The Death Penalty: a Collision of Laws?

by

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Abstract

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The death penalty may not be considered an issue of purely sovereign concern. The international community has increasingly expressed its abolitionist tendencies through 'hard law' and 'soft' normativity. This thesis addresses the global trend towards abolition of the death penalty in international law and practice, and the accompanying procedural restrictions which have been placed upon its use. It then considers the capital jurisprudence of the United States and South Africa, analysing the extent of extranational influence upon their constitutionalism. It concludes that the South African Constitutional Court has proven an exemplar of cosmopolitan constitutionalism which may be favourably contrasted with the parochialism demonstrated by the United States Supreme Court.

Dedication

This thesis is dedicated to those who face, and those who fight, the death penalty.

"All people are members of the same family. They have a common origin in creation. If one limb is struck by pain all the others are gripped by anxiety. If the suffering of other people doesn't hurt you, you don't deserve to be called human".

Muslih-ud-Din Sa'di

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Chapter 1 Introduction

In 1993, the Judicial Committee of the Privy Council determined that the death row phenomenon amounted to "inhuman or degrading punishment or other treatment" in violation of section 17 (1) of the Constitution of Jamaica.[1] Whilst the judgement in *Pratt & Morgan* was of great import to the petitioners and their fellow condemned inmates, it also exemplifies a trend towards what may be described as 'cosmopolitan constitutionalism'. In reaching its decision, the Privy Council - previously criticised as "unreasoned, crude, parochial and constitutionally naive" for its dismissal of foreign precedent[2] - had considered the findings of the United Nations Human Rights Committee and the Inter-American Commission on Human Rights in earlier appeals by Pratt and Morgan, as well as jurisprudence on the death row phenomenon from Canada, India, the United States, Zimbabwe and the European Court of Human Rights.

The Privy Council is not alone in fostering an awareness of foreign and international law; according to Anne-Marie Slaughter, "[c]ourts are talking to one another all over the world".[3] She identifies this evolution in judicial behaviour as "transjudicial communication".[4]

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1 *Pratt & Morgan* v. *Attorney General for Jamaica et al*, (1993) 13 Hum.Rts. L.J. 338.

2 D. Pannick, *Judicial Review of the Death Penalty* (London: Duckworth, 1982) at 133 referring to the judgement of the Judicial Committee of the Privy Council in *Ong Ah Chuan* v. *Public Prosecutor of Singapore*, [1981] 1 A.C. 648.

3 A.-M. Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U.Rich. L.Rev. 99.

4 *Ibid.* at 99. For the purposes of this thesis we will use the terms 'transjudicial communication' and 'transjudicial discourse' interchangeably.

Transjudicial communication involves more than simple citation of binding decisions from superior courts; whilst respect for precedent is a long-established judicial practice and, traditionally, courts have considered international law to the extent that it did not conflict with existing domestic provisions, the singular feature of transjudicial discourse is that in many instances courts are electing to give consideration to the judgements of national and international tribunals by which they are not formally bound.[5] It is not just that formal reference to, and discussion of, external jurisprudence may be apparent in opinions such as that of the Privy Council in *Pratt & Morgan* which cite foreign and international sources. One can also detect, as Slaughter puts it, "tacit emulation" whereby courts are latently influenced by, but do not explicitly refer to, extranational judicial decisions.[6] In addition, courts are becoming aware of the prevailing or evolving ethos surrounding decision-making; considering the trends in national, regional and international regimes as well as the 'hard law' handed down.

In this thesis, we will assert that transjudicial communication is a positive addition to judicial reasoning and is essential to cosmopolitan constitutionalism. It may also prove inevitable. It is no longer feasible for states to exist in a vacuum. Logistical barriers have given way to the technical revolution; indeed, the advent of online legal databases may render the jurisprudence of some foreign courts, notably those of the United States, more accessible than domestic

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5 This cross-fertilization of judicial thinking may encompass horizontal exchange - the consideration of judgements of other courts at an equivalent level, for example the Privy Council, as the final appellate court for Jamaica, referring to the jurisprudence of the Supreme Court of Zimbabwe - or vertical exchange - where the courts involved are of a different level, for example the Privy Council considering the jurisprudence of the Human Rights Committee. See note 687 and accompanying text; Slaughter, *ibid.* at 103 *et seq.*

6 Slaughter, *ibid.* at 105, and generally at 103 *et seq.*

precedent. The 'global village' phenomenon has engulfed law. The increasing inter-dependence of states through international trade, investigations into domestic human rights concerns in the formulation of commercial and legal transactions, the development of regional and international legal structures, and the incremental internationalization of formerly sovereign issues have all contributed to a world in which legal parochialism is no longer sufficient.

Transjudicial discourse has made a particular contribution in the area of human rights law where courts are faced with fundamentally similar issues and may share an ideological commitment.[7] The interpretation of substantively analogous clauses, prohibiting "cruel and unusual" or "cruel, inhuman and degrading" punishment for example, may be assisted by reference to the definitions adopted by other courts. Equally, human rights jurisprudence, as an emerging field, benefits from comparative study; in South Africa, for example, in assessing whether the death penalty could be imposed in a rational manner, the Constitutional Court was able to consider the experiences of the United States in attempting to establish a non-arbitrary system of capital punishment.[8]

A further benefit of transjudicial discourse is that courts may feel their judgements are vindicated by reference to equivalent jurisprudence from foreign or international jurists. This is particularly apt where the decision is likely to prove controversial domestically; in the United States, the Court of Appeals for the Ninth Circuit struck down execution by lethal gas as

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7 Slaughter refers to a "common substantive mission". *Ibid.* at 102.

8 *State* v. *Makwanyane et al* [1995] 6 BCLR 665 at 694, Chaskalson, P., (CC).

unconstitutionally cruel and unusual punishment.[9] Reference to an earlier decision of the Human Rights Committee that execution by lethal gas asphyxiation amounted to cruel, inhuman and degrading punishment in violation of article 7 of the *International Covenant on Civil and Political Rights*[10] would have demonstrated that the Ninth Circuit was conforming to international norms. However, there is no indication that the Ninth Circuit was aware of the Committee's judgement, far less influenced by it.[11] According to Slaughter, "the listening court may reach the same legal conclusion or formulate the same line of reasoning independently, yet nevertheless search for and cite evidence that foreign courts are like-minded".[12]

Correspondingly, a revolutionary decision from one court which is subsequently cited in other jurisdictions will gain status, as with the *Soering* judgement of the European Court of Human Rights[13] which has been cited with approval by the Privy Council,[14] the Supreme Court of Zimbabwe[15] and members of the Human Rights Committee.[16] We might consider this 'self-developing law'; the judgement of one court being relied upon and expanded until it develops

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9 *Fierro, Ruiz & Harris* v. *Gomez & Calderon*, 77 F.3d 301 (9th Cir. 1996).

10 *Ng* v. *Canada*, [1993] 15 Hum.Rts. L.J. 149.

11 U.S. parochialism in constitutional adjudication will be a developed theme throughout this thesis.

12 Slaughter, *supra* note 3 at 118.

13 *Soering* v. *United Kingdom*, (1989) 11 E.H.R.R. 439.

14 *Pratt & Morgan*, *supra* note 1.

15 *Catholic Commission for Justice and Peace in Zimbabwe* v. *the Attorney General, the Sheriff of Zimbabwe & the Director of Prisons*, (1993) 13 Hum.Rts. L.J. 323.

16 *Barrett & Sutcliffe* v. *Jamaica*, (Nos. 270/1988 & 271/1988) U.N. Doc CCPR/C/44/D/1988 & U.N. Doc A/47/40 at 246, Christine Chanet dissenting.

into a regional or international norm.

The death penalty provides an ideal vehicle through which to assess cosmopolitan constitutionalism. In addition to the conclusions which may be drawn as to the more general benefits of engaged constitutionalism, capital punishment raises discrete concerns. Firstly, the death penalty is established as an international human rights issue, rather than a matter of purely domestic concern. This has been assisted by the development of international law and the efforts of international abolitionist organisations such as Amnesty International. In addition, litigation at a domestic and regional level over capital punishment and the extradition of defendants facing capital charges has focussed the attention of abolitionist states on the application of the death penalty in other jurisdictions.

Secondly, other than in the United States where capital litigation has become an art form, in many jurisdictions the death penalty is a 'one-shot deal' for the courts. The Constitutional Courts of Hungary and South Africa, for example, each abolished the death penalty in their first capital case.[17] In the absence of a body of domestic case-law, it proved extremely useful for both courts to consider how other liberal jurisdictions have coped with the question of capital punishment to deciding the issue in such a vacuum that it could be dismissed or criticised as blind experimentation.

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17 *Constitutional Court Decision No. 23/1990 on the unconstitutionality of capital punishment*, [1990] X. 31 AB; *Makwanyane*, *supra* note 8.

In this thesis, we will consider the global trend towards abolition of the death penalty in international law and practice, and the accompanying procedural restrictions which have been placed upon its use. We will then consider the capital jurisprudence of the United States and South Africa, analysing the extent to which foreign and international law has influenced their constitutionalism. South Africa provides an interesting jurisdiction for this comparative study, reflecting foreign experience yet retaining a uniquely domestic perspective. Professor Steiker sees South Africa as "both a mirror for and the child of the American legal system, or at least American constitutionalism".[18] However, as we will see, South African constitutionalism has surpassed the U.S. model - which has, to date, resisted relinquishing parochialism - and has established itself as a model of cosmopolitan constitutionalism. We will conclude that the insular tendencies of the U.S. courts have resulted in discordance with the constitutionalism of other liberal states, but that their isolationist approach may be essential for the maintenance of their current system of capital punishment.

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18 C.S. Steiker, "Pretoria, Not Peoria" (1996) 74 Tex. L.Rev. 1285 at 1285.

Chapter 2 The Death Penalty in International Law

In 1977, the General Assembly of the United Nations affirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment".[19] In the last half-century, the death penalty has become the exception rather than the rule. According to Amnesty International, the majority of the world's nations are abolitionist *de jure* or *de facto*; of the retentionist nations, four - China, the Ukraine, the Russian Federation and Iran - are responsible for the vast majority of known executions (91.6% in 1996).[20]

In this chapter we will trace the development of international human rights law relating to the death penalty, concluding that the right to life has become synonymous with the progressive abolition of capital punishment and the absolute prohibition of the juvenile death penalty. We shall agree with the conclusion that "[t]he day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as an imperative rule of *jus cogens*, is undeniably in the forseeable future".[21] We will also consider

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19 G.A. Res. 32/61 (8 December 1977).

20 In 1996, of 4 272 known executions in 39 countries, 3 500 took place in China, 167 in the Ukraine, 140 in the Russian Federation and 110 in Iran. Amnesty International, "Facts and Figures on the Death Penalty" (March 1997) Internet site www.amnesty.org/ailib/intcam/dp/dpfacts.html.

21 W.A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Grotius Publications, 1993) at 2.

other human rights issues brought into play by the death penalty and assess their contribution to the abolitionist movement.

A. The Right to Life and the Death Penalty

i. Hard Law; Soft Trends

Whilst the roots of the modern human rights movement may be firmly embedded in history, the term 'international human rights' was uncoined, indeed unknown, until well into the twentieth century. This does not imply that human rights, to some extent, had not been acknowledged; the worldwide movement against slavery provides an early example of what today would be considered an international human rights movement. Nonetheless, "[u]ntil World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the right of each equal sovereign to be monstrous to his or her own subjects".[22]

The legacy of World War II has been an incremental awareness of the vulnerability of individual rights. Implicit in the Nuremberg Tribunals, and the prosecution of Nazi leaders for 'crimes against humanity' inflicted upon German nationals not protected by international treaty, was the principle that certain rights were intrinsic in customary international law. Randall identifies a

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22 T. J. Farer and F. Gaer, "The UN and Human Rights: At the End of the Beginning" in A. Roberts & B. Kingsbury (eds.), *United Nations, Divided World* (Oxford: Clarendon Press, 1993), Chapter 8 at 240.

paradigmatic shift in international law in post-war decades; from a decentralized structure of sovereign states, there has evolved a system in which "centralized attention [is paid] to individual rights".[23] However, it must be recalled that, initially, abolition of the death penalty was not considered an essential element of the burgeoning human rights movement; following World War II, hundreds of war criminals were executed in Europe and the Pacific[24] and, upon protesting the provision of the death penalty in the *Nuremberg Charter*, Uruguay was accused of harboring Nazi sympathies.[25]

In 1945, the Charter of the United Nations entered into force. Rising from the ashes of the League of Nations, the new Organization included, in the Preamble to its Charter, acknowledgement and support for human rights:

> [w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm our faith in fundamental human rights ... [and] ... the dignity and worth of the human person ... have resolved to combine our efforts to accomplish these aims.

Notwithstanding this recognition, if any single instrument may be credited with establishing human rights categorically within the realm of international law it must be the *Universal Declaration of Human Rights* [*UDHR*] adopted by the General Assembly of the United Nations

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23 K.C. Randall, *Federal Courts and the International Human Rights Paradigm* (Durham: Duke University Press, 1990) at 203.

24 H. Engel, *Lord High Executioner: an Unashamed Look at Hangmen, Headsmen, and Their Kind* (Toronto: Key Porter Books, 1996) at 100 and 190.

25 Schabas, *supra* note 21 at 1.

in 1948.[26] Whilst establishing some species of normative standard and not legally enforceable *per se*, the *UDHR* may well constitute customary international law and, in 1968, it was accepted as part of the law of the United Nations.[27] In 1970, the International Court of Justice held that at least some human rights norms are *erga omnes*.[28]

Article 3, *UDHR*, provides that "[e]veryone has a right to life, liberty and security of person". It would seem irrefutable that the death penalty is incompatible with such an unqualified right. During the drafting process, however, the death penalty had been the object of much controversy. Whilst an initial draft prepared by the Secretariat of the Commission on Human Rights provided for the death penalty as an exception to an otherwise unqualified right to life,[29] at the Drafting Committee notice had been paid to the nascent abolitionist movement and it was

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26 G.A. Resolution 217A (III), G.A.O.R., 3rd Ses., Part 1, Resolutions, 71.

27 At the 1968 Conference on Human Rights in Teheran, it was proclaimed that the Universal Declaration "constitutes an obligation for the members of the international community". Text in (1969) 63 Am.J. Int'l L. 674.

28 *In re Barcelona Traction, Light and Power Co.*, [1970] I.C.J. 4 at 32. Obligations *erga omnes* are obligations owed by States towards the international community as a whole because of the importance of the right protected. *Ibid.* They may be distinguished, however, from *jus cogens* - which, in terms of article 53 of the *Vienna Convention on the Law of Treaties*, denotes a "peremptory norm of general international law [which] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation can be permitted and which can be modified only by a subsequent norm of general international law having the same character" - as obligations *erga omnes* are "neither absolute nor unqualified". *Barcelona Traction, ibid.* Thus, whilst *jus cogens* norms are also *erga omnes*, obligations *erga omnes* are not necessarily *jus cogens*.

29 "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". U.N. Doc. E/CN.4/AC.1/3. This broad exception may be contrasted with subsequent qualified right to life clauses which tolerate the death penalty in defined circumstances rather than for any capital crime under domestic law. See *infra*.

cautioned that the U.N. ought not to be seen to approve the death penalty.[30] René Cassin proposed the unequivocal wording of Article 3, but debate continued as to whether the text ought to specifically accommodate or abolish capital punishment. The delegates did not favour the wide exception originally proposed, but nor could they reach agreement on explicit abolitionist sentiment, which was objected to either on principle or because it did not extend far enough. A Soviet draft providing for the abolition of the death penalty in peacetime was defeated by a roll-call vote,[31] and Cassin's clause was subsequently adopted by a roll-call vote in which there were 12 abstentions but no opposing votes cast.[32]

The *UDHR* was the object of compromise. Thorny right to life matters such as the death penalty and abortion threatened that compromise, and it is no accident that the final wording of article 3 remained silent. As we will see in chapter 4, when we consider the unqualified right to life of the South African Constitution, such a clause may prove the most successful, as well as the most expedient, solution as it provides for flexible interpretation; right to life clauses which specifically accommodate the death penalty are more difficult to reconcile with the trend towards abolition.[33] Although article 3 was not necessarily intended to be abolitionist, it has been interpreted as promoting abolition of the death penalty. According to the General

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30 W.A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 1997) at 30.

31 U.N. Doc. A/C.3/SR.107 at 6. There were 9 votes in favour, 21 against and 18 abstentions.

32 *Ibid.* at 16.

33 On the unqualified wording of the right to life clause in South Africa, see *infra* note 571 and accompanying text. In particular see the reasoning of Justice Sachs, that the clause was not deliberately silent but established an unqualified prohibition on capital punishment. *Infra* note 575 and accompanying text.

Assembly of the United Nations, progressive restriction of the death penalty with a view to abolition is integral "in order to fully guarantee the right of life, provided for by article 3 of the *Universal Declaration of Human Rights*".[34] If this interpretation is correct and article 3 ought to be read as abolitionist then, despite the aspirational nature of the *Declaration*, there are important implications for the abolitionist movement. Should the *UDHR* constitute customary international law, the death penalty would be prohibited *ex facie*.

It had been anticipated that the *UDHR*, as a non-binding resolution of the General Assembly, would provide a basis for an international treaty on human rights. However, lack of consensus among the members of the United Nations resulted not in a binding instrument but in the adoption of two Covenants.[35] The *International Covenant on Civil and Political Rights* [*ICCPR*] and the *International Covenant on Economic, Social and Cultural Rights* were adopted by the General Assembly of the United Nations in 1966, and came into force in 1976.[36]

The right to life is contained in article 6, *ICCPR*:

> 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

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34 G.A. Res. 2857 (XXVI) (20 December 1971).

35 It had been determined that two Covenants were necessary to accommodate the differences observed in the nature of the legal obligations and the appropriate methods of implementation: civil and political rights, requiring States to abstain from certain actions, were seen as 'legal' and capable of immediate enforcement, whereas economic, social and cultural rights, which tend to require positive State action, were considered 'promotional' rights the progressive implementation of which States should aspire towards as economic development allowed.

36 999 U.N.T.S. 171; 993 U.N.T.S. 3.

> may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
> 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
> 5. Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 6 may have proven the most contentious aspect of the *Covenant*; the drafting process incorporated numerous proposed amendments and took eleven years.[37] An unqualified right to life clause, similar to that contained in the *UDHR*, had been proposed[38] as it was felt that the provisions relating to the right to life ought not to include any exception which would appear to condone the taking of life.[39] However the proposal was rejected by the Commission on Human Rights at its 6th session.[40] Also rejected were proposals advocating the specific enumeration of exceptions to the right, which were felt to over-emphasise killing rather than life.[41] Ultimately, compromise was reached over the clause "[n]o one shall be arbitrarily

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37 See Schabas, *supra* note 21 at 51 *et seq*.

38 U.N. Doc. E/CN.4/385.

39 M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 115.

40 U.N. Doc. E/CN.4/SR.149 para. 21.

41 Bossuyt, *supra* note 39 at 117 *et seq*.

deprived of his life" which was considered sufficient indication that, whilst the right was not absolute, nor was it to be capriciously violated, 'arbitrarily' being defined as meaning both "illegally" and "unjustly".[42]

Although objections had been raised to the inclusion of provisions relating to the death penalty, the Commission on Human Rights was aware that a number of States retained capital punishment and felt that the *Covenant* should attempt to provide adequate safeguards for capital defendants and inmates.[43] Far from promoting the death penalty, article 6 restricts its imposition with reference to the crime committed, the status of the offender and the legal procedures to be followed. It is evident that the death penalty is tolerated as a 'necessary evil' which ought to be subject to strict limitations. Correspondingly, the article includes the substantive restrictions of 6 (2) that the death penalty be imposed only for "the most serious crimes" and 6 (5) exempting juveniles and pregnant women, as well as the prohibition of arbitrary deprivation in 6 (1) and the procedural requirements of 6 (2) and 6 (4). The emphasis in 6 (6) on the progression towards abolition of capital punishment is of great significance. According to Bossuyt, paragraph 6 is the key abolitionist clause contained in the *ICCPR*. He notes that, whilst the Commission determined that the abolition of the death penalty ought not to be a requirement of article 6 but should be left to States, 6 (6) was included "in order to avoid the impression that the *Covenant* sanctioned capital punishment".[44]

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42 *Ibid.* at 121 *et seq.*

43 See generally Bossuyt, *ibid.* at 113 *et seq.*

44 U.N. Doc. E/CN.4/Sub.2/1987/20 para. 9. See also Bossuyt, *ibid.* at 128 and at 144.

Article 40 establishes an enforcement mechanism for the *ICCPR*, requiring the submission of periodic reports to the Human Rights Committee [HRC]. In addition, the *Optional Protocol to the International Covenant on Civil and Political Rights* affords nationals of ratifying states the right of individual petition to the HRC.[45] The Committee has addressed a number of issues relating to article 6 and capital punishment, and has interpreted article 6 (2) as promoting the desirability of abolition of the death penalty. According to Professor Schabas, the HRC "has been very demanding with respect to States parties that still impose the death penalty ... [and] ... will insist upon information concerning measures to limit or abolish the death penalty".[46] In addition, the HRC has emphasised that the phrase "the most serious crimes" ought to be interpreted restrictively,[47] specifically concluding that political crimes do not meet this stipulation.[48]

It is clear that the *ICCPR*, whilst countenancing the use of capital punishment within defined parameters, generally advocates abolitionism. It signified the emergence of an abolitionist norm within the international community despite the fact that 'hard law', as contained in international treaties like the *Covenant*, tolerated the death penalty. This norm attained greater legal status

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45 (1976) 999 U.N.T.S. 171.

46 Schabas, *supra* note 21 at 127.

47 *Human Rights Committee General Comment 6 (16)*. U.N. Doc CCPR/C/21/Add.1, U.N. Doc A/37/40, Annex V, U.N. Doc CCPR/3/Add.1.

48 Schabas, *supra* note 21 at 106 *et seq*.

with the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty*, 1990 [*Second Optional Protocol*].[49]

The *Second Optional Protocol* may be considered the inevitable extension of the abolitionist aspiration discussed during the drafting of the *ICCPR*.[50] Indeed, the Preamble makes specific mention of article 6, *ICCPR*, noting that it "refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable". The protocol was designed to make abolition of the death penalty "an obligation under international law for States that had already decided upon abolition in their domestic law".[51] In addition, Bossuyt felt that the existence of such an instrument would become "a pole of attraction for States that were considering the abolition of the death penalty".[52]

The initial draft of the *Second Optional Protocol* was submitted by Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal and Sweden.[53] At the request of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Special Rapporteur Marc Bossuyt prepared a report analysing the draft and re-

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49 G.A. Res. 44/128, (1990) 29 I.L.M. 1464.

50 *Supra* note 38 and accompanying text.

51 Sub-Commission on Prevention of Discrimination and Protection of Minorities, 37th Sess., Summary Record of the 14th meeting (15 August 1984); U.N. Doc. E/CN.1/Sub.2/1984/SR.14 at para 30.

52 *Ibid.*

53 U.N. Doc. A/C.3/35/L.75.

drafting the protocol in light of State comments.[54] Whilst the original draft had not included a preamble, space had been left for that purpose. Bossuyt drafted preambular paragraphs intended to "set[] the framework" of the protocol.[55] Other than suggesting the text of the preamble, Bossuyt's report pays little attention to this aspect of the *Second Optional Protocol*. However, he is clear that it ought to "express the purpose of the second optional protocol: to undertake the international commitment to abolish the death penalty".[56]

The text of the preamble remained virtually unchanged in the adopted instrument. It will be quoted in its entirety, as it provides further evidence of the abolitionist sentiment within the international community (recalling, of course, that the text was adopted by the General Assembly and not merely by those States which subsequently became party to it). The preamble provides

> The States Parties to the present *Protocol*
> Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,
> Recalling article 3 of the *Universal Declaration of Human Rights* adopted on 10 December 1948 and article 6 of the *International Covenant on Civil and Political Rights* adopted on 10 December 1966,
> Noting that article 6 of the *International Covenant on Civil and Political Rights* refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,
> Convinced that all measures of abolition of the death penalty should be considered progress in the enjoyment of the right to life,
> Desirous to undertake hereby an international commitment to abolish the death penalty,

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54 U.N. Doc. E/CN.4/Sub.2/1987/20.

55 *Ibid.* at para 155.

56 *Ibid.* at para 156.

Have agreed ...[57]

It is clear that both the *UDHR* and the *ICCPR* are being interpreted in a manner which encourages abolition of the death penalty and, from the initial paragraph, that abolitionism is becoming an integral aspect of the human rights culture. In particular, the text of the preamble suggests that an interpretive presumption against the death penalty may be read into article 6, *ICCPR*. This would require that cases concerning capital punishment be decided narrowly in order that, wherever possible, an abolitionist decision may be reached. The plethora of related issues in capital cases - the death row phenomenon, the method of execution, discrimination within the criminal justice system, to name but three - provide international and domestic fora with ample opportunity to invoke such a presumption in delivering abolitionist judgements, even where the text of the instrument, or constitution, appears to tolerate the death penalty for the crime committed.

Adopted by the General Assembly on December 15, 1989, the *Second Optional Protocol* provides:

> 1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
> 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.[58]

Article 6, *Second Optional Protocol*, establishes this unqualified right as non-derogable. Nonetheless, in terms of article 2 a reservation may be entered at the time of ratification or

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57 Original emphasis omitted.

58 Article 1, *Second Optional Protocol*.

accession allowing for the death penalty "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Although initially a reservations clause had not been favoured, it was felt that the inclusion of article 2 was essential for the adoption of the protocol, not least because it accorded with the language of *Protocol 6, European Convention on Human Rights*.[59]

Notwithstanding the abolitionist presumption referred to earlier, it remains to be seen whether the *Second Optional Protocol* will be used in an evolutionary interpretation of article 6, *ICCPR*, as prohibiting capital punishment. The very existence of the instrument indicates that the abolition of the death penalty is desirable and worthy of international attention, and, as we have seen, it was intended to encourage States towards abolition, but it is far from binding non-party States. In his report, Bossuyt concluded that his analysis was not intended "to press States to abolish capital punishment or to become parties to a second optional protocol".[60]

The Human Rights Committee has yet to be confronted with interpreting article 6 in light of the *Second Optional Protocol*. However, the European Court of Human Rights faced a similar issue in *Soering* v. *United Kingdom* concerning article 2 (1) of the *European Convention* and

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59 Schabas, *supra* note 21 at 173.

60 U.N. Doc. E/CN.4/Sub.2/1987/20 at para. 182. It may be that his deference was intended to encourage retentionist States which contemplated opposing the draft protocol.

Protocol 6 to the *Convention*.[61] The *European Convention on Human Rights*, 1955 [*ECHR*],[62] which came into force in September 1953, is the key to regional human rights protection in Europe, and has provided a model for subsequent human rights agreements including the *ICCPR*. As we have seen, initial developments in the field of human rights did not envisage abolition of the death penalty, and the right to life clause of the *ECHR* contains an unequivocal exception for capital punishment. Article 2 (1) provides "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

However, the progression of Western European states towards abolition was perceived as rendering article 2 antediluvian, and efforts were made to produce an amended provision. In April 1983, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* [*Protocol 6*][63] was adopted. Article 1 provides "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed", and articles 3 and 4 make *Protocol 6* non-derogable and non-reservable. In 1996, the Parliamentary Assembly of the Council of Europe resolved that any state wishing to join the Council must effect an immediate moratorium on executions, and

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61 *Soering, supra* note 13.

62 213 U.N.T.S. 221.

63 *European Treaty Series* 114.

undertake to ratify *Protocol 6*.[64] This renders *Protocol 6* mandatory for new members;[65] the Council of Europe has issued a strong signal that abolition of the death penalty is essential to participation in the European human rights system. In the same resolution, the Assembly criticised member States which continued to impose capital punishment. In particular, it

> call[ed] upon Russia, Ukraine and Latvia to honour their commitments regarding the introduction of a moratorium on executions and the immediate abolition of capital punishment ... [and] ... warn[ed] these countries that further violations of their commitments, especially the carrying out of executions, [would] have [serious] consequences.

The *Soering* case arose over the proposed extradition of a German national from the United Kingdom to face capital charges in the United States. The U.K. is not party to *Protocol 6* and the death penalty *per se* had not been challenged as violating the *ECHR*. Nonetheless, Amnesty International had submitted written comments arguing that evolving standards in Western Europe had rendered capital punishment inhuman and degrading treatment or punishment in violation of the provisions of article 3.[66] As we have seen, article 2 (1) expressly permits capital punishment and the Court concluded that "[a]rticle 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that

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64 Resolution 1097 (1996) of the Parliamentary Assembly of the Council of Europe (28 June 1996). Internet site: http://stars.coe.fr/ta/ta96/ERES1097.html.

65 It should be noted that not all existing member States have signed and ratified *Protocol 6*, despite the invitations to do so extended in Resolutions 1044 (1994) reprinted (1994) 37 Yearbook Euro. Convention. Hum.Rts. 497, and 1097, *ibid.*. Thus, whilst ratification of the protocol has become compulsory for new members, it is not so for all member States of the Council of Europe.

66 *Soering, supra* note 13 at 473.

would nullify the clear wording of [a]rticle 2 (1)".[67] However, the Court is not restricted to an originalist interpretation of the *ECHR*; in *Soering*, it cited a previous judgement in which it determined that "the *Convention* is a living instrument which ... must be interpreted in the light of present-day conditions".[68] It accepted the submission of Amnesty International that *Protocol 6* reflected "a virtual consensus in Western European legal systems that the death penalty is ... no longer consistent with regional standards of justice",[69] but found that the adoption by Contracting Parties of an optional instrument, *Protocol 6*, pre-empted a challenge that subsequent practice could be seen as abrogating article 2 (1).[70] It is unclear whether the Court felt that were it not for the existence of *Protocol 6* it may have found itself able to adopt an evolutionary interpretation of 2 (1). As it was, however, it took refuge in deferring to the will of the member States on the basis that, notwithstanding the 'virtual consensus' in favour of abolition which ought to indicate that the death penalty was incompatible with the 'present-day conditions' referred to in *Tyrer*, States wishing to bind themselves to abolition would ratify *Protocol 6*. That an abolitionist instrument may have prevented a more flexible judicial interpretation of the right to life is ironic, to say the least.

