was growing international outrage, particularly in Europe, with United States

⁹⁶ (1963) 596 UNTS 261. See: Eva Rieter, 'Interim Measures by the World Court to Suspend the Execution of an Individual: The Breard Case', (1998) 16 *Netherlands Quarterly of Human Rights* 475; Constanze Schulte, 'Jurisprudence of the International Court of Justice: Order Issued in the Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)', (1998) 9 *European Journal of International Law* 761; Alison Duxbury, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights', (2000) 31 *California Western International Law Journal* 141.

⁹⁷ *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, [1998] ICJ Reports 258.

⁹⁸ *Breard v. Greene, Paraguay v. Gilmore*, 66 *US Law Week* 3684 (SC, 1998).

⁹⁹ *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, [1999] ICJ Reports 1, para. 29.

¹⁰⁰ *Ibid.*, para. 25. Betraying the human rights dimension of the litigation, Judge Oda, in the only individual declaration that accompanied the provisional measures order, said: 'if Mr Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration' (para. 2).

death penalty practice. During the proceedings the issue was not raised directly by Germany, although Berlin had made its opposition to the death penalty quite clear in earlier diplomatic correspondence with the American authorities.¹⁰¹ Karl LaGrand had already been executed when the application was submitted, so the Court only ordered that Walter LaGrand's execution be suspended, a request Arizona ignored. The Court later found that 'the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order'.¹⁰² In its judgment on the merits, of 27 June 2001, the Court concluded that the United States had breached international law in proceeding with the execution of Walter LaGrand, although it was studiously neutral on the question of capital punishment.¹⁰³ The case is now authority for the binding nature of provisional measures orders.

But violations of the *Vienna Convention* provisions do indeed raise very significant human rights issues. Article 36(1)(b), in guaranteeing a foreign national a right to be informed of the right to consular assistance, provides a guarantee of procedural fairness that may be decisive in capital cases. The Inter-American Court of Human Rights, in its 1999 Advisory Opinion, focused precisely on these human rights aspects of the consular notification issue.¹⁰⁴ Some 120 foreign nationals, representing nearly forty nationalities, have been sentenced to death in the United States since capital punishment was reinstated in the 1970s, virtually all of them in breach of the *Vienna Convention*. The importance of this right was affirmed by the United Nations General Assembly in a resolution following the Inter-American Court's ruling.¹⁰⁵

Until relatively recently, discussion of the death penalty in international human rights law focused on the norm protecting the right to life. The *travaux préparatoires* of the various instruments indicate that their drafters approached the question more or less strictly from the angle of the right to life. The provisions that deal explicitly with capital punishment are generally included within the articles on the right to life, as can be seen from article 6 of the *International Covenant on Civil and Political Rights*,¹⁰⁶ article 2 of the *European Convention on Human Rights*¹⁰⁷ and article 4 of the *American Convention on Human Rights*.¹⁰⁸ That the death penalty might also involve the norm prohibiting cruel, inhuman

¹⁰¹ *LaGrand (Germany v. United States of America)*, 27 June 2001, para. 26. ¹⁰² *Ibid.*, para. 115.

¹⁰³ Judge Oda, again in dissent, suspected that a human rights agenda lay behind the German application: 'I would hazard a guess that the German Government was prompted to bring this case before the International Court of Justice by the outcry raised by some in Germany, by the emotional reaction on the part of some people there – where the death penalty has been abolished – to a case involving the existence and application of the death penalty in the United States.' *Ibid.*, Dissenting Opinion of Judge Oda, para. 9.

¹⁰⁴ *The Right to Information on Consular Assistance in the Context of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999.

¹⁰⁵ 'Protection of Migrants', UN Doc. A/RES/54/166.

¹⁰⁶ See n. 42 above.

¹⁰⁷ See n. 43 above. ¹⁰⁸ See Appendix 20, p. 436.

and degrading treatment or punishment did not arise during the drafting of these instruments.¹⁰⁹ Precisely because the basic international human rights instruments appear to authorize the death penalty, some have turned to the prohibition of cruel punishment in order to attack capital punishment indirectly. Challenges have addressed such issues as the method of execution,¹¹⁰ delay in informing offenders of reprieves,¹¹¹ and the 'death row phenomenon', that is, the prolonged wait that many condemned prisoners undergo between sentence and execution.¹¹² Cruel, inhuman and degrading treatment or punishment is also prohibited by certain specialized instruments, of which the most important is the United Nations *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.¹¹³ Adopted by the General Assembly in 1984, it completed work initiated with the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,¹¹⁴ adopted by the General Assembly in 1976. The treaty body created by the *Convention*, the Committee Against Torture, only occasionally addresses death penalty issues.

Taken as a whole, this review of international norms on the death penalty shows an inexorable progress towards abolition. In the early stages, abolition was only partial. Certain categories of individuals, such as juveniles, pregnant women and the elderly, were excluded from capital punishment, and its use was confined to an ever-shrinking list of serious crimes. By the 1980s, the abolitionist movement in international law had gained sufficient momentum that treaties proclaiming abolition of the death penalty could be drafted and opened for signature, ratification and accession. Nearly seventy States have now bound themselves to one or another of the conventional norms on abolition of the death penalty, and several others have signed the treaties or announced that they are contemplating ratification. Given the enormous and rapid progress in the development of international norms respecting the death penalty since the end of the Second World War, the general acceptance of abolition and its elevation to a customary norm of international law, perhaps even a norm of *jus cogens*, may be envisaged in the not too distant future.

¹⁰⁹ The actual wording of the provision varies from instrument to instrument, although its content is almost certainly identical: *Universal Declaration on Human Rights*, art. 5; *International Covenant on Civil and Political Rights*, art. 7; *European Convention on Human Rights*, art. 3; *American Declaration on the Rights and Duties of Man*, art. XXVI; *American Convention on Human Rights*, art. 5; *African Charter of Human and Peoples' Rights*, art. 5.

¹¹⁰ *Ng v. Canada* (No. 469/1991), UN Doc. A/49/40, Vol. II, p. 189, (1994) 15 *HRLJ* 149; *Kindler v. Canada* (No. 470/1991), UN Doc. A/48/40, Vol. II, p. 138, (1993) 14 *HRLJ* 307, 6 *RUDH* 165; *Cox v. Canada* (No. 539/1993), UN Doc. CCPR/C/52/D/539/1993, (1995) 15 *HRLJ* 410.

¹¹¹ *Pratt and Morgan v. Jamaica* (Nos. 210/1986, 225/1987), UN Doc. A/44/40, p. 222.

¹¹² *Soering v. United Kingdom et al.*, 7 July 1989, Series A, Vol. 161, 11 *EHRR* 439; *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All E.R. 769, [1993] 2 LRC 349, [1994] 2 AC 1, [1993] 3 WLR 995, 43 WIR 340, 14 *HRLJ* 338, 33 ILM 364 (JCPC).

¹¹³ GA Res. 39/46. ¹¹⁴ GA Res. 3452 (XXX).

A parallel with the prohibition of torture and of slavery is helpful in this respect. Slavery was a common practice throughout history, and its prohibition, even in so-called civilized countries such as the United Kingdom and the United States, dates only to the 1800s. Torture was widely accepted and admitted, in certain circumstances, until the end of the Second World War. These two forms of barbarism are now proscribed in international human rights law, not only as conventional norms but also as customary norms. Although their prohibition naturally appears in the various international instruments, the mention is to some extent superfluous, because these are also peremptory norms, rules of *jus cogens*, enshrined by international custom.¹¹⁵ The abolition of the death penalty may well be only a matter of decades behind the prohibition of slavery and torture.

Article 3 of the *Universal Declaration of Human Rights* is totally compatible with abolition of the death penalty, a testimony to the foresight of its authors, even though they stopped short of stating this expressly. As the international abolitionist trend gains hegemony, the *Universal Declaration* will not become outdated, its interpretation will merely be brought up to date. The *Universal Declaration* is often recognized as a statement of customary international law, and its very general wording permits it to grow and evolve in tandem with international custom. Dynamic or evolutive interpretation is fundamental to international human rights law.

This study seeks to demonstrate that since 1948, that is, since the first suggestion of the existence of an international norm limiting or abolishing the death penalty, there has been a clear and measurable progress towards that goal. The study does not endeavour to address the religious, moral, political and criminological arguments for the abolition or retention of the death penalty, these matters being the subject of an already enormous literature. The offences for which the death penalty may be imposed are increasingly limited. More and more categories of individuals who may never be subjected to the death penalty are being identified. International law is setting higher and higher standards for procedural requirements that are essential to any trial in which the death penalty may be imposed subject to law. These norms have been entrenched by convention, but in many cases it can be demonstrated that they are also customary in nature. These developments are, in effect, a form of partial abolition of the death penalty.

This progressive restriction has been crowned, in recent years, by the emergence of a norm that effectively abolishes the death penalty. Although still far from enjoying universal acceptance, its very existence testifies to its significance. Such instruments as the various protocols abolishing the death penalty

¹¹⁵ Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law*, Oxford: Clarendon Press, 1989, pp. 220–222.

would have been unthinkable three or four decades ago. That they are now not only thinkable but also widely ratified shows how far the conception of the right to life, indeed how far human rights law in general, has developed and will continue to develop.