In his concurring opinion in *Soering*, Judge de Meyer adopted an evolutionary interpretation of the provisions of article 2 (1). He determined that, whilst the article was adopted in the

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67 *Ibid.* at 474.

68 *Ibid.* at 473, citing *Tyrer* v. *United Kingdom*, [1978] 2 E.H.R.R. 1.

69 *Ibid.* at 473.

70 *Ibid.* at 474.

aftermath of World War II at a time when capital punishment was still imposed in Western Europe, "[i]n so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice".[71] According to Judge de Meyer, "[capital] punishment is no longer consistent with the present state of European civilisation".[72] He considered that the adoption and extensive ratification of *Protocol 6* signified the unlawfulness of the death penalty and, accordingly, all States Party to the *ECHR* were prohibited from extraditing in a capital case regardless of whether they had ratified the protocol.[73]

Judge de Meyer's findings that capital punishment is inconsistent with European civilisation are further underscored by the subsequent adoption of Resolutions 1044 and 1097 by the Parliamentary Assembly. Indubitably, the normative standards of the Council of Europe have superseded the toleration of the death penalty contained in article 2 (1). Accordingly, we must determine whether such standards should be imposed on States which have not ratified *Protocol 6*. As we have seen, whilst accession to the Council of Europe is now dependant upon a willingness to cease executions and ratify *Protocol 6*, there is no corresponding obligation upon existing members. Using the protocol in interpreting the provisions of article 2 (1) would allow the Court to achieve the distinct objective of the Council of Europe; *de jure* abolition of the death penalty within its jurisdiction. It would also provide for conformity within the European

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71 *Ibid.* at 484.

72 *Ibid.*

73 *Ibid.*

human rights system in place of the current bifurcation whereby existing member States, whilst invariably *de facto* abolitionist, are under a lesser legal requirement than that applicable to new members.

Could such an interpretation be made of article 6, *ICCPR*? At present, it seems unlikely; Judge de Meyer's opinion, whilst in concurrence, was the opinion of one judge of the European Court. At the time of *Soering*, the member States of the Council of Europe were all abolitionist for ordinary crimes. Effectively, despite the fact that not all States had ratified *Protocol* 6, there existed unanimous support in domestic law and practice that the death penalty ought not to be imposed for murder, the crime with which Soering was charged.[74] Nonetheless, despite that consensus, the majority of the European Court were unable to adopt an evolutionary interpretation of article 2 (1) and, as we will see below, that court has been considerably more progressive in its capital jurisprudence than the Human Rights Committee.

In the international system there is no equivalent unity with regard to capital punishment. Whilst the majority of States are at least *de facto* abolitionist, the retentionist lobby is strong, particularly from those States which impose the death penalty under Shari`a (Islamic law). In interpreting article 6 as consummately abolitionist, the Human Rights Committee would be imposing normativity which may exceed its mandate. Despite the fact that the international community may have moved towards a progressive restriction on, and interpretive presumption

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74 Such consensus is evident given the subsequent resolutions of the Parliamentary Assembly as discussed above.

against, capital punishment, the text of the *ICCPR* tolerates the death penalty and significant numbers of States continue to impose it. The presumption, whilst strong, has probably not reached the point where it permits an evolutionary interpretation prohibiting capital punishment. Efforts by the Human Rights Committee to force the issue, whilst laudable for abolitionists, would be met with strong opposition. For the time being at least, the Committee should focus upon a mandate which *is* supported by international law; subjecting the death penalty to rigorous evaluation in light of the procedural and substantive restrictions upon its use. It may not be the time for an all-out offensive on the death penalty, but the Committee has the power to chip away at its plethora of vulnerabilities.[75]

ii. U.S. Reservations to the *ICCPR*

An opportunity arose for the HRC to emphasise the presumption in favour of abolition when it was confronted with reservations relating to capital punishment entered by the United States to the *ICCPR*. The U.S. ratified the *ICCPR* with effect from 8 September 1992, under extensive reservation to articles 6 and 7.[76] Effectively, the U.S. had reserved to the entire provision of article 6 other than the prohibition on the execution of pregnant women[77] and article 7 to "the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual

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75 Unfortunately, however, the HRC has been rather reticent in the exercise of this power in challenges presented by persons facing the death penalty; in the course of this thesis we will critically examine the Committee's jurisprudence.

76 *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1994*, UN Doc. ST/LEG/SER.E/13 (1995) p125.

77 As the due process requirements of the U.S. Constitution guarantee the procedural aspects of article 6 it is difficult to discern the justification for such an all-encompassing reservation.

treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States".[78] Norway and Ireland also entered reservations to specific clauses of article 6 but, as both States are abolitionist in practice and the Norwegian reservation was subsequently withdrawn, neither, unlike the U.S. reservations, attracted objections.[79] The U.S. was the sole nation to reserve to the provisions of article 7.

Whilst reservations to human rights instruments have the disappointing effect of weakening the protected provisions, they have to date been tolerated by the international community in that they accommodate states which might otherwise refuse to ratify. However, reservations are regulated; in 1951, when the International Court of Justice held that reservations to the *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, were permissible provided they were "compatible with the object and purpose of the Convention", the 'compatibility test' came into being.[80] It was reiterated in Article 19 (c) of the *Vienna Convention on the Law of Treaties*, 1980.[81]

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78 Noting that the provisions of the *ICCPR* are not in violation of the U.S. Constitution, one commentator has questioned the reference to the Constitution finding, "[p]erhaps the hope was that a constitutional reference would lend more dignity to the U.S. position". A.E. Mayer, "Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?" (1996) 23 Hastings Const'l L.Q. 727 at 763.

79 Schabas, *supra* note 30 at 82. Most of the objecting nations were members of the European Union; Professor Schabas suggests they co-operated on the wording of their objections. *Ibid.* at 84.

80 *Reservations to Genocide Convention*, [1951] I.C.J. Rep. 15 at 21 *et seq.*

81 Article 19 provides:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> (a) the reservation is prohibited by the treaty;
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

In 1994, the HRC issued a *General Comment* on reservations to the *ICCPR*.[82] Whilst recognising that reservations are not prohibited by the *ICCPR*, it found that any reservations would be subject to the 'compatibility' test.[83] As reservations which offend peremptory norms would be incompatible with the object and purpose of the *Covenant*, they could not survive that test. Accordingly, no reservation could be entered to a clause which contains provisions of customary international law.[84] The illustrative list of customary norms provided by the HRC included the right not to be subjected to cruel, inhuman and degrading treatment or punishment and the right of children and pregnant women not to be executed.[85] In addition, the Committee determined that "reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law".[86] It fell to the Committee to determine whether reservations met the compatibility test and it determined that, rather than the *ICCPR* not being in effect for States which entered invalid reservations, such reservations would be "severable, in the sense that the *Covenant* will be operative for the reserving party without the benefit of the reservation".[87]

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

82 *General Comment No. 24 (52) on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

83 *Ibid.* at para 6.

84 The Committee is appearing to assume that all customary norms are also *jus cogens* but does not elaborate on this assumption.

85 *General Comment No. 24 (52), supra* note 82 at para 8.

86 *Ibid.* at para 19.

87 *Ibid.* at para 18.

The response of the international community was indubitably opposed to the U.S. reservations and several European States lodged objections.[88] In particular, they objected to the reservation entered to article 7, on the basis that it amounted to a derogation from a non-derogable right.[89] In its *General Comment*, the HRC addressed the issue of reservations to non-derogable rights, concluding that, "[w]hile there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the *Covenant*, a State has a heavy onus to justify such a reservation".[90] In a similar vein, the Inter-American Court has determined that a reservation may be entered to a non-derogable right where it is intended to "restrict certain aspects ... [of the right] ... without depriving the right as a whole of its basic purpose".[91] However, the Court was clear that "a reservation which was designed to enable a State to *suspend* any of the non-derogable fundamental rights must be deemed incompatible with the object and purpose of the Convention".[92] It is far from apparent that the U.S. government could have satisfied the strict scrutiny to which reservations to non-derogable rights are subjected. However, as the HRC had already specified that reservations

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88 See Schabas, *supra* note 30 at 86.

89 Although article 4 (1) of the *ICCPR* allows for derogation from *Convention* obligations "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", 4 (2) provides that "[n]o derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision".

90 *General Comment No. 24 (52)*, *supra* note 82 at para 10. Thus, ironically, whilst no reservations are permitted to customary norms, they may be tolerated to otherwise non-derogable rights.

91 *Restrictions to the Death Penalty (Advisory Opinion Requested by the Inter-American Commission)*, (1983) 4 Hum. Rts. L.J. 339 at 356. It may be that the HRC's approach was influenced by the Commission's earlier opinion. It remains, however, that the *General Comment* did not adequately reconcile its approach to the interaction of reservations with (a) peremptory, (b) customary and (c) non-derogable norms.

92 *Ibid.* My emphasis.

could not be entered to peremptory norms including the rights protected by article 7, in determining the validity of the U.S. reservations to the *ICCPR*, the matter of reserving to non-derogable rights did not progress beyond the State objections referred to above.

However, in 1995, the Human Rights Committee did address the issue of the U.S. reservations in its consideration of the report submitted by the U.S. under article 40, *ICCPR*.[93] The HRC "regretted" the extent of the U.S. reservations, declarations and understandings to the *ICCPR*, perceiving them as an attempt to "ensure that the U.S. has accepted what is already the law of the United States".[94] In addition, it rejected reservations entered to article 6 (5), which prohibits execution of juvenile offenders, and article 7, which prohibits "torture ... or cruel, inhuman or degrading treatment or punishment", as "incompatible with the object and purpose of the Covenant".[95] The U.S. was asked to review its reservations with a view to their withdrawal, in particular those entered to 6 (5) and 7.[96]

The HRC gave no indication of the legal effect of its reasoning but, perhaps not surprisingly given that the *General Comment* considered illegitimate reservations severable from the *Covenant*, it continued to address the issue of the U.S. death penalty system in light of articles

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93 *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*, U.N. Doc. CCPR/C/79/Add.50 (1995) para 14.

94 *Ibid.*

95 *Ibid.* Although no mention was made of the non-derogable status of article 7, this is not surprising given that the *General Comment* provided for an absolute rejection of reservations to peremptory norms, whereas the more general approach to reservations to non-derogable rights is to subject them to strict scrutiny.

96 *Ibid.* at para 31.

6 and 7. Concern was expressed at the number of capital offences provided for and death sentences imposed, and the Committee "deplored" the expanded federal death penalty and the fact that capital punishment had been re-introduced in previously abolitionist states.[97] It was equally critical of the juvenile death penalty and the alleged capital sentencing of mentally retarded offenders. In addition, the Committee considered that the prolonged detention on death row endured by condemned prisoners "may amount to a breach of article 7".[98] The U.S. was urged to revise state and federal law on the death penalty in accordance with the *Covenant*, "with a view eventually to abolishing it".[99]

However, the Committee's failure to reinforce its *General Comment* by specifying whether the U.S. was bound as if no reservations had been entered, or whether it was no longer party to the *Covenant* led to confusion.[100] Professor Schabas has recently concluded that, notwithstanding the HRC's silence, State objections to the U.S. reservations coupled with the *ratio* of the European Court of Human Rights in *Loizidou*,[101] "suggest that the United States is bound by the

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97 The presumption against the re-introduction of the death penalty will be discussed below. *Infra* note 212 and accompanying text.

98 *Ibid.* at para 16.

99 *Ibid.* at para 31.

100 See generally, W.A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: is the United States Still A Party?"(1995) 21(2) Brooklyn J. Int'l. L. 277, and M. Nash (Leich), "Contemporary Practice of the United States Relating to International Law: International Covenant on Civil and Political Rights" (1995) 89 Am.J.Int'l L. 589 at 591.

101 In *Loizidou* v. *Turkey (Preliminary Objections)* the Court found that invalid territorial restrictions entered to Articles 25 and 46 of the *ECHR* could be separated from Turkey's general acceptance of the *Convention*, rendering Turkey bound by *Convention* obligations. Series A, Vol. 310 (1995).

Covenant as a whole, including articles 6 (5) and 7".[102] This accords with the HRC's *General Comment* and with their review of the U.S. state report..

Response within the U.S. to the findings of the Committee was extreme; the Senate sought to enact legislation restricting funding to the HRC until it validated the U.S. reservations to the *ICCPR*. According to Schabas, "[t]he Committee has not deemed it necessary to react to this bizarre legislative proposal".[103] Even more bizarre was the reaction of Senator Jesse Helms, Chairperson of the Senate Foreign Relations Committee. Convinced that the international community was attempting to deprive Americans of the heightened protection of the U.S. Constitution, he referred to the Human Rights Committee's "attempt ... to undermine the United States Constitution" and their "insane interpretation of international law".[104] He concluded "the U.N.'s view of the U.S. Constitution, and U.S. Senate reservations to human rights treaties, is quite clear - the U.N., not the U.S. Senate, claims to know what's best for Americans. To which the majority of Americans reply: Bullfeathers!"[105]

Rhetoric aside, Senator Helms' remarks are disturbing, not least because they were supported by a number of other Senators. Nonetheless, his reaction does not appear to have been endorsed by the Executive Branch. His style may be parochial, but the international community might

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102 Schabas, *supra* note 30 at 89.

103 *Ibid.* at 90.

104 *United States Congressional Press Release* (14 June 1995).

105 *Ibid.*

be forced to determine whether it is preferable to have the U.S. ratifying international human rights instruments under reservation, or not at all. This is far from being a distant possibility. According to Senator Helms, "[t]he United Nations' absurd posture regarding Senate reservations to treaties is enough to dismiss any possibility of U.S. ratification of any U.N. human rights treaty".[106] In the course of this thesis, we will become acquainted with American insularity in constitutional adjudication; attempting to force their hand over human rights at the international level might well repel them ever further from the fold of the international community.

However, the role of the Human Rights Committee in assessing State reports under, and reservations to, the *ICCPR* can not be dictated to by American parochialism. In its *General Comment*, the HRC noted "[t]he number of reservations, their content and their scope may undermine the effective implementation of the *Covenant* and tend to weaken respect for the obligations of States parties".[107] Not only is the presumption in favour of abolition an issue, but the credibility of the *Covenant* and the Committee require a consistent, critical approach to reservations generally. The HRC has determined that invalid reservations are severable; it would be unthinkable for it to retreat on this matter of principle, or to establish a two-tier system in order to accommodate Senator Helms and his colleagues. Speaking on behalf of the European Union in 1996, an Irish representative to the Third Committee noted that

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106 *Ibid.* Here, the executive failure to line up behind any Congressional sovereign pique would be beside the point, as Congress' approval must be given for further treaty ratification.

107 *General Comment No. 24 (52), supra* note 82 at para 1.

"[r]eservations should not be seen as an expedient mechanism for obtaining international approval through the formal ratification of human rights instruments, whilst avoiding obligations".[108] In severing the U.S. reservations to articles 6 (5) and 7, the Human Rights Committee holds the United States to its international obligations *and* underscores the abolitionist sentiment evident in the *Second Optional Protocol*.

B. The Juvenile Death Penalty

If sentencing adults to death may be tolerated by the international community in certain circumstances, the same cannot be said for the juvenile death penalty. The 'juvenile death penalty' may be defined as the sentencing to death and/ or the execution of a defendant aged under eighteen at the commission of a capital offence. It is increasingly rare; in a study conducted in 1963, of 95 reporting nations indicating a minimum age for capital punishment, 75 (78.9%) reported a minimum age of eighteen or older. Only 7 (7.4%), including the United States, reported a minimum age under 16.[109] According to Amnesty International, currently more than 100 retentionist countries have explicit legislative guarantees protecting juvenile offenders from the death penalty, or may be presumed to exclude such an eventuality through

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108 "U.N.: Reservations to Human Rights Treaties Called Into Question by E.U. in Third Committee" M2 Presswire (15 November 1996).

109 An additional eight nations reported no specified minimum age. Statistics compiled by the author from C.H. Patrick, "The Status of Capital Punishment: a World Perspective" (1965) 56 J.Crim.L., Criminology & Police Sci. 397.

unreserved ratification of international agreements prohibiting execution of juvenile offenders.[110] For the decade commencing in 1985, the execution of juvenile offenders has been documented in only eight nations: Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, the United States of America and Yemen.[111] Of these, the United States is responsible for the majority of documented juvenile executions; since 1985, nine juvenile offenders have been executed, five of them in Texas.[112]

In accordance with both the progressive movement towards specialised juvenile justice systems and the abolition of the death penalty, it is noteworthy that many nations now abolitionist rejected the juvenile death penalty well before dispensing with capital punishment for adult offenders. In Canada, where the death penalty was removed from the statute books for all ordinary crimes in 1976, life imprisonment was the maximum penalty imposed upon juvenile offenders under the *Criminal Code*.[113] In Hungary, the *Penal Code*, 1978, exempted defendants under the age of 20,[114] although capital punishment for adults was not abolished until 1990.[115] In South Africa, where the death penalty was declared unconstitutional for ordinary crimes in

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110 Amnesty International, "Juveniles and the Death Penalty" (30 August 1995) AI Index: ACT at 6.

111 *Ibid.*

112 *Ibid.*

113 s. 206 (3) [rep. & sub. 1960-61, c.44, s.2]. *Regina* v. *Hage*, (1969) 1 C.C.C. 287.

114 Amnesty International, *When the State Kills* (London: A.I. Publications, 1989) at 145.

115 *Constitutional Court Decision No. 23/1990, supra* note 17.

1995,[116] juveniles had been excluded from death sentencing since 1977.[117]

Among the binding international instruments which prohibit the execution of juvenile offenders are article 6 (5), *ICCPR*,[118] article 4 (5), *American Convention on Human Rights [ACHR]*, [119]and article 37 (a) of the *U.N. Convention on the Rights of the Child*, 1989 [*UNCRC*].[120] In 1984, ECOSOC adopted a series of "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", Safeguard 3 of which exempts juvenile offenders.[121]

In *Roach & Pinkerton* v. *United States*, the petitioners alleged before the Inter-American Commission on Human Rights that customary international law prohibited the execution of juvenile offenders.[122] As the United States was not party to the *ACHR* with its corresponding interdiction on the juvenile death penalty, the Commission was required to determine whether the unqualified right to life contained in article 1 of the *American Declaration of the Rights and Duties of Man* could be interpreted as prohibiting the juvenile death penalty by virtue of a norm

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116 *Makwanyane*, *supra* note 8.

117 *Criminal Procedure Act* (Act 51 of 1977) s. 277 (3)(a).

118 "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age".

119 "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age".

120 "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age".

121 "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death". ECOSOC Resolution 1984/50 (25/5/84).

122 (1987) 8 Hum.Rts. L.J. 345.

of customary international law. The Commission considered that, even if such a norm existed, as the proposed reservations to the *ACHR* submitted to the U.S. Senate in 1977 included a reservation to article 4 (5) which prohibits the juvenile death penalty, *ergo* the U.S. could not be bound by customary international law unless the norm had reached the status of *jus cogens*.[123] Whilst a *jus cogens* norm against the execution of children, *however defined*, was recognised as in existence among the member states of the O.A.S., the Commission was only able (or willing) to identify an *emerging* norm of customary international law fixing 18 as the threshold for imposition of the death penalty.[124] Accordingly, the U.S. could not be considered to have violated an international *jus cogens* norm prohibiting the imposition of the death penalty on persons aged under 18 at the commission of the offence.[125]

It is questionable whether the Commission was correct in finding that the proposed reservation would render the U.S. immune from customary law. The sources of international law, as listed in article 38 (1) of the *Statute of the International Court of Justice*, include "international custom, as evidence of a general practice accepted as law".[126] The principal components of custom include duration, consistency and generality of practice, pursuant to a belief by states that they are under a legal obligation (*opinion juris et necessitas*).[127] States may exclude

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123 *Ibid.* at 351.

124 *Ibid.* at 354.

125 The Commission did find the U.S. in violation of its international obligations, however, as discussed below.

126 *I.C.J. Acts & Docs. No. 3* (1977) at 77.

127 See I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990) at 4 *et seq.*

themselves from customary obligation only through persistent objection; according to Professor Brownlie, "[e]vidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted".[128] Such objection is required to be constant "where [the development of the norm] is intense, structured, clear, and vocal, [and] the persistent objector must continually make its position known to ensure that the law does not find tacit consent through a relatively short period of silence".[129]

In addition to the state practice considered above, the widespread ratification of the *ICCPR* and the *ACHR* are indicative of a general consensus against the execution of juveniles. The United States signed the *ICCPR* and the *ACHR* without reservation, only publicising such reservations during internal debate over ratification.[130] In fact, when President Carter initially submitted the *ICCPR* and *ACHR* to Senate for ratification, the State Department testified that juvenile execution never occurred in the U.S..[131] It is doubtful whether a letter from the U.S. President to the Senate concerning the proposed reservation to article 4 (5), *ACHR*, as accepted by the Commission as indicative of protest, satisfies the requirements of persistent objection. Indeed, according to one commentator, "[n]o international body or legal scholar previously had considered that a state's single, internal protest of a norm of international law [would be]

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128 *Ibid.* at 10.

129 D.A. Colson, "How Persistent Must the Persistent Objector Be?" (1986) 61 Wash. L.Rev. 957 at 967.

130 D. Shelton, "Note on *Roach & Pinkerton* v. *United States*" (1987) 8 H.Rts.L.J. 355 at 359.

131 *International Human Rights Treaties: Hearings Before the Committee on Foreign Relations*, 96th Congress, Ist Session 55 (1977). In J. Fitzpatrick, "The Relevance of Customary International Norms to the Death Penalty in the United States" (1995/96) 25 Ga.J. Int'l & Comp. L 165 at 174.

sufficient to exempt that state from the binding force of the norm".[132] As already discussed, the Human Rights Committee would subsequently establish that reservations entered to clauses of the *ICCPR* which constitute norms of customary international law are impermissible.[133] We may construe from this that reservations, however formed and to whatever instrument, are insufficient 'objection' to escape customary obligations. This is consistent with the general view that any right of states to object to the application of a customary norm must occur at the nascent stage of the norm and not subsequently. In the event that such objection has been raised persistently and timeously, however, the state is probably not bound by custom.

Notwithstanding the fact that the U.S. was considered not to have violated customary international law, the Commission found that U.S. practice breached the rights to life and equality guaranteed by articles 1 and 2 of the *American Declaration.* According to the Commission, the diversity of state practice and legislation relating to the juvenile death penalty resulted in a system "subject to the fortuitous element of where the crime took place".[134] Consequently,

> [t]he failure of the federal government to preempt the states as regards this most fundamental right - the right to life - result[ed] in a pattern of legislative arbitrariness throughout the United States which result[ed] in the arbitrary deprivation of life and inequality before the law.[135]

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132 D. Weissbrodt, "Execution of Juvenile Offenders by the United States Violates International Human Rights Law" (1988) 3 Am.U.J.Int'l L. & Policy 339 at 369.

133 *General Comment No. 24 (52), supra* note 82.

134 *Roach & Pinkerton, supra* note 122 at 355.

135 *Ibid.*

Given that similar criticisms may be addressed to the adult death penalty, the breadth of this statement is surprising; in not restricting itself to the right to life of juvenile offenders, the Commission is implicitly denouncing the entire U.S. system of capital punishment, with the possible exception of the federal and military death penalties which are imposed on a national basis. For Roach and Pinkerton, however, the decision of the Commission was small victory; despite Commission appeals to the U.S. Government and the relevant State Governors,[136] the petitioners were executed during the course of the proceedings.[137]

It has been posited that a prohibition on the juvenile death penalty has yet to reach "the necessary level of universality and consistency that international law requires",[138] on the premise that many nations which do not permit juvenile execution do so under a contractual duty based on ratification of international human rights treaties. This theory, however, negates the consensus reached in the drafting of such instruments. Whilst treaties do impose contractual obligations upon ratifying nations, their text tends to reflect, even codify, international norms or practice. Indeed,

> [d]uring the period of negotiations and drafting of ... [the *ICCPR,*] ... neither the United States nor any other country objected to the juvenile capital punishment language as contrary to human rights principles. Rather, the *travaux preparatoires* reveal that the contents of Article 6 were already the consensus

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136 *Ibid.*

137 Roach was executed in South Carolina on 10 January 1986; Pinkerton was executed in Texas on 15 May 1986. The Commission delivered its opinion on 27 March 1987. *Ibid.* at 345 *et seq.*

138 L. Dalton, "*Stanford* v. *Kentucky* and *Wilkins* v. *Missouri*: a Violation of an Emerging Rule of Customary International Law" (1990/91) 32 Wm. & Mary L.Rev. 161 at 191.

of nations.[139]

In ratifying without reservation, states are electing to be bound by the norms contained within an instrument; one cannot determine customary international law by the behaviour of only those states which refuse to ratify, or do so under reservation.

Ultimately, the question of whether the juvenile death penalty violates customary international law may be answered by the Human Rights Committee. As we have seen, the 1994 *General Comment* determined that no reservation could be entered to a clause which is also a norm of customary international law.[140] The illustrative list of norms provided by the Committee included the prohibition of the execution of pregnant women and children.[141] Whilst 'children' was not defined by the HRC, the definition contained in the *U.N. Convention on the Rights of the Child* includes "every human being below the age of 18 years"[142] and the international instruments to date have set the age threshold for execution at 18.[143] Accordingly, the HRC's *General Comment* may be understood as identifying a customary norm prohibiting the execution of all juvenile offenders.

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139 V.P. Nanda, "The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: an Appraisal Under the *International Covenant on Civil and Political Rights*" (1992/93) 42 DePaul L.Rev. 1311 at 1328.

140 *General Comment No. 24 (52), supra* note 82 at 8.

141 *Ibid.*

142 Article 1, *UNCRC.*

143 *Supra* note 118 and accompanying text.

C. Capital Jurisprudence

As we have seen, notwithstanding the abolitionist trend and the exhortation of the *Second Optional Protocol*, the death penalty is not prohibited in international law but is tolerated subject to procedural and substantive restrictions. In addition, an interpretive presumption in favour of abolition has been identified. In this section, we will consider the jurisprudence of international fora confronted with cases which challenge capital punishment and its accessory issues.

i. The Death Row Phenomenon

> From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead'.[144]

In the United Kingdom, death sentences had always been executed expeditiously. Indeed, the Royal Commission on Capital Punishment estimated the delay in 1950 as six weeks in the event of an appeal, and only three weeks if no appeal was lodged.[145] Currently, however, in many jurisdictions the delay between sentencing and execution is measured in decades. In the United States there are inmates who have been under sentence of death for over twenty years[146] and,

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144 *Catholic Commission, supra* note 15 at 335. For discussion of case, see *infra* note 164 and accompanying text.

145 *Report of the Royal Commission on Capital Punishment 1949-53* (London: HMSO, 1953).

146 See *McKenzie* v. *Day*, 57 F.3d 1461 (9th Cir. 1995) (Norris, J., dissenting).

in Japan, Sakae Menda spent 32 years on death row before being acquitted.[147] The result of this prolonged detention, whilst "the brooding horror of hanging ... haunt[s] the prisoner in her condemned cell",[148] is often referred to as the death row phenomenon. It has been litigated before a number of international and constitutional fora as constituting cruel, inhuman and degrading treatment.

Perhaps the most renowned litigants in this area are Pratt and Morgan, Jamaican death row inmates who raised the issue of the death row phenomenon before the Inter-American Commission on Human Rights, the Human Rights Committee and the Judicial Committee of the Privy Council, the highest appellate court for Commonwealth jurisdictions maintaining this avenue of review.[149] They were ultimately successful in gaining a reprieve from the Privy Council in 1993, having been under sentence of death for almost fifteen years.

Pratt and Morgan first petitioned the Inter-American Commission on Human Rights.[150] The Commission, however, considered the petition on due process grounds rather than addressing the death row phenomenon and it was dismissed on the basis that due process had been satisfied. Nonetheless, clemency was recommended for humanitarian reasons and in accordance with the

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147 *When the State Kills, supra* note 114 at 62.

148 *Ediga Anamma* v. *State of Andhra Pradesh*, AIR 1974 SC 799.

149 The larger Commonwealth jurisdictions, including Canada, India, Nigeria and Pakistan, have terminated this right of appeal.

150 *Pratt* v. *Jamaica* (Case No. 9054) Resolution No. 13/84, O.A.S. Doc. OEA/Ser.L/V/II.66 doc. 10 rev. 1 at page 111.

spirit of the *American Convention on Human Rights*, and the Commission exhorted Jamaica to take steps towards abolition of the death penalty.[151] Several years later the Commission revisited the issue, informing the government of Jamaica that a delay of four years by the Jamaican Court of Appeals in issuing its reasons for judgement amounted to cruel, inhuman and degrading treatment in violation of article 5 (2) of the *ACHR*, and requesting that the death sentences be commuted.[152]

Following the Inter-American Commission's initial findings, but prior to their subsequent communication, the case was submitted to the Human Rights Committee.[153] The HRC took over two years to find the case admissible but eventually found in Pratt and Morgan's favour, determining that the Court of Appeal's delay in issuing its reasons constituted a violation of the right to be tried without undue delay and the right to review of conviction and sentence as protected by articles 14 (3)(c) and 14 (5) of the *ICCPR*.[154] In addition, the Committee identified a breach of article 7 resulting from an alleged delay of 20 hours between the issuing of a stay of execution and its communication to the petitioners.[155] However, the death row phenomenon

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151 This is an interesting invocation of the abolitionist trend by the Commission, and illustrates the spirit of abolitionism in which domestic courts could engage.

152 Communication of July 9, 1987 as referred to in the Privy Council decision, *Pratt & Morgan*, *supra* note 1 at 338.

153 *Pratt* v. *Jamaica*, (1990) 11 Hum.Rts. L.J. 150.

154 The HRC and the Inter-American Commission had both mistakenly believed that the delay prevented Pratt from appealing to the Privy Council. This misunderstanding was subsequently clarified in the judgement of the Privy Council. *Pratt & Morgan*, *supra* note 1 at 340.

155 The Privy Council noted that this allegation was subsequently denied by the Jamaican government. *Ibid.* at 342.

was dismissed on the basis that prolonged judicial proceedings did not generally constitute cruel, inhuman and degrading treatment and, whilst the Committee found that an individual assessment was appropriate in capital cases, it determined that the petitioners had failed to substantiate the claim that their detention under sentence of death constituted a violation of article 7.