The first chapters of this study consider the universal norms. The drafting and interpretation of the relevant provisions in the three principal instruments, the *Universal Declaration*, the *International Covenant on Civil and Political Rights* and the *Second Optional Protocol* are considered successively. A generally chronological approach is followed in order to highlight the progressive evolution of abolitionist norms. Two treaties with their own particular missions, but which bear at least tangentially on death penalty issues, the *Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment* and the *Convention on the Rights of the Child* are discussed in the chapter on the *Covenant*. The 1984 'Safeguards Guaranteeing the Rights of Those Facing the Death Penalty'¹¹⁶ are considered in the chapter dealing with the *Second Optional Protocol*, because these two instruments were drafted in parallel. Developments in international humanitarian law and international criminal law are treated in separate chapters, somewhat out of chronological order because the earliest norms dealing with the death penalty in international law appear in the 1929 *Geneva Convention*,¹¹⁷ while the most recent were adopted in 1998. Three subsequent chapters deal with the main regional systems, those of the Council of Europe, the Organization of American States and the African Union. As has already been explained, because of their paucity the international legal developments in Asia have not received any detailed treatment. Developments on the death penalty within other European institutions, notably the European Union and the Organization on Security and Cooperation in Europe, are discussed within the chapter on European human rights law.

¹¹⁶ ESC Res. 1984/50 (see Appendix 8, p. 413 below). Subsequently endorsed by GA Res. 39/118.

¹¹⁷ *International Convention Concerning the Treatment of Prisoners of War*, (1932–33) 118 LNTS 343, art. 66.

The *Universal Declaration of Human Rights* and recognition of the right to life

The cornerstone of contemporary human rights law is the *Universal Declaration of Human Rights*,¹ adopted by the General Assembly of the United Nations on 10 December 1948. The *Universal Declaration* was complemented, some eighteen years later, by three international treaties, the *International Covenant on Civil and Political Rights*,² the *International Covenant on Economic, Social and Cultural Rights*,³ and the *Optional Protocol to the International Covenant on Civil and Political Rights*.⁴ A *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*⁵ was adopted by the United Nations General Assembly in December 1989, and came into force on 11 July 1991. Collectively, the five instruments comprise what is termed the 'International Bill of Rights'.

Although the *Universal Declaration* is not a binding treaty, it has played a seminal role not only in the United Nations system but also in the regional systems for the protection of human rights. The *Universal Declaration* is often cited, at least in part, as a statement or codification of customary international law, or as an authoritative interpretation of the human rights clauses in the *Charter of the United Nations*.⁶ According to the International Court of Justice, 'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'⁷ In June 1993 the World Conference on Human Rights at Vienna reaffirmed 'that the Universal Declaration of Human Rights, which constitutes a common standard

¹ GA Res. 217 A (III), UN Doc. A/810 (hereinafter, the *Universal Declaration* or *Declaration*).

² (1976) 999 UNTS 171 (hereinafter, the *Civil Rights Covenant* or *Covenant*).

³ (1976) 993 UNTS 3. ⁴ (1976) 999 UNTS 171.

⁵ GA Res. 44/128, (1990) 29 ILM 1464 (hereinafter, *Second Optional Protocol*) (see Appendix 4, p. 397).

⁶ John Humphrey, 'The International Bill of Rights: Scope and Implementation', (1976) 17 *William & Mary Law Review* 527; Thomas Buergenthal, 'International Human Rights Law and Institutions: Accomplishments and Prospects', (1988) 63 *William & Mary Law Review* 1.

⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports 226, para. 70.

of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments'.⁸ Because of its role in the subsequent elaboration of international norms and its continuing significance as a benchmark for standards of human rights, it is essential to analyse the scope of the *Universal Declaration* with respect to the death penalty.

The *Universal Declaration* makes no mention of the death penalty. It does, however, enshrine the protection of the right to life in article 3. The debates in the Commission on Human Rights, in its Drafting Committee, and in the Third Committee of the General Assembly respecting adoption of the *Universal Declaration* indicate that the issue of abolition of the death penalty was crucial in the drafting of article 3. Three general approaches were considered by the drafters.

The first was to recognize in express form the death penalty as a limitation or an exception to the right to life. This approach was in fact followed in several subsequent international treaties, including the *Civil Rights Covenant*,⁹ the *European Convention on Human Rights*¹⁰ and the *American Convention on Human Rights*,¹¹ although it did not find favour with the drafters of the *Declaration*. Article 29 of the *Universal Declaration* recognizes that the human rights and fundamental freedoms stated in that document are subject to limits but gives no more precise indication of the scope of those limits or of whether there are in fact some rights which may not be limited. Critics of this first approach felt it suggested an endorsement of the death penalty by the United Nations and only harmed the eventual objective, which was abolition of the death penalty.

The second approach was to proclaim without equivocation the abolition of the death penalty. As the *Declaration* was a form of manifesto or statement of objectives, countries could recognize the goal of abolition even though their internal legislation still permitted capital punishment. This view found considerable support among delegates involved in the drafting process but failed to rally the majority, largely because of fears of isolating those States which still retained capital punishment. Nowhere in the *travaux* is there a defence of the death penalty as such, and the decision to exclude abolition was in no way intended as a statement that the United Nations in some way approved of or accepted the death penalty.

The third solution, one of compromise, stated the right to life in absolute terms, making no mention of either abolition or retention of the death penalty. This third approach, ambiguous and equivocating, eventually prevailed.

⁸ 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/24 (Part I), chap. III, 14 HRLJ352.

⁹ Art. 6.

¹⁰ (1955) 213 UNTS 221, ETS 5, art. 2§1 (hereinafter the *European Convention*) (see Appendix 14, p. 423).

¹¹ (1979) 1144 UNTS 123, OASTS 36, art. 4 (hereinafter the *American Convention*) (see Appendix 20, p. 436).

Of course, the death penalty was not the only question debated by the drafters of the *Declaration* with respect to article 3. The other difficult issue was abortion. Many delegations to the United Nations would have preferred some mention that the right to life began ‘from conception’, thereby protecting the foetus. On this point, too, compromise dictated silence.

1.1 The origins of the Universal Declaration

The importance of an international declaration of human rights was recognized at the very earliest planning stages of the United Nations, at a time when the outcome of Second World War was still uncertain. As far back as 1942, United States State Department officials had given consideration to an international bill of rights as part of their scheme for the post-war united nations organization. A draft declaration, based on the American *Bill of Rights*, the French *Déclaration des droits de l'homme et du citoyen*, the English *Bill of Rights*, the post-World War I minority treaties and the 1929 declaration of the Institute of International Law, was prepared. It included guarantees of equality before the law with respect to ‘life, liberty, property, enterprise and employment’ and stated that nobody could be deprived of life without due process.¹²

The preliminary meetings for the organization of the United Nations were held in late 1944 at Dumbarton Oaks. The Dumbarton Oaks Proposals only set out the goals of the United Nations Organization and did not venture into the specific human rights that would be addressed. The phrase employed was: ‘promote respect for human rights and fundamental freedoms’.¹³ The following year at San Francisco the *United Nations Charter*¹⁴ was adopted and the organization inaugurated. The *Charter* declared that the promotion and encouragement of respect for human rights was an obligation upon member States¹⁵ and assigned the responsibility for human rights matters to the Economic and Social Council¹⁶ and to Commissions that were to be set up by the Council.¹⁷

At San Francisco, there were unsuccessful efforts to adopt an ‘international bill of rights’ as part of the *Charter* or as an adjunct to it, and with this in mind drafts were submitted by Panama and Cuba. The Cuban draft proclaimed:

¹² Ruth B. Russell, *A History of the United Nations Charter*, Washington, D.C.: Brookings Institution, 1958, pp. 323–325; Louis B. Sohn, ‘How American International Lawyers Prepared for the San Francisco Bill of Rights’, (1995) 89 *AJIL* 540; Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1998.

¹³ *Dumbarton Oaks Proposals for a General International Organization*, Documents of the UN Conference on International Organization, San Francisco, 1945, Vol. III, p. 19.

¹⁴ *Charter of the United Nations*, (1945) 39 *AJIL* Supp. 190, 145 BFSP 805.

¹⁵ *Ibid.*, art. 55§c; see Jean-Bernard Marie, Nicole Questiaux, ‘Article 55: alinéa c’, in Jean-Pierre Cot, Alain Pellet, eds., *La Charte des Nations Unies*, Paris, Brussels: Economica, Bruylant, 1985, pp. 863–883; E. Schwelb, ‘The International Court of Justice and the Human Rights Clauses of the Charter’, (1972) 68 *AJIL* 337.

¹⁶ *Charter of the United Nations*, arts. 60, 62§2.

¹⁷ *Charter of the United Nations*, art. 68.

The right to life, to liberty, to personal security and to respect of his dignity as a human being.¹⁸

The Panamanian draft, derived from a version prepared by the American Law Institute, made no mention of the right to life.¹⁹ The San Francisco conference did not proceed with the matter, leaving it as a priority for the future Commission on Human Rights.²⁰

In order to give detailed direction to the Economic and Social Council for the establishment of the Commission, a 'nuclear commission on human rights' was convened in May 1946, with Anna Eleanor Roosevelt as its chair.²¹ Although consideration of the Cuban²² and Panamanian²³ drafts was on its agenda,²⁴ the Commission took the view that the actual drafting of the bill would be the task of the 'Permanent Commission on Human Rights', following the creation of that body.²⁵ The report of the nuclear commission to the Economic and Social Council contained recommendations to this effect.²⁶ Subsequently, the Commission on Human Rights was created by the Economic and Social Council and it was assigned responsibility for drafting the 'international bill of rights'.²⁷

During the second part of the General Assembly's first session, in the autumn of 1946,²⁸ Panama asked that its draft declaration²⁹ be discussed, but the matter was referred to the new Commission.³⁰ Meanwhile, Chile submitted yet a third declaration, which was, in effect, the draft 'American Declaration' which had been prepared by the Inter-American Juridical Committee subsequent to the Chapultepec conference in the spring of 1945. Dated 31 December 1945, it was the work of Francisco Campos, F. Nièto del Rio, Charles G. Fenwick and A. Gómez Robledo, and contains the first specific mention of the issue of capital punishment in international human rights law.³¹

¹⁸ UNCIO Doc. 2G/14(g), which mentioned the right to life. ¹⁹ UNCIO Doc. 2G/7/(2).