Pratt and Morgan subsequently appealed to the Judicial Committee of the Privy Council.[156] The Privy Council held that detention for fourteen years under sentence of death amounted to inhuman punishment in violation of section 17 (1) of the Jamaican Constitution, and further indicated that all death row inmates who had been under sentence of death for a period of five years or more should have their sentences commuted to life imprisonment.

Section 17 of the Jamaican Constitution provides:

> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day [i.e. before independence].

As hanging had been lawful for convicted murderers prior to independence, their Lordships determined that it could not be considered to violate section 17 (1). However, the full bench of the Judicial Committee overruled an earlier decision of the Privy Council in *Riley* v. *Attorney*

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156 *Ibid.* at 338.

General of Jamaica[157] in which section 17 (2) was interpreted as authorising execution regardless of delay. In *Pratt*, section 17 (2) was construed as "authorising descriptions of punishment for which the court may pass sentence and ... [not as preventing an] ... appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17 (1)".[158] As

> [b]efore independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay ... their Lordships [were] unwilling to adopt a construction of the Constitution that result[ed] in depriving Jamaican citizens of that protection.[159]

Their Lordships concluded, however, that the cause of the delay must be investigated for

> [i]f delay is due entirely to the fault of the accused, such as escape from custody or frivolous and time-wasting resort to legal procedures which amount to an abuse of process, the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him.[160]

Equating litigation with escape seems somewhat harsh, especially as no clear definition is given of 'frivolous', other than noting that appeal to the Privy Council and international human rights bodies would not amount to frivolous procedure.[161] However, the Council accepted that "[i]t is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure" and faulted the judicial system which would permit such

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157 *Riley* v. *Attorney-General for Jamaica*, [1983] 1 A.C. 719.

158 *Pratt & Morgan, supra* note 1 at 343.

159 *Ibid.*

160 *Ibid.*

161 *Ibid.* at 345.

appeals to prolong the process for years.[162] Their Lordships held that "if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage".[163]

The death row phenomenon was also litigated in the case of *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General et al.*[164] The Supreme Court of Zimbabwe held that delays of 52 and 72 months violated the constitutional prohibition against torture or inhuman or degrading punishment or treatment as contained in section 15 (1) of the Zimbabwean Constitution.[165] The Supreme Court construed 15 (1) as an evolutionary provision, whose application is reliant upon

> the exercise of a value judgement ... that must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part), as evidenced in the decisions of other courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.[166]

In the course of this thesis, it will be argued that such a global outlook, in which international law and norms and extranational jurisprudence are contemplated in addition to domestic opinion, corresponds with progressive decision-making in capital cases.

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162 *Ibid.*

163 *Ibid.* There is no small irony in the fact that this abolitionist interpretation could result in a more efficient, and legal, execution of death sentences.

164 *Supra* note 15.

165 "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment".

166 *Catholic Commission, supra* note 15 at 323.

The Human Rights Committee would revisit the issue of the death row phenomenon on a number of occasions, including the extradition cases referred to below, but it remained resistant to the contention that lengthy detention on death row *per se* constituted a breach of article 7. In *Barrett & Sutcliffe* v. *Jamaica*, the Committee upheld *Pratt*, finding that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension".[167] The petitioners had submitted that "the execution of a sentence of death after a long period of time is widely recognised as cruel, inhuman and degrading, on account of the prolonged and extreme anguish caused to the condemned man by the delay".[168] The Committee adopted the view that inmates pursuing avenues of appeal could not then argue that their detention violated their human rights, determining that "even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies".[169] Ms. Chanet authored an individual opinion in the matter, disagreeing with the Committee on the essence of the cause of the delay. Citing the decision of the European Court of Human Rights in *Soering*,[170] she concluded "[w]ithout being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly".[171] It appears that Ms. Chanet, at least, sees the irony

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167 (Nos. 270/1988 & 271/1988) U.N. Doc. A/47/40 at 254, para 8.4.

168 *Ibid.* at para 3.5.

169 *Ibid.* at para 8.4.

170 See *infra* note 174 and accompanying text.

171 *Barrett & Sutcliffe*, *supra* note 167 at Appendix.

in the "hurry it up" aspect of the death row phenomenon argument.

In *Simms* v. *Jamaica*, a petition premised upon the death row phenomenon was declared inadmissible. The Committee referred to the decision of the Privy Council in *Pratt* only insofar as to note that it did not accord with the HRC's own jurisprudence on the death row phenomenon.[172] However, in recent years the Committee has become more receptive to the claim that the death row phenomenon violates article 7. In *Francis* v. *Jamaica*, the HRC found that a Court of Appeals delay of 13 years in issuing written judgement was attributable to the state.[173] Unbending slightly from its former stance, the Committee found that, whilst prolonged incarceration on death row would affect inmates to varying degrees, it was evident that the petitioner's mental health had seriously deteriorated. In particular, it took note of death row conditions and the abusive treatment suffered by the petitioner at the hands of prison officials. Although the HRC was careful to demonstrate specific circumstances which contributed to the violation, in abandoning its resolute stance against claims of the death row phenomenon, *Francis* represents an important evolution in HRC jurisprudence. It will be recalled that, in *Pratt*, the Committee found that an individual assessment was required in capital cases to determine whether article 7 had been breached. In assessing death row conditions, presumably a common factor in the majority of petitions raising the death row phenomenon, the HRC's findings in *Francis* are of great significance.

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172 *Simms* v. *Jamaica*, (No. 540/1991) U.N. Doc. CCPR/C/43/D/541/1993.

173 U.N. Doc. CCPR/C/54/D/606/1994.

ii. Capital Extradition

The disposal in *Soering* has been described as "the most remarkable judgement of the European Court of Human Rights"[174] as, in a virtually unprecedented move, the Court unanimously held that an extraditing State could be liable for violations of the *European Convention* subsequently inflicted by the requesting nation. In accordance with the *Extradition Treaty of 1982 between the United States and the United Kingdom*, the United States had requested the extradition of Soering, a West German national indicted on two counts of capital murder in Virginia, who had been arrested on charges of cheque fraud in the U.K.. Some months later, the government of the Federal Republic of Germany also requested his extradition. In terms of article 4 of the *Extradition Treaty*, the British government had requested assurances from the U.S. that, in the event of Soering's extradition and conviction, the death penalty would not be imposed or, if imposed, would not be executed.[175] The local prosecutor, the Commonwealth's Attorney for Bedford County, Virginia, undertook to make representations to the judge during the sentencing proceeding expressing the wishes of the U.K. that the death penalty not be imposed, an assurance which was underwritten by the U.S. government.

In July 1988, Soering lodged a petition with the European Commission of Human Rights

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174 R.B. Lillich, "The *Soering* Case" (1991) Am.J.Int'l L. 128 at 149.

175 Article 4 provides

> [i]f the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

claiming that, in view of the serious risk that he would be sentenced to death if extradited, he faced the death row phenomenon which amounted to inhuman and degrading treatment or punishment in violation of article 3, *ECHR*.[176] Whilst the Commission accepted that an extraditing nation could be liable in such instances, it did not find that prolonged detention on death row violated article 3. However, the complaint was declared admissible on other grounds and the case progressed to the Court.

The Court determined that "in so far as a measure of extradition has consequences adversely affecting the enjoyment of a *Convention* right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State".[177] The assurances of the U.S. administration were dismissed as inadequate on the basis that

> [i]n the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action. If the national authority with responsibility for prosecuting the offence takes such a firm stand, it is hardly open the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing 'death row phenomenon'.[178]

The Court found that whilst article 3 could not be interpreted as prohibiting capital punishment, it could be invoked with regard to circumstances relating to the punishment. It cited "[t]he manner in which [the death penalty] is imposed or executed, the personal circumstances of the

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176 Application 14038/88. See *Soering, supra* note 13 at 463.

177 *Ibid.* at 466.

178 *Ibid.* at 471.

condemned person, [] a disproportionality to the gravity of the crime committed ... [and] ... the conditions of detention awaiting execution" as areas containing potential article 3 violations.[179] In Soering's case, his youth and mental health issues,[180] the likelihood of prolonged detention on death row in poor conditions and the fact that West Germany, a State party to the ECHR in which Soering could be convicted but would face neither the death penalty nor the affiliated Convention violations, had also requested extradition combined to convince the Court that his extradition posited a "real risk of treatment going beyond the threshold set by [a]rticle 3".[181]

Soering represents a creative solution to textual toleration of the death penalty. The European Court, unable or unwilling to find the death penalty prohibited *ex facie*, nonetheless protected Soering from the death penalty through invocation of associated issues. Pursuant to the Court's decision, the U.K. government sought and obtained assurances that Soering would not be tried on capital charges.[182] Soering was extradited to Virginia, convicted on two counts of first degree murder and sentenced to life imprisonment.[183] It should be noted that other nations have been less willing to respect international fora in death penalty matters; Canada has extradited capital defendants to the U.S. regardless of complaints lodged with the Human Rights

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179 *Ibid.* at 474.

180 Soering was 18 at the commission of the capital offence and had introduced evidence that he was suffering from a psychiatric syndrome known as "folie à deux".

181 *Ibid.* at 478.

182 "U.K.: Britain Sets Conditions to Extradite West German Suspect to U.S." Reuters (1 August 1989).

183 R.B. Lillich, "The *Soering* Case" (1991) 85 Am.J.Int'l L. 128 at 141

Committee[184] and, in 1986, the U.S. executed two juvenile offenders whose case was pending before the Inter-American Commission on Human Rights.[185]

The U.S. response to *Soering* was wounded; New York Senator Alfonse D'Amato derided the judgement as "contrived and indefensible".[186] However, it was subsequently cited by a federal court as "constitut[ing] an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration or lack of due process at trial in the requesting country".[187] The Court concluded "[i]t reflects a persuasive though non-binding international standard".[188] As we will see in chapter 3, the U.S. courts have been consistently resistant to extranational law; that *Soering* was even judicially acknowledged is remarkable.

The Human Rights Committee has considered three petitions relating to capital extradition from Canada to the United States. It has generally responded with deference, paying consideration to *Soering* but distinguishing the judgement from the factual circumstances before it. In accordance with the jurisprudence on the death row phenomenon considered above, the Committee has been reluctant to invoke the interpretive presumption in favour of abolition.

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184 *Kindler* v. *Canada*, (1993) 14 Hum.Rts. L.J. 307; *Ng* v. *Canada*, *supra* note 10.

185 *Roach & Pinkerton*, *supra* note 122.

186 "E.C: a Human Rights Court Bars American 'Death Row' Justice" Reuters (7 August 1989)

187 *In re Ahmad*, 726 F.Supp. 389 at 410 (E.D. N.Y. 1989).

188 *Ibid.*

In 1993, the HRC held that capital extradition to the U.S. did not violate the provisions of the *ICCPR*.[189] Kindler, a U.S. citizen, had been convicted in Pennsylvania on capital charges. The jury recommended imposition of the death penalty, but Kindler escaped to Canada prior to sentencing. The U.S. subsequently requested Kindler's extradition in terms of the *Extradition Treaty Between Canada and the United States*, 1976. Whilst Canada abolished the death penalty for all ordinary offences in 1976, capital extradition has not been struck down. However, article 6 of the *Extradition Treaty* provides that

> [w]hen the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.

In Kindler's case, the Minister of Justice decided such assurances should not be sought and the extradition was ordered.[190] Following unsuccessful domestic appeals, Kindler complained to the Human Rights Committee, alleging that Canada had violated the *ICCPR* in extraditing him to face the death penalty and the death row phenomenon, both of which, he submitted, constituted cruel, inhuman and degrading treatment or punishment.

Whilst the HRC found that extradition in circumstances where there is a "real risk" that the

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189 *Kindler, supra* note 189.

190 *Ibid.* at 308. Such assurances have been requested in the extradition of a Canadian citizen to face capital charges. In 1992, the Minister of Justice secured a guarantee from the state of Florida that the death penalty would not be sought in the murder trial of Lee O'Bomsawin, an Abenaki Indian and Canadian citizen. J.F. Burns, "Canada Wins U.S. Extradition Deal" New York Times (14 February 1992) A3.

extraditee's rights under the *ICCPR* will be violated may breach the extraditing State's obligations under the *Covenant*,[191] it concluded that Kindler did not face any such risk. Albeit recognising that article 6, *ICCPR*, promotes the desirability of abolition, and "the evolution of international law and the trend towards abolition", the HRC noted that the death penalty was not prohibited in international law and thus could not be considered to violate the provisions of article 6 or 7.[192]

The HRC recalled its jurisprudence on the death row phenomenon, finding that prolonged detention under sentence of death did not, *per se*, constitute a violation of article 7. Rather, attention would be paid to the personal circumstances of the individual, the conditions of detention and the method of execution. According to the judgement in *Kindler*, "[i]n this context the Committee has had careful regard to the [*Soering*] judgment".[193] The HRC distinguished *Kindler* from *Soering*, however, on its facts. Kindler had not presented the Committee with evidence of the specific circumstances of death row conditions in Pennsylvania or the proposed method of execution. Accordingly, no violation of article 7 was found.

The HRC would subsequently cite *Kindler* as establishing that lethal injection did not violate

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191 *Ibid.* at 313.

192 *Ibid.* It did, however, find that "it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty ... a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision". *Ibid.* at 314.

193 *Ibid.*

the provisions of article 7;[194] as we have seen, this is not necessarily correct. In *Kindler*, the Committee did not address the matter of lethal injection noting only that no submission had been made as to the method of execution. In fact, it is unclear which method of execution Kindler faced; the Supreme Court of Canada, at least, was under the impression that he would be electrocuted.[195]

The method of execution was litigated, however, in the case of *Ng* v. *Canada*.[196] Ng, a British citizen from Hong Kong, was in detention in Alberta when the U.S. requested his extradition to stand trial in California on multiple charges of capital murder. The Minister of Justice decided not to seek assurances that the death penalty would not be imposed and Ng's domestic challenge to this decision was unsuccessful. Like Kindler, Ng was extradited the day judgement was handed down from the Supreme Court of Canada.[197] He then petitioned the Human Rights Committee challenging Canada's actions.

In 1992, in accordance with the United Nations Economic and Social Council [ECOSOC] safeguards,[198] the HRC had noted that the death penalty "must be carried out in such a way as

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194 *Cox* v. *Canada*, (1994) 15 H.Rts.L.J. 410 at 417.

195 *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

196 *Ng, supra* note 10.

197 *Ibid.* Canada was thus precluded from giving effect to the HRC request to delay extradition, a request the government's pre-emptive move suggests was anticipated.

198 *Infra* note 236 and accompanying text.

to cause the least possible physical pain and suffering".[199] Canada submitted in *Ng* that "[i]t may be that certain forms of execution are contrary to article 7", however it claimed that asphyxiation by lethal gas, the sole method of execution in California, was not contrary to the provisions of the *ICCPR* or international law.[200] The Committee disagreed, finding that execution by lethal gas did not meet the requirements of its *General Comment* of 1992. Accordingly, it identified a violation of article 7 and requested that Canada make representations in an effort to prevent the execution.[201] Notwithstanding the judgement, Ng remains in custody in California and will be tried on capital charges in the next year.[202]

Ng did not signal the rise of an overwhelming abolitionist sentiment from the HRC. In 1994, it upheld the use of lethal injection as a form of execution in *Cox* v. *Canada*.[203] Cox, a black American male in custody in Quebec, had been charged with two counts of capital murder in Pennsylvania. The U.S. requested his extradition in accordance with the *Extradition Treaty*, 1976 and, as in *Kindler* and *Ng*, the Minister of Justice decided not to exercise the discretionary powers contained in article 6 of the *Treaty*. Accordingly, Cox was ordered to be extradited to

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199 *General Comment 20 (44)*, U.N. Doc CCPR/C/21/Rev/1/Add.3.

200 *Ng, supra* note 10 at 152 *et seq.*

201 *Ibid.* at 157.

202 S. Graham, "High Court Order Likely to Reinstate Ng's Defenders" The Recorder (19 September 1996) 1. Ng no longer faces the gas chamber, however, as execution by lethal gas was held unconstitutional in *Fierro, Ruiz & Harris, supra* note 9. No reference was made by the court to the findings of the Human Rights Committee. In chapter 3 it will become apparent that such transjudicial discourse is not, in general, to be expected from the U.S.' courts.

203 *Cox, supra* note 194.

Pennsylvania where, if convicted upon capital charges, he faced execution by lethal injection.[204]

Cox alleged that his extradition to face the "systemic racism in the application of the death penalty in the United States" and exposure to the death row phenomenon violated Canada's obligations under the *ICCPR*. His petition that extradition would expose him to racial discrimination, in violation of article 6, and the death row phenomenon, in violation of article 7, was declared admissible by the HRC in November 1993.[205] In considering the merits of the case, however, the HRC concluded that it could not find, "on the basis of the submissions before it, that Mr. Cox would be subject to a violation of his rights by virtue of his colour".[206] In chapter 3, the issue of discrimination in the U.S. capital justice system will be considered in more depth. At this stage, suffice it to say that there exists an extensive body of evidence relating to racial discrimination. The reported decision does not establish whether the HRC was presented with evidence of discrimination beyond Cox' bald assertion that he would face racism. If the Committee *was* presented with such evidence, their deferential decision making, which accords with their jurisprudence in *Kindler*, is discordant with the interpretive presumption against the death penalty which has arisen from article 6, *ICCPR*, and the *Second Optional Protocol*, as well as the international prohibition on racial discrimination.[207]

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204 *Ibid.* at 412.

205 *Ibid.* at 414.

206 *Ibid.* at 416.

207 The obligation to protect individuals from racial discrimination was recognised as an obligation *erga omnes* in *Barcelona Traction, supra* note 28. In addition, it is prohibited by article 2, *ICCPR*, and by the *International Covenant on the Elimination of All Forms of Racial Discrimination*, 1966.

In accordance with its previous jurisprudence, the HRC found that as prolonged detention on death row facilitated inmate appeals the death row phenomenon could not be considered a violation of article 7. In addition, it cited *Kindler* as authority that lethal injection constituted an acceptable method of execution.[208]

It is the inevitable conclusion of this section that the Human Rights Committee has been disinclined to invoke the presumption in favour of abolition. Faced with challenges to the death penalty premised upon the death row phenomenon, the method of execution, capital extradition from an abolitionist state and systemic racial discrimination, it had numerous occasions upon which to use that presumption in chipping away at the death penalty. The decisions in *Ng* and *Francis* notwithstanding, the HRC has wasted these invaluable opportunities. The normative abolitionist framework outlined earlier in this chapter has not been borne out by international jurisprudence; interpreting international law in such a way as to protect individuals from the death penalty wherever possible requires a stringency which the Human Rights Committee - unlike the European Court of Human Rights, the Judicial Committee of the Privy Council and the Supreme Court of Zimbabwe - has too often failed to demonstrate. It is to be hoped that *Cox* is an anomaly, and that *Francis* and *Ng* mark an evolution in the HRC's approach to capital cases, one in which the presumption will inspire strict scrutiny of the many accessory challenges raised by the death penalty.

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208 *Cox*, *supra* note 194 at 417.

D. Possibilities for Abolition

As long as the 'hard' law of nations tolerates the death penalty despite increasing abolitionist tendencies and the HRC issues deferential judgements which fail to take account of the interpretive presumption, one may question the assistance lent by international law to the abolitionist movement. Notwithstanding textual and jurisprudential accommodation, however, the international community has clearly established the desirability of abolition. In April 1997, the Commission on Human Rights adopted a resolution calling on States party to the *ICCPR* to contemplate accession to the *Second Optional Protocol* and urging retentionist nations to comply with international standards on the imposition of the death penalty, progressively restrict capital offences and consider a moratorium on executions with a view to future abolition.[209]

Domestically, at least for jurisdictions in which respect is accorded to extranational law and opinion,[210] it is likely that one could successfully argue that the trend towards abolition is worthy of compliance. Notwithstanding the unhappy precedent of the Human Rights Committee, the abolitionist trend is evident, and domestic courts may incorporate it into more progressive judgements than those of the HRC. It is disappointing that the HRC has not provided domestic courts with more abolitionist jurisprudence. However, its decisions do not bind other courts to a cramped interpretation. There is no *stare decisis* requiring domestic

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209 U.N. Doc. E/CN.4/1997/L.20, adopted by a roll call vote: 27 votes in favour; 11 opposing; 14 abstentions.

210 Note that Chapter 3 assesses a jurisdiction in which extranational influence has been consistently rejected.

courts to correspondingly restrict their interpretation of international obligations and expectations.

If we wish to consider the role of international law and trends in domestic litigation, we have addressed *how* domestic courts may go beyond the jurisprudence of the Committee in capital cases. However, we must also consider *why* they should take that step. International human rights law has not developed in a vacuum; it is the product of evolving perceptions. Courts wishing to craft jurisprudence which is progressive and which imports international normativity will be frustrated by the reticence of the HRC. They are to be encouraged to invoke the interpretive presumption and the textual guarantees of international law above and beyond the Committee's decision-making. To this end, the HRC could be deemed to have established a minimum threshold, a foundation upon which domestic courts may erect their own, evolutionary, interpretation.

The seemingly inherent weaknesses of the death penalty provide domestic courts with a solid basis for abolition which may be happily married with the international trend. In addition, in the event that an abolitionist decision is handed down, there is compelling evidence to suggest that international law resists future re-visitation of the issue.

i. Abolition of the Death Penalty and Adoption of the *Second Optional Protocol*

The initial draft of the *Second Optional Protocol* was submitted by Austria, Costa Rica, the

Dominican Republic, the Federal Republic of Germany, Italy, Portugal and Sweden.[211] Article 1 (2), which is substantively identical to the provisions of article 4 (3) of the *American Convention on Human Rights*, prohibited the re-introduction of the death penalty in abolitionist States.[212] The final draft of the *Second Optional Protocol*, however, contained no such prohibition. This does not signify that States are free to revert to capital punishment. Bossuyt, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the protection of Minorities who prepared the final draft of the protocol in his report to the Commission on Human Rights, considered the provision on re-introduction unnecessary in the *Second Optional Protocol*, concluding

> [s]uch a provision is useful in a convention as the *American Convention on Human Rights*, where there is no obligation to abolish the death penalty, but there is no need for such a provision in an optional protocol which explicitly abolishes capital punishment in all States which are parties to it. It is obvious that a State party to the second optional protocol could not re-establish the death penalty without manifestly violating that protocol. Indeed, a re-establishment of capital punishment would be contrary to the object and purpose of the second optional protocol.[213]

Clearly the *Second Optional Protocol* is not binding upon States not party to the instrument. From the beginning, Bossuyt warned that "[t]he Sub-Commission [on Prevention of Discrimination and Protection of Minorities] must be aware of the possibilities and limits of such a protocol, which would be binding only upon the States parties to it, and could not be an

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211 U.N. Doc. A/C.3/35/L.75.

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

213 U.N. Doc. E/CN.4/Sub.2/1987/20 para 162.

obligation of international law for other States".[214] However, it is suggested that States party to the *Second Optional Protocol* are not alone in being constrained from re-introducing the death penalty following a period of abolition. A number of members of the Human Rights Committee have interpreted the provisions of the *ICCPR* as rendering such a prohibition. In *Kindler* v. *Canada*, Mr Wennergren's dissenting opinion concluded that, whilst article 6 (2), *ICCPR* provides a "dispensation" for retentionist nations to continue to impose the death penalty, it could not be invoked as justification for reintroducing the punishment in an abolitionist State.[215] He found that "the 'dispensation' character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution of death sentences among States parties to the *Covenant*".[216] Ms Chanet, also in dissent, agreed, determining "[a]rticle 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and *thus rules out the application of the text to countries which have abolished the death penalty*".[217]

According to Mr Pocar's dissent in *Kindler*

> the wording of paragraphs 2 and 6 clearly indicate that article 6 tolerates - within certain limits and in view of future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its

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214 U.N. Doc. E/CN.1/Sub.2/1984/SR.14 at para 29.

215 *Kindler*, *supra* note 184 at 316.

216 *Ibid.*

217 *Ibid.* at 318. Original emphasis. See also Ms Chanet's dissent in *Ng*, *supra* note 10 at 162 and in *Cox*, *supra* note 194 at 420.

> abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the *Covenant*, not to reintroduce it.[218]

An "international legal ratchet effect", whereby once States have committed themselves to a certain human rights measure they may not retreat from their commitment, has been identified in the context of social rights.[219] Under article 2 (1) of the *International Covenant on Economic, Social and Cultural Rights*, States are required to take steps towards "achieving progressively the full realization of the rights recognised in the ... *Covenant*". Once such steps have been taken, the threshold of rights protection is heightened, and "lowering the fulfilment level of a right is presumptively prohibited".[220] Abolitionism may be perceived as such a progressive duty, binding States which have abolished capital punishment and preventing either re-introduction or, as in the *Kindler* dissents discussed, extradition to face the death penalty.

In addition, States subject to the *American Convention on Human Rights* are prohibited from extending or re-introducing the death penalty by the provisions of articles 4 (2) and (3). The Inter-American Court on Human Rights had occasion to consider the issue in 1983, when the Inter-American Commission requested an advisory opinion on the scope of article 4. With reference to the expansion or re-introduction of capital punishment, the Court determined that

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218 *Kindler, supra* note 184 at 318. See also Mr Pocar's dissent in *Ng, supra* note 10 at 157 and in *Cox, supra* note 194 at 420.

219 C.M. Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) 6 Const'l Forum 79 at 82.

220 C. Scott & P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141(1) U.Penn L.Rev. 1 at 80.

4 (2) and (3) created "a cut off as far as the penalty is concerned ... by means of a progressive and irreversible process applicable to counties which have not decided to abolish the death penalty altogether as well as to those countries which have done so".[221] In particular, "[t]he re-establishment of the death penalty for any type of offence whatsoever is absolutely prohibited, with the result that a decision by a State party to the Convention to abolish the death penalty, whenever made, becomes *ipso jure*, a final and irrevocable decision".[222]

The dissents of the Human Rights Committee and an advisory opinion of the Inter-American Court based on textual support for the prohibition on re-introduction of the death penalty, albeit important, do not provide sufficient basis for a claim that the expansion or re-introduction of capital punishment violates customary international law. However they are indicators of a growing consensus that abolition is not to becontemplated as a short or medium term measure. Whilst the United States did not respond to the most recent survey on capital punishment carried out by the Secretary-General of the United Nations, the report critically referred to the fact that capital punishment had been re-introduced in Kansas and New York, and that the federal death penalty had been extended.[223] Clearly, the normative trends embodied in the *Second Optional Protocol*, and the interpretive presumption in favour of abolition arising therefrom, are influencing international opinion and the interpretation of the *Covenant*.

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221 *Restrictions to the Death Penalty Advisory Opinion*, OC-3/83 at para 57.

222 *Ibid.*

223 U.N. Doc. E/1995/78 (08 June 1995).

Correspondingly, there is no provision for withdrawal from the *Second Optional Protocol*; once signed, the treaty is binding upon parties and establishes a constitutional-type restriction upon future governments. In terms of article 56 of the *Vienna Convention on the Law of Treaties*, where a treaty does not contain provisions relating to termination, denunciation or withdrawal, denunciation and withdrawal are not permissible unless "it is established that the parties intended to admit the possibility of denunciation or withdrawal; or [] a right of denunciation or withdrawal may be implied by the nature of the treaty". In Bossuyt's report on the *Second Optional Protocol*, as in the instrument itself, no discussion is entered into upon the possibility of withdrawal. The assumption is clear that, once party to the *Second Optional Protocol*, States must abide by the abolitionist obligations contained therein. Indeed, States are not even permitted to introduce subsequent reservations to the protocol. In terms of article 2 (1), reservations allowing for the death penalty for serious military crimes committed during wartime - the sole basis upon which reservations to the protocol are permitted - must be entered at the time of ratification or accession.[224] We may conclude that in States which have abolished the death penalty - and, in particular, those which are party to the *Second Optional Protocol* - re-introduction of capital punishment is illegal.

ii. 'Back Door' Challenges

It ought, by now, to be apparent to the reader that international law tolerates the death penalty subject to procedural restrictions. Accordingly, it may be that the path to abolition lies in what

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224 "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime".

we may refer to as a 'back door' challenge; one which attacks the death penalty not *ex facie*, but by virtue of its manner of application. In theory, the most obvious premise upon which to challenge the death penalty lies in its annihilation of the right to life. In practice, however, the right to life is seldom unqualified and the death penalty as a violation of the right to life has never been successfully argued. Nonetheless, notwithstanding the difficulty of raising substantive challenges, the death penalty is vulnerable on many procedural issues and it may be that 'back-door' arguments present a creative solution to abolitionist efforts. In addition, despite the record of the Human Rights Committee to date, the presumption in favour of abolition lends itself to such challenges. Domestically, this has proven successful in the United States where, in 1976, the Supreme Court struck down all existing capital punishment statutes on the basis of their arbitrary and capricious effect.[225]

In what has become classic phraseology in human rights instruments, article 5 of the *Universal Declaration of Human Rights* provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7, *ICCPR*,[226] article 3, *ECHR*,[227] and article 5 (2), *ACHR*,[228] contain substantially similar guarantees. In 1994, the Human Rights Committee determined that the prohibition constitutes a customary norm of international law

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225 See *Furman* v. *Georgia*, *infra* note 265 and accompanying text.

226 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

227 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

228 "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human being".

and is thus exempt from reservation.[229]

Although the death penalty *per se* has not been considered cruel, inhuman or degrading by an international judicial body, there has been considerable litigation over death row conditions and the method of execution adopted. As we have seen,[230] the European Court of Human Rights ruled in 1989 that the extradition of a capital defendant to the U.S. state of Virginia where he faced potential exposure to the death row phenomenon amounted to a violation of article 3, *ECHR*,[231] and in 1987, the Inter-American Commission on Human Rights informed the government of Jamaica that a delay of four years by the Jamaican Court of Appeals in issuing its reasons for judgement in a capital appeal amounted to a violation of article 5(2), *ACHR*..[232] In 1993, the Human Rights Committee found that execution by lethal gas asphyxiation amounted to cruel, inhuman and degrading punishment in violation of article 7, *ICCPR*.[233]

The provision of article 6 (2), *ICCPR*, that sentence of death be imposed "not contrary to the provisions of this present Covenant" implicitly mandates that capital trials be conducted in accordance with the other requirements of the *ICCPR*. Of particular note is article 14, which establishes the right to a fair trial. In *Pratt & Morgan* v. *Jamaica* the HRC identified a breach

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229 *General Comment No. 24 (52), supra* note 82.

230 *Supra* note 61 and accompanying text.

231 *Soering, supra* note 13.

232 Communication of July 9, 1987 as referred to in the Privy Council decision, *Pratt & Morgan, supra* note 1 at 338.

233 *Ng, supra* note 10.

of article 14, *ICCPR*, and, correspondingly, article 6.[234] In *Reid* v. *Jamaica*, the Committee found that the imposition of a death sentence during proceedings which did not meet the requirements of article 14 resulted in a concomital violation of article 6.[235]

In tacit acknowledgment of the unacceptable circumstances surrounding many capital trials and executions, in 1984 ECOSOC adopted a series of safeguards designed to protect the rights of capital defendants.[236] Whilst substantially reiterating the procedural requirements of the *ICCPR*, safeguard 5 added a right "of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings" and safeguard 9 provided that capital punishment should be imposed "so as to inflict the minimum possible suffering". Safeguard 3 exempted juvenile offenders, pregnant women and new mothers, and insane persons from capital sentencing. Largely in response to the U.S.' differentiation between insane persons and those suffering from mental retardation,[237] a subsequent resolution was adopted by ECOSOC extending the protection given to insane persons to those "suffering from mental retardation or extremely limited competence".[238] The requirement of adequate assistance of counsel was also extended to demand a heightened

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234 210/1986 and 225/1987, U.N. Doc A/44/40.

235 250/ 1987, U.N. Doc A/45/40, Vol II, 85.

236 *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* E.S.C. Res. 1984/50, adopted without a vote. The safeguards had been drafted by the U.N. Committee on Crime Prevention and Control in order to assist in the determination of the extent of 'legitimate' capital punishment under article 6, *ICCPR*.

237 *Penry* v. *Lynaugh*, *infra* note 308. See generally Schabas, *supra* note 21 at 159.

238 E.S.C. Res. 1989/64, article 1 (d).

standard, "above and beyond the protection afforded in non-capital cases".[239]

In the course of this thesis, it will become apparent that the death penalty is often imposed in discriminatory circumstances. Race, gender, and socio-economic status can play as large a role in the capital punishment system as the crime itself. Arbitrariness in capital sentencing is, of course, prohibited; article 6, *ICCPR*, provides that "[n]o one shall be arbitrarily deprived of his life". The international prohibition on discrimination contained in the *International Covenant on The Elimination of All Forms of Racial Discrimination*, 1966 and the *Convention on the Elimination of all Forms of Discrimination Against Women*, 1979 may be invoked to signal that discriminatory sentencing fails to satisfy the requirements of the *ICCPR*.

To date, however, international fora have tended to evade the issue of discriminatory practice in capital punishment. In *Cox* v. *Canada*, the Human Rights Committee found that insufficient evidence had been presented on the issue of racial discrimination within the U.S. capital justice system.[240] The Inter-American Commission, whilst identifying geographic arbitrariness in *Roach & Pinkerton* - a finding which may be applied to any federal criminal justice system - declared an application alleging racial discrimination inadmissible in *Celestine* v. *United States*.[241] Displaying undue deference to the U.S. Supreme Court's findings in *McCleskey* v.

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239 *Ibid.* article 1 (a).

240 *Cox, supra* note 194 and accompanying text.

241 Case No. 10,031, Resolution No. 23/89 reported in O.A.S. Doc. A/Ser.L/V/II.76 doc. 44; O.A.S. Doc. A/Ser.L/V/II.77 rev. 1 doc. 7.

Kemp,[242] the Commission determined that statistical evidence on racial discrimination was insufficient to establish a *prima facie* case which would transfer the burden of proof to the government. In *McCleskey*, however, the U.S. Supreme Court recognised the extent of racial discrimination within the criminal justice system but found that McCleskey had not established discrimination in *his* case.[243] Thus, the Commission actually produced a more conservative decision than the U.S. Court. Such judgements are disappointing, not only for individuals raising discrimination claims before international courts, but for their implications upon domestic jurisprudence. Courts which choose to engage in transjudicial discourse are faced with strong norms of international law against discrimination which have been weakly interpreted. Parties wishing to invoke the protection of international law will be better served by principled reasoning based on international text; it is to be hoped that progressive courts will interpret international instruments for themselves rather than blindly following international precedent.

Conclusion

It is evident that international law provides both procedural and substantive opportunities to challenge the death penalty. In this chapter, we have identified a gradual trend towards abolition of capital punishment in international law which, whilst yet to pronounce the death penalty illegal *ex facie*, has imposed increasingly strict conditions on its use. When one considers its widespread application at the genesis of the human rights movement, this has been

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242 *Infra* note 344 and accompanying text.

243 *Ibid.*

a phenomenal metamorphosis.

Perhaps the most palpable evidence of the international trend towards abolition has been the omission of the death penalty from recent war-crimes tribunals; capital punishment is not provided for in the statutes of either the Yugoslavia Tribunal[244] or the Rwanda Tribunal.[245] The Government of Rwanda actively campaigned for the inclusion of the death penalty, and cited its exclusion as a determining factor in its vote against the draft resolution on the establishment of the tribunal,[246] but the Security Council was not prepared to compromise on this "principled issue".[247] In addition, the draft statute proposing the creation of a permanent International Criminal Court does not make provision for the imposition of capital punishment.[248]

In subsequent chapters we will assess the influence of the international law and norms discussed above on the domestic capital jurisprudence of the United States and the Republic of South Africa. We will identify the inter-twining of parochial constitutional reasoning with retention of capital punishment, and globally-oriented constitutional reasoning with abolitionism.

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244 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, Security Council Resolution 827 (1993) adopted by the Security Council at its 3217th meeting on 25 May 1993.

245 *Statute of the International Criminal Tribunal for Rwanda*, Security Council Resolution 955 (1994) adopted by the Security Council at its 3453rd meeting on 8 November 1994.

246 See Minutes of the 3453rd Meeting of the Security Council (8 November 1994).

247 D. Shraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 E.J.I.L. 501 at 511.

248 *Report of the International Law Commission on the Work of its 45th Session. Annexure: Report of the Working Group on a Draft Statute for an International Criminal Court.* U.N. Doc. A/48/10 (Supplement No. 10) 1993.

Chapter 3 United States of America

Whilst the United States has noted "the general trend ... for the gradual abolition of the death penalty",[249] this can provide little comfort to the 3000 plus condemned inmates currently facing the executioner.[250] Although far from leading the world in executions,[251] the U.S. is the sole Western power retaining the death penalty for ordinary crimes[252] and one of a tiny minority of nations which continue to execute juvenile offenders.[253]

In this chapter, I intend to evaluate capital jurisprudence, principally from the U.S. Supreme Court. I will identify the resistance of the Court to the consideration of extranational law and will demonstrate that, rather than adopting a cosmopolitan approach, U.S. courts have allowed domestic practice to guide their constitutional interpretation. I will indicate areas in which the U.S. fails to conform to international requirements, procedural and substantive, with specific

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249 Organization of American States, *Observation of the Governments of the Member States Regarding the Draft Inter-American Convention on Prevention of Human Rights*, O.A.S. Doc. OEA/ser. K/XVI/1.1 doc. 10 (Eng.) (1969) at 150.

250 Electrocution is provided for in 10 states; the firing squad in 2; hanging in 3; lethal gas in 5; and lethal injection in 32. N.B. Some states use more than one method. Federal and Military executions are performed by lethal injection. NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A.* (Spring 1996).

251 In 1994, 87% of the executions recorded by Amnesty International were carried out in China (1791), Iran (139) and Nigeria (100+). In addition, there were unconfirmed reports of several hundred executions in Iraq. 31 executions were carried out in the U.S. Amnesty International, *Abolition of the Death Penalty Worldwide: Developments in 1994* (October 1995), and *Death Row, U.S.A.*, *ibid.*

252 Countries which retain the death penalty only for extraordinary crimes such as treason or specified military offences are considered abolitionist. See Amnesty International, *The Death Penalty: Facts and Figures 1996* Internet site www.amnesty.org/ailib/intcam/dp/dpfact96.html.

253 *Supra* note 109 and accompanying text.

emphasis upon the juvenile death penalty, as well as U.S. resistance to the abolitionist trend identified in chapter 2.

A. The Death Penalty in the U.S. Courts

i. The Constitution

In capital litigation, the relevant provisions of the U.S. Constitution are contained in the Bill of Rights' Eighth and Fourteenth Amendments. The Eighth Amendment provides "[e]xcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted". According to Chief Justice Warren "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man".[254] The language of the Eighth Amendment was paraphrased from the English *Bill of Rights*, 1689.[255] The phraseology is vague and the Supreme Court has dealt with the issue on a case-specific basis, avoiding dispositive definition. Rather, the Court has adopted a normative approach, holding in 1910,

> [t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth ... In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.[256]

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254 *Trop* v. *Dulles*, 356 U.S. 86 at 100 (1958).

255 For an extensive history of the prohibition against cruel and unusual punishment, see *Furman*, *infra* note 265 at 316 *et seq*, Marshall J.

256 *Weems* v. *United States*, 217 U.S. 349 at 373 (1910).

In 1957, *Trop* v. *Dulles* established a new standard in constitutional interpretation.[257] Recognizing that the scope of the Eighth Amendment is not static, Chief Justice Warren stated "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".[258] Thus, the originalist, 'framers' intent' approach was superseded by an evolutionary method of interpretation. Justice Brennan would later conclude "[h]ad th[e] 'historical' interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights".[259] In its judgement, the Court took account of the practices of other jurisdictions, concluding "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime".[260] As will be demonstrated in this chapter, the conclusions of 'the civilized nations of the world' concerning the death penalty and, in particular, the execution of juvenile offenders, have been less persuasive to the Court.

Whilst the cruel and unusual punishment clause was intended to bind the federal government, pursuant to the Supreme Court's decision in *Robinson* v. *California*,[261] the prohibition of the Eighth Amendment is applicable to states by virtue of the due process clause of the Fourteenth Amendment. It provides

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257 *Trop*, *supra* note 254.

258 *Ibid.* at 101.

259 *Furman* v. *Georgia*, *infra* note 265 at 265.

260 *Trop*, *supra* note 254 at 102.

261 370 U.S. 660 (1962).

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[262]

Robinson overturned the Court's judgement in *Pervear* v. *Commonwealth*, in which it found that the cruel and unusual punishments clause was applicable to national but not state legislation.[263] In 1947, the Court had assumed, but did not decide, that violations of the Fifth and Eighth Amendments constituted violations of the Fourteenth Amendment.[264]

ii. Capital Jurisprudence

In 1972, the Supreme Court decided the seminal case of *Furman* v. *Georgia*.[265] In a plurality disposition which surprised even counsel for the petitioners[266] and was denounced as "[a] license for anarchy, rape [and] murder",[267] *Furman* pronounced the death penalty, as applied, unconstitutional. Other than a short *per curiam* stating the decision of the Court, there was no majority opinion; the plurality Justices - Douglas, Brennan, Stewart, White and Marshall, JJ., - filed independent opinions concurring in judgement but incorporating very different reasoning. According to one commentator, "Furman so starkly deviated from the traditional format that it

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262 My emphasis.

263 72 U.S. 475 (1867).

264 *Francis* v. *Resweber*, 329 U.S. 459 (1947).

265 408 U.S. 238 (1972). Together with *Jackson* v. *Georgia* No. 69-5030 and *Branch* v. *Texas* No. 69-5031.

266 M. Meltsner, *Cruel and Unusual: the Supreme Court and Capital Punishment* (New York: Random House, 1973) at 289.

267 *Ibid.* at 290.

can be characterized as a decision in which there was not only no Court opinion, but no Court - only a collection of individual, even separately sovereign, Justices".[268]

The opinions in *Furman* have been classified into three categories:

- abolitionist - the death penalty as illegal *per se* (espoused by Brennan and Marshall, JJ.);
- strict constructionist - on the text of the Constitution and *stare decisis* the death penalty was not illegal but, as legislators, they would have voted against the death penalty (Burger, C.J., and Blackmun, Rehnquist and Powell, JJ.);
- neutral - focusing upon procedural rather than substantive concerns; as the implementation of the death penalty was arbitrary its *prima facie* constitutionality could be left for future consideration (Douglas, Stewart and White, JJ.).[269]

Of the plurality, Justices Brennan and Marshall concluded that the death penalty *per se* constituted cruel and unusual punishment; Justice Douglas found it incompatible with the equal protection clause of the Fourteenth Amendment; Justice Stewart rejected the "wanton" and "freakish" manner with which it was applied, comparing the likelihood of receiving the death penalty with being struck by lightning,[270] and Justice White criticised the infrequency with which it was applied. Thus the Justices demonstrated a spectrum of opinions, ranging from "the

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268 R.A. Burt, "Disorder in the Court: the Death Penalty and the Constitution" (1987) 85 Michigan L.Rev. 1741 at 1758.

269 J. Gorecki, *Capital Punishment: Criminal Law and Social Evolution* (New York: Columbia University Press, 1983) at 5.

270 *Furman, supra* note 265 at 309 *et seq.*

death penalty should never be used' to 'it is not being used enough'.

If consensus was reached, it was that the discretionary statutes in question were "pregnant with discrimination ... an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments".[271] In 1967, the President's Commission on Law Enforcement and Administration of Justice had concluded

> there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.[272]

The plurality made it clear that even *ex facie* constitutionality of the death penalty was not sufficient to save it in any circumstance; the application of the punishment rendered it equally vulnerable to constitutional attack. Whilst the decision was criticised for overstepping judicial boundaries and clouding the separation of powers through judicial legislation, *Furman* has been compared to the other major civil rights cases which "were a response to deeply rooted social conflicts that elected representatives had not addressed".[273]

Furman presented the Court with an ideal opportunity to promote a comparative style of jurisprudence. However, virtually no reference to extranational law was made in the opinions.

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271 *Ibid.*, at 257, Douglas J.

272 *The Challenge of Crime in a Free Society* (1967), in A.J. Goldberg & A.M. Dershowitz, "Declaring the Death Penalty Unconstitutional" (1970) 83 Harvard L. Rev. 1773 at 1792.

273 Meltsner, *supra* note 266 at 304.

Whilst the case, decided in 1972, preceded a number of the developments outlined in chapter 2, there existed an established international abolitionist movement. Despite the fact that the Court had been presented with evidence of this trend, the plurality opinions did not incorporate it into their reasoning; the sole reference is contained in Chief Justice Burger's dissenting opinion in which he acknowledges "[t]he world-wide trend towards limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight".[274] Equally, Justice Powell, in dissent, was the only member of the bench to acknowledge that England and Canada were debating the merits of capital punishment.[275] Justice Brennan who, as we will see below, would later champion the cause of transjudicial discourse, referred to the abolitionist states of the U.S., but not their international counterparts.[276]

Throughout *Furman*, great weight was accorded to the historical underpinnings of the cruel and unusual punishments clause; the English Bill of Rights and the intent of the Framers of the Constitution in including the provision.[277] However, the English tradition was contemplated only until the enactment of the Bill of Rights and, notwithstanding Justice Powell's brief reference to developments in England and Canada, no consideration was given to the subsequent jurisprudence of the English courts or, for that matter, the other common law courts of the world. It should be noted, however, that Justice Marshall made passing reference to the work

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274 *Furman*, *supra* note 265 at 404.

275 *Ibid.* at 462.

276 *Ibid.* at 298.

277 See generally *ibid.* at 316 *et seq*, Marshall, J., and 376 *et seq*, Burger, C.J., dissenting.

of the British Royal Commission on Capital Punishment, and his opinion may present latent appreciation, Slaughter's "tacit emulation",[278] of their work.

Whilst *Furman* may have represented the optimum compromise available, in failing to determine the constitutionality of the death penalty the Court paved the way for a decade of extensive capital litigation. Across the United States, frantic attempts were being made to draft death penalty statutes which would be found acceptable. David von Drehle noted

> [i]n the wake of *Furman*, several justices had privately predicted that America would never see another execution. The rush of the state legislatures to restore the death penalty shocked them with its vehemence and delivered a loud, clear message: America loved its death penalty.[279]

These efforts would later be characterized by Justice Stewart as "[t]he most marked indication of society's endorsement of the death penalty".[280]

State legislatures employed one of two techniques in an attempt to circumvent the untrammelled discretion deemed unconstitutional in *Furman*, either eliminating discretion altogether through the enactment of mandatory death penalty statutes, or establishing elaborate systems of 'guided discretion'. In 1976, the Supreme Court decided the issue, upholding 'guided discretion'

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278 *Supra* note 6 and accompanying text.

279 D. von Drehle, *Among the Lowest of the Dead: the Culture of Death Row* (New York: Times Books, 1995) at 162.

280 *Gregg* v. *Georgia*, 428 U.S. 153 at 179 (1976).

statutes in a troika of cases[281] and striking down the mandatory death penalty in two more.[282]

In *Woodson* v. *North Carolina*, the Supreme Court rejected mandatory death sentencing for first degree murder, relying upon the historical repudiation of mandatory capital punishment, North Carolina's failure to "fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death", and the statutory preclusion of individualized sentencing.[283] Subsequently, mandatory death penalty statutes drawn far more narrowly than North Carolina's would be struck down in *Roberts* v. *Louisiana*, for restricted categories of capital murder;[284] *Roberts v. Louisiana*, for the murder of a police officer;[285] and *Sumner* v. *Shuman*, for murder committed by an inmate serving a life sentence.[286]

A new era in American capital punishment was heralded with the cases known collectively as *Gregg* v. *Georgia*.[287] The Supreme Court upheld the constitutionality of death penalty statutes which provided for 'Super Due Process'; 'guided discretion' in a bifurcated proceeding

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281 *Gregg* v. *Georgia*, *ibid*; *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976).

282 *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

283 *Woodson*, *ibid.*, at 303, Stewart J.

284 428 U.S. 325 (1976).

285 431 U.S. 633 (1977).

286 483 U.S. 66 (1987).

287 *Supra* note 281.

followed by prompt judicial review. 'Guided discretion' was considered to channel the jury's discretion and avoid the arbitrariness identified in *Furman*. Justice White concluded "[n]o longer can a jury wantonly and freakishly impose the death penalty; it is always circumscribed by the legislative guidelines".[288]

The statutes established a separate sentencing hearing to be held pursuant to conviction at an initial guilt/innocence phase. According to Justice Stewart,

> the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.[289]

Following imposition of a death sentence, the Georgia statute in question provided for expedited direct review by the state Supreme Court whose consideration was to include a proportionality review.[290] Proportionality review has since been held a commendable, additional safeguard, but not a constitutional requirement.[291]

In *Gregg*, Justice Stewart announced the judgement of the Court and the opinion of himself,

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288 *Gregg, ibid.* at 206.

289 *Ibid.* at 195.

290 *Ibid.* at 166.

291 *Pulley* v. *Harris*, 465 U.S. 37 (1984).

Justice Powell and Justice Stevens. He developed what may be characterized as a 'penological purpose test' stating that, in order to comport with "the basic concept of human dignity at the core of the Amendment", "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering".[292] The twin "principle social purposes" said to be served by the death penalty were retribution and deterrence.[293] According to Miller,"[t]he Court's insistence that the death penalty, as applied, meet some valid penological purpose serves as a crucial judicial protection against cruel and unusual punishment".[294] However, as will be demonstrated below, the Court has retreated from this position considerably.

The Supreme Court gave no consideration to the law and trends of the international community in either *Gregg* or *Woodson*. Rather, in *Gregg*, the focus was upon American standards of decency as represented by the actions of state legislatures. Subsequently, Justice White would acknowledge that "[t]h[e] public judgement as to the acceptability of capital punishment, evidenced by the immediate post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg*".[295]

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292 *Gregg, supra* note 280 at 182 *et seq.*

293 *Ibid.*

294 E. Miller, "Executing Minors and the Mentally Retarded: the Retribution and Deterrence Rationales" (1990) 43 Rutgers L.Rev. 15 at 29.

295 *Coker* v. *Georgia*, 433 U.S. 584 at 594 (1976).

Public opinion is to some extent, however, a two-way street, and it has also been invoked in order to restrict the scope of death penalty statutes. In *Woodson*, the phenomenon of jury-nullification - wherein juries fail to convict not because they are not convinced of the accused's guilt, but because they are unwilling to have him condemned - and the historical rejection of mandatory capital punishment by states convinced the Court of "the incompatibility of mandatory death penalties with contemporary values".[296] Implicit in the final phrase is 'American contemporary values'; whilst jury-nullification in capital cases is a phenomenon which has been observed in other jurisdictions, in particular in the United Kingdom, the Court restricted itself to domestic consideration.

Following *Gregg*, the Court would face a number of substantive constitutional challenges to capital punishment, and it continued to assess Eighth Amendment claims primarily in light of state and jury practice. In *Coker* v. *Georgia*, the death penalty for rape of an adult woman was declared unconstitutional.[297] Further to their judgements in *Gregg* and *Woodson*, the Court noted "we seek guidance in history and from the objective evidence of the country's present judgement concerning the acceptability of death as a penalty for rape of an adult woman",[298] finding persuasive the fact that no other state provided for the death penalty in such instances.[299]

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296 *Woodson*, *supra* note 282 at 295.

297 *Coker*, *supra* note 295.

298 *Ibid.* at 593, White, J.

299 Following the invalidation of death penalty statutes in *Furman* and *Woodson*, only Georgia provided for the death penalty for rape of an adult woman. Whilst Florida also provided for the death penalty for rape, it was restricted to cases where the victim was a child. *Ibid.* at 594 *et seq.*

Albeit indicating the Court's usage of comparative law, it is clear from *Coker* that public opinion is evidenced by the sentiments of the domestic population rather than those of the wider, international community. The actions of states of the Union, not states of the world, were at issue.[300]

Whilst Justice White voiced the caution that

> recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgement will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,[301]

the opinions of the Court were clearly influenced by such attitudes, paying only cursory attention to penological principles, and apparently incorporating no extranational perspective. No reference was made to foreign statute or practice, yet the Court would subsequently refer to its consideration in *Coker* of "the historical development of the punishment at issue, legislative judgements, international opinion, and the sentencing decisions juries have made".[302] It is unclear whether this is revisionist history or whether the Court had been presented with evidence of international trends and had been tacitly influenced in its decision-making.

In the 1982 case of *Enmund* v. *Florida*, capital punishment was struck down for participation in a felony murder where there was neither intention to, participation in, or knowledge of the

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300 The role of public opinion will be addressed below at note 718 and accompanying text.

301 *Coker, supra* note 295 at 597.

302 *Enmund* v. *Florida*, 458 U.S. 782 at 788 (1982).

murder.[303] Although eight states provided for the death penalty in similar circumstances, the Court noted that the majority of states had rejected such punishment and that there existed overwhelming evidence "that American juries have repudiated imposition of the death penalty for [such] crimes".[304] In 1987, however, major participation in a felony resulting in death, coupled with a reckless disregard for human life, was held not to exempt a defendant from capital charges.[305]

In 1986, the Court appeared to break with tradition, referring to extranational practice and the United States' shared legal ancestry in the case of *Ford* v. *Wainwright* in which execution of an insane inmate was held to violate the Eighth Amendment.[306] Justice Marshall, writing for the Court, began his judgement as follows: "[f]or centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does".[307] However this brief acknowledgement of an extranational context was not elaborated upon, and no reference was made to the international norms against the execution of insane inmates, the Court preferring to focus upon historical English tradition.

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303 *Ibid.*

304 *Ibid.* at 794.

305 *Tison* v. *Arizona*, 481 U.S. 137 (1987).

306 477 U.S. 399 (1986).

307 *Ibid.* at 401.

Whilst the decision in *Ford* conformed with international law and practice, subsequent litigation would considerably restrict the ruling. In *Penry* v. *Lynaugh*, the Court differentiated between degrees of mental illness, finding that the Eighth Amendment did not "categorically prohibit the execution of mentally retarded capital murderers".[308] As we have seen in chapter 2, the international community reacted strongly to this U.S. distinction, and it inspired an additional ECOSOC safeguard which would exempt inmates with mental illnesses and not only those pronounced insane.[309]

Notwithstanding such substantive decisions, capital jurisprudence has tended to focus on procedural issues, and there has been an incremental retreat from the principles of *Furman* and *Gregg*. This evolution has been described as follows:

> from 1976 to 1983, the Court sought to define the parameters of the modern system of capital punishment by identifying the various protections that must be afforded capital defendants; from 1983 to the present, the Court has become increasingly concerned with promoting expeditious executions.[310]

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308 492 U.S. 302 at 305 (1989). The Supreme Court was not the first judicial body to draw semantic distinctions in death penalty jurisprudence; it will be recalled that the Human Rights Committee, rather than attacking the death penalty on principle, has attempted to chip away at procedural issues of capital punishment. In *Ng, supra* note 10, the HRC found that execution by lethal gas asphyxiation did not meet its test of "least possible physical and mental suffering". However, in the cases of *Kindler, supra* note 184, and *Cox, supra* note 194, it did not object to lethal injection.

309 It will be recalled that, in 1984, ECOSOC adopted the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, article 3 of which prohibited the execution of insane persons. In 1988, the *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* was adopted developing the original *Safeguards*. In particular, in response to *Penry*, the category of insane persons was expanded to exclude "persons suffering from mental retardation or extremely limited competence" from execution. *Supra* note 236 and accompanying text.

310 W.S. White, *The Death Penalty in the Nineties* (Ann Arbor: The University of Michigan Press, 1991) at 5.

Considered fundamental to 'guided discretion' has been the restriction of statutory aggravating factors,[311] together with the discretion to consider any mitigating circumstance. In *Lockett* v. *Ohio*, the Supreme Court held that in order to satisfy the requirement of individualized sentencing, mitigating circumstances may not be limited to those specified by statute.[312] However, Justice Scalia has been deeply critical of the "*Woodson-Lockett* principle", which he claims has resulted in "the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained".[313] In 1990 he announced

> I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under *stare decisis*. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.[314]

Indeed, the Supreme Court generally has retreated from the principle of *Lockett*. In 1993, it upheld the constitutionality of a Texas statute which allowed juveniles to be sentenced to death without the jury being instructed to consider age as a mitigating factor. The Court held that whilst the *Lockett* doctrine precludes states from limiting mitigating factors, they are free to structure and shape consideration of mitigation evidence "in an effort to achieve a more rational

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311 *Dawson* v. *Delaware*, 112 S.Ct 1093 (1992) - constitutionally protected conduct may not be used as an aggravating circumstance; *Zant* v. *Stephens* 462 U.S. 862 (1983) - factors which should mitigate (e.g. mental illness) may not be used as an aggravating circumstance; *Gardner* v. *Florida*, 430 U.S. 349 (1977) - the defendant must have an opportunity to rebut aggravating circumstances presented by the state.

312 438 U.S. 586 (1978).

313 *Walton* v. *Arizona*, 497 U.S. 639 at 673 at 668 (1990).

314 *Ibid.* at 673.

and equitable administration of the death penalty".[315] Subsequently, an Arkansas jury sentenced a 17 year old to death for the rape, robbery and murder of an elderly woman. Whilst the prosecutor had been "concerned" by the defendant's youth, the jury did not accept it as a mitigating factor during the sentencing deliberations.[316]

iii. The Death Penalty Within the Criminal Justice System

The evolution of the structure approved by the Supreme Court in *Gregg* has resulted in a Byzantine system tortuously slow and restricted by technical minutiae, yet capable of overlooking major errors of fact, representation and conviction. The electrocution of John Spenkelink, the first inmate to be executed against his will in the post-*Gregg* era,[317] illustrated the infeasibility of the new death penalty: "Spenkelink's death actually portended just how contentious and crazy and tortured the whole process was going to be. One man's execution illuminated the oceans of money and brains and energy the death penalty would consume".[318]

Capital punishment does indeed consume 'oceans of money'; former Governor of New York, Mario Cuomo, estimated that the cost of capital prosecution could be in excess of $2 million,[319]

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315 *Johnson* v. *Texas*, 113 S.Ct. 2658 (1993).

316 "Boy, 17, Gets Death Penalty in Arkansas" New York Times (11 January 1996) A11. Subsequent proceedings, *Sanford* v. *State*, 327 Ark. 678 (S.Ct 1997).

317 The first person to be executed post-*Gregg* was Gary Gilmore, who was executed by firing squad in Utah in January 1977, after demanding that his sentence be carried out.

318 von Drehle, *supra* note 279 at 116.

319 "New York Enacts Capital Punishment" National Law Journal (20 March 1995) A08.

and it has been suggested that the State of California could make annual savings of $90 million by abolishing the death penalty.[320] In Florida the cost of execution has been estimated at six times the cost of incarcerating an inmate for the rest of his natural life,[321] and a study conducted by faculty at Duke University indicated that a sentence of death costs $2.6 million more than a sentence of twenty years to life imprisonment.[322]

Fiscally, the death penalty does more than place an onerous burden on the taxpayer, however. Rather than shoring up the criminal justice system, the maintenance of such an expensive punishment siphons funding from other spheres of justice. Amnesty International warns that this immense drain on the public purse places "a disproportionate burden on the criminal justice system and may divert resources from other, more effective, forms of law enforcement".[323] According to Justice Handler of the Supreme Court of New Jersey, "the staggering financial cost of maintaining a capital-murder regime negates any practical benefit of our death penalty statute".[324]

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320 S. Magagnini, "Closing Death Row Would Save State $90 Million a Year" The Sacramento Bee (28 March 1988) 1.

321 D. von Drehle, "Bottom Line: Life in Prison One-Sixth as Expensive" Miami Herald (10 July 1988) 12A.

322 M.Walker, "Penal Price of Executioner's Bullet and Pill" The Observer (22 December 1996) 17.

323 Amnesty International, *United States of America: the Death Penalty* (London: Amnesty International Publications, 1987) at 6.

324 *New Jersey* v. *Marshall*, 123 N.J. 1 at 258 (Supreme Court of New Jersey) (Handler, J. in dissent).