²⁰ The First Committee did, on 1 June 1945, adopt a resolution that the General Assembly should examine the Panamanian text and give it an effective form (UNCIO Doc. 944, I-I, 34). See also Lilly E. Landerer, 'Capital Punishment as a Human Rights Issue Before the United Nations', (1971) 4 *HRJ* 511, at p. 513.

²¹ UN Doc. A/125/Add.1, p. 7; UN Doc. E/HR/6, p. 3.

²² UN Doc. E/HR/1; UN Doc. E/HR/13, p. 1; UN Doc. E/HR/15, pp. 4-5.

²³ UN Doc. E/HR/3; UN Doc. E/HR/13, p. 1; UN Doc. E/HR/15, pp. 4-5.

²⁴ UN Doc. E/HR/5.

²⁵ UN Doc. E/HR/13, p. 1; UN Doc. E/HR/15, pp. 4-5, UN Doc. E/HR/19, p. 5.

²⁶ UN Doc. E/38/Rev.1. ²⁷ UN Doc. A/125, para. 47.

²⁸ UN Doc. A/101, UN Doc. A/118. ²⁹ *Ibid.* ³⁰ UN Doc. A/234, p. 3.

³¹ UN Doc. A/C.1/38; UN Doc. E/CN.4/2. See also Francisco Campos, F. Nièto del Rio, Charles G. Fenwick, A. Gómez Robledo, 'Report to Accompany the Draft Declaration of the International Rights and Duties of Man', (1946) 40 *AJIL Supp.* 100. The right to life provision, which was Article 1, read:

Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. It includes the right to

1.2 Drafting by the Commission on Human Rights

The first session of the Commission on Human Rights was held from 27 January to 10 February 1947.³² In addition to the drafts from Cuba, Panama and Chile,³³ a fourth text had been submitted by the American Federation of Labor, which also made no mention of the right to life and focused its attention on economic and social rights.³⁴ The Commission's Secretariat, headed by John P. Humphrey, prepared a general memorandum on the proposed bill of rights,³⁵ a comparative analysis of the four drafts³⁶ and a study of the human rights provisions in trusteeship agreements endorsed by the General Assembly.³⁷ Another fourteen draft declarations from various individuals and groups completed the files of the Commission Secretariat,³⁸ and these too were analysed in a working paper prepared by the Secretariat. Proposals were also submitted by the United States³⁹ and India.⁴⁰

The Secretariat suggested that the Bill might take one of three forms: a declaration in the General Assembly, a binding treaty or an amendment to the *Charter*.⁴¹ The Secretariat classified the rights set out in the various drafts into

sustenance and support in the case of those unable to support themselves by their own efforts; and it implies a duty of the state to see to it that such support is made available.

The right to life may be denied by the state only on the ground of a conviction of the gravest of crimes, to which the death penalty has been attached.

See our discussion of the drafting of the *American Declaration of the Rights and Duties of Man* in Chapter 8 below.

³² UN Doc. E/CN.4/SR.1*. For a history of the work of the Commission on Human Rights in the drafting of the *Universal Declaration* and the *Covenant*, see Jean-Bernard Marie, *La Commission des droits de l'homme de l'ONU*, Paris: Pedone, 1975.

³³ UN Doc. E/CN.4/2. It was also reproduced for the Drafting Committee in UN Doc. E/CN.4/AC.1/3/Add.1, at p. 14.

³⁴ UN Doc. E/CT.2/2, UN Doc. E/C.2/32. ³⁵ UN Doc. E/CN.4/W.4.

³⁶ UN Doc. E/CN.4/W.8.

³⁷ UN Doc. E/CN.4/W.13. There is nothing about the 'right to life' in this document.

³⁸ UN Doc. E/CN.4/W.16. See also Verdoodt, *Naissance*, p. 41. Almost all of the documents originated in the Western hemisphere. The earliest was the work of Alexandre Alvarez, and had been presented at the Havana meeting of the American Institute of International Law in January 1917. The second was adopted at the Briarcliff meeting of the International Law Institute in October 1929 (*Annuaire de l'Institut de droit international*, 1929, Vol. II, Brussels: Goemaere, 1929, pp. 118–120; Institut de droit international, 'Declaration of International Rights of Man', (1941) 35 *AJIL* 663). Several of the proposals were the work of individuals: H. G. Wells, Wilfred Parsons, Rollin McNitt, Irving Jacobs, Gustavo Gutiérrez and H. Lauterpacht (from the book H. Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945, p. 69; René Cassin said this work deserved 'une place exceptionnelle' in the history of the *Universal Declaration*: Cassin, 'La Déclaration universelle des droits de l'homme,' (1951) 79 *RCADI* 237, p. 272). Several were from non-governmental organizations: Free World, American Bar Association, World Government Association, American Association of the United Nations, American Jewish Conference, Commission to Study the Organization of Peace. The right to life was recognized in many of these drafts, according to an analysis by the Secretariat: UN Doc. E/CN.4/W.18. For a discussion of these drafts, see UN Doc. E/CN.4/Sub.2/7.

³⁹ UN Doc. E/CN.4/4, which did not mention the right to life.

⁴⁰ UN Doc. E/CN.4/11, which did not mention the right to life. It was entitled 'Draft of a Resolution for the General Assembly'.

⁴¹ UN Doc. E/CN.4/W.4, p. 10.

three broad categories: 'the status of equality', 'the status of liberty' and 'the status of social security'. 'Life' was the first title enumerated in the 'status of liberty' category.⁴² The Secretariat's analysis was discussed by the Commission at its thirteenth plenary meeting, where the 'right to life' was considered under the not altogether synonymous title of the 'right to existence'.⁴³ The summary records provide a *précis* of remarks by Colonel Hodgson of Australia, who considered the right to life to be so obvious that its mention was unnecessary:

In his opinion certain rights enumerated in the list paragraph 2 were quite obvious, and already guaranteed. That applied, for example, to the right to existence which was, so to speak, a *sine qua non*. It was a right which was already assured by the laws of all countries . . .⁴⁴

René Cassin replied immediately:

As regards the right to existence, for example, the fundamental consideration was to assure the protection of human life. That certainly was not as elementary a right as one might believe for in 1933, when Germany violated those principles, there were many countries in the world who asked themselves whether they had a right to intervene. He considered that it was of fundamental importance to affirm the right of human beings to existence.⁴⁵

During its first session, the Commission on Human Rights recognized that an *ad hoc* 'Drafting Committee' would be best suited to prepare the draft bill.⁴⁶ This approach was endorsed by the Economic and Social Council, which requested the Secretariat to prepare a documented outline.⁴⁷ The outline was to be studied by the Drafting Committee and mailed to Commission members by 25 June 1947. It would then be considered at the Commission's second session at the end of the year, returned to the Drafting Committee if necessary for a redraft, resubmitted to the Commission on Human Rights, and then sent on to the Economic and Social Council, with a view to adoption by the General Assembly at its 1948 session. The Drafting Committee was composed of representatives from Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States.

In preparation for this session, and according to its instructions, the Secretariat of the Commission on Human Rights drew up a draft outline bill

⁴² UN Doc. E/CN.4.18; in its earlier working paper, the Secretariat had described this third category as the 'status of survival'. The initial working paper did not include the 'right to life' as part of the enumeration: UN Doc. E/CN.4/W.4., p. 12.

⁴³ However, when these comments were subsequently repeated in an analysis prepared by the Secretariat of the Commission on Human Rights (UN Doc. E/CN.4/AC.1/3), the expression 'right to existence' which had been used in the summary records was replaced by 'right to life'.

⁴⁴ UN Doc. E/CN.4/SR.13, p. 7. ⁴⁵ *Ibid.*

⁴⁶ UN Doc. E/CN.4/SR.9, p. 5; UN Doc. E/CN.4/SR.12, p. 5; UN Doc. E/259, §10(a).

⁴⁷ UN Doc. E/RES/46(IV), UN Doc. E/325.

consisting of a preamble and forty-eight articles.⁴⁸ The article on the right to life proposed by the Secretariat recognized the death penalty as the sole exception to the right to life:

Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached.⁴⁹

A lengthy annotated text was also prepared by the Secretariat,⁵⁰ containing the draft outline articles, accompanied by the observations made by members of the Commission on Human Rights at its first session,⁵¹ equivalent articles in the draft international declarations or proposals submitted by Chile, Cuba, Panama, India and the United States of America, and relevant texts from national constitutions.⁵²

The Commission had also received comments from individuals and non-governmental organizations, and these too were included in the document. The only submission relating to the death penalty came from the Comité Permanente de Relaciones Espiritualistas, in a letter dated 8 February 1947 to the Secretary-General, requesting that capital punishment be outlawed, 'as any form of violent death is unChristian'.⁵³

In anticipation of the Drafting Committee session scheduled for June 1947, both the United Kingdom and the United States produced new proposals. The United Kingdom proposal, which specifically mentioned the death penalty as an exception to the right to life, would be discussed and then considered as an initial draft not of the declaration but of the covenant.⁵⁴ A few days later, the United States submitted a proposal that similarly expressed the death penalty as an exception to the right to life.⁵⁵

⁴⁸ UN Doc. E/CN.4/AC.1/3. ⁴⁹ *Ibid.*; reprinted in UN Doc. E/CN.4/21, Annex A.