B. The U.S. Death Penalty and International Law

It will be recalled that in chapter 2 we considered the law and trends of the international system as they relate to capital punishment. In particular, we noted that the *ICCPR*, whilst not abolishing the death penalty, substantively restricted its use and imposed procedural requirements upon retentionist nations. The United States has not only resisted the abolitionist trend and the exhortations of the *Second Optional Protocol*, it has also created a system of capital punishment which procedurally fails to meet international standards of non-arbitrariness and non-discrimination. In addition, it has consistently rejected the issue of the death row phenomenon in its international policy and in the domestic courts. In this section we will consider evidence of arbitrariness and discrimination in capital sentencing, and the impervious attitude of the U.S. to the death row phenomenon.

i. Arbitrariness

Article 6 (1), *ICCPR*, prohibits the arbitrary deprivation of life. In *Eddings* v. *Oklahoma*, the U.S. Supreme Court held that "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all".[325] Unfortunately, the Court appears to have since resigned itself to the inevitability of such flaws. In a utopian criminal justice system, justice would be dispensed in a rational and even-handed manner, taking into account the specific circumstances of each crime and defendant, and determining the appropriate and proportional sentence.

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325 455 U.S. 104 at 112 (1982).

However, the criminal justice system is neither rational nor even handed. In addition to factors of discrimination based on race, sex, class and geography, the wide discretionary powers in many aspects of the system affect the result. Plea bargaining - indispensable to the effective operation of criminal justice - literally gives prosecutors the power of life and death. In New York the informal position of many states has been mandated by law, and a sentence of death may only be pronounced pursuant to a plea of not guilty and subsequent trial. A defendant may not plead guilty and receive the death penalty.[326]

Prosecutorial discretion can lead to seemingly arbitrary and unfair results. Whilst there are certain, notorious prosecutors who aim for the death penalty in every case,[327] personal political or moral beliefs may preclude a prosecutor from ever seeking the death penalty. When New York reintroduced the death penalty in September 1995, Bronx District Attorney Robert T. Johnson stated that his "doctrinal opposition to capital punishment" would preclude him from seeking it in any circumstance.[328] Following the murder of a police officer in March 1996, Governor George E. Pataki replaced Johnson as prosecutor in the case with Attorney General Dennis C. Vacco, who proceeded to lay capital charges.[329] The suicide of suspect Angel Diaz preempted the trial, but controversy over the case continued as Johnson challenged the

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326 *New York Penal Law*, §220.10 (e).

327 See generally T. Rosenberg, "The Deadliest D.A." in H.A. Bedau (ed.), *The Death Penalty in America* (New York: Oxford University Press, 1997) at 319 *et seq*.

328 J. Berger, "Death Penalty Case Lures Top Legal Help" New York Times (08 November 1995) B2.

329 J. Dao, "Vacco Seeks Death Penalty in Police Officer's Shooting" New York Times (10 July 1996) B3.

legitimacy of Governor Pataki's actions.[330] Executive clemency, the very instrument which ought to prevent blatant miscarriages of justice, has become a seldom used political tool.

Justice Blackmun, in dissent from denial of certiorari in *Callins* v. *Collins*, denounced the U.S. Supreme Court for

> [h]aving virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty ... [choosing] ... to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.[331]

Justice Blackmun's rhetoric is reflected in the execution of those for whom arbitrariness is a matter of life and death. Freddy Goode was executed in Florida following dismissal of an appeal which, to all intents and purposes, was identical to that upheld in *Ford* v. *Wainwright* shortly thereafter.[332] "Bohrer [counsel for Freddy Goode] remembered being scolded for his appeal when he appeared before U.S. District Judge Terrell Hodges. The appeal, Hodges had declared, was 'frivolous and ... an abuse' of the law. Two years later, Bohrer's appeal *was* the law".[333] In May 1993, Leonel Herrera was executed in Texas, the Supreme Court having rejected evidence of newly discovered factual innocence as valid grounds for federal *habeus*

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330 R.L. Swarns, "Man Held in Police Death is Found Hanged in Jail" New York Times (06 September 1996) A1.

331 114 S.Ct. 1127 at 1129 (1994), Blackmun J. dissenting from denial of certiorari. Citations omitted.

332 *Goode* v. *Wainwright*, 464 U.S. 78 (1983); *Ford*, *supra* note 306, affirming the common law prohibition against the execution of an insane person.

333 von Drehle, *supra* note 279 at 237.

corpus relief absent an independent constitutional violation.[334] On 4 January 1995, Texas executed Jesse DeWayne Jacob. He had been convicted on the basis of a confession, subsequently admitted to have been fabricated when the prosecutor decided to try another person in the case.[335]

In *Barefoot* v. *Estelle*, the Court affirmed a decision of the Fifth Circuit rejecting federal *habeus* claims on their merits and refusing a stay of execution.[336] Application for a stay had been filed with the Court of Appeals pending appeal to that court; oral argument was conducted five days later before a bench which had read the transcripts from neither the trial nor the federal *habeus* hearing. The following day the petition was denied and the appellant was subsequently executed.[337] In *Barefoot*, the Court expressed its exasperation with the continual *habeus* petitions of death row inmates, stating "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exceptions ... Federal courts are not forums in which to relitigate state trials".[338] According to Justice Blackmun,

> [t]he Court today seems to give a new meaning to our recognition that death is different. Rather than requiring 'a correspondingly greater degree of scrutiny of the capital sentencing determination', the Court relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny.[339]

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334 *Herrera* v. *Collins*, 113 S.Ct. 853 (1993).

335 *Jesse DeWayne Jacobs* v. *Scott*, 115 S.Ct. 711 (1995).

336 463 U.S. 880 (1983).

337 *Death Row, U.S.A., supra* note 250.

338 *Barefoot, supra* note 336 at 887.

339 *McCleskey, infra* note 344 at 348.

Justice Scalia has determined that "[t]he Court has [] imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality".[340] However, in *Callins*, Justice Blackmun concluded "despite the effort of the States and courts to devise legal formulas and procedural rules ... the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake".[341]

ii. Discrimination

It is contended that the U.S. courts have failed to provide an atmosphere in which discrimination does not factor. Discrimination on the basis of race, gender and socio-economic status all contribute to a death row population which is overwhelmingly composed of indigent men convicted of murdering white victims.

Racial discrimination appears endemic in the U.S. death penalty system: whilst blacks and whites are the victims of homicide in the United States in almost equal numbers, most executed offenders have been convicted of the murder of a white victim. In the post-*Gregg* era, of the 328 inmates executed to 26 April 1996, 267 (81.4%) were convicted of murdering only whites. Of the remaining 61, 4 cases involved multiple victims including whites. Accordingly, 271

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340 *Thompson, infra* note 396 at 856.

341 *Callins* v. *Collins*, 114 S.Ct. 1127 (1994), Blackmun J. dissenting from denial of certiorari.

(82.6%) of the cases culminating in execution involved white victims.[342] In 1990, the U.S. General Accounting Office reported to Senate and the House Committees on the Judiciary on racism in capital sentencing. The report identified "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision".[343]

In *McCleskey* v. *Kemp*, the Court upheld the death sentencing of a black man convicted of murdering a white police officer.[344] McCleskey had relied upon the Baldus study, a sophisticated and highly credible survey of over 2000 murder cases in Georgia, as evidence of overwhelming racial discrimination in the Georgia capital justice system. The study concluded that prosecutors sought the death penalty in 70% of cases involving black defendants and white victims, but only 15% of cases involving black defendants and black victims. In a consideration of sentencing, Baldus concluded that a black defendant convicted of murdering a white victim was 22 times more likely to result in a death sentence than a black defendant convicted of murdering a black victim.[345] Albeit accepting the validity of the Baldus study, the Court found that "[a]t most ... [it] ... indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system".[346]

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342 Statistics complied by the author from *Death Row, U.S.A., supra* note 250.

343 U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* GAO/GGD-90-57 at 5. Copy with the author.

344 481 U.S. 279 (1987).

345 *Ibid.* at 286.

346 *Ibid.* at 312. Citations omitted.

According to the Court, general evidence of discrimination was not sufficient to establish the unconstitutionality of McCleskey's sentence for "to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in *his* case acted with discriminatory purpose"[347] or "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect".[348] In accordance with the jurisprudence of the Court, the state could not be said to have discriminated absent proof of purposeful discrimination.[349] However, the Court has previously allowed statutory claims pursuant to a Congressional Act which resulted in a discriminatory effect,[350] and in desegregation litigation the lasting impact of former *de jure* discrimination was acknowledged.[351] Justice Powell, who authored the majority (5-4) opinion in *McCleskey*, would rue the Court's decision and was subsequently quoted as wishing he could change his vote.[352]

In deciding *McCleskey*, the Court retreated considerably from their position that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner".[353] In *Furman*, Justice

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347 *Ibid.* at 292.

348 *Ibid.* at 298.

349 *Ibid.* at 298. See generally *Washington* v. *Davis*, 426 U.S. 229 (1976).

350 *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

351 See generally *Brown* v. *Board of Education*, 437 U.S. 483 (1954) and *Brown II*, 349 U.S. 294 (1955).

352 D. von Drehle, "Retired Justice Changes Stand on Death Penalty" Washington Post (10 June 1994) A1.

353 *Godfrey* v. *Georgia* 446 U.S. 420 at 417 (1980). *McCleskey, supra* note 344 at 322, Brennan J. in dissent.

Douglas had concluded

> [i]t would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.[354]

In 1988, the Supreme Court refused to grant an evidentiary hearing into whether race was a factor in the sentencing jury's calculus in the case of William Andrews, a black 'non-triggerman' convicted by an all-white jury of the murders of three white victims. [355] Despite evidence of a napkin discovered in the jury room which depicted a man on the gallows and the words "Hang the Niggers", Andrews was executed in Utah on 30 July 1992.[356]

In *Callins* Justice Blackmun concluded

> [t]he arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards.[357]

Rather than attempting to cure this infection, or at least to promote a less racist society, the Supreme Court has resigned itself to acceptance. In *McCleskey* the Court held,

> [t]he Constitution does not require that a State eliminate any demonstrable

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354 *Furman, supra* note 265 at 242.

355 *Andrews* v. *Shulsen*, 99 L.Ed.2d 253 (1988).

356 *Death Row, U.S.A., supra* note 250.

357 *Callins, supra* note 341 at 1135.

> disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use'.[358]

Effectively, the situation is that "since we cannot practicably monitor a publicly acceptable capital-punishment system in such a way as to prevent race-based death-sentencing disparity, we will tolerate race-based disparity as the necessary cost of the system".[359]

Race is not the sole basis of discrimination; there is evidence to suggest that gender bias is also a factor. The adult death row population is 98.4% male. According to Professor Streib, whilst women account for 13% of murder arrests, they account for only 2% of death sentences, 99% of which are reversed on appeal or commuted.[360] Of 16000 lawful executions documented in the United States, 398 (2.5%) were of women.[361] In the post-*Gregg* era, of 328 executions only one (0.3%) was of a female, Velma Barfield who was executed in North Carolina in November 1984.[362] In January 1996, hours before her scheduled execution by lethal injection in Illinois, Guinevere Garcia, who had 'volunteered' for execution by dropping her appeals, had her

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358 *McCleskey, supra* note 344 at 319. Citations omitted.

359 *Memorandum of Law in Support of Appellant's Position in* Makwanyane & Mchunu *v.* State, filed by S.W. Hawkins (NAACP LDEF), K. Roth & J.E. Mendez (Human Rights Watch), J. Greenberg (Columbia University School of Law) & A.G. Amsterdam (NYU School of Law) at 35. Copy with the author.

360 As reported in S. Bindman, "Equality Hasn't Reached Death Row" Toronto Star (23 July 1996) A11.

361 V.L. Streib & L. Sametz, "Executing Female Juveniles" (1989) 22 Conn. L.Rev. 3 at 11.

362 *Death Row, U.S.A., supra* note 250.

sentence commuted to life imprisonment without the possibility of parole.[363]

Professor Streib believes there exists "an unwritten, unwillingness to sentence women to death". He notes "[y]ou're not going to get much political mileage out of saying: 'Let's fry a few of these women".[364] It must be acknowledged, however, that in addition to sympathetic gender bias the disparity may be rooted in the types of crime committed by women and in the fact that they are less likely to have a record of violent crime, an aggravating factor in many capital cases.

It is apparent that the U.S. courts are tolerating an arbitrary and discriminatory system of capital punishment, and the restrictions upon federal *habeus corpus* contained in the *Antiterrorism and Effective Death Penalty Act*, 1986 as upheld in *Felker* v. *Turpin*[365] will undoubtedly render the

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363 D. Terry, "Only Hours Before Execution, a Woman is Spared in Illinois" New York Times (17 January 1996) A8.

364 Bindman, *supra* note 360.

365 116 S.Ct. 2333 (1996). In an expedited hearing, the Supreme Court unanimously upheld the constitutionality of the *Antiterrorism and Effective Death Penalty Act of 1986*. The provisions of Title I of the Act severely restrict the availability of federal habeus corpus, and *ex facio* restricted the jurisdiction of the Supreme Court. In terms of §106(b)(3), a petitioner must file a motion for leave to file a second or subsequent habeus petition in Federal District Court, that motion to be decided upon by a panel of three judges who will determine whether the petition satisfies the requirements of §106(b) which allows for filing of a second or subsequent petition only under certain conditions. The provisions of §106(b)(3)(e) render this panel's decision neither open to appeal or to petition of certiorari. However, in drafting the bill, an ancient and seldom used power of the Supreme Court to consider original petitions was overlooked. Contained in s2241 of the *Federal Code*, this original habeus jurisdiction is seldom used other than by desperate inmates who, unaware of the standard filing procedure in the Federal Courts, send their appeals directly to the Court. The Act made no mention of the Court's power under s2241 and the Court declined to consider it repealed by implication. As §106(b)(3) specifies leave to appeal in the District Court, the provisions relating to the 3 judge panel do not apply to the Supreme Court's ability to consider original habeus petitions, thus not depriving the Court of jurisdiction in violation of the Constitution's Exceptions Clause, Article III §2. The conditional requirements of §106(b) do not specify the District Court and are accordingly applicable to the Court but were held not sufficient to amount to suspension of the privilege of the writ of habeus corpus in violation of the Constitution's Suspension Clause,

system ever more capricious. The situation has been summarised by one condemned inmate as follows:

> [j]ustice just doesn't happen unless you have the money ... If you have that, you don't get the death penalty. It's basically the blacks and people that are at or below the poverty line, that can't afford legal representation from the start. And when the quality of your defense depends on your station in life, that's inherently unfair.[366]

His remarks echo Justice Douglas, in *Furman*:

> [i]n a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[367]

It may be that such arbitrariness is an inherent aspect of the death penalty, that "unfairness and discrimination are not merely uncontrollable accessories of the punishment of death. They are its very essence. To tolerate capital punishment is to accept them as inevitable".[368] It is apparent that "any humanly imposed system of penalties will exhibit some imperfection",[369] yet in international law it is established that the imposition of capital punishment requires some heightened standard. If this is unattainable - Justice Blackmun, in *Callins* concluded "[i]t is virtually self-evident to me now that no combination of procedural rules or substantive

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Article I §9.

366 A.J. Bannister, in S. Trombley, *The Execution Protocol* (New York: Crown Publishers, Inc., 1992) at 176.

367 *Furman, supra* note 265 at 255.

368 *Memorandum, supra* note 359 at 1.

369 *McCleskey, supra* note 344 at 279, Brennan J.

regulations ever can save the death penalty from its inherent constitutional deficiencies"[370] - the answer lies not in compromise but in abolition.

iii. The Death Row Phenomenon

A third area in which the U.S. system of capital punishment has lagged behind international standards relates to the acceptable period of detention under sentence of death. As we have seen, constitutional fora have found that the death row phenomenon, the result of prolonged detention awaiting execution, constitutes unacceptably cruel punishment.[371] The United States, however, has consistently resisted such determination, both at a political and judicial level.

The U.S. reservation to Article 7 of the *ICCPR* was rejected by the Human Rights Committee in 1995.[372] In reserving its interpretation of Article 7 to "the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States",[373] the U.S. patently intended to avoid implications of the death row phenomenon. According to the State Department, the reservation clarified that the U.S. "do[es] not accept the 'death row phenomenon' as constituting 'cruel, unusual or degrading treatment or punishment',

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370 *Supra* note 341 at 1130, Blackmun J. dissenting from denial of certiorari. Citations omitted.

371 See *Pratt & Morgan*, *supra* note 149 and accompanying text; *Soering*, *supra* note 61 and accompanying text.

372 *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*, U.N. Doc. CCPR/C/79/Add.50 (1995) §14. On the U.S. reservations to the *ICCPR* see *supra* at note 76 and accompanying text.

373 *Supra* note 76 and accompanying text.

as the European Court of Human Rights recently held".[374]

In a parallel attempt to avoid *Soering* resonance, the US issued an understanding to the *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;

> the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/ or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.[375]

In interpreting international law in accordance with domestic interpretation of the Constitution, the U.S. is restricting international law to the sovereign will of the domestic states. Given, however, that there are currently over 3000 men and women on death row in the United States, and that there is frequently a time lapse of several years between sentencing and execution, it is not surprising that the issue of the death row phenomenon is actively opposed by the Government.

The lengthy delay between sentencing and execution is symbolic of the schizophrenic attitude towards the death penalty in the United States. Whilst thousands of inmates are under sentence of death, the actual number of executions is relatively low; this year, perhaps around 60. In 1995, it was estimated that, to clear the backlog, states would have to execute one prisoner daily

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374 Nash (Leich), *supra* note 100 at 591.

375 U.N. Doc ST/LEG/SER.E/13 (1995) at page 180.

until 2021.[376]

The Supreme Court has been unreceptive to claims of the death row phenomenon thus far, although Justice Stevens recently noted

> [o]ur decision [in *Gregg*] rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, and (2) the death penalty might serve "two principle social purposes: retribution and deterrence". It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted ... Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal".[377]

Justice Stevens illustrates one of the major flaws in the 'intent of the Framers' arguments beloved of original constructionists such as Justice Scalia; the post-*Gregg* death penalty is administered in a radically different fashion from the hangings of the 18th Century. Prolonged detention on death row whilst the modern requirements of due process are satisfied may well constitute cruel and unusual punishment, yet to revert to the speedy executions of the Framer's day would certainly violate due process.

Given the wealth of extranational material available on the death row phenomenon, it is

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376 D.A. Kaplan, "Anger and Ambivalence" Newsweek (7 August 1995) 24.

377 *Lackey* v. *Texas*, 115 S. Ct. 1421 at 1421 (1995), Memorandum respecting denial of certiorari. Citations omitted.

frustrating that Justice Stevens did not avail himself of the opportunity to present his concerns about prolonged detention on death row in a more cosmopolitan context. Whilst recognizing that the Privy Council had considered the issue in *Pratt & Morgan*, Justice Stevens made no reference to *Soering*. As the European Court of Human Rights had given extensive consideration to the conditions in which condemned prisoners are held in Virginia, before concluding that the extradition of a capital defendant to potentially face such detention would violate the extraditing nation's obligations under the *ECHR*,[378] *Soering* would have provided Justice Stevens with a clear indication that the U.S. was failing to meet international expectations, thus emphasising the need for the Supreme Court to at least address the issue of the death row phenomenon.

C. The Juvenile Death Penalty in the U.S.

i. The U.S. and the International Prohibition on the Juvenile Death Penalty

In chapter 2 we ascertained that the juvenile death penalty is prohibited by customary international law as well as by a number of human rights instruments. We observed that the United States has been the subject of regional litigation on the issue of the juvenile death penalty and that the Inter-American Commission on Human Rights found the U.S. failure to establish a federal standard on the execution of juvenile offenders violated their obligations

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378 *Supra* note 61 and accompanying text.

under articles 1 and 2 of the *American Declaration of the Rights and Duties of Man.*[379]

In addition, the U.S. has been the subject of controversy over death penalty reservations entered to international human rights instruments. As we have seen, the U.S. reservations to the *ICCPR* and the subsequent response of the Human Rights Committee prompted a great deal of controversy, leading to doubts over whether the U.S. remained bound by the *Covenant.*[380] Regardless of whether the U.S. remains party to the *ICCPR*, as their reservation to the international prohibition on the juvenile death penalty has been rejected by the HRC, it may be that the U.S. is bound by customary international law relating to the execution of juvenile offenders. Although U.S. courts are not constitutionally mandated to consider international law, and it has never been incorporated by state or federal constitution or legislation, article 1 (8) of the Constitution gives Congress power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations". In 1900, when the U.S. Supreme Court decided the case of *The Paquete Habana*, it was apparently incontrovertible that, at least as far as that court was concerned, "[i]nternational law is part of [the] law".[381] According to the judgement in *Filartiga* v. *Pena-Irala*, the U.S. is "bound both to observe and construe the accepted norms of international law" for "it is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land".[382]

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379 *Roach & Pinkerton, supra* note 122 and accompanying text.

380 *Supra* note 76 and accompanying text.

381 175 U.S. 677 (1900).

382 630 F.2d 876 at 886 (2d Cir. 1980).

The practice of both state and federal courts has been to treat customary international law as though incorporated,[383] and it has generally been considered to constitute federal law.[384] In *Fernandez* v. *Wilkerson*, whilst the arbitrary detention of an alien was found not to violate any constitutional, statutory or treaty provision, as arbitrary detention is prohibited by customary international law the judge concluded the detention amounted to an abuse of executive discretion. Accordingly, the situation was "judicially remediable as a violation of international law".[385]

Whilst it should be noted that customary international law has never been relied upon to invalidate inconsistent domestic law,[386] this does not mean that the U.S. is released from its international obligations relating to the juvenile death penalty. The courts ought, at the very least, to factor international developments into their jurisprudence. This would bring the U.S. into accordance with the practice of their foreign counterparts. In Australia, for example, the High Court has recognised a strict interpretive obligation upon courts to interpret legislation in accordance with Australia's international obligations wherever possible.[387] Eighth Amendment interpretation, with its emphasis on the evolution of society, would appear to present the courts

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383 See L. Henkin, "International Law as Law in the United States" (1984) 82 Mich. L.Rev. 1555 at 1557.

384 *Banco Nacional de Cuba* v. *Sabbatino*, 476 U.S. 398 (1964).

385 505 F.Supp. 787 at 798 (D. Kan. 1980), affirmed on other grounds 654 F.2d. 1382 (10th Cir. 1981).

386 L. Dalton, "*Stanford* v. *Kentucky* and *Wilkins* v. *Missouri*: a Violation of an Emerging Rule of Customary International Law" (1990) 32 Wm & Mary L.Rev. 161 at 188.

387 *Minister for Immigration and Ethnic Affairs* v. *Teoh*, [1995] 128 ALR 353. For discussion see M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997) at 230 *et seq.*

with an ideal opportunity to determine standards of American society in light of international trends, and this is particularly so where the international community has been unequivocal in its rejection of a punishment, as with the juvenile death penalty. However, as we will see in this section, and have seen to some extent already, the courts have been unreceptive to international law, and increasingly hostile to the consideration of extranational developments as well as non-legislative domestic recommendations.

In the U.S., international pressure to prohibit the execution of juvenile offenders has been reinforced by the support of a number of prestigious legal organisations. The Model Penal Code, drafted by the American Law Institute in 1962, expressly rejected the juvenile death penalty,[388] as did the National Commission on the Reform of Criminal Law.[389] In August 1983, in their first formal pronouncement on capital punishment, the American Bar Association adopted a resolution opposing the juvenile death penalty.[390] In 1988 the National Council of Juvenile and Family Court Judges adopted a similar resolution.[391] Unfortunately, such domestic efforts have failed to reinforce their conclusions with relevant extranational reference; a recent A.B.A. resolution calling for a moratorium on execution until states implemented procedural recommendations and abolished execution of juveniles and persons with mental retardation

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388 American Law Institute Model Penal Code §210.6(1)(d) (Proposed Official Draft, 1962).

389 Final report of the Proposed New Federal Criminal Code (1971) §3603.

390 V.L. Streib, "The Eighth Amendment and Capital Punishment of Juveniles" (1986) 34 Cleveland State L. Rev. 363 at 388.

391 (October 1988) 19 Juvenile and Family Court Newsletter 4.

made no mention of international, or foreign, law or norms.[392] This is unfortunate, not least because the entry of extranational law in domestic recommendations could facilitate its influence on the values of American society as recognised by the courts.

ii. The Juvenile Death Penalty Before the Courts

Following *Gregg*, the Supreme Court appeared reluctant to confront the constitutionality of the juvenile death penalty. In *Eddings* v. *Oklahoma*, certiorari was granted to determine whether the Eighth and Fourteenth Amendments prohibited the imposition of the death penalty on a defendant aged 16 at the commission of the offence. The Supreme Court evaded the issue, however, vacating the petitioner's death sentence on the grounds that insufficient consideration had been paid to mitigating factors.[393] Nonetheless, *Eddings* was later cited as upholding the constitutionality of the juvenile death penalty.[394]

In 1993, Christopher Burger was electrocuted in Georgia for a murder he committed at the age of 17. The Supreme Court found that, as the issue of the juvenile death penalty had not been raised in a case which was basically concerned with the effectiveness of counsel, the Court need not give it consideration.[395] However, the Court could not stall indefinitely and, in 1988, it

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392 *Recommendation of the American Bar Association Section of Individual Rights and Responsibilities* (February 1997). Copy with the author.

393 *Supra* note 325.

394 *High v. Zant*, 250 Ga. 693, 300 S.E. 2d 654 (1983), cert. denied 104 S.Ct. 2669 (1984). *State* v. *Battle*, 661 S.W.2d 487 (Mo. 1983)(en banc), cert. denied 104 S.Ct. 2325 (1984).

395 *Burger* v. *Kemp*, 483 U.S. 776 at 779, 796 (1987).

decided the case of *Thompson* v. *Oklahoma*.[396] Thompson had been sentenced to death for a murder committed at the age of 15. A child under Oklahoma law, pursuant to a petition filed by the District Attorney Thompson was certified to stand capital trial as an adult. The U.S. Supreme Court subsequently granted certiorari to consider whether a sentence of death imposed upon a defendant aged 15 at the commission of the crime constituted cruel and unusual punishment in violation of the Eighth Amendment.

The judgement of the Court was delivered by Justice Stevens, joined by Brennan, Marshall and Blackmun, JJ., with Justice O'Connor concurring in judgement. The plurality determined that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense".[397] Consistently with the capital jurisprudence considered above, in reaching their decision the plurality considered "the work product of state legislatures and sentencing juries" as evidence of "evolving standards of decency".[398] Justice Stevens, emphasising the role of such analysis in constitutional interpretation, noted

> [o]ur capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of the legislatures and juries, provide an important measure of whether the death penalty is 'cruel and unusual'. Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.[399]

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396 487 U.S. 815 (1988).

397 *Ibid.* at 838.

398 *Ibid.* at 822.

399 *Ibid.* at 822, note 7.

Principal in the determination of 'contemporary standards' was the fact that the 18 states which included a minimum age in their death penalty statute had each established it at, at least, 16.[400] The plurality did not confine their attention to capital statutes, however, but considered general principles of juvenile justice in addition to a variety of legislative arenas in which children are treated differently to adults.[401] The conclusion reached, "that the normal 15-year-old is not prepared to assume the full responsibilities of an adult",[402] was found to be consistent with

> the basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions.[403]

Justice Scalia, in dissent, reduced his consideration of this evidence to a footnote, concluding

> [i]t is surely constitutional for a State to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary fully to appreciate the pros and cons of brutally killing a human being.[404]

In evaluating the penological implications of *Thompson*, the plurality reiterated the twin social purposes of retribution and deterrence outlined in *Gregg*.[405] With regard to the former, precedent indicated that "the Court ha[d] already endorsed the proposition that less culpability

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400 *Ibid.* at 829.

401 For example in relation to driving, marriage and gambling.

402 *Thompson, supra* note 396 at 825.

403 *Ibid.* at 825, footnote 23.

404 *Ibid.* at 871, footnote 5.

405 *Ibid.* at 836.

should attach to a crime committed by a juvenile than to a comparable crime committed by an adult".[406] The *Gregg* rationale, that retribution is "not inconsistent with our respect for the dignity of men",[407] was held "simply inapplicable to the execution of a 15-year-old offender" given "the lesser culpability, ... the teenager's capacity for growth, and society's fiduciary obligations to its children".[408] Deterrence was equally rejected; the plurality dismissed the notion that teenage defendants would make rational cost-benefit analysis as "so remote as to be virtually non-existent",[409] and remarked that even in the unlikely situation such analysis was made, so few defendants under 16 had actually been executed that no deterrence would result.[410]

Albeit concurring in judgement, Justice O'Connor premised her opinion on narrower grounds. Adopting a more positivist approach, and unwilling to accommodate "unnecessary, or unnecessarily broad constitutional adjudication",[411] she deferred the issue of 'line-drawing' to the states.[412] She considered not that the death penalty was cruel and unusual punishment for all defendants under the age of 16 but that, as the statute under which Thompson was sentenced to death did not provide for a minimum age at which defendants would be eligible for capital

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406 *Ibid.* at 835, referring to *Eddings, supra* note 325.

407 *Gregg, supra* note 280 at 183.

408 *Thompson, supra* note 396 at 836 *et seq.*

409 *Ibid.* at 837.

410 *Ibid.* at 838.

411 *Ibid.* at 858.

412 *Ibid.* at 854.

punishment, there was considerable risk that the Oklahoma legislature had not anticipated that juveniles transferred to the adult system might face the death penalty.[413]

Insofar as the penological argument was concerned, Justice O'Connor was not prepared to make a class exception; whilst acknowledging that "adolescents are generally less blameworthy than adults" she continued,

> it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of the death penalty. Nor has the plurality educed any evidence demonstrating that 15-year-olds are inherently incapable of being deterred from major crimes by the prospect of the death penalty.[414]

Justice Scalia, in dissent, agreed "[t]here is no rational basis for discerning ... a societal judgement that no one so much as a day under 16 can *ever* be mature and morally responsible enough to deserve ... [the death] ... penalty".[415]

The dissent scathingly rejected the plurality's assessment of contemporary standards, stating

> the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views ... The most reliable signs consist of the legislation that the society has enacted. It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.[416]

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413 *Ibid.* at 857.

414 *Ibid.* at 853.

415 *Ibid.* at 870. Original emphasis.

416 *Ibid.* at 865.