⁵⁰ UN Doc. E/CN.4/AC.1/3/Add.1.

⁵¹ With respect to the 'right to life', Cassin's remarks, cited above, were reproduced.

⁵² The provisions of twenty-six national constitutions dealing with the right to life were presented. There was nothing from countries with an unwritten constitution, such as the United Kingdom, Canada, and Australia, with the curious result that nowhere in the list was the *Magna Carta* mentioned. The United States *Constitution's* fifth amendment was reproduced, but not the fourteenth. Of the twenty-six constitutions, eighteen expressly addressed the issue of the death penalty and its exceptions.

⁵³ UN Doc. E/CN.4/AC.1/6, p. 2.

⁵⁴ UN Doc. E/CN.4/AC.1/4, p. 9; reprinted as Annex B of the Drafting Committee report, UN Doc. E/CN.4/21. The United Kingdom proposal and the Secretariat Draft Outline were reproduced in a comparative outline, UN Doc. E/CN.4/AC.1/3/Add.3. The right to life provision stated:

Article 8. It shall be unlawful to deprive any person of his life save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.

⁵⁵ UN Doc. E/CN.4/AC.1/8; reprinted as Annex C of the Drafting Committee report, UN Doc. E/CN.4/21; the United Kingdom, United States and Secretariat proposals were reproduced in a comparative outline, UN Doc. E/CN.4/AC.1/11. It read:

Article 8. The right to life is fundamental and may not be denied to any person except upon conviction for the gravest of crimes under general law providing for the penalty of death.

The Secretariat draft article 3, on the right to life, was considered at the second plenary meeting of the Drafting Committee, in June 1947, together with the United Kingdom draft. Eleanor Roosevelt read both articles to the Drafting Committee and then noted that there was a movement underway in some States to abolish the death penalty. She suggested that it might be better not to use the term 'death penalty'.⁵⁶ Her views found support from the Soviet delegate, Koretsky, who argued that the United Nations should not in any way signify approval of the death penalty.⁵⁷ René Cassin cautioned that even countries which had no death penalty must take into account the fact that some are in the process of abolishing it. He preferred the Secretariat draft article 3 to the United Kingdom draft article 8, adding that if the principle of universal abolition were to be adopted, it should not impose a strict obligation on States that wished to maintain the death penalty.⁵⁸

At its third plenary meeting, the Drafting Committee compared the Secretariat's article 3 with the alternative text prepared by United the States. The expression 'gravest of crimes' in the United States alternative was criticized by Wilson of the United Kingdom for vagueness, because what might be considered grave in one country could be viewed differently in another.⁵⁹ By the close of its sixth plenary meeting, the Drafting Committee had agreed to set up a Working Group, composed of the representatives of France, Lebanon and the United Kingdom.⁶⁰ This Working Group in turn decided that it would be preferable for the draft declaration to be the work of a single individual and asked René Cassin to assume the responsibility. Cassin was to prepare a draft declaration based on those articles in the Secretariat outline that he felt belonged in the Bill, and he returned in a few days with a text consisting of a preamble and forty-four articles.⁶¹

Obviously influenced by the earlier discussion on the subject of capital punishment, Cassin had decided to delete any mention of the death penalty from the draft article on the right to life. His proposed provision on the 'right to life' read:

No one shall be deprived of life or personal liberty, or be convicted or punished for crime in any manner, save by judgment of a competent and impartial tribunal, in conformity with law, after a fair public trial at which he has had the opportunity for a fair hearing, the right to be confronted with the witnesses against him, the right of compulsory process of obtaining witnesses in his favour, and right to consult with and be represented by counsel.

⁵⁶ UN Doc. E/CN.4/AC.1/SR.2, p. 10.

⁵⁷ UN Doc. E/CN.4/AC.1/SR.2, p. 11; his views were supported by Santa Cruz of Chile and Wilson of the United Kingdom. See Philippe de La Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, Paris; Librairie générale de droit et de jurisprudence, 1967, p. 94.

⁵⁸ UN Doc. E/CN.4/AC.1/SR.2, p. 10 ⁵⁹ UN Doc. E/CN.4/AC.1/SR.3, p. 12.

⁶⁰ UN Doc. E/CN.4/AC.1/SR.6, p. 8; UN Doc. E/CN.4/21, §13.

⁶¹ UN Doc. E/CN.4/AC.1/SR.7, p. 2; UN Doc. E/CN.4/21, §14; the draft is UN Doc. E/CN.4/AC.1/W.2/Rev.1.

Chapter 2. (Right to Life and Physical Inviolability)

Article 7. Every human being has the right to life and to the respect of his physical inviolability. No person, even if found guilty, may be subjected to torture, cruelty or degrading treatment.⁶²

The Working Group reviewed Cassin's text, studying only the preamble and the first six articles, and gave it back to him for another draft.⁶³ Cassin further revised his text⁶⁴ which was then examined by the Drafting Committee:⁶⁵

Article 7. Every human being has the right to life, to personal liberty and to personal security.⁶⁶

Although in its early meetings in June 1947 there was no real distinction between the declaration and the covenant, by the close of its first session the Drafting Committee had determined to prepare two separate documents for the Commission, a draft declaration and a draft covenant.⁶⁷ The draft declaration was of course the text written by René Cassin, as modified, which made no mention of the death penalty. As for the covenant, the Drafting Committee agreed to submit the substantive proposals from the United Kingdom, also as modified,⁶⁸ together with an alternative proposal, from Lebanon, both of which referred explicitly to the death penalty as an exception to the right to life.⁶⁹

The distinction in the approach to the two documents, with respect to the right to life, would persist. In fact, it remains to this day. The 'treaty', destined to impose binding legal obligations on states rather than mere goals or objectives, retained the death penalty as a permissible limit on the right to life through each of its successive drafts. On the other hand, nowhere in the draft declaration was the death penalty recognized as an exception to the right to life.

The notion that the 'International Bill of Rights' should consist of at least two documents, the first a General Assembly resolution stating general principles

⁶² UN Doc. E/CN.4/AC.1/W.2/Rev.1; it is also published as Annex D of UN Doc. E/CN.4/21.

⁶³ *Ibid.* ⁶⁴ UN Doc. E/CN.4/AC.1/W.2/Rev.2. ⁶⁵ UN Doc. E/CN.4/AC.1/SR.8, p. 4.

⁶⁶ UN Doc. E/CN.4/AC.1/W.2/Rev.2; UN Doc. E/CN.4/AC.1/SR.12; Annex F of UN Doc. E/CN.4/21.

⁶⁷ UN Doc. E/CN.4/21, para. 12.

⁶⁸ UN Doc. E/CN.4/AC.1/4, Annex I; it is also published as Annex G of UN Doc. E/CN.4/21. It does not seem entirely clear that the United Kingdom draft was intended to be a 'covenant' rather than a 'declaration'. The two notions were somewhat confused at this early stage, as can be seen by the fact that the Secretariat prepared a comparison of the Secretariat, United Kingdom and United States drafts (UN Doc. E/CN.4/AC.1/11). The Secretariat draft formed the basis of the future declaration, the United States draft was a commentary on it, and the United Kingdom draft was the antecedent of the future covenant.

⁶⁹ Annex G of UN Doc. E/CN.4/21:

It shall be unlawful to deprive any person, from the moment of conception, of his life or bodily integrity, save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.

and the second a binding instrument or 'covenant', won rapid acceptance. Resolutions confirming this approach were drafted by the United Kingdom⁷⁰ and France.⁷¹ In November 1947, the United States also presented two separate drafts along these lines.⁷² Ecuador submitted a 'Draft Charter of International Human Rights and Duties', which borrowed heavily from an earlier Chilean proposal and had the distinction of being the first text to openly proclaim abolition of the death penalty. It began with the affirmation: 'There shall be no death penalty.'⁷³

The Commission on Human Rights held its second session in December 1947. Eleanor Roosevelt presented the report of the Drafting Committee⁷⁴ and explained that the Commission had to decide whether there should be both a 'declaration' and a 'convention', and what measures of implementation should be adopted.⁷⁵ Three working groups were set up, one on the draft declaration, another on the draft convention and a third on the measures of implementation.⁷⁶ Roosevelt was named chair of the Working Group on the 'declaration', assisted by René Cassin, as *rapporteur*.⁷⁷ There was no discussion on the issue of capital punishment, debate centring on the economic and social dimensions of the right to life⁷⁸ and on the troublesome question of abortion.⁷⁹ The original Drafting Committee text was adopted by four votes, with two abstentions.⁸⁰ The Working Group on the draft covenant focused exclusively on the issue of abortion,⁸¹ and this debate continued into the plenary session of the Commission.⁸²

The death penalty did, however, become a significant issue when the report of the Working Party on the 'declaration' was submitted to the plenary Commission.⁸³ The delegate from Uruguay pointed out that many countries refused to apply the death penalty on philosophical, sociological and moral grounds. Uruguay said that the death penalty should in no case be imposed for political offences and proposed an amendment proclaiming that 'human life is

⁷⁰ UN Doc. E/CN.4/42 and UN Doc. E/CN.4/49. ⁷¹ UN Doc. E/CN.4/48.

⁷² UN Doc. E/CN.4/36 and Add. 1 and Add. 2; see also UN Doc. E/600, Annex A, p. 21.

⁷³ UN Doc. E/CN.4/32.

Article I. (1) *Right to life*: 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.

Everyone, including incurables, imbeciles, and the insane, has the right to life from the moment of conception.

Persons unable to support themselves by their own efforts have the right to sustenance and support, and the State has the corresponding duty of seeing to it that such support is made available.

⁷⁴ UN Doc. E/CN.4/21. ⁷⁵ UN Doc. E/CN.4/SR.23, p. 4.

⁷⁶ UN Doc. E/CN.4/SR.29, p. 12. ⁷⁷ UN Doc. E/CN.4/57; UN Doc. E/600, para. 21.

⁷⁸ UN Doc. E/CN.4/AC.2/SR.3, p. 5. ⁷⁹ *Ibid.*, pp. 7–8.

⁸⁰ UN Doc. E/CN.4/AC.2/SR.3, p. 8. ⁸¹ UN Doc. E/CN.4/56; UN Doc. E/600, para. 21.

⁸² UN Doc. E/CN.4/SR.35, pp. 12–17. ⁸³ UN Doc. E/CN.4/57.

inviolable'.⁸⁴ At the request of Belgium, a separate vote was taken on each of the three paragraphs in the Uruguayan amendment, and the third paragraph, dealing with the death penalty, received three votes in favour, nine against and five abstentions.⁸⁵ As a result, the earlier Drafting Committee text that said 'Everyone has the right to life, to liberty and security of the person' was left unchanged by the Commission.⁸⁶ In fact, the text was to remain untouched throughout the subsequent debates, despite frequent attempts at amendment. The Commission adopted the text by sixteen votes in favour, with no recorded negative votes or abstentions.⁸⁷ The Commission's report on the second session included comments from the representative of Uruguay to the effect that the death penalty 'could not be justified by any philosophical or social arguments on any grounds of criminal or ethical policy'.⁸⁸

Comments from Member States on the Commission's draft declaration and covenant were solicited by the Secretary-General.⁸⁹ Two States attempted to introduce reference to the death penalty as an express exception to the right to life in the declaration. Brazil said that the article on the right to life in the declaration should include the restriction contained in the draft covenant, namely 'save in the execution of the sentence of a court following his conviction for a crime for which this penalty is provided by law'.⁹⁰ New Zealand proposed an amendment to the draft declaration that would make the right to life 'subject to deprivation only in cases prescribed by law and after due process'.⁹¹

The Drafting Committee held its second and final session at Lake Success, New York, in May 1948, prior to the third session of the Commission on Human Rights. It studied both the draft declaration and the draft covenant. During consideration of the right to life article in the declaration, attention was almost entirely devoted to the abortion question, and the issue of capital punishment was virtually ignored.⁹² The chair, Eleanor Roosevelt, brushed aside a suggestion from the representative of the American Federation of Labor that

⁸⁴ UN Doc. E/CN.4/SR.35, at p. 13.

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

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

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

⁸⁵ UN Doc. E/CN.4/SR.35, p. 14. ⁸⁶ UN Doc. E/600, Annex A, art. 4.

⁸⁷ UN Doc. E/CN.4/SR.35, p. 14.

⁸⁸ UN Doc. E/CN.4/77, UN Doc. E/600; the draft declaration is UN Doc. E/CN.4/77, Annex A, UN Doc. E/600, Annex A; the draft convention is UN Doc. E/CN.4/77, Annex B, UN Doc. E/600, Annex B; the report was considered by the Economic and Social Council: UN Doc. E/SR.128.

⁸⁹ UN Doc. SOA/17/1//01. ⁹⁰ UN Doc. E/CN.4/82/Add.2.

⁹¹ UN Doc. E/CN.4/82/Add.12, p. 24.

⁹² For discussion of the right to life, see UN Doc. E/CN.4/AC.1/SR.35, pp. 2–6.

the entire article in the draft declaration be replaced with the corresponding text in the *American Declaration on the Rights and Duties of Man*, which had been recently adopted at Bogotá.⁹³ The right to life provision in the declaration which had been adopted the previous year at Geneva by the Commission was again adopted by the Drafting Committee, this time by seven votes with one abstention.⁹⁴

The Commission's discussion of the right to life provision of the declaration was rather perfunctory. Lebeau of Belgium questioned the need to say that every individual has the right to life, because in his opinion the declaration would only apply to those who were already alive. René Cassin answered that, at a time when millions of people had been deprived of their life, it was important for the Commission to emphasize that right.⁹⁵ Lebeau then said that, if this were the case, the wording should be changed to: 'Everyone has the right to protection of his life.' Otherwise, Belgium would have to abstain in voting on the draft article, he said.⁹⁶ The Soviet delegate suggested that the remarks of Lebeau were logical but that the article should nevertheless remain in its original form. He said that during discussion of the article in the Drafting Committee, he had criticized its lack of concreteness and its remoteness from reality, given that millions of people were dying of starvation, succumbing to epidemics and being exterminated in wars.⁹⁷ At Lebeau's request, the article was voted on in two stages. The first part, 'Every one has the right to life', was adopted by fourteen votes to none, with one abstention (presumably Lebeau); the second, 'Every one has the right to liberty and security of person', was adopted by fifteen votes to none.⁹⁸ Perhaps the most significant change made by the Commission at its third session to the draft declaration was the addition of article 29§2, providing for limitations on rights in a general form.⁹⁹

The Commission's draft of the declaration was then submitted to the Economic and Social Council, where it received more or less summary approval.¹⁰⁰ At its August 1948 session, each of the Council members was invited to comment briefly on the drafts, although no amendments were ever proposed. Four delegates touched on the right to life. Santa Cruz, of Chile, described article 3 as containing 'the essence of the declaration'.¹⁰¹ The Council agreed to submit the

⁹³ UN Doc. E/CN.4/AC.1/SR.35, p. 7. Article I of the *American Declaration*, OAS Doc. OEA/Ser.L./V/1.4, reads: 'Every human being has the right to life, liberty and the security of his person.'

⁹⁴ UN Doc. E/CN.4/AC.1/SR.35, p. 8. ⁹⁵ UN Doc. E/CN.4/SR.53, p. 2.

⁹⁶ *Ibid.*, p. 3. ⁹⁷ *Ibid.* ⁹⁸ *Ibid.*

⁹⁹ C. K. Boyle, 'The Concept of Arbitrary Deprivation of Life', in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Boston: Martinus Nijhoff, 1985, pp. 221–244, p. 227.

¹⁰⁰ UN Doc. E/SR.180, UN Doc. E/SR.201, UN Doc. E/SR.202, UN Doc. E/SR.215, UN Doc. E/SR.218.

¹⁰¹ UN Doc. E/SR.218, p. 3; see also UN Doc. E/SR.215, p. 28 (Venezuela); UN Doc. E/SR.215, p. 34 (Soviet Union).

Commission's draft 'International Declaration of Human Rights' to the General Assembly.¹⁰²

1.3 Drafting by the Third Committee of the General Assembly

The General Assembly held the first part of its third session in Paris, in the autumn of 1948.¹⁰³ Before the text was submitted to the General Assembly for the final vote, article by article analysis of the draft declaration was conducted by the Third Committee. The debates in the Third Committee on article 3 were lengthy and heated, consuming five half-day sessions which sometimes degenerated into the tense polemics that characterized the dawn of the cold war.¹⁰⁴ The succinct text of article 3 that had been submitted by the Commission on Human Rights¹⁰⁵ eventually came through unscathed. It survived numerous attempts at amendment,¹⁰⁶ including one aimed at abolition of the death penalty,¹⁰⁷ and in a roll-call vote on the provision not one delegate opposed its adoption, although there were eight abstentions.

Most of the controversy surrounding the right to life provision of the declaration came from the delegations of the Soviet Union, the socialist States of Eastern Europe, and Latin America. The United States, the United Kingdom, France and a number of their allies consistently upheld the text of the Commission draft.¹⁰⁸ There was almost no discussion of the abortion issue, which had

¹⁰² UN Doc. E/SR.218, p. 16. ¹⁰³ UN Doc. A/632, UN Doc. E/800.

¹⁰⁴ A first attempt at closure, after three days of discussion, was unsuccessful: UN Doc. A/C.3/SR.105, p. 2.

¹⁰⁵ UN Doc. E/800:

Everyone has the right to life, liberty and security of person.

¹⁰⁶ Panama, UN Doc. A/C.3/220:

Every human being has the right to exist and to maintain, develop, protect and defend his existence.

Cuba, UN Doc. A/C.3/224:

Every human being has the right to life, liberty, security and integrity of the person.

Mexico, UN Doc. A/C.3/266:

Add, as a second paragraph, the following: 'The right to maintenance, health, education and work, is considered essential in order to obtain an increase in the standard of living of the individual, as well as to secure the full existence of social justice and the full development of the human being.'

Uruguay: UN Doc. A/C.3/268:

Everyone has the right to life, honour, liberty, and to legal, economic and social security.

Lebanon, Cuba and Uruguay: UN Doc. A/C.3/274/Rev.1 (as Belgium).

Belgium: UN Doc. A/C.3/274/Rev. 1:

Everyone has the right to life, liberty, and respect of the physical and moral integrity of his person.

¹⁰⁷ 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.