Accordingly,

> [w]hen the Federal Government, and almost 40% of the States, including a majority of the States that include capital punishment as permissible sanction, allow for the imposition of the death penalty on any juvenile who has been tried as an adult ... it is obviously impossible for the plurality to rely upon any evolved societal consensus discernible.[417]

Justice Scalia's manipulation of statistics adds little weight to his opinion. Whilst there existed federal statutes which failed to specify a minimum age for capital punishment, the most recent bill passed by Senate, authorizing the death penalty for certain drug-related murders, had established a minimum age threshold of 18.[418] Justice Scalia's "almost 40%", rather than proving a lack of consensus against the death penalty for under-16 year olds, emphasises that over 60% of states had rejected the death penalty either completely, or specifically for those defendants aged under 16. In *Thompson*, Justice Scalia has restricted the community from which contemporary standards must be evaluated even further. It is no longer sufficient to refer to domestic American norms; the scope has been narrowed to those states which provide for the impugned punishment. Extending this logic, it is difficult to see how any punishment provided for in state legislation could be struck down as unconstitutional.

Given the international prohibition on the juvenile death penalty, one might have anticipated the plurality would have incorporated extranational law or norms to reinforce their decision. However, whilst it was emphasised that the judgement was in accordance with "respected professional organizations, ... other nations that share our Anglo-American heritage, and [] the

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417 *Ibid.* at 868.

418 S.2455, 100th Cong., 2d Sess.; 134 Cong. rec. 14118 (1988). *Thompson, supra* note 396 at 830, note 30.

leading members of the Western Europe community"[419] and brief reference was made to jurisdictions in which the juvenile death penalty, or the death penalty *per se*, was not imposed, no consideration was given to the international law which has developed on the execution of juvenile offenders.

Notwithstanding this limited use of extranational law, Justice Scalia objected, pointedly referring to "the legislation of *this* society, which is assuredly all that is relevant"[420] and criticising "[t]he plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries ... [as] ... totally inappropriate as a means of establishing the fundamental beliefs of this Nation".[421] He determined that the Court must judge punishments within

> the original understanding of 'cruel and unusual' ... or 'the evolving standards of decency' *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained - or even strongly entertained, or even held as an 'abiding conviction' - by a majority of the small and unrepresentative segment of our society that sits on this Court.[422]

In light of the plurality's brief acknowledgement of extranational developments, Justice Scalia's response seems excessive. Perhaps he identified in *Thompson* - in either the plurality opinions or the bench conference - the crumbling of the Court's parochial dyke and feared the

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419 *Ibid.* at 830, note 31.

420 *Ibid.* at 868. Original emphasis.

421 *Ibid.* at 868, footnote 4. Citations omitted.

422 *Ibid.* at 873. Original emphasis. Citations omitted.

consequences of extranational influence. Such a fear could explain his retreat from consideration of even general domestic opinion; as we have seen, he adopted an extremely restricted vision of the domestic community, accepting the views of a minority of states as dispositive.

Justice Scalia concluded that "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution".[423] Presumably, however, if such consensus of 'our own people' did exist he would perceive it as determinative, such that it would be an even greater imposition to give effect to the views of other nations! There may not have existed 'settled consensus' in the United States, but it is not the case that the juvenile death penalty is frequently imposed. Whilst the U.S. is responsible for the majority of the world's documented juvenile executions,[424] and the courts have consistently upheld the constitutionality of the juvenile death penalty, empirical evidence indicates that it is an atypical punishment. Notwithstanding the fact that juveniles account for approximately 10% of homicide offenders,[425] and 25 states either provide a minimum statutory age of under 18 at

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423 *Ibid.* at 868, note 4.

424 *Supra* note 112 and accompanying text. It must be emphasised that Amnesty International is working with statistics of documented executions and the U.S. is probably the nation which produces the most tangible paper trail. Were other nations as transparent, the statistics might well be different.

425 Of 16268 homicide offenders in 1994, 2664 or 10.6% were under the age of 18. (Statistics compiled by the author from *Death Row, U.S.A.* and an analysis of F.B.I. data by James Alan Fox, Dean of the College of Criminal Justice, Northeastern University as reported in F. Butterfield, "Barrooms' Decline Underlies a Drop in Adult Killings" New York Times (19 August 1996) A1 et seq.

which defendants may face capital charges or do not specify a minimum age at all,[426] juveniles represent a small proportion of condemned inmates. Of the 3122 death row inmates at 30 April 1996, 42 (1.3%) were juvenile offenders.[427] In *Furman*, Justice Brennan wrote "[l]egislative authorization, of course, does not establish acceptance. The acceptability of severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use".[428] He emphasised, "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily".[429]

The dissent in *Thompson* acknowledged that the death penalty was "very rarely" imposed on juvenile defendants, but ascribed this to "[a] society less willing to impose the death penalty, and entirely unwilling to impose it without individualized consideration" rather than basis "for attributing that phenomenon to a modern consensus that such an execution should never occur"[430] In refusing to convert "a statistical rarity of occurrence into an absolute constitutional ban",[431] they appear to have lost sight of the fact that the Eighth Amendment prohibits cruel *and unusual* punishment.

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426 S.D. Strater, "The Juvenile Death Penalty: in the Best Interests of the Child?" (1995) 22 H. Rts. 10, quoting U.S. Department of Justice statistics.

427 *Death Row, U.S.A.*, *supra* note 250.

428 *Furman*, *supra* note 265 at 279.

429 *Ibid.* at 293.

430 *Thompson*, *supra* note 396 at 870.

431 *Ibid.* at 871.

Thus, the Court fractured over the issue of executing a 15 year old. Given the narrow framework of Justice O'Connor's concurrence, it would be incorrect to state that an unwavering bright line has been drawn at 16 for imposition of the death penalty. However, whilst the complexion of the Court has changed somewhat since *Thompson* - and the retirement of Justices Brennan and Marshall has impacted upon the abolitionist cause - it is unlikely that the Court would uphold a death sentence for an offender below the age of 16. Nonetheless, prosecutors continue to seek the death penalty in such cases.[432]

The actual ruling in *Thompson* would prove frustratingly elusive for the lower courts. In *Allen* v. *State*, the Supreme Court of Florida vacated a death sentence imposed in 1991 on a defendant aged 15 at the commission of the offence.[433] Noting the rarity of the juvenile death penalty, the Court held the imposition of the death penalty on Allen constituted cruel or unusual punishment in violation of article 1 §17 of the Florida Constitution.[434] Referring to *Thompson* only in a footnote, the majority concluded "[t]he exact precedent set in *Thompson*'s plurality opinion and concurrence may not be conclusively clear, but we believe the decision there supports the result we reach today".[435] The Indiana Supreme Court also struggled with the opacity of *Thompson* but, as the impugned provision of the *Indiana Code* specified no minimum age for the death penalty, found *Thompson* sufficient authority to hold unconstitutional the execution of a female

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432 *Strater, supra* note 426 at 11. *Allen* v. *State*, 636 So. 2d 494 (Fla. 1994).

433 *Allen, ibid.*

434 *Ibid.* at 498.

435 *Ibid.* at 498, footnote 7.

aged 15 at the time of her offence.[436]

In contrasting cases which illustrate the potential *de minimus* and *de maximus* interpretations of *Thompson*, the Supreme Court of Mississippi upheld the constitutionality of a capital statute which lacked a minimum age on the basis that "[t]here can be no doubt that under Mississippi law, no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony",[437] whereas the Supreme Court of Washington vacated a death sentence imposed upon a 17 year old defendant as, in the absence of a minimum age provision in the statute, theoretically an 8 year old child could be sentenced to death, eight being the age at which children are eligible for transfer to the adult system.[438] By the rationale of the Mississippi court, the Washington statute would also have been saved; Justice O'Connor's opinion in *Thompson* was interpreted as requiring a minimum age for execution, but not specifying the age at which that threshold should be established. Accordingly, if the state law could not accommodate execution of a child under 8, or 13, the mandate of *Thompson* appeared to have been satisfied.

Counsel and *amicus curiae* in *Thompson* had asked the Court to prohibit the execution of all

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436 *Cooper* v. *State*, 540 N.E. 2d 1216 at 1220 *et seq* (Ind. 1989).

437 *Blue* v. *Mississippi*, 674 So. 2d 1184, Miss. LEXIS 19 at 140 (S. Ct. Miss., 1996).

438 *Washington* v. *Furman*, 122 Wash. 2d 440 (S. Ct. Wash., 1993). Justice O'Connor clarified the requirement for statutory age-minimums in *Stanford* v. *Kentucky* determining that, in the absence of national consensus forbidding the execution of 16 and 17 year old defendants, state legislatures were not required to specify that commission of a capital offence at that age could lead to execution. *Infra* note 440 at 381.

juvenile defendants. However, the plurality restricted their mandate to determining the "case before [them]".[439] Accordingly, the constitutionality of imposition of the death penalty on 16 and 17 year olds was unresolved until 1989 when, in *Stanford* v. *Kentucky* together with *Wilkins* v. *Missouri*, a 5-4 decision of the Court held that the Eighth Amendment does not preclude the execution of defendants aged 16 or older at the time of the offence.[440]

Emphasising the uneasy divisions in the Court on the issue of capital punishment, and the importance of Justice O'Connor's swing vote, Justice Scalia, author of the dissent in *Thompson*, delivered the opinion of the Court, joined in part and in judgement by Rehnquist, C.J., and White, O'Connor and Kennedy, JJ.. Justice Brennan's dissenting opinion, joined by Marshall, Blackmun and Stevens, JJ., focussed upon

> the rejection of the death penalty for juveniles by a majority of the States, the rarity of the sentence for juveniles, both as an absolute and comparative matter, the decisions of respected organizations in relevant fields ... and its rejection generally throughout the world.[441]

On the issue of the juvenile death penalty, domestic practice was in accordance with the opinions of 'respected organizations' and the international community. It is unclear whether the dissent would have been influenced by extra-legal and extranational norms had that not been the case. Effectively, Justice Brennan amalgamated what could potentially have provided three different standards: state practice; professional opinion; and, global trends.

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439 *Thompson*, supra note 396 at 838.

440 492 U.S. 361 (1989); No. 87-6026.

441 *Stanford, ibid.* at 390.

The majority judgement is highly consistent with the dissent authored by Justice Scalia in *Thompson*. In determining whether the juvenile death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment, the majority focused upon contemporary standards indicated "not [by] our own conceptions of decency, but [by] those of modern American society as a whole".[442] Justice Scalia "emphasize[d] that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici ... that the sentencing practices of other countries are relevant".[443] The standards of 'modern American society' were established by the practices of state legislatures with the Court concluding that, as "a majority of the States *that permit capital punishment* authorize it for crimes committed at age 16 or above", there was insufficient evidence to "establish the degree of national consensus th[e] Court had previously thought sufficient to label a particular punishment cruel and unusual".[444]

In restricting its consideration to retentionist states the Court disregarded the fact that, overall, 30 states would not have executed Wilkins, who was aged 16 at the commission of the offence, and 27 states would not have executed Stanford, who was aged 17 at the commission of the

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442 *Ibid.* at 369.

443 *Ibid.* at 369, footnote 1. Amnesty International had filed a brief of *Amicus Curiae* in support of the petitioners in *Stanford*, citing extranational practice against the execution of juvenile offenders.

444 *Stanford, supra* note 441 at 371. My emphasis. In effectively reducing the evolutionary *Trop* doctrine to little more than a requirement to abide by public opinion, the U.S. may be contrasted with other Western democracies - for example, France, Germany, the U.K. and Canada - where abolition of the death penalty took place in the face of popular opinion. In the U.K. and Canada, attempts to reintroduce the death penalty have been consistently defeated despite public opinion to the contrary. See generally, R.G. Hood, *The Death Penalty: a World-wide Perspective* (Oxford: Clarendon Press, 1989) at chapter 7.

offence.[445] In addition, the employment of 'default' analysis assumed that the 19 state death penalty statutes which lacked a minimum age had "consciously authorized the execution of juveniles".[446] Justice Brennan, in dissent, held

> I would not assume, however, in considering how the States stand on the moral issue that underlies the constitutional question with which we are presented, that a legislature that has never specifically considered the issue has made a conscious moral choice to permit the execution of juveniles".[447]

In addition to dismissing "the sentencing practices of other countries",[448] Justice Scalia "declined to rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional associations".[449] Justice Brennan, for the dissent, disagreed, noting "[t]he view of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society".[450] His emphasis on the utility of comparative norms as 'indicators' of acceptability in domestic constitutionalism suggests a flexible judicial discourse which, whilst not going so far as to accord significant weight to extranational precedent, is greater than tacit emulation. In *Thompson* fleeting consideration had been given to the practices of other nations; in *Stanford* Justice Brennan broke

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445 *Stanford, supra* note 441 at 385.

446 *Ibid.* at 385, Brennan J.

447 *Ibid.*

448 *Ibid.* at 377.

449 *Ibid.*

450 *Ibid.* at 384.

with tradition and referred also to the international prohibition on the juvenile death penalty, and the fact that the U.S. had signed or ratified human rights instruments which contained such prohibition.[451]

Justice Scalia's isolationist stance in *Stanford* represents an unwelcome, reactionary move. As one commentator remarks,

> [a]lthough the Court reasonably seeks to protect an 'American' ethic and understanding of the death penalty, doing so defeats its ability to reach a logical 'standard of decency', unless it would posit that the decency and the dignity of Americans are somehow lower than the rest of the world.[452]

Justice Scalia has been criticised for the "pugnacious parochialism" he has demonstrated in juvenile death penalty cases,[453] and his absolute rejection of extranational law in interpreting the Eighth Amendment has resulted in cramped constitutional interpretation in which domestic practice has proved dispositive. It is especially ironic that Justice Scalia, an original constructionist, is so adamantly opposed to consideration of extranational law and practice given that the framers "necessarily referred to foreign, rather than American, norms".[454] In a recent law journal article, Justice Blackmun reflected upon the early understanding that international law would be binding upon the nascent United States, and the utility of international comparison

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451 *Ibid.* at 389 *et seq.*

452 Nanda, *supra* note 139 at 1338.

453 J. Fitzpatrick, "The Relevance of Customary International Norms to the Death Penalty in the United States" (1995/96) 25 Ga.J. Int'l & Comp. L. 165 at 178.

454 H.A. Blackmun, "The Supreme Court and the Law of Nations" (1994) 104 Yale L.J. 39 at 47.

in death penalty cases, noting "[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments".[455] Justice Scalia is not a lone voice, however; resistance to extranational perspective has also been noticeable in the state courts. In *Cooper* v. *State*, the Indiana Supreme Court acknowledged the international attention received by the case of a 15 year old female sentenced to death, but warned "[t]he appeal pending in this Court, however, must be resolved only on the basis of Indiana and federal law".[456]

Normative aspirations were rejected in *Stanford*, with Justice Scalia requiring evaluation of actual contemporary standards; "not what they *should* be, but what they *are*".[457] Dismissing "socioscientific, ethicoscientific, or even purely scientific evidence" as inapplicable in Eighth Amendment jurisprudence, Justice Scalia found

> [i]f such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis.[458]

Justice Scalia has since determined

> the text and tradition of the Constitution ... ought to control. The Fifth Amendment provides that '[n]o person shall be held to answer for a capital ... crime, unless on presentment or indictment of a Grand Jury, ... nor be deprived of life ... without due process of law'. This clearly permits the death penalty to

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455 *Ibid.* at 45.

456 540 N.E. 2d 1216 at 1217 *et seq* (Ind. 1989).

457 *Stanford, supra* note 441 at 378. Original emphasis.

458 *Ibid.*

> be imposed and established beyond doubt that the death penalty is not one of the 'cruel and unusual punishments' prohibited by the Eighth Amendment.[459]

What Justice Scalia has not recognised is that a constitution may tolerate the death penalty without justifying it; constitutional recognition of capital punishment was intended to protect the rights of the capital defendant, not enshrine the death penalty for time immemorium. As far as the juvenile death penalty is concerned it is not constitutionally mandated and its abolition, in keeping with the law and norms of the international community, need not impact upon the death penalty for adult offenders.

Justice Scalia's originalist approach was not validated by a majority of the Court in *Stanford*: Justice O'Connor, concurring in judgement, agreed with the dissent that the Court has "a constitutional obligation to conduct proportionality analysis".[460] Criticising the positivist approach adopted by Justice Scalia, Justice Brennan declared "[t]his Court abandons its proven and proper role in our constitutional system when it hands back to the very majorities the Framers distrusted the power to define the scope of protection afforded by the Bill of Rights".[461]

Whilst the *Stanford* Court proceeded to consider domestic sentencing practices, the majority were not convinced that the rarity with which the juvenile death penalty is imposed renders it unconstitutionally unusual, finding

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459 *Callins*, *supra* note 341, Scalia J. concurring in denial of certiorari.

460 *Stanford*, *supra* note 441 at 382.

461 *Ibid.* at 392.

> it is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.[462]

Yet, the Court had previously rejected sentences as cruel and unusual despite the fact that they continued to be sporadically handed down,[463] and "evidently, resort to the Cruel and Unusual Punishments Clause would not be necessary to test a sentence never imposed"![464]

Consistently with his dissent in *Thompson*, Justice Scalia was not convinced by arguments that the death penalty should conform with other laws which draw 'bright lines' at 18. Once again, he distinguished between general social activity and criminal culpability, determining "[i]t is, to begin with, absurd to think than one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong".[465] Whilst class exceptions may be suitable in other areas, it was felt that the individualization required by the *Lockett* doctrine rendered such an exemption unnecessary in capital cases.[466]

Justice Scalia's determinations are discordant with the treatment of children in the legal system,

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462 *Ibid.* at 374. Original emphasis.

463 *Coker, supra* note 295.

464 *Stanford, supra* note 441 at 386, Brennan J.

465 *Ibid.* at 374. However, the goal of rehabilitation within the juvenile justice system does not assume juveniles never know right from wrong; rather, like statutes on driving, drinking and voting, it acknowledges juvenile characteristics of vulnerability and lack of maturity.

466 *Ibid.* at 374 *et seq.* However, the Court has made class exemptions in the past, e.g., *Ford*, supra note 306.

where they are more often seen as deserving protection and guidance. The goal of the juvenile justice system, a relatively recent concept, is considered to be rehabilitation rather than punishment,[467] with the focus upon 'the best interests of the child'. Acknowledging that the immaturity of juveniles affects their decision-making, in *Bellotti* v. *Baird* the Supreme Court noted that "during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgement to recognize and avoid choices that could be detrimental to them".[468] *Stanford* appears to belie these developments; in no sense could execution be considered in the best interests of the child.

In his dissent to *Thompson*, Justice Scalia remarked

> if one believes that the data the plurality relies upon are effective to establish, with the requisite degree of certainty, a constitutional consensus in this society that no person can ever be executed for a crime committed under the age of 16, it is difficult to see why the same judgement should not extend to crimes committed under the age of 17, or of 18.[469]

It is my contention that the data to which he refers *does* establish that contemporary American society has rejected the notion of the juvenile death penalty. There is empirical evidence that it is not favoured by a majority of the population,[470] and it is hypothesised that, despite public

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467 *In re Gault*, 387 U.S. 1 (1967).

468 443 U.S. 622 at 635 (1979).

469 *Thompson*, *supra* note 396 at 871.

470 A poll conducted in the mid-1980's showed less than one third of the respondents were in favour of the death penalty for offenders under the age of 18. "SCJP Poll results: Don't Execute Juveniles" (1986) 13 Southern Coalition report on Jails and Prisons 1. In an extensive study conducted by Professor Finkel of the Department of Psychology at Georgetown University, the following conclusions were reached; in a particularly heinous crime in which the age actor may be expected to be most muted or discounted, and in which 60% of the subjects would have voted for the death penalty in the control case of a 25 year old defendant, only 25% would

favour for retributivist punishment, "society does not feel the same satisfying, cleansing reaction when a child is being executed".[471]

iii. The Future of the Juvenile Death Penalty

What lies ahead for the juvenile death penalty in the United States? Given the political complexion of the current Supreme Court - and acknowledging that, in the constitutional adjudication discussed above, politics have played an important role[472] - reversal of *Stanford* seems unlikely. Despite the ruling of the Inter-American Commission in *Roach & Pinkerton*,[473] it is equally unlikely that the Federal Government will bow to international pressure on the issue; whilst the low numbers of juvenile death sentences would seem to accommodate a politically expedient abolition, the issue of sovereignty is very dear to the United States. However, action could be taken by Congress that is tied to a national discourse, either through the enactment of legislation on equal protection grounds or through influencing state action by

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have sentenced a juvenile under the age of 15 to death, and 35% would have sentenced a 16, 17 or 18 year old. Finkel *et al*, "Killing Kids: the Juvenile Death Penalty and Community Sentiment" (1994) 12 Behavioural Sciences & the Law 5.

471 Streib, *supra* note 390 at 392.

472 According to one commentator,

> [t]hat the floor was placed at only 16 and may be temporary at that will be remembered as a quirk of timing. If Justice Powell had not resigned in the summer of 1987, if he had been sitting for the *Thompson* case, and if he had not been replaced by Justice Kennedy for the *Stanford* case, it seems reasonable to assume that the *Thompson* plurality and the *Stanford* dissent would have been five-Justice majority opinions. Justice O'Connor's narrow opinions would have been of interest to only a few nit-picking scholars, and Justice Scalia's radical opinions would have been only sour grapes.

V.L. Streib "Excluding Juveniles From New York's Impendent Death Penalty (1990) 54 Albany L. Rev. 625 at 672.

473 *Roach & Pinkerton, supra* note 122.

placing conditions on federal grant financing, as occurred in the Civil Rights era.[474]

From the consideration above, it is apparent that the Supreme Court is willing to be guided by the states on the issue of unconstitutional punishment. Frustrating in its perpetuation of random, geographic influence on a national issue, it may be, nonetheless, that the states hold the key to abolition of the juvenile death penalty. According to Streib, "state legislatures ... are being sensitized to the wishes of their voting constituencies, and the message from these constituencies is relatively clear".[475] In New York, where nineteen juvenile offenders were executed between 1767 and 1956,[476] the death penalty was reintroduced in September 1995 for capital defendants "more than eighteen years old at the time of commission of the crime".[477]

There is evidence of societal distaste, jury nullification and a high reversal rate in juvenile death penalty cases: legislators do not favour the death penalty for juvenile offenders; prosecutors routinely do not seek it; death qualified juries seldom impose it. In the rare instances it is imposed the sentence is unlikely to be carried out, either through executive or judicial

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474 Weissbrodt, *supra* note 132 at 373. Citations omitted.

475 V.L. Streib, *Death Penalty for Juveniles* (Bloomington: Indiana University Press, 1987) at 186.

476 Streib, *supra* note 472 at 638, Table 6.

477 *New York Penal Law* §125.27 (1)(b). Whilst this was undoubtedly intended to draw the 'bright line' at 18 rather than 19, the meaning of this ill-phrased clause is already being queried; one commentator has questioned whether in fact the inclusion of the term "more than" means 18 year old defendants will be exempted. Forthcoming article: J.R. Acker, "When the Cheering Stopped: an Overview and Analysis of New York's Death Penalty Legislation" __ Pace L.Rev. __ (199__). Faced with such ambiguity, the New York courts could appropriately invoke the interpretive presumption outlined in Chapter 2 and interpret the clause so as to restrict the imposition of the death penalty as far as possible, in other words, establishing the age threshold at 19.

intervention. State courts are demonstrating their disapproval; in *Lewis* v. *State*,[478] Justice Hill of the Georgia Supreme Court found the juvenile death penalty so rare as to be "excessive, disproportionate and unconstitutional".[479] Shortly thereafter the legislation was amended to establish a minimum age of 17.[480] In the state of Washington, 18 was held to be the presumptive minimum age for capital sentencing in the absence of a statutory minimum.[481]

The tortured machinations of the post-*Gregg* system of capital punishment make it not surprising that, to date, no juvenile offender has been executed whilst still under the age of eighteen. The youngest of the juvenile offenders executed to date, Jay Pinkerton, was executed by lethal injection in Texas in 1986 at the age of 24.[482] Given the predilection of death row inmates for volunteering their appeals, however, it is not inconceivable that an executioner may be faced with a child on the gurney. Perhaps then the futility, and barbarity, of killing children will be recognized in the United States, as it has been in the vast majority of jurisdictions.

Conclusion

The Supreme Court has recognised that the cruel and unusual punishments clause reflected a fear of governmental abuse, for

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478 268 S.E. 2d 915 (Ga. 1980).

479 *Ibid.* at 920. Special concurrence.

480 *Georgia Code*, Am. §17.9.3 (1982).

481 *State* v. *Furman*, 858 P.2d 1092 (Wash. 1993).

482 M. Schlangenstein, "Two-time Murderer Executed" U.P.I. (15 May 1986).

> [w]ith power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?[483]

The capital jurisprudence of the Court post-*Furman* belies this awareness; in deferring to the will of the majority, the Eighth Amendment is being interpreted as a lowest common denominator, rather than an essential check on state power. *Stanford* and *Penry* v. *Lynaugh*[484] were decided on the same day, by the same majority. According to Berg, the positivist approach adopted by the Court in allowing itself to be guided by state legislatures "decentralized"[485] capital punishment:

> [u]nable to categorize completely the execution of mentally retarded persons or 16-year-olds as either inside or outside the bounds of the Eighth Amendment, the Plurality left the task of administering the punishment in these cases to the States. Militating in favour of this outcome are principles of federalism, deference to the States, and judicial restraint.[486]

However, this devolved approach negates the role of the Court in promoting national standards and constitutional guarantees. In 1943, the Court held "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts".[487] In response to *Penry* and *Stanford*, the Court's new-found deference

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483 *Weems*, *supra* note 256 at 372.

484 *Supra* note 308.

485 P.C. Berg, "Youth, Mental Retardation, and Capital Punishment" (1990) 13 Harvard J. L. & Public Policy 415 at 432.

486 *Ibid.* at 431.

487 *Board of Education* v. *Barnette*, 319 U.S. 624 at 638 (1943).

was grieved: "[w]hat a cruel document that Constitution must be, in the stony eyes of the Court majority ... What a harsh and merciless reading of a document written primarily to protect citizens against the powers of the states!"[488]

As we have seen, the system of capital punishment currently in place in the United States falls far short of international standards. Accordingly, it is perhaps inevitable that the courts have proven unreceptive to transjudicial discourse. If international law and trends, and the practices of foreign jurisdictions, were seriously considered in American jurisprudence the courts would be compelled either to find a basis upon which to distinguish the U.S. from the majority of the world's nations, or to follow extranational precedent and invalidate the adult death penalty, as applied, and the juvenile death penalty in its entirety. It is unlikely that the courts will willingly shoulder such responsibility.

In addition, the courts' reserve towards extranational law is indicative of the general isolationist tendencies of the United States. Whilst often messianic in its export of U.S. normativity, illustrated by the *Helms-Burton Act*, for example, no reciprocal respect is accorded. According to Justice Blackmun,

> Professor Henkin has observed that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'. Unfortunately ... the Supreme Court's own recent record in the area is somewhat more qualified. At best, I would say that the present Supreme Court enforces *some* principles of international law and *some* of its obligations

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488 Wicker, "Death and Mockery" New York Times (27 June 1989) A23.

some of the time.[489]

However, that legal systems may no longer claim the degree of territorial sovereignty once enjoyed is uncontroversial. The development of international human rights law is undoubtedly a factor, but is not solely responsible; the movement towards regional trade agreements and free markets also entails increasing awareness of international law and recognition of foreign domestic law. Globalization has had a corresponding effect on legal development; in 1980, Grundman observed that the three major exports of the United States were "rock music, blue jeans and United States law".[490] The answer, therefore, may lie in political pressure: for example, Professor Schabas recognised the U.S. accession to the *ICCPR* as "a recognition ... that its previous indifference to contemporary international human rights law was a source of embarrassment and had become a political liability".[491]

Regardless of extranational influence, however, the Supreme Court may be forced towards a second *Furman*. There is evidence to suggest that capital punishment has degenerated to an unacceptable level for domestic litigators; in February 1997, the American Bar Association called upon each retentionist state to effect a moratorium on executions until the A.B.A. policies on capital punishment, designed to ensure non-arbitrariness and to reduce the risk of executing an innocent person, had been implemented. Of note is the emphasis placed on the elimination

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489 Blackmun, *supra* note 454 at 49. Citations omitted.

490 V. R. Grundman, "The New Imperialism: The Extraterritorial Application of United States Law" (1980) 14 Int'l L. 257 at 257.

491 Schabas, *supra* note 100 at 325.

of discrimination, and the abolition of the death penalty for juvenile and mentally retarded offenders.[492]

In *Weems*, the Court noted "[i]n the application of a constitution, [] our contemplation cannot be only of what has been but of what may be".[493] Subsequently, the Court has engaged in a social discourse in which it is being dictated to by public opinion rather than attempting to exhort normative values for American society in light of prevailing global developments. As we have seen, *Soering* was dismissed as providing little more than curiosity value[494] and *Ng* was not discussed at all in a Ninth Circuit judgement which actually reached a similar conclusion.[495] It is the contention of this thesis that such constitutionalism is parochial and, ultimately, self-defeating. To this end, I will evaluate the contrasting approach of the South African Constitutional Court, in which considerable emphasis is placed upon extranational law and normativity, before drawing my conclusions as to the benefits of cosmopolitan constitutionalism.

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492 *Supra* note 392 and accompanying text.

493 *Weems*, *supra* note 256 at 373.

494 See *supra* note 187 and accompanying text.

495 See *supra* note 9 and accompanying text.

Chapter 4 South Africa

In June 1995, a unanimous decision of the Constitutional Court of South Africa abolished the death penalty for ordinary crimes.[496] In addition to the immediate impact for the 453 condemned inmates whose death sentences were commuted, the decision crowned the metamorphism of South Africa; once the bête noire of the international community, it had transformed from a racist minority regime into a fledgling democracy in which consideration of the rule of law and human rights would be paramount. In this chapter, we will identify the role played by the Constitutional Court in assimilating lessons for South Africa from indigenous and extranational experience, and fostering an atmosphere promoting the development of rights-based thinking.

A. The Constitutional Court

The interim Constitution of the Republic of South Africa [the Constitution],[497] the result of "an improbable deal between a government that negotiated itself out of power and a former twenty-

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496 *Makwanyane, supra* note 8.