¹⁰⁸ See, for example, the comments of René Cassin: UN Doc. A/C.3/SR. 103, p. 6.

so troubled the members of the Drafting Committee and of the Commission on Human Rights.¹⁰⁹

In a very general sense, the critics felt that the Commission draft was somewhat outmoded, patterned on an eighteenth-century concept of human rights that had emerged from the works of Rousseau, the United States *Declaration of Independence*, and the French *Déclaration des droits de l'homme et du citoyen*.¹¹⁰ The Soviet Union attempted to address this point with a proposal to replace the Commission's right to life provision with a completely new text that imposed positive duties on States to protect individuals against hunger.¹¹¹ In addition to the expected support from Byelorussia and Ukraine, the first three sentences of the Soviet draft were also approved of by Yugoslavia,¹¹² Haiti,¹¹³ the Dominican Republic,¹¹⁴ Belgium¹¹⁵ and Lebanon.¹¹⁶ Even Cassin stated that the French delegation had no problem with the substance of the Soviet proposal, but that it considered it to be out of place.¹¹⁷

For the purposes of this study, the most significant feature of the Soviet proposal was its fourth sentence: 'The death penalty should be abolished in time of peace.' In the ensuing debate, hardly a voice was raised to defend capital punishment in peacetime, although a few were candid enough to admit that their governments had not yet abolished the death penalty.¹¹⁸ The view was widespread among delegates that, although there was little quarrel with the principle contained in the death penalty article, it was controversial and therefore inopportune¹¹⁹ or premature.¹²⁰ The United Kingdom representative said that its inclusion in the declaration might make it difficult for some States to accept.¹²¹ Several delegates explained that they would abstain in the vote as a result.¹²² The Netherlands, although agreeing with abolition of the death penalty, said it had no place in a declaration of human rights and should be reconsidered when a separate declaration of the rights and duties of States was being prepared.¹²³

¹⁰⁹ See: UN Doc. A/C.3/SR.105, p. 9; UN Doc. A/C.3/SR.104/Corr.1.

¹¹⁰ St Lot, the Haitian delegate and *rapporteur* of the Committee, said that the Commission draft had been overly influenced by the doctrine of individualism of Jean-Jacques Rousseau: UN Doc. A/C.3/SR.105, p. 3.

¹¹¹ UN Doc. A/C.3/265 (see n. 107 above). ¹¹² UN Doc. A/C.3/SR.103, p. 11.

¹¹³ UN Doc. A/C.3/SR.105, p. 2.

¹¹⁴ The Dominican delegate, Bernadino, also supported the joint amendment from Lebanon, Cuba and Uruguay: UN Doc. A/C.3/SR.105, p. 3.

¹¹⁵ UN Doc. A/C.3/SR.103, p. 8. ¹¹⁶ UN Doc. A/C.3/SR.102, pp. 4–5.

¹¹⁷ UN Doc. A/C.3/SR.103, p. 6; the same criticism was made by Costa Rica: UN Doc. A/C.3/SR.105, p. 5.

¹¹⁸ Belgium (UN Doc. A/C.3/SR.103, p. 9).

¹¹⁹ UN Doc. A/C.3/SR.105, p. 5; Norway (UN Doc. A/C.3/SR.104, p. 12); Pakistan (UN Doc. A/C.3/SR.105, p. 8); Haiti (UN Doc. A/C.3/SR.105, p. 2); New Zealand (UN Doc. A/C.3/SR.105, p. 10); Australia (UN Doc. A/C.3/SR.103, p. 2); Turkey (UN Doc. A/C.3/SR.103, p. 11).

¹²⁰ UN Doc. A/C.3/SR.102, pp. 4–5. ¹²¹ *Ibid.*, p. 9.

¹²² Pakistan: UN Doc. A/C.3/SR.105, p. 8; Peru: UN Doc. A/C.3/SR.104, p. 10.

¹²³ UN Doc. A/C.3/SR.103, p. 10.

Brazil explained that, although it did not allow the death penalty, this was a matter for penal legislation and not an issue properly before the Third Committee.¹²⁴ Eleanor Roosevelt of the United States said that the Third Committee was not attempting to write criminal law, and that the declaration was not the place for the issue of capital punishment.¹²⁵

The Soviet amendment was quite clearly restricted to abolition in peacetime only, and when the suggestion was made that this be extended to wartime as well, the Soviet delegate actually argued in favour of the death penalty.¹²⁶ No country which had suffered aggression and occupation could accept that point of view, said Pavlov. By accepting the principle of the abolition of the death penalty in time of war, the declaration would guarantee the defence of war criminals.¹²⁷

It is difficult to appreciate this exception outside of the context of post-war Europe. The *Charter of the Nuremberg Tribunal*¹²⁸ had provided for the possibility of capital punishment, and the sentence was actually imposed on several of the Nazi leaders.¹²⁹ A report prepared by the Secretariat of the United Nations more than thirty years later noted that 'the post-war years were not conducive to allowing Member States to come to an unequivocal position on the issue. Some countries with a long abolitionist tradition argued for barring the death penalty during times of war, while other members proposed an exception for offenders guilty of crimes against mankind.'¹³⁰

Several Latin American delegates were unhappy with the Soviet amendment because it did not go far enough; they simply could not accept the death penalty, even in wartime. Costa Rica's delegation said it would abstain from voting on the death penalty provision because of its restriction to times of peace.¹³¹ The Venezuelan delegate said he could not support the Soviet proposal on the death penalty, because it implied that such punishment was legal in times of war,

¹²⁴ *Ibid.*, pp. 7–8. Virtually identical comments were made by the Syrian representative: UN Doc. A/C.3/SR.103, p. 8, and by the Egyptian delegate: UN Doc. A/C.3/SR.107, p. 6.

¹²⁵ UN Doc. A/C.3/SR.103, p. 12.

¹²⁶ On the use of the death penalty in the Soviet Union, see: W. Adams, 'Capital Punishment in Imperial and Soviet Criminal Law', (1970) 18 *American Journal of Comparative Law* 575; William Carty Quillin, 'The Death Penalty in the Soviet Union', (1977) 5 *American Journal of Criminal Law* 225; G. P. Van den Berg, 'The Soviet Union and the Death Penalty', (1983) 35 *Soviet Studies* 154; Andrew Scobell, 'The Death Penalty under Socialism, 1917–90: China, the Soviet Union, Cuba, and the German Democratic Republic', (1991) 12 *Criminal Justice History* 189.

¹²⁷ UN Doc. A/C.3/SR.104, p. 9. A review of the Soviet comments indicates that the argument was not so much about abolition of the death penalty in wartime as it was about the imposition of capital punishment on war criminals, something that might well take place in peacetime. The problem was accentuated when Denmark stated that it would vote against the Soviet amendment because, although it had been historically abolitionist, the death penalty had been reinstated *in peacetime* in order to deal with crimes arising during the war: UN Doc. A/C.3/SR.105, p.11. Belgium also refused to support the Soviet proposal because it made it impossible 'to shoot traitors in time of peace': UN Doc. A/C.3/SR.103, p. 9.

¹²⁸ (1951) 82 UNTS 279, art. 27.

¹²⁹ See Chapter 6.

¹³⁰ UN Doc. A/CONF.87/9, para. 4.

¹³¹ UN Doc. A/C.3/SR.105, p. 6.

and this was contrary to his country's laws.¹³² He said that he would have been able to vote in favour of the proposal if it had envisaged the complete abolition of the death penalty.¹³³ Uruguay's delegate proposed an amendment aimed at total abolition, but this was not voted upon.¹³⁴ The Ukrainian delegate argued that even if abolition were confined only to peacetime, something was gained, despite failure to reach agreement on total abolition.¹³⁵

There were also suggestions that an abolitionist provision belonged in the declaration but not in the article on the right to life.¹³⁶ Uruguay felt it belonged with the provisions on legal rights, and Belgium proposed that it be placed with cruel, inhuman and degrading treatment or punishment.¹³⁷ Indeed, in the 1980s and 1990s, litigation dealing with capital punishment developed around construction of the norm prohibiting cruel punishment, specifically with respect to delay in imposition of the death sentence and method of execution.¹³⁸ However, during drafting of the basic norms, the death penalty debate revolved almost exclusively around the right to life.

The first of the amendments to be voted upon was that of the Soviet Union, which had been the focus of so much of the debate. It was agreed to vote on each sentence separately, and not to vote on the first sentence as this did not lead to any controversy.¹³⁹ After rejection of the second and third sentences,¹⁴⁰ the final sentence, dealing with the abolition of capital punishment, was defeated, on a roll-call vote, by twenty-one votes to nine, with eighteen abstentions.¹⁴¹ Uruguay actually voted against the amendment, and other proponents of abolition abstained. The United Kingdom delegate expressed the view that the vote on the Soviet proposal aimed at abolition could in no way be interpreted as a vote for or against capital punishment.¹⁴²

¹³² UN Doc. A/C.3/SR.102, pp. 10–11. ¹³³ UN Doc. A/C.3/SR.104, p. 10.

¹³⁴ UN Doc. A/C.3/274/Rev.1. ¹³⁵ UN Doc. A/C.3/SR.105, p. 7.

¹³⁶ Ecuador reserved the right to make such a proposal: UN Doc. A/C.3/SR.104, p. 12.

¹³⁷ UN Doc. A/C.3/SR.103, p. 3.

¹³⁸ *Soering v. United Kingdom and Germany*, 7 July 1989 Series A, Vol. 161, 11 EHRR 439; *Ng v. Canada* (No. 469/1991), UN Doc. A/49/40, Vol. II, p. 189, (1994) 15 HRLJ 149; *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General et al.*, (1993) 1 ZLR 242 (S), 4 SA 239 (ZSC), 14 HRLJ 323; *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All E. R. 769, [1993] 2 LRC 349, [1994] 2 AC 1, [1993] 3 WLR 995, 43 WIR 340, 14 HRLJ 338, 33 ILM 364 (JCPC); *S.v. Makwanyane*, 1995 (3) SA 391, (1995) 16 HRLJ 154 (Constitutional Court of South Africa).

¹³⁹ UN Doc. A/C.3/SR.107, p. 4. ¹⁴⁰ *Ibid.*, p. 5.

¹⁴¹ *Ibid.*, p. 6. *In favour*: Byelorussian Soviet Socialist Republic, Cuba Czechoslovakia, Dominican Republic, Mexico, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia.

Against: Afghanistan, Australia, Brazil, Canada, Chile, China, France, Greece, Guatemala, Haiti, Luxembourg, Panama, Philippines, Siam, Syria, Turkey, Union of South Africa, United Kingdom, United States of America, Uruguay, Yemen.

Abstained: Argentina, Belgium, Burma, Costa Rica, Denmark, Ecuador, Egypt, Ethiopia, Honduras, India, Lebanon, Netherlands, New Zealand, Norway, Peru, Saudi Arabia, Sweden, Venezuela.

¹⁴² UN Doc. A/C.3/SR.103, p. 12.

The phrase ‘right to life’ was adopted by forty-nine votes to none, with two abstentions.¹⁴³ The phrase ‘liberty and security of the person’ was adopted by forty-seven votes to none, with four abstentions.¹⁴⁴ With the two phrases endorsed by the Committee, the chairman proceeded to put the entire article to a vote. Before doing so, however, the Soviet representative explained that his delegation objected to neither the first nor the second part of the provision but that it felt they did not form a complete article, as the guarantees of the right to life had been omitted.¹⁴⁵ According to the Soviet Union, the necessary guarantees were those in its amendment, including abolition of the death penalty in times of peace. As a result, the Soviet Union announced that it would abstain on the vote on the entire article.¹⁴⁶ Cuba,¹⁴⁷ Chile,¹⁴⁸ Mexico,¹⁴⁹ Panama¹⁵⁰ and Haiti¹⁵¹ also presented justifications of their abstentions, based on various reasons unrelated to the death penalty issue. The right to life article, as originally drafted by the Commission on Human Rights, was voted on as a whole by the Third Committee, in a roll-call vote, and adopted by thirty-five votes in favour to none against, with twelve abstentions.¹⁵²

The declaration was submitted to the General Assembly by the Third Committee on 7 December 1948.¹⁵³ A last-ditch attempt by the Soviet Union to postpone consideration of the declaration until the following year failed,¹⁵⁴ and what had now become the *Universal Declaration of Human Rights* was adopted by the General Assembly on 10 December 1948, without a dissenting vote but with several abstentions.¹⁵⁵

1.4 Interpretation of the *Universal Declaration*

The *Universal Declaration* was not conceived of as an instrument creating binding norms at international law. Nevertheless, some jurists have since suggested that the *Declaration* represents a codification of customary norms.¹⁵⁶ The drafters

¹⁴³ UN Doc. A/C.3/SR.107, p. 14. ¹⁴⁴ *Ibid.* ¹⁴⁵ *Ibid.*, pp. 14–15.

¹⁴⁶ *Ibid.*, p. 15. Similar views were expressed by the delegates from Yugoslavia, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic.

¹⁴⁷ *Ibid.*, at p. 15; similar view were expressed by the Ecuadorean delegate.

¹⁴⁸ *Ibid.*; see also Philippines, UN Doc. A/C.3/SR.107, p. 17.

¹⁴⁹ *Ibid.* ¹⁵⁰ *Ibid.* ¹⁵¹ *Ibid.*, p. 17.

¹⁵² *Ibid.*, p. 16. *In favour*: Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Denmark, Dominican Republic, Egypt, Ethiopia, France, Greece, Guatemala, Honduras, India, Iran, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Saudi Arabia, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States of America, Uruguay, Venezuela, Yemen.

Abstained: Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Ecuador, Haiti, Lebanon, Pakistan, Panama, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia.

¹⁵³ UN Doc. A/777. ¹⁵⁴ UN Doc. A/785/Rev.2. ¹⁵⁵ UN Doc. A/811.

¹⁵⁶ John P. Humphrey, ‘The Universal Declaration of Human Rights: Its History, Impact and Judicial Character’, in Bertrand G. Ramcharan, *Human Rights: Thirty Years After the Universal Declaration*, The

of the *Declaration* did not intend it as such, as they were working in parallel on a distinct instrument, the draft 'covenant', whose very purpose was to go beyond the *Declaration* and to create such binding obligations. Consequently, great care must be taken in drawing conclusions about the scope of article 3 of the *Universal Declaration* based on the *travaux préparatoires*, as if the exercise were truly one of treaty interpretation.¹⁵⁷

Even in treaty interpretation, the *travaux préparatoires* are only a secondary source.¹⁵⁸ Just as in private municipal law the preliminary discussions between the parties to a contract can certainly assist in elucidating doubtful provisions, so in international law such materials are helpful where treaty provisions remain unclear. Resort to the *travaux préparatoires* is less appropriate in the context of international human rights law than with respect to other types of treaties, because the former merits an interpretation that goes beyond the intention of its drafters.¹⁵⁹ By its very nature, international human rights law must be dynamic, adapting and evolving with progress in social thought and attitudes. The only consequence of an exaggerated emphasis in the *travaux préparatoires* in the interpretation of human rights provisions is the imposition of a static view of their scope, the 'freezing' of their meaning at the time of their adoption. With respect to the specific case of the *Universal Declaration*, these comments are all the more relevant when we consider that the General Assembly and the subsidiary bodies never intended article 3 to constitute a binding norm.

It is useful in this respect to consider the experience of the Inter-American Commission on Human Rights in the interpretation of the *American Declaration of the Rights and Duties of Man*.¹⁶⁰ Like the *Universal Declaration*, it was not conceived of as a treaty imposing binding norms. Unlike the *Universal Declaration*, it was, some twenty years later, converted into a normative instrument by the Organization of American States.¹⁶¹ Subsequently, litigants before the Inter-American Commission attempted to argue, in cases dealing

Hague: Martinus Nijhoff, 1984. See also the dissent of Judge Tanaka in *South West Africa Cases, Second Phase (Ethiopia v. South Africa, Liberia v. South Africa)*, [1966] ICJ Reports 6, pp. 288–293; and *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] ICJ Reports 3, p. 42.

¹⁵⁷ Commissioner Marco Gerardo Monroy Cabra of the Inter-American Commission on Human Rights, in a dissenting opinion, said that it is an error to use the *Vienna Convention on the Law of Treaties* in order to interpret a human rights 'declaration' such as the *American Declaration on the Rights and Duties of Man* (and, by analogy, the *Universal Declaration of Human Rights*): *Roach and Pinkerton v. United States* (Case No. 9647), Resolution No. 3/87, reported in OAS Doc. OEA/Ser.L/V/II.71 doc. 9 rev. 1, p. 147, (1987) 8 HRLJ 345, p. 182.

¹⁵⁸ *Vienna Convention on the Law of Treaties*, (1979) 1155 UNTS 331, art. 32.

¹⁵⁹ *Loizidou v. Turkey (Preliminary objections)*, 23 March 1995, Series A, No. 310, paras. 71–72.

¹⁶⁰ See n. 93 above.

¹⁶¹ *Charter of the Organization of American States*, (1952) 119 UNTS 4, *AJIL Supp.* 43, amended by *Protocol of Buenos Aires*, (1970) 721 UNTS 324, arts. 3j, 51e, 112, and 150. See: Thomas Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights', (1975) 69 *AJIL* 828.

with the right to life, that the relevant provision of the *American Declaration* implicitly includes the same content as the more prolix provisions of the *American Convention on Human Rights*, adopted in 1969 and in force only since 1978. The Inter-American Commission has had considerable difficulty with this argument and, on at least two occasions, has refused to use one instrument in order to construe the other.¹⁶² More generally, it has found the challenge of finding a normative content in an instrument conceived of as a declaration or manifesto to be a daunting one. As far as the Inter-American Commission is concerned, the major assistance the *travaux préparatoires* provide in interpreting the *American Declaration* is in demonstrating how different that document is from the subsequent *Convention*.¹⁶³

The *travaux préparatoires* of article 3 of the *Universal Declaration* are of great significance principally because the debates in the Commission on Human Rights and the Third Committee of the General Assembly represent the first major exchange on the subject of capital punishment within the context of international human rights law. The drafters of the *Universal Declaration* created an original norm, the right to life, inspired by incomplete formulations found in the instruments of the American revolution, but with a meaning going far beyond a mere right not to be deprived of life except with due process. The models on which the *Declaration* was based all recognized the death penalty as an explicit exception to the right to life. The *Universal Declaration* went one step further, removing any reference to the death penalty essentially because, in the words of Eleanor Roosevelt, there was a movement underway in some States to abolish capital punishment and, therefore, it might be better not to mention the death penalty.¹⁶⁴

Participants in the debate attempted to breathe meaning into the provision with specific clauses, for example by emphasizing an economic and social content for the right to life or, in other words, the right to live, the right to a certain quality to life. There was even an attempt to make the declaration overtly abolitionist. But in the end prudence dictated a less precise statement, one which neither excluded the more radical approaches to the right to life nor endorsed them. In this way, it accurately served the purpose of the *Declaration*, which was to be a manifesto whose scope could evolve over time, and not a detailed statement riddled with awkward exceptions.

The *travaux préparatoires* indicate that the drafters of the *Universal Declaration* considered that the question of capital punishment fell squarely

¹⁶² *White and Potter v. United States* (Case no. 2141), Resolution No. 23/81, OAS Doc. A/Ser.L/V/II.52 doc.48, OAS Doc.A/Ser.L/V/II. 54 doc. 9 rev. 1, at pp. 25–54, Inter-American Commission on Human Rights, *Ten Years of Activities, 1971–1981*, Washington, D.C.: Organization of American States, 1982, pp. 186–209, (1981) 1 *HRLJ* 110; *Roach and Pinkerton v. United States* (Case No. 9647).