497 (Act 200 of 1993). Although the final Constitution has now been certified by the Constitutional Court and signed into law by President Mandela, see *infra* note 671 and accompanying text, for the purposes of this chapter the use of "Constitution" will refer to the interim Constitution, and the final Constitution will be denoted by the use of "final Constitution".

seven year captive of that government",[498] became effective on 27 April 1994. In a nation which had, to all intents and purposes, castrated the rule of law, resulting in a legal and political climate best described as a "monster that eventually devoured justice itself ... [through the twin evils of] ... unrestrained supremacy of Parliament and the constitutional denial of democracy",[499] the adoption of the Constitution provided concrete guarantees that the 'new South Africa' would indeed be a new South Africa. According to Justice Mahomed of the Constitutional Court, the Constitution represented

> a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[500]

In contrast to oppressive regimes under military control, in South Africa law provided the tool for the implementation and enforcement of apartheid. The ruling Nationalist party was "obsess[ed] with legalism": "[t]here [was] a law for everything, and, in the Nationalist's view, such laws, no matter how draconian, [were] lawful simply because they [were] the law".[501] The deferential positivism of the judiciary, perceived as little more than "the coy handmaiden of the executive",[502] "in its refusal to protect even the most basic civil liberties, [was] largely a rubber

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498 P.N. Levenberg, "South Africa's New Constitution: Will It Last?" (1995) 29 Int'l Lawyer 633 at 633.

499 C. Villa-Vicencio, "Whither South Africa? Constitutionalism and Law-making" (1991) 40 Emory L.J. 141 at 145.

500 *Makwanyane*, *supra* note 8 at 758.

501 L. Berat, "A New South Africa? Prospects for an Africanist Bill of Rights and A Transformed Judiciary" (1991) 13 Loyola of L.A. Int'l & Comp L.J. 467 at 471.

502 *Ibid.* at 495.

stamp for executive decisions".[503] Accordingly, in order to gain credibility with those for whom law signified oppression and apartheid, it was essential that the Constitutional Court be perceived as distinct from the former judiciary.

The Constitutional Court was established under section 98 (2) of the Constitution as a "court of final instance over all matters relating to the interpretation, protection and enforcement" of the Constitution. The concept of judicial review was alien to the South African system, which had inherited the British doctrine of parliamentary supremacy, and indeed the former South African Constitution expressly provided that no court was "competent to inquire into or pronounce upon the validity of an Act of Parliament".[504] The eleven justices of the Constitutional Court must have felt the burden of their responsibility as they considered *Makwanyane*, their inaugural case. They were presented with an opportunity to craft South African constitutional jurisprudence, with virtually no domestic precedent, on a highly controversial issue.

It is apparent from the opinions in *Makwanyane* that the Court was influenced by extranational law and normativity as well as by South Africa's history. It will be recalled that Justice Mahomed viewed the Constitution as rejecting the insularity and parochialism of South Africa's past, encouraging instead a culture of cosmopolitan constitutional interpretation.[505] The

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503 *Ibid.* at 472.

504 *The Republic of South Africa Constitution Act* (Act 110 of 1983) s. 34 (3).

505 *Supra* note 500 and accompanying text.

Constitutional Court used *Makwanyane* as a vehicle for establishing the timbre of their forthcoming jurisprudence, incorporating international law and foreign precedent in addition to traditional, indigenous values. Their extensive consideration of international trends and extranational law may have been animated by the wealth of material available on the death penalty - as well as the paucity of domestic precedent on justiciable rights - but it was also constitutionally motivated.

It had been apparent throughout the drafting of the Constitution that international law would play an important role in the development of a justiciable Bill of Rights in South Africa. In his address at the inauguration of the Constitutional Court, the Minister of Justice, Mr Dullah Omar, charged

> [t]he role of this Court, the Constitutional Court, is to act as guardian and protector of the Constitution. And we pray that its actions and decisions will be guided by wisdom and a deep respect for human rights and, in particular, the dignity of every woman and man in our country. It will be guided by international principles that have, over the years, been developed to guard and protect the lives of ordinary people in all countries where human rights are honoured.[506]

The drafters of the Constitution had specifically encouraged consideration of international and foreign precedent in section 35 (1), "a jewel in the Constitution; a provision which should serve as a model to other states that seek to promote a human rights culture".[507] It provides

> [i]n interpreting the provisions of ... [the Bill of Rights] ... a court of law shall

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506 Address by the Minister of Justice, Mr Dullah Omar, at the Ceremony Marking the Inauguration of the Constitutional Court, Johannesburg, 14 February 1995. Copy with the author.

507 J. Dugard, "International Law and the 'Final' Constitution" (1995) S.Af. J.Hum.Rts. 241 at 242.

> promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in ... [the Bill of Rights] ..., and may have regard to comparable foreign case law.

According to Professor Dugard, "it is clear that the values of the international human rights legal order are to rank with those of freedom, equality and the basic values of an open and democratic society".[508]

The common law principle of recognising customary international law insofar as it does not conflict with existing domestic provisions was given constitutional status in section 321 (4) of the Constitution which provides that "[t]he rules of customary international law binding on the Republic shall, unless inconsistent with the Constitution or an Act of Parliament, form part of the law".[509] Whilst this codification reinforces the position of international law in the South

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508 *Ibid.*

509 Customary international law probably formed part of the law of South Africa through its incorporation into the common law inherited from England. Blackstone was satisfied that this was the position in England, stating "[t]he Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted to its fullest extent by the common law, and is held to be part of the law of the land". Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1809) Book IV, Chapter 5 at 67. According to Schaffer, whilst "[i]n South Africa, prior to 1970, there was no positive judicial statement on the relationship between international law and municipal law, ... South African courts had ... followed the British lead by taking judicial notice of customary international law". R. Schaffer, "The Inter-relationship Between Public International Law and the Law of South Africa: An Overview (1983) 32 Int'l & Comp. L.Q. 277 at 296. Citations omitted. South African law is not, of course, solely descendant from British law, but in *Nduli and Another* v. *Minister of Justice and Others*, [1978] 1 S.A. 893 (AD), the Appellate Division acknowledged that Roman-Dutch law also mandated the incorporation of customary international law in South Africa. A trilogy of cases in 1970 established, irrefutably, that customary international law formed part of the law of South Africa. *S.* v. *Ramotse* (14 September 1970) Unreported judgement of the Transvaal Provincial Division; see J. Dugard, "International Law *is* Part of our Law" (1971) 88 S.Af.L.J. 13 at 13; *Parkin* v. *Government of the République Démocratique du Congo and Another* [1971] 1 S.A. 259 (W); *South Atlantic Islands Development Corporation Ltd.* v. *Buchan* [1971] 1 S.A. 234 (C).

However, the traditional approach of considering customary international law to the extent that it did not conflict with existing domestic law rendered it sterile in South Africa. According to Professor Dugard,

> [c]ustomary international law has always been part of our common law, with the result that

African jurisdiction, 321 (4) is more restrictive than 35 (1), which accommodates the influence of foreign or international law in finding legislation incompatible with the constitutional provisions of the Bill of Rights.

Dugard interprets the constitutional provisions as

> serv[ing] a twofold purpose. First, they inform politicians, lawyers and the public of South Africa that the new constitutional state, unlike the apartheid state, aims to conform to the prescriptions of the international legal order. Secondly, they inform the international community of South Africa's commitment to international law and give notice of the manner in which South Africa will bind itself in its future relations with states.[510]

It is apparent from the jurisprudence of the Court that, notwithstanding the provisions of section 35 (1), the Justices recognize the inherent value of transjudicial discourse. In *Makwanyane*, President Chaskalson determined that

> international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35 (1).[511]

Justice Mahomed found that the Court should aspire to interpret constitutional provisions "[in] consistency with constitutional perceptions evolving both within South Africa and the world

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> it was open to courts to apply those norms of human rights law that had acquired the status of custom - unless they were in conflict with legislation. As the apartheid legislative order violated almost every right recognized in the *Universal Declaration of Human Rights* there was little scope for the application of customary norms.

J. Dugard, "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 S.Af.J.Hum.Rts. 208 at 208.

510 Dugard, *ibid.* at 241.

511 *Makwanyane, supra* note 8 at 686.

outside with which our country shares emerging values".[512]

It is particularly appropriate that the South African Constitution mandates the consideration of extranational law, as the text of the Constitution itself draws heavily on foreign and international constitutional provisions. It is logical for the interpreters of the Constitution to have regard to the interpretative jurisprudence of their counterparts; little is to be accomplished by a new Court re-inventing the wheel. At its most basic, Slaughter's "simple dissemination of ideas" inherent in transjudicial discourse[513] is well represented in *Makwanyane* and *Williams*; the considerable body of material available relating to punishment and penology afforded the Court an opportunity to craft its decision in light of prevailing international opinion and foreign experience.[514]

The unhappy domestic experience of capital punishment was also integral to the decision in *Makwanyane*. President Sólyom of the Hungarian Constitutional Court considered the abolition of the death penalty "more than a symbolic opposition to a political system that sacrificed human life, without restraint, for its political purposes",[515] and his South African counterparts

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512 *Ibid.* at 763.

513 Slaughter, *supra* note 3 at 117.

514 See below.

515 *Constitutional Court Decision No. 23/1990*, *supra* note 17 at 18. The Hungarian Court held that the death penalty allowed for "the irreparable elimination of life and human dignity", thus violating the provisions of Article 54 (1) of the Hungarian Constitution. In reaching its decision, the Court looked to the practice of foreign jurisdictions as well as international law on the death penalty, concluding that there existed a trend towards abolition of capital punishment in international and foreign law.

were equally conscious of the implications of capital punishment under the former regime in South Africa. Justice Langa noted "[t]he emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned".[516] Justice Mahomed found that "[i]t is against this historical background and [the] ethos [of the new constitution] that the constitutionality of capital punishment must be determined".[517] The Court was under no illusion that the death penalty had been abused for political purposes; at this stage, to better understand that which was all too obvious to the judges of the Constitutional Court, it is appropriate to consider the development of capital legislation and procedure in the apartheid era.

B. The Death Penalty in South Africa

i. Legislative History

Capital punishment was probably an imperial import in Commonwealth Africa; one commentator asserts that prior to European contact, "[t]he severest punishment was ostracism".[518] Justice Sachs noted in *Makwanyane* that indigenous southern African society did

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516 *Makwanyane*, *supra* note 8 at 750.

517 *Ibid.* at 759.

518 F. Viljoen, "Endnotes to the Death Penalty Decision" (1996) S.Af.L.J. 652 at 663.

not generally impose the death penalty other than in extra-judicial witch killings,[519] and in Nigeria it is posited that "the non-invocation of the death penalty had been the most conspicuous policy of [the] pre-colonial and pre-Islamic criminal justice system".[520]

During the early period of colonial rule in South Africa, capital punishment and torture were instituted along with Roman-Dutch law. The subsequent British occupation in 1795 was followed, in 1796, by the abolition of all legal torture in the British colonies. There ensued a corresponding reduction in the number of executions and capital offences; by 1910, when the Union of South Africa was established, the death penalty was imposed only for murder.[521]

The *Criminal Procedure and Evidence Act*, 1917, made the death penalty mandatory for murder unless the offender was a woman convicted of murdering her newborn child, or was under the age of 16 at the commission of the crime.[522] Despite the stringency of mandatory death sentencing, the majority of sentences imposed under the 1917 Act were subsequently commuted; between 1923 and 1934, it is estimated that 76% of condemned inmates were

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519 *Makwanyane*, supra note 8 at 788.

520 A.A. Adeyemi, "Death Penalty: Criminological Perspectives: the Nigerian Situation" (1987) Revue Internationale de Droit Penal 58 at 489.

521 See P.N. Bouckaert, "Shutting Down the Death Factory: the Abolition of Capital Punishment in South Africa" (1996) 32 Stanford J. Int'l L 287 at 288 *et seq*.

522 (Act 31 of 1917) s. 338, subsequently *Criminal Procedure Act* (Act 56 of 1955) s. 329; *Criminal Law Amendment Act* (Act 16 of 1959) s. 25. In 1958, the age threshold was raised to 18, but the death penalty could be imposed upon juveniles on a discretionary basis until 1977, when they were exempted altogether by section 277 (3)(a) of the *Criminal Procedure Act* (Act 51 of 1977).

reprieved, and the quotient for female inmates was even higher, at 93%.[523]

Perhaps in response to this executive nullification of judicial sentencing, or as a normative acknowledgment of the severity of mandatory punishment, in 1935 the Roman-Dutch concept of extenuating circumstances was given legislative basis.[524] The presiding judge, pursuant to a finding of the existence of extenuating circumstances, was thus empowered to pass a sentence other than death. This move appears to have been welcomed by the judiciary as, between 1935 and 1946, extenuating circumstances were found in 66% of murder cases.[525]

Although murder remained the only crime met with mandatory death sentencing, the list of discretionary capital crimes was exponentially increased. In 1917, only rape and treason were discretionary capital crimes; by 1977 the *Criminal Procedure Act* provided for the death penalty for murder, kidnapping, child stealing, rape, aggravated or attempted robbery, aggravated or attempted housebreaking, and treason.[526]

In addition, the death penalty was introduced for a number of political offences. In 1962, 'sabotage', defined as unlawful entry to land or buildings "to further or encourage the

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523 E. Kahn, "The Death Penalty in South Africa" (1970) 33 J. of Contemp. Roman-Dutch L. 108 at 112.

524 *General Law Amendment Act* (Act 46 of 1935) s. 61(a).

525 Kahn, *supra* note 523 at 113.

526 (Act 51 of 1977) s. 227.

achievement of any political aim", was made a capital crime.[527] Subsequently, a number of capital offences were created under an amendment to the *Communism Act*, including the receipt of training, within South Africa or abroad, which could further the objects of communism.[528] Professor Dugard commented that a South African student studying political science and communist theory in an American university could thus face the death penalty.[529] The *Terrorism Act*, 1967 and the *Internal Security Act*, 1982 provided for the death penalty for 'terrorism', a broadly defined offence which included threatened and attempted acts of violence, or assisting a person convicted of terrorism.[530]

Notwithstanding the fact that most death sentences for treason or political offences were ultimately commuted by the President if no loss of life had resulted from the offence,[531] "[m]any observers believe[d] that death sentences in politically-related cases ... [were] ... imposed to signal to the rest of the population that offenses against the public order [would] be dealt with severely".[532] Given the intensity of the political struggle, it is unlikely that severe sanctions

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527 *General Law Amendment Act* (Act 76 of 1962) s. 21. Nelson Mandela served 27 years in prison having been convicted of sabotage in 1964. Arthur Chaskalson, one of Mandela's defence counsel in that trial, would later become the first President of the Constitutional Court. See N. Mandela, "A Long Walk to Freedom" (London: Little, Brown & Co., 1994) at 338 *et seq*.

528 *Suppression of Communism Act* (Act 44 of 1950) s. 11(b) inserted by *General Law Amendment Act* (Act 37 of 1963) s. 5 as amended by *General Law Amendment Act* (Act 80 of 1964) s. 15.

529 J. Dugard, "Soldiers or Terrorists? The ANC and the SADF Compared" (1988) 4 S.African J.Hum.Rts. 221 at 264.

530 (Act 83 of 1967) s. 2(1) and (Act 74 of 1982) s. 54(1).

531 *When the State Kills*, *supra* note 114 at 207.

532 N.V. Holt, Jr., "Human Rights and Capital Punishment: the Case of South Africa" 30 Va J. Int'l L. 273 at 303.

proved a deterrent; according to the Minister of Justice there were 83 people under sentence of death for "unrest-related crimes" in 1988.[533]

In July 1990, a *Criminal Law Amendment Act* was passed abolishing the death penalty for housebreaking, and making it discretionary for murder.[534] It also profoundly changed the sentencing potential, creating a 'real', or natural, life sentence.[535] The 1990 Act enacted a radical new appellate structure, including automatic right of appeal against conviction and sentence.[536] Notwithstanding the introduction of a prosecutorial right of appeal against sentence, the appeal court was not permitted to impose the death penalty in such action.[537] Executions could be carried out only once confirmation had been received from the Minister of Justice that the sentence had been upheld and that the State President had decided not to grant mercy to the condemned inmate.[538] The capital offence of treason was restricted to wartime[539] and it was later suggested that this would equally apply to terrorism.[540]

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533 *Inside South Africa's Death Factory; a Black Sash Research Project* (February 1989) at 5.

534 (Act 107 of 1990) s. 277(1).

535 s. 276 (1)(b).

536 s. 316 (a)(1).

537 s. 322 (6).

538 s. 279.

539 s. 277.

540 J.H. van Rooyen, "Toward a New South Africa Without the Death Sentence - Struggles, Strategies and Hopes" (1993) 20 Fla.State. U. L.Rev.737 at 759.

In 1992, in response to the findings of a tribunal established to review all death sentences imposed before the enactment of the 1990 Act[541] and probably, in no small part, to the immense pressure on the South African government to commute the sentences of death imposed on political opponents like the Sharpeville 6,[542] the Minister of Justice announced a moratorium on executions pending the inauguration of the Bill of Rights.

ii. Capital Procedure

Criminal capital cases were tried before the Supreme Court. The judge, who had sole responsibility for determining questions of law and sentence, was assisted in the determination of questions of fact and aggravating and mitigating circumstances by two assessors (usually lawyers).[543] The process, substantively similar to that upheld by the United States Supreme Court in *Gregg* v. *Georgia*,[544] has been summarised as an essentially bifurcated trial, "the first phase of the trial concern[ing] factual guilt and the execution analysis involv[ing] moral guilt".[545] Until 1990, appeals could be lodged with the Appellate Division of the Supreme Court only once leave had been obtained from either the trial judge or the Chief Justice. That decision was final, leaving the defendant no further appellate opportunities. Whilst clemency petitions

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541 Hood, *supra* note 444 at 28.

542 See *Makwanyane*, *supra* note 8 at 779, O'Regan, J.

543 The jury system was abolished in South Africa in 1969. van Rooyen, *supra* note 540 at 744. Citations omitted.

544 *Supra* note 280 and accompanying text.

545 A. Goldfarb, "The Dilemma of Discretion: a U.S. Perspective on the Proposal for Reform of the South African Death Penalty for Murder" (1990) 6 S.African J.Hum.Rts. 266 at 270.

could be made to the President, according to Amnesty International reprieve was granted in only 12% of cases by 1987.[546]

In South Africa, the seemingly inherent arbitrariness of the death penalty was compounded by the legal and political infrastructure. In 1989, four members of the ANC charged with treason, terrorism and murder refused to be associated with their trial. Jabu Obed Masina announced to the court "[o]ur refusal to participate in the proceedings stems from our belief that this court and this judicial system is founded on injustice and oppression. We state that such a judicial system cannot operate independently from the political system within which it operates".[547] According to one commentator, "[n]o aspect of capital punishment in South Africa [could] fully be distinguished from the poverty, bitterness and violence engendered by apartheid",[548] and on several occasions the United Nations protested the use of the death penalty as a means of political repression.[549]

As in many areas of South African society, the legal profession was dominated by a conservative white male elite, and the predominantly white judiciary did little to advance the credibility of law under apartheid governments. In any judicial system which imposes the death

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546 *When the State Kills*, *supra* note 114 at 205.

547 *Inside South Africa's Death Factory*, *supra* note 533 at 12.

548 Holt, *supra* note 532 at 301.

549 U.N. Docs. S/Res/191 (1964) § 4 (a); A/Res/37/69A (1982) § 1; A/Res/42/22A (1987) § 3 (a); A/Res/44/27A (1989) § 3.

penalty there will be 'hanging judges'; in South Africa it was openly acknowledged that the personal predilections of the sentencing judge played a significant role in whether the defendant would face the gallows. Former Supreme Court Judge Leon said in 1988, "[s]ome judges convict more easily than others ... I know judges who impose the death penalty not infrequently, and I know one judge who has been on the bench some years who has never passed the death sentence".[550] Anecdotal evidence indicates that the death penalty was, at times, imposed by judges who did not expect it to be executed:

> [a] Durban judge ... told me that, on occasion, he had even imposed death sentences merely to frighten local criminals, while fully intending to write to the Ministry of Justice to recommend clemency. He didn't know whether these death sentences had actually been commuted. He felt sure they had been, but he'd never inquired ... The judge informed me that the state president commutes about 80% of the death sentences every year, but the actual commutation rate last year [1986] was just 15%.[551]

In South Africa, as in the United States, there is, not surprisingly, compelling evidence to suggest that the death penalty was imposed in a racially discriminatory way. According to Amnesty International, between June 1982 and June 1983, of 81 blacks[552] convicted of murdering whites, 38 (46.91%) were executed, whereas of the 21 whites convicted of killing blacks none were executed. Of 2208 blacks convicted of the murder of another black, 55 (2.49%) were executed, but of 52 whites convicted of murdering another white only one

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550 *Inside South Africa's Death Factory*, *supra* note 533 at 9.

551 D. Bruck, "On Death Row in Pretoria Central" The New Republic (13 July 1987) 18 at 20.

552 The former South African regime classified non-whites as either black (African), coloured or Indian. For the purposes of this study, the use of the term 'black' refers to all persons of colour.

(1.92%) was executed.[553] Thus, it is clear that execution was used primarily for the punishment of the inter-racial killing of a white by a black, but was also disproportionately imposed against intra-racial killing by blacks. It was less likely to be imposed for an intra-racial killing by a white, and was not once carried out on a white convicted of killing a black.

As in the United States, the issue of inter-racial rape attests to the discriminatory application of the death penalty. In 1955, the Minister of Justice is reported to have boasted that, during his tenure, no black man sentenced to death for the rape of a white woman had been reprieved.[554] The flipside of this racist equation lies in the fact that, according to Professor Dugard, no white man was ever executed for the rape of a black woman.[555]

In addition to racial discrimination, the majority of capital defendants faced further hurdles. The use of English or Afrikaans in the court room often forced black defendants to use interpreters when giving testimony, with the corresponding loss of inflection and possibility of mis-translation. Representation for indigent defendants was provided on a *pro deo* basis; the Bar Council appointing an advocate to the case. No solicitor was provided to assist counsel and the majority of cases were argued by inexperienced or incompetent advocates.[556] As the

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553 *When the State Kills*, *supra* note 114 at 28.

554 Rand Daily Mail (16 September 1955) in Kahn, *supra* note 523 at 117.

555 J. Dugard, *Human Rights and the South African Legal Order* (Princeton, N.J.: Princeton University Press, 1978) at 127.

556 *Inside South Africa's Death Factory*, *supra* note 533 at 8.

Department of Justice made execution lists public only after the hangings, even those inmates with counsel were sometimes unable to exhaust their legal appeals.[557]

The death sentence in South Africa was executed by hanging. The gallows at Pretoria Central Prison could accommodate seven inmates, and multiple executions were frequent. Following execution, a medical doctor would certify death and then the body would be buried by the government. Apartheid operated even in death, and the bodies would be buried in different cemeteries according to race. Families were not permitted to view the body or accompany the coffin, but would later receive a grave number at which to mourn.[558]

iii. Abolitionism

Until *Makwanyane*, the only serious investigation into abolition of the death penalty had been conducted by the Lansdown Commission - appointed by the Smuts government in 1945 to enquire into penal and prison reform - which reported in 1947 that public opinion and the possible deterrent value of the death penalty demanded its retention.[559] The Commission, whilst aware of foreign research, perceived discretely national factors at play; according to Kahn, it was considered that whilst the "racial, social and economic conditions of abolitionist countries were not so different from South Africa's as to make their experience of no value, [] few had so heterogeneous a population and none the bulk of 80% of its population still in a state of

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557 *Ibid.*

558 *Ibid.* at 39.

559 *Report of the Penal and Prison Reform Commission* (U6 47 of 1947).

barbarism".[560]

Latterly, although some grass roots abolitionist sentiment was evident, in particular amongst the English churches and organisations such as the Black Sash,[561] there was limited abolitionist activity in South Africa; "in a country with a host of iniquities to remedy[,] the execution of criminals was not high on the list of political and cognate priorities".[562] In addition, the administration discouraged academic research and activity on issues of punishment. Indeed, in 1970, Professor Barend van Niekerk was prosecuted for contempt of court following publication of his article "Hanged by the Neck Until You are Dead"[563] in which he presented opinions canvassed from the legal profession on the death penalty and discrimination in capital sentencing.[564] In 1979, the Director of the Institute of Criminology at the University of Cape Town was banned from visiting prisons after publishing evidence of neglect and abuse within the prison system.[565]

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560 Kahn, *supra* note 523 at 123 *et seq.*

561 G. Devenish, "The Historical and Jurisprudential Evolution and Background to the Application of the Death Penalty in South Africa and its Relationship With Constitutional and Political Reform" (1992) 1 S.African C.J. 1 at 12.

562 *Ibid.* Citations omitted.

563 B.v.D. van Niekerk, "Hanged by the Neck Until You are Dead" (1969) 86 S.African L.J. 457 and (1970) 87 S.African L.J. 60.

564 *State* v. *van Niekerk* [1970] 3 S.A. 655 (T).

565 van Rooyen, *supra* note 540 at 746, note 78.

C. *State* v. *Makwanyane*

i. The Death Penalty as a Violation of Constitutional Rights

In *Makwanyane*, a judgement which had been anxiously anticipated and predicted,[566] and would be praised as "an exemplar of judicial decision-making" for its "tone ... at once loftily aspirational in its hopes for the new country, and yet deeply humble in light of the difficulty and complexity of the problems before it",[567] the Court struck down the death penalty for ordinary crimes. The case, an informal referral from the Court of Appeal, concerned the constitutionality of section 277 (1)(a) of the *Criminal Procedure Act*, which prescribed the death penalty as a competent sentence for the crime of murder. The South African Government accepted the petitioner's argument that the death penalty constituted cruel, inhuman and degrading punishment in violation of section 11 (2) of the Constitution, and ought to be declared unconstitutional, and submitted as much to the Court as an intervenor in the case. The Attorney-General for the Witwatersrand, however, contended that the death penalty formed a necessary and acceptable punishment and that, in failing to make specific reference to the death penalty, the framers of the Constitution intended to leave the matter to Parliament.[568] The Attorney-General, whose office is independent of the Government, was the real respondent in

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566 See L.M. du Plessis, "Whither Capital Punishment and Abortion Under South Africa's Transitional Constitution?" (1994) 7 S.African J. Crim. Justice 145.

567 Steiker, *supra* note 18 at 1286.

568 See *Makwanyane*, *supra* note 8 at 677, Chaskalson, P. A similar situation arose in Hungary when the Constitutional Court was faced with determining the constitutionality of the death penalty. The Hungarian government supported the abolitionist petition, but the Chief Public Prosecutor opposed it, citing Parliament as the correct forum for abolition. *Supra* note 17.

Makwanyane. [569]

In 1991, recognising the inherently controversial nature of the death penalty, the South African Law Commission had recommended entrusting the final decision on capital punishment to a future Constitutional Court. The Commission was aware that this would "naturally [impose] an onerous task on the Constitutional Court" but felt "it is a task which this Court [would] in future have to carry out in respect of many other laws and executive and administrative acts".[570] Correspondingly, the framers of the Constitution elected to leave the ultimate decision on the death penalty - and other right to life issues such as abortion and euthanasia - to the Constitutional Court.

The right to life clause is contained in section 9 of the Constitution which provides "[e]very person shall have the right to life", a phraseology which may be distinguished from the right to life clauses of other constitutional instruments which either expressly accommodate or reject capital punishment.[571] It is clear from the reports of the Technical Committee on Fundamental Rights that the unqualified wording of section 9 was intended to give the Court the final say.[572]

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569 (Act 51 of 1977).

570 South African Law Commission, *Interim Report on Group and Human Rights (Project 58)* (August 1991) at 277.

571 Section 12 (1) of the Constitution of Zimbabwe provides "[n]o person shall be deprived of his life intentionally except in execution of the sentence of a court". It may be contrasted with Article 6 of the Constitution of Namibia, which provides "[t]he right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia".

572 *Makwanyane*, *supra* note 8 at 681 and especially note 33, Chaskalson, P.

President Chaskalson openly disapproved of this Solomonic solution, remonstrating

> [i]t would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution.[573]

As we will see, notwithstanding the evidence to the contrary, a number of justices relied upon a strictly textual interpretation of the "unqualified and unadorned"[574] language of section 9 as proof that the framers intended the Constitution to outlaw capital punishment. Justice Sachs noted "even if, as the President's judgement suggests, the framers subjectively intended to keep the issue open for determination by this Court, they effectively closed the door by the language they used and the values they required us to uphold".[575]

Section 9 is contained in a justiciable Bill of Rights, Chapter 3 of the Constitution, the necessity of which had been recognised by all parties to the constitutional negotiation process; liberal progressives sought entrenched legal safeguards to protect human rights, and conservatives, acknowledging the defeat of white power and the dismantling of apartheid, sought protection of their minority interests and property. Whilst the Court's decision *per se* was unanimous in *Makwanyane*, and each Justice professed to concur with the opinion of President Chaskalson, it would be more accurate to say that the judges concurred in part and in the result, but not in

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573 *Ibid.* at 675.

574 *Ibid.* at 782, Sachs, J.

575 *Ibid.* at 791.

all aspects of the reasoning; there was little consensus reached as to the Chapter 3 rights violated. Eleven separate opinions were authored, basing the decision on varying sections of the Bill of Rights:

- Chaskalson, P., Madala, J., and Kentridge, A.J., held that capital punishment constituted cruel, inhuman or degrading treatment or punishment in violation of section 11 (2);
- Kriegler and Sachs, JJ., found a violation of the right to life, protected by section 9;
- Ackermann and Didcott, JJ., held that the death penalty violated sections 9 and 11 (2);
- Langa, Mokgoro and O'Regan, JJ., found capital punishment violated the right to human dignity, provided for in section 10, as well as the provisions of sections 9 and 11 (2); and,
- Mahomed, J., identified a violation of the equality provisions of section 8, in addition to violations of sections 9, 10 and 11(2).

Although no exhaustive definition of the Chapter 3 rights was attempted in *Makwanyane*, it is apparent that the Court intends to adopt a holistic approach when interpreting the provisions of the Constitution. Justice Mahomed, for example, interpreted section 11 (2) "having regard to the ordinary meaning of the words used[,] ... its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and postamble to the Constitution".[576] President Chaskalson accepted that, in the

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576 *Ibid.* at 763.

ordinary meaning of the words, the death penalty is cruel, inhuman and degrading,[577] but recognised an obligation upon the Court to assess whether it constituted cruel, inhuman and degrading treatment or punishment within the meaning of section 11 (2).[578] He adopted a disjunctive interpretative approach and found that for a punishment to be constitutional under 11 (2) it could be neither cruel, nor inhuman, nor degrading.[579]

Correspondingly, and pursuant to the Court's holding in *Zuma*,[580] President Chaskalson found that section 11 (2) ought to be construed, not in isolation, but "in its context which includes the history and background to the adoption of the Constitution" - including the reports of the technical committees to the multi-party negotiating process which amounted to *travaux*

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577 Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it '... involves, by its very nature, a denial of the executed person's humanity', and it is degrading because it strips the person of all dignity and treats him or her as an object to be eliminated by the State.
Ibid. at 682, Chaskalson, P., quoting Brennan, J., concurring in *Furman*, *supra* note 265 at 290.

578 *Makwanyane*, *ibid.* at 682.

579 *Ibid.* at 705. The Court would subsequently uphold and expand this interpretation, finding, in *State* v. *Williams et al* [1995] 3 SA 632, [i]t is clear that, when the words of s 11 (2) of the Constitution are read disjunctively, as they should be, the provision refers to seven distinct modes of conduct, namely torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment. *Ibid.* at 639. Citations omitted.
In *Williams*, the Court looked to the jurisprudence of international and foreign courts which have interpreted substantially similar provisions concluding that, notwithstanding textual distinctions, a "common thread[;] ... the identification and acknowledgement of society's concept of decency and human dignity" was revealed. *Ibid.* at 643.

580 *State* v. *Zuma et al* [1995] 4 BCLR 401 (SA). Although *Makwanyane* was the first case heard by the Court, the first judgement was issued in *Zuma*. In the latter case, the Court struck down section 217 (1)(b)(ii) of the *Criminal Procedure Act*, 1977 which provided for a presumption that a confession had been freely and voluntarily made providing the confession appeared as such *ex facie*. The Court found that the legislation violated the constitutional rights of detained, arrested and accused persons as established in section 25 (2), (3)(c) and (3)(d) of the Constitution.

préparatoires[581] - as well as other provisions of the Constitution and the rights enshrined in Chapter 3.[582] Accordingly, the rights to life, dignity and equality, protected by sections 9, 10 and 8 respectively, were brought into play in an 11 (2) analysis.[583]

Having considered the arbitrariness and racism of the South African justice system, as well as the death penalty apparatus of the United States, President Chaskalson concluded "[i]t cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die".[584] Albeit recognising that, to an extent, arbitrariness is inherent in any criminal justice system, he was convinced that "death is different";[585] what is unfortunate in a non-capital case is intolerable in a capital[586] case. President Chaskalson held that arbitrariness, together with the finality of execution, the destruction of life and the annihilation of human dignity, rendered the death penalty cruel, inhuman and degrading in violation of 11 (2).[587] Having found such a violation, he determined it unnecessary to consider whether capital punishment violated any further provisions of the Bill

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581 *Makwanyane*, *supra* note 8 at 679.

582 *Ibid.* at 676.

583 *Ibid.* at 676.

584 *Ibid.* at 692.

585 *Ibid.* at 693.

586 "Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable". *Ibid.*

587 *Ibid.* at 706.

of Rights.[588] In recognising that the system in which a punishment is imposed is as vulnerable to constitutional challenge as the punishment itself, the South African Court made a tangential leap which, with the exception of *Furman*, the U.S. Supreme Court has simply been unable to make. *Makwanyane* instructs us that, even if a punishment is *prima facie* acceptable, it is not immune to constitutional challenge if it is applied in an arbitrary or discriminatory fashion.

Notwithstanding the differentiation between the death penalty and other forms of punishment made by President Chaskalson and Justice Ackermann, who found that "death is unique and the dimensions and consequences of arbitrariness in its imposition differ fundamentally from the dimension and consequences of arbitrariness in the imposition of any other punishment",[589] the Court has not tolerated arbitrariness in non-capital punishment either. In *Williams*, the Court rejected corporal punishment of juveniles as unconstitutional and referred more than once to its capriciousness, "[t]he severity of the pain [being] arbitrary, depending as it does almost entirely on the person administering the whipping".[590]

Justice Didcott adopted a more philosophical approach in finding capital punishment in violation of sections 9 and 11 (2). Whilst recognising that the right to life is not easily defined, he determined that it "entitle[d] one, at the very least, not to be put to death by the State deliberately, systematically and as an act of policy that denies in principle the value of the

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588 *Ibid.* at 723.

589 *Ibid.* at 728 *et seq.*

590 *Williams, supra* note 579 at 646. See also at 657.

victims' life".[591] Jurisprudence on the death penalty and the death row phenomenon from the United States and Zimbabwe convinced him the death penalty is "intrinsically cruel, inhuman and degrading punishment".[592] Implicit in this statement is the notion that extranational sources reveal intrinsic, or essential, elements of morality and humanity.

Justice Kriegler agreed that "at the very least [section 9] indicates that the State may not deliberately deprive any person of his or her life",[593] and found that a section 9 violation obviated the need to consider potential violations of other sections concluding "[i]nasmuch as capital punishment, by definition, strikes at the heart of the right to life, the debate need go no further".[594] Justice Kriegler determined that "[t]he issue is not whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it".[595] In reaching this conclusion, however, he adopted an extremely textual approach which, given that section 9 was left deliberately inconclusive, was somewhat disappointing.

Justice Sachs also favoured a textual interpretation of section 9, declaring "[t]his Court is unlikely to get another case which is emotionally and philosophically more elusive, and

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591 *Makwanyane, supra* note 8 at 733.

592 *Ibid.* at 736.

593 *Ibid.* at 748.

594 *Ibid.* at 749.

595 *Ibid.* at 747.

textually more direct".[596] He concluded

> [t]he unqualified statement that 'every person has the right to life', in effect outlaws capital punishment. Instead of establishing a constitutional framework within which the State may deprive citizens of their lives, as it could have done, our Constitution commits the State to affirming and protecting life.[597]

Justice Sachs later postulated that the adoption of "sweeping language" may have been an effort to "remove any temptation in coming years to attempt to solve grave social and political problems by means of executing opponents".[598]

The Justices were concerned not only with the effect of the death penalty on the condemned inmate, but with the implications for a society which maintains a system of capital punishment. Justice Mokgoro emphasised that the death penalty was "inhuman and degrading to the humanity of the individual, as well as to the humanity of those who carry it out".[599] Justice Mahomed also made reference to the detrimental effect of capital punishment on the wider community, finding

> [i]t is not only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilisation, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the first place.[600]

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596 *Ibid.* at 782.

597 *Ibid.* at 783.

598 *Ibid.* at 790.

599 *Ibid.* at 774.

600 *Ibid.* at 761.

Justice Langa identified an obligation upon the state to promote human dignity, finding "[f]or good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead".[601] The Court has consistently emphasised the importance of fostering an atmosphere in which human rights and human dignity are paramount, and is clearly prepared to guide social development in this area. It has recognized that state action will be dispositive, for

> [i]f the State, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.[602]

ii. Limitations Analysis

Identification of a constitutional violation in *Makwanyane* was not, however, sufficient to declare the death penalty unconstitutional as the South African Constitution contains a limitations clause. Section 33 (1), which is substantially modelled on section 1 of the Canadian Charter, provides that rights may be limited only by a law of general application which is "reasonable", "justifiable in an open and democratic society based on freedom and equality" and which does not "negate the essential content of the right in question". Certain rights, including the right to dignity, and freedom and security of person, as contained in sections 10 and 11, are

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601 *Ibid.* at 751.

602 *Williams*, *supra* note 579 at 647.

further protected in that the law must also be "necessary".[603]

In *Zuma*, the Court had identified a two-stage approach to constitutional examination of legislation, involving a broad interpretation of whether a protected right had been violated, followed by an assessment of whether or not such violation could be justified under the limitations clause.[604] In his judgement in *Makwanyane*, President Chaskalson held that, upon the identification of a violation, the onus switched to the state to justify the impugned legislation.[605] Accordingly, pursuant to his findings that the death penalty violated section 11 (2), the onus was on the state to show that the death penalty was justifiable, reasonable and necessary, and did not negate the essential content of the right.

President Chaskalson considered first the determination of reasonableness and necessity: effectively conducting a proportionality test. He found

> inherent in the requirement of proportionality ... [is] ... the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[606]

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603 s. 33 (1)(aa).

604 *Zuma, supra* note 580 at 414.

605 *Makwanyane, supra* note 8 at 708.

606 *Ibid.*

In other words, the Court must assess what the right protects, why and how it has been restricted, and whether the restriction is the least drastic means of achieving the state purpose.

The Court was unable to agree on whether the death penalty would automatically fail the requirement of 33 (1) that it not negate the essential content of the right. Ultimately, however, President Chaskalson concluded that the 'essential content' clause need not be defined in *Makwanyane*[607] as the state had failed to satisfy the other provisions of the limitations clause. Applying a proportionality test to the penological purpose of the legislation, he considered that retribution "could not be accorded the same weight under [the] Constitution as the rights to life and dignity" and, given the lack of evidence that the death penalty protects society any more than life imprisonment, coupled with the dangers of arbitrariness and infallibility, the state had not justified the death penalty in accordance with section 33 (1).

Retribution is anathemic to the principles of the new South Africa; the Constitution's postamble emphasises "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation" and this, whilst primarily focused upon political reconciliation, could equally apply to the penological issues raised in *Makwanyane*. According to Didcott, J.,

> retribution smacks too much of vengeance to be accepted, either on its own or in combination with other aims, as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves,

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607 Although it is unfortunate that the Court chose not to define the clause, it has become a moot point as the final Constitution does not contain such a provision. See *infra* note 671 and accompanying text.

> and [] the expression of moral outrage which is its further and more defensible object can be communicated effectively by severe sentences of imprisonment.[608]

Subsequently, in *State* v. *Williams et al*, the Court found whipping to violate section 11 (2) of the Constitution. Langa, J., wrote, for the Court,

> [t]he Constitution now offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance, rather than on correction, prevention and the recognition of human rights.[609]

In the absence of domestic research, the *Makwanyane* Court considered the international evidence on deterrence, and the inconclusive results persuaded them that the death penalty could not be justified on that sole premise. Justice Kriegler found "[i]t simply cannot be reasonable to sanction judicial killing without knowing whether it has any marginal deterrent value".[610] This contrasts favourably with the cramped approach of the Court of Appeal in Tanzania, which found that, in the absence of conclusive proof on whether the death penalty was a more effective punishment, it could not be deemed unconstitutional.[611]

President Chaskalson, whilst agreeing that the deterrence of crime is a valid state purpose, rejected the contention that the death penalty is essential to this objective, noting "[w]e would be deluding ourselves if we were to believe that the execution of ... [a] ... few people each year

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608 *Makwanyane, supra* note 8 at 739.

609 *Williams, supra* note 579 at 648.

610 *Makwanyane, supra* note 8 at 749.

611 *Mnyaroje & Sangula* v. *Republic of Tanzania*, Criminal Appeal No. 142 of 1994 (Court of Appeal, 1995).

... will provide the solution to the unacceptably high rate of crime".[612] Rather, he found "[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system".[613]

iii. Public Opinion

For many white South Africans the Old Testament provided a more than adequate basis for capital punishment. The Dutch Reformed Church, a predominantly conservative Afrikaans denomination which has long held its own interpretation of divine guidance in South Africa, persistently advocates a reintroduction of the death penalty. However, data suggests that South Africans generally premise their support for the death penalty on utilitarian grounds. A research paper presented in 1993 showed that, of all persons polled, 65% supported the death penalty for its deterrent value, 55% for its retributive function, and 54% believed it was cheaper than imprisonment.[614] In *Makwanyane*, President Chaskalson acknowledged that public opinion was heavily in favour of retention, but rightly concluded that "[t]he question before [the Court] is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence ... If public opinion were to be decisive there would be no need for constitutional adjudication".[615]

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612 *Makwanyane*, *supra* note 8 at 715.

613 *Ibid.*

614 A. Parekh & C. de la Rey, "Public Attitudes Towards the Death Penalty in South Africa" , paper presented to the International CRIMSA Conference on Violence and Corruption; the Crimes of Africa (September 1993) at 6.

615 *Makwanyane*, *supra* note 8 at 703.

In determining the constitutionality of capital punishment, President Chaskalson noted that, whilst "[p]ublic opinion may have some relevance to the enquiry, [] in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and uphold its provisions without fear or favour".[616] Other than acknowledging that the South African public favoured retentionism, no emphasis was placed upon domestic sentiment. Rather, the President turned to the jurisprudence of the Human Rights Committee and the courts of Hungary, Canada and Massachusetts and California for assistance in the interpretation of section 11 (2). Unlike the U.S. Supreme Court, the Constitutional Court would source values not solely in the domestic population, but in an international context.

Whilst the South African approach may be contrasted with the jurisprudence of the United States where public opinion, as evidenced by state practice and the sentencing predilections of juries, has been sufficient to convince the Supreme Court of the acceptability of an impugned punishment,[617] it is in accordance with the practice of other retentionist nations where the death penalty was abolished in defiance of strong public opinion. In Canada, capital punishment was abolished for all crimes other than certain military offences in 1976.[618] At the time of abolition, public opinion polls reported that 80% of Canadians favoured retention of the death penalty.[619]

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616 *Ibid.* at 703.

617 See above.

618 *Criminal Law Amendment Act (No.2)*, 1976, section 25 (1) & (2).

619 Pothier, *Canadian Legislative Behaviour Under A Free Vote: The Case of Capital Punishment* (Toronto: Carleton University, 1977).

iv. The Death Penalty for Treason

Notwithstanding the fact that the Court found the impugned legislation could not be saved by the limitations clause, *Makwanyane* did not render the death penalty unconstitutional in all circumstances. Whilst President Chaskalson did not restrict his findings to murder but included the other capital crimes of section 277 (1), he noted that different considerations under section 33 (1) might be brought into play in the case of treason during a time of war, as provided for in section 277 (b).[620] Given that each justice concurred in the judgement of President Chaskalson, one must derive that the Court was unanimous in sequestering the issue of capital punishment for treason. South Africa would be in no way unique in retaining the death penalty for such 'special crimes'; according to Amnesty International there are currently 15 nations which have abolished the death penalty for 'ordinary crimes' but retain it for 'exceptional crimes' such as treason or military offences.[621]

However, it is difficult to reconcile the opinions of the Justices with imposition of the death penalty in any circumstance. Albeit continuing with a section 33 (1) analysis, Justice Didcott questioned whether "a sentence with a sequel of such cruelty, inhumanity and degradation can ever be rightly regarded in a civilised society as a reasonable or justifiable measure, let alone a necessary one".[622] In light of this statement, it is hard to conceive that the death penalty could

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620 *Ibid.* at 724.

621 Amnesty International, "Facts and Figures on the Death Penalty" (March 1997) Internet site www.amnesty.org/ailib/intcam/dp/dpfacts.html.

622 *Makwanyane*, *supra* note 8 at 736.

ever be countenanced, yet in his opening paragraph Justice Didcott explicitly concurred with President Chaskalson "for the crimes covered by his judgement".[623]

D. International and Comparative Law

i. Extranational law and the Constitution

As we have seen, section 35 (1) of the Constitution requires the Court to "have regard to public international law" and encourages "regard to comparable foreign case law" in its Chapter 3 interpretation. The Court has responded enthusiastically to the extranational material available and, to date, its judgements indicate extensive consideration of international trends and the jurisprudence of international human rights tribunals and foreign domestic courts. In *Zuma*, the first decision handed down, Acting Justice Kentridge, writing for the Court, noted that "[t]he principles upon which a constitutional bill of fundamental rights should be interpreted have been the subject of numerous judicial dicta, in jurisdictions abroad and in Southern Africa".[624] Correspondingly, the judgement referred to the jurisprudence of the Privy Council, the European Court of Human Rights, and the Supreme Courts of Canada, the United States and Botswana, in advocating a "generous" and "purposive" interpretation of Chapter 3 rights.[625]

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623 *Ibid.* at 733.

624 *Zuma, supra* note 580 at 410.

625 *Ibid.*

It is apparent in *Makwanyane* and *Williams* that the Court perceives the trends within the international community as indicative of a progressiveness towards which South Africa should aspire. The Court has done more than simply provide comparative jurisprudence; it has allowed extranational law and values to influence its normativity. In *Williams*, a case challenging the corporal punishment of juveniles, Justice Langa, writing for the Court, considered the jurisprudence of the Human Rights Committee, the European Commission and Court of Human Rights, and the Supreme Courts of the United States, Canada, Zimbabwe and Namibia.[626] He acknowledged that whilst

> our ultimate definition of ... [the contemporary norms, aspirations, expectations and sensitivities of the people] ... must necessarily reflect our own experience, and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as foreign case law.[627]

In addition, behavioural trends, as evidenced by domestic and international law and jurisprudence, were of importance in assessing the status of corporal punishment. Justice Langa identified

> a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the Courts and Legislatures of various countries and through the international instruments. It is a clear trend which has been established.[628]

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626 *Williams, supra* note 579.

627 *Ibid.* at 640.

628 *Ibid.* at 644.

President Chaskalson, in *Makwanyane*, was similarly concerned with the behaviour of the international community. He recognised the trend towards abolition of the death penalty - in particular the fact that it had been abolished in "the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola"[629] - and the infrequency with which it is imposed in many retentionist nations as symbolic of evolving humanity, noting that, traditionally, "[a]s societies became more enlightened, they restricted the offences for which this penalty could be imposed".[630]

The Court did not restrict its consideration to the judgements of other courts, but assessed the reasoning by which such judgements were reached. The Court was as concerned with ethos as with text, and interesting to note is the frequent citation of the dissenting judgements of abolitionist judges. In particular, attention was paid to opinions which rejected the death penalty despite constitutional accommodation. Aware that the constitutions of "the great democracies of India and the United States"[631] specifically allow for the death penalty, in *Makwanyane* Acting Justice Kentridge found it "therefore understandable that the Supreme Courts of those two countries have found themselves unable to hold that the death penalty is *per se* unconstitutional"[632] but continued,

> [n]onetheless in our attempt to identify objectively the values of an open and

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629 *Makwanyane, supra* note 8 at 685.

630 *Ibid.*

631 *Ibid.* at 743, Kentridge, A.J..

632 *Ibid.* at 744.

> democratic society what I find impressive is that individual Judges of great distinction such as Brennan, J., in the United States and Bhagwati, J., in India have held, notwithstanding those constitutional provisions, that the death penalty is impermissible when measured against the standards of humanity and decency which have evolved since the date of their respective constitutions".[633]

Despite the Constitutional Court's consideration of extranational law, there has been resistance to the constitutionalism of section 35. Noting that linguistic barriers facing the justices may result in their favouring constitutional law of English-speaking nations, Sonnekus warns that

> the danger remains that the untainted lawyers, given the task of judicially guaranteeing and defending the new democracy and constitutionally guaranteed bill of rights, will be interpreting it along American or Canadian lines even though the bill was written from an entirely different angle,[634]

and the jurisprudence of the lower courts has been less than favourable in its consideration of non-domestic case law. Justice Tebbutt, of the Cape Provincial Division, expressed concern that consideration of foreign case law

> should be done with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being ... The South African Constitution must be interpreted within the context and historical background of South Africa.[635]

Justice Cloete, of the Transvaal Provincial Division, warned that "the danger of relying on cases decided in foreign jurisdictions is that a person not trained in the practice of law in those

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633 *Ibid.*

634 J.C. Sonnekus, "South Africa's Transition to Democracy and the Rule of Law" (1995) 29 Int'l Lawyer 659 at 673.

635 *Park-Ross and another* v. *Director: Office for Serious Economic Offences* [1995] 2 S.A. 148 at 160 (CPD).

jurisdictions will not be able to place decided cases in context, and, for that reason, can easily misinterpret the legal position".[636]

Whilst the Court generally operates in English, and has principally relied upon jurisprudence of English-speaking fora, such apprehension appears unfounded; the Court has not followed blindly, but has carefully evaluated extranational law, learning by the example - positive and negative - of other jurisdictions, yet continually aware that it is developing South African constitutionalism. It has considered African customary law and tradition as well as recent jurisprudence from courts in Africa, Asia, Europe, and North America. The Constitution requires the judiciary to consider public international law, where applicable, and offers them the opportunity of referring to comparative law in the interpretation of constitutional rights. However, the courts are not bound by such precedent. It is a resource rather than a restraint, and the Court has approached it as such.

In *Makwanyane*, President Chaskalson noted the importance of international and foreign authorities for their analysis of the issues raised by capital punishment, but, aware that South Africa differed from the majority of foreign and international precedents in that the Constitution did not provide for exceptions to the right to life, found that public international law and foreign jurisprudence could assist the Court but did not bind it.[637] He noted that public international

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636 *Shabalala* v. *Attorney-General, Transvaal, and another*; *Gumede and others* v. *Attorney-General, Transvaal* [1995] 1 S.A. 608 at 640 (TPD).

637 *Makwanyane*, *supra* note 8 at 686 *et seq.*

law, as evidenced by international agreements and customary international law, provided "a framework within which Chapter 3 can be evaluated and understood".[638]

In 1996, Deputy President Mahomed wrote, for the Court,

> [i]nternational law and the contents of international treaties to which South Africa might or might not be a party at any time are ... relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal enactment.[639]

Whilst the Deputy President was clearly establishing the dualist structure of the state, his emphasis upon the role of extranational law in constitutional interpretation underscored President Chaskalson's findings in *Makwanyane*. Evidently, international treaties will not be self-executing, however the Bill of Rights may provide a vehicle for incorporation of human rights norms by virtue of its interpretation, where at all possible, in conformity with international obligations.

In *Azapo*, a challenge had been made to section 20 (7) of the *Promotion of National Unity and Reconciliation Act*, 1995[640] which provided that persons granted amnesty by the Truth and

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638 *Ibid.* at 686.

639 *The Azanian Peoples Organization (AZAPO) et al* v. *The President of the Republic of South Africa et al*, CCT 17/96 at para 26.

640 Act 34 of 1995.

Reconciliation Commission could not be found criminally or civilly liable in respect of the act, omission or offence for which amnesty had been granted. The applicants claimed that the consequences of 20 (7) violated section 22 of the Constitution in that agents of the former regime were immune from prosecution and civil litigation. Section 22 provides that "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate another independent or impartial forum" and it was alleged that the Amnesty Committee did not meet these specifications. However, the epilogue to the Constitution specifically contemplated the amnesty and as the Court was satisfied that the Act was consistent with the constitutional mandate the challenge was unsuccessful.

The Court's consideration of international law was prompted by the applicant's contention that the *Geneva Conventions* require state prosecution of those responsible for gross violations of human rights. However, the Court dismissed the *Conventions* as "irrelevant" to the determination of the constitutionality of section 20 (7) as Parliament was free to legislatively override international obligations in terms of section 231 of the Constitution, and the requirements of section 35 (1) related only to the use of public international law in interpreting the rights entrenched in the Bill of Rights.[641] In addition, it found that the *Conventions* would not apply as they related to inter-state conflict.[642]

It is clear that, despite the restrictive reasoning of *Azapo*, the Court perceives international law

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641 *Azapo, supra* note 639 at para 26.

642 *Ibid.* at para 28.

and the values of the global community as essential to South African Bill of Rights constitutionalism and to the development of an evolutionary respect for human rights. Albeit finding in *Azapo* that "[t]he court is directed only to 'have regard' to public international law if it is applicable to the protection of the rights entrenched in the chapter",[643] in *Makwanyane* and *Williams* international law and norms were considered extensively, arguably beyond the mandate of 35 (1).

As we have seen the trend in international law is towards abolition of the death penalty, but it is not yet illegal. In *Makwanyane*, President Chaskalson recognised that, other than in the Hungarian death penalty decision, international and foreign fora had been interpreting constitutional provisions which specifically accommodated capital punishment.[644] As the South African constitution contained no such provision, the Constitutional Court was able to take advantage of this trend without its limitations, extending it to promote abolitionism in South Africa. In *Williams*, Justice Langa noted

> [t]he Constitution requires us to 'have regard' to the [international] consensus [against corporal punishment]; we are not bound to follow it, but neither can we ignore it. The determinative test will be the values we find inherent in or worthy of pursuing in this society, which has only recently embarked on the road to democracy.[645]

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643 *Ibid.* at para 27.

644 *Makwanyane, supra* note 8 at 687. He did not interpret such constitutions as *promoting* capital punishment but as tolerating it: the *ICCPR*, he determined, "tolerates but does not provide justification for the death penalty". *Ibid.* at 697.

645 *Williams, supra* note 579 at 648.

Makwanyane provides a good example of how the Court has subjected extranational experience to such a 'determinative test' and has learned from the mistakes of their foreign counterparts. Briefs filed by the petitioners had criticised the U.S. for its arbitrary and discriminatory application of the death penalty,[646] and the justices made much of the negative example of the United States. President Chaskalson found the U.S. experience reinforced his rejection of capital punishment, noting

> [c]onsiderable expense and interminable delays result from the exceptionally high standard of procedural fairness set by the United States' Courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path ... persuade me that we should not follow this route.[647]

Indeed, the Court was clear from an early stage that the U.S. route was one it was not willing to travel. Professor Steiker records an eye-witness account of an incident during the oral argument in *Makwanyane*, where the Attorney General of the Witwatersrand referred to a New York Times article on the reintroduction of the death penalty in New York as evidence that public opinion favoured retention of capital punishment. Allegedly, "[o]ne of the Justices responded solemnly and without a trace of irony: 'Counsel, this is not New York; this is South Africa'".[648] Steiker notes "[f]rom the vantage point of the United States, where the chant 'Hey, hey, get the word; this is not Johannesburg' has been a staple of domestic protest marches, this

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646 See *Memorandum*, *supra* note 359.

647 *Makwanyane*, supra note 8 at 694.

648 Steiker, *supra* note 18 at 1289.

table-turning stings".[649]

ii. An African Court

In addition to its consideration of the trends and jurisprudence of international law and liberal states, the Court has also fostered an Africanist interpretation of the Constitution. In *Makwanyane*, Justices Mokgoro and Sachs noted the relevance of the evolution of South African law and indigenous values in interpreting the Constitution,[650] and Justice Madala exhorted counsel to introduce "traditional African jurisprudence".[651] As we have seen, the death penalty was probably a European import to South Africa, and Justice Sachs' opinion reminds us that "the relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder".[652]

Justice Sachs interpreted the Constitution as textually abolitionist, however his concern at "the source of the values" to be applied by the Court in its constitutional interpretation inspired him to address this subject in some detail.[653] He concluded that the Court should give "long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice".[654]

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649 *Ibid.*

650 *Makwanyane, supra* note 8 at 768, Mokgoro, J., and 786, Sachs, J.

651 *Ibid.* at 757.

652 *Ibid.* at 788.

653 *Ibid.* at 784.

654 *Ibid.* at 785.

Several of the justices included extensive evaluation of *ubuntu*, an indigenous African concept enshrined in the postamble to the Constitution, in their opinions. Whilst no precise definition of *ubuntu* is proffered, it appears to embody life and human dignity within a community.[655] Indeed, throughout the judgement one may trace an intertwining of these rights. According to Justice Mokgoro, "life and dignity are like two sides of the same coin[;] [t]he concept of *ubuntu* embodies them both".[656] President Chaskalson considered "[t]he rights to life and dignity [] the most important of all human rights, and the source of all other personal rights in Chapter 3".[657] In his address to the Constitutional Assembly at the adoption of the interim Constitution, State President Nelson Mandela referred to the "founding principl[e] of human dignity ... [as] ... immutable" to the new Constitution.[658]

Justice Langa, writing for the Court in *Williams*, emphasised the importance of comparative African law in interpretation of Chapter 3 rights.[659] He noted the particular relevance of the jurisprudence of Namibia and Zimbabwe in the Constitutional Court's deliberations finding

> [t]he decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has

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655 *Ibid.* at 752, Langa, J.

656 *Ibid.* at 773.

657 *Ibid.* at 722.

658 Nelson Mandela, Address to the Constitutional Assembly on the Occasion of the Adoption of the New Constitution, Cape Town (8 May 1996).

659 *Williams*, *supra* note 579 at 648.

had a deep influence on our law.[660]

The inclusion of comparative African constitutionalism and customary African law and tradition in the Court's jurisprudence is a welcome departure from the Euro-centrism apparent in the history of South Africa, and former colonial nations generally. According to Berat, "[s]ome African governments, in their zeal to create uniformity and speed development, have chosen to abandon customary law, while others have maintained a strict dualism between customary and national law".[661] In weaving together indigenous, foreign and international influences, the Court is producing a jurisprudence singularly South African, yet representing the benefits of comparative constitutionalism. This has been identified as the Constitutional Court "self-consciously engendering a liberal culture of rights, which is both founded upon human rights and informed by indigenous values".[662]

Conclusion

It is unfortunate that the Court did not produce a more consistent decision. Internal inconsistencies in the judgement relating to the rights violated, the interpretation of section 9, the meaning of 'essential content', and the difficulty in reconciling the possible retention of the death penalty for treason render the decision unwieldy. Nonetheless, one must not lose sight

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660 *Ibid.* at 642.

661 L. Berat, "Customary Law in a New South Africa: A Proposal" (1992) 15 Fordham Int'l L. J. 92 at 128.

662 B.E. Harcourt, "Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases" (1996) 9 Harvard Hum. Rts. J. 255 at 258.

of the fact that, in presenting "a catalogue of all of the competing forces"[663] at play in *Makwanyane*, the Court displayed commendable transparency, a welcome characteristic in South Africa.[664]

One may question whether the decision in *Makwanyane* was inevitable in light of the bastardization of criminal law and the death penalty during the apartheid era, and the A.N.C. governmental support for the abolitionist movement. Justice Sachs makes the apposite observation that a trend exists for abolition of capital punishment following liberation from repression; "Germany after Nazism, Italy after fascism, and Portugal, Peru, Nicaragua, Brazil, Argentina, the Phillippines and Spain all abolished capital punishment for peacetime offences after emerging from periods of severe repression".[665]

However, notwithstanding the decision in *Makwanyane* and, it is suggested, because the Court elected not to strike the death penalty in all instances,[666] the debate over capital punishment was far from over. The National Party and other opposition parties called for the drafters of the final Constitution to accommodate the death penalty for murder and rape, and demanded a national referendum. The National Assembly, in which the ANC holds the majority, rejected

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663 Steiker, *supra* note 18 at 1287.

664 See generally Harcourt, *supra* note 662.

665 *Makwanyane, supra* note 8 at 790.

666 P.M. Maduna, "