¹⁶³ See our discussion of the case law of the Inter-American Commission, pp. 315–325, 340–350 below.

¹⁶⁴ UN Doc. E/CN.4/AC.1/SR., p. 10.

within the context of the right to life. Furthermore, from the very beginning of the debates, its authors viewed the right to life as raising the matter not only of the death penalty, that is, of limitations on its implementation, but also of its abolition. Of course, they knew that most States in the world still imposed the death penalty and that the international community had also endorsed it, at least for war criminals. A proclamation of abolition of the death penalty might well have discredited and isolated the *Declaration*, making it a statement so out of step with the real world as to lose its potential significance.

Despite widespread support for abolition, there was no real consensus that the *Declaration* should take an abolitionist stance. Had, for example, the Soviets and the Latin American States truly desired that it reflect such a position, compromise would have been expected on the sole issue which divided them, namely, application of the death penalty in wartime or, rather, to war crimes and treason committed during wartime.

A final observation is in order. Nowhere, in any of the *travaux préparatoires* of the *Universal Declaration*, is a word spoken in support of the benefits of capital punishment, at least in time of peace. The death penalty was viewed virtually unanimously as a necessary evil, one whose existence could not be justified on philosophical or scientific grounds. But its existence in the arsenal of domestic criminal law could not be questioned, and only a relatively small number of United Nations members had even contemplated abolition at the time. The fact that delegates to the Commission on Human Rights and the General Assembly made no attempt whatsoever to explain or account for the hiatus between their consideration of the right to life and the raw reality of their own legal systems is in itself quite striking. Their mission, to be sure, was one of elaborating a manifesto, a human rights beacon to guide domestic and international lawmakers over future decades. Of the twenty-one States that opposed the controversial Soviet amendment, more than half have now abolished the death penalty.

Publicists have provided little real guidance to interpretation of article 3 of the *Universal Declaration*. An article by Lilly Landerer describes the drafting of article 3, but makes no effort at interpretation.¹⁶⁵ Albert Verdoodt's exhaustive review of the drafting of the *Declaration* complains that the article is too vague, but admits that there is some implicit content with respect to the death penalty.¹⁶⁶ Verdoodt notes that there is no express condemnation of the death penalty 'for serious crimes', suggesting at the very least that some condition of proportionality in imposition of the death sentence is implicit in article 3.

The inescapable conclusion is that article 3 of the *Universal Declaration* is indeed abolitionist in outlook. By its silence on the matter of the death penalty,

¹⁶⁵ Landerer, 'Capital Punishment'.

¹⁶⁶ Albert Verdoodt, *Nuissance et signification de la Déclaration universelle des droits de l'homme*, Louvain, Paris: Nauwelaerts, 1963, pp. 99–100.

it envisages the abolition of capital punishment and, at the same time, admits its existence as a necessary evil, a relatively fine line which in hindsight appears to have been rather astutely drawn. A summary analysis of the death penalty debate in a report from the Secretariat of the United Nations has described the right to life provision in the *Universal Declaration* as being 'neutral' on the question of the death penalty.¹⁶⁷ Yet, several important resolutions of the General Assembly and the Economic and Social Council dealing with the limitation and ultimate abolition of capital punishment cite article 3 of the *Declaration* in their preambles,¹⁶⁸ implying that it is in fact favourable to abolition. The 'neutral' view is also in contradiction with the Secretary-General's report of 1973 on capital punishment, which claimed that article 3 of the *Declaration* implies limitation and abolition of the death penalty.¹⁶⁹ Clearly, the General Assembly has considered that article 3 of the *Declaration* and the abolition of the death penalty are indissociable.

In 1948, the death penalty was an almost universally recognized exception to the right to life, as can be seen by its constant inclusion in the early drafts of the *International Covenant on Civil and Political Rights* which was being prepared contemporaneously and by the same individuals. Eleanor Roosevelt's views against explicit reference to the death penalty in the *Universal Declaration*¹⁷⁰ were endorsed by Koretsky of the Soviet Union, Cassin of France, Santa Cruz of Chile and Wilson of the United Kingdom.¹⁷¹ There was never any retreat from this position, despite the fact that the Soviet Union's abolitionist amendment failed to rally a majority of votes in the Third Committee. The true purpose of the *Universal Declaration* was to set goals for humanity, not to entrench the status quo, and this must be kept in mind in any construction of article 3.

Therefore, it is no exaggeration to state that article 3 of the *Universal Declaration* was aimed at eventual abolition of the death penalty, a role which it has admirably fulfilled, as our subsequent analysis of article 6 of the *Civil Rights Covenant*, the *Second Optional Protocol* and the various specialized and regional instruments should make clear. No better proof exists that the drafters of the *Declaration* contemplated the eventual abolition of the death penalty than the fact that article 3 has retained its pertinence during the evolution of more comprehensive abolitionist norms over subsequent decades.

¹⁶⁷ UN Doc. A/CONF.87/9, §4.

¹⁶⁸ GA Res. 2393 (XXIII); GA Res. 2857(XXVI); GA Res. 32/61; GA Res. 44/128; ESC Res. 1745 (LIV); ESC Res. 1930 (LVIII).

¹⁶⁹ UN Doc. E/5242, para. 11. ¹⁷⁰ UN Doc. E/CN.4/AC.1/SR.2, p. 10.

¹⁷¹ *Ibid.*, p. 11.

The *International Covenant on Civil and Political Rights*: drafting, ratification and reservation

The drafting procedure of the *International Covenant on Civil and Political Rights*,¹ which began in the Drafting Committee of the Commission on Human Rights during the spring of 1947, was not completed until the final version of the instrument was adopted by the General Assembly in 1966.² Although a number of United Nations bodies were involved at various stages of the drafting, the Commission on Human Rights and the Third Committee of the General Assembly were its principal architects.

The Commission on Human Rights devoted its more or less continuous attention to the drafting of the *Covenant* from 1947 until 1954.³ Successive drafts were reworked at its annual meetings and then transmitted to the Economic and Social Council and the General Assembly in the annual reports of the Commission. Occasionally, the General Assembly would redirect the Commission, as it did in 1951, when it divided the instrument into two separate ‘covenants’, one for civil and political rights and the other for economic, social and cultural rights.⁴ The right to life provision remained in the civil rights covenant, despite the fact that it also has an economic and social dimension.⁵

¹ (1976) 999 UNTS 171.

² GA Res. 2200 A (XXI).

³ The secondary sources on drafting of the *Covenant* include: Manfred Nowak, *CCPR Commentary*, Kehl: Engel, 1993; Dominic McGoldrick, *The Human Rights Committee*, Oxford: Clarendon Press, 1991; Vratislav Pechota, ‘The Development of the Covenant on Civil and Political Rights’, in Louis Henkin, ed., *The International Bill of Rights – the International Covenant on Civil and Political Rights*, New York: Columbia University Press, 1981, pp. 32–71; Marc J. Bossuyt, ‘The Death Penalty in the “travaux préparatoires” of the International Covenant on Civil and Political Rights’, in Daniel Prémont, ed., *Essais sur le concept de ‘droit de vivre’ en mémoire de Yougindra Khushalani*, Brussels: Bruylant, 1988, pp. 251–265; Lilly E. Landerer, ‘Capital Punishment as a Human Rights Issue Before the United Nations’, (1971) 4 *HRJ* 511.

⁴ GA Res. 543 (VI). See John P. Humphrey, *Human Rights and the United Nations – A Great Adventure*, Dobbs Ferry, NY: Transnational, 1984, p. 129.

⁵ Bertrand G. Ramcharan, ‘The Concept and Dimensions of the Right to Life’, in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1985, pp. 1–32; Hector Gros Espiell, ‘The Right to Life and the Right to Live’, in Daniel Prémont, ed.,

It was discussed at length by the Commission at its second, fifth, sixth and eighth sessions, in 1947, 1949, 1950 and 1952 respectively.

The final versions of the two draft covenants were adopted by the Commission on Human Rights at its tenth session, in 1954. They were then sent to the General Assembly, via the Economic and Social Council, for approval. At the time, few could have anticipated that the drafting procedure in the General Assembly would take another twelve years. The Third Committee of the General Assembly, meeting annually in the autumn of each year, examined the drafts in sometimes exhaustive detail. But consideration of the right to life provision of the *International Covenant on Civil and Political Rights*, the text which addressed the question of capital punishment, was the most time consuming. The article took up most of the twelfth session of the Third Committee, in 1957, undergoing extensive modifications, almost all of it related to the issue of capital punishment. For the purposes of this study, the most important development in the Third Committee was the addition of the notion of abolition of the death penalty to the *Covenant*. Article 6 of the *International Covenant on Civil and Political Rights*, as adopted by the Third Committee at the close of its 1957 session, was not subjected to any further debate or amendment in the General Assembly or its organs before formal adoption of the entire instrument in 1966. The final version of the right to life provision of the *Covenant*, article 6, is composed of six paragraphs, four of which (2, 4, 5 and 6) make direct reference to the death penalty:

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 judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from 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 eighteen years of age and shall not be carried out on pregnant women.

Essais, pp. 45–53; Mikuin Leliel Balanda, ‘Le droit de vivre’, in Prémont, ed., *ibid.*, pp. 31–41; *General Comment 6(16)*, UN Doc. CCPR/C/21/Add.1, also published as UN Doc. A/37/40, Annex V, UN Doc. CCPR/3/Add.1, pp. 382–383 (see Appendix 5, p. 402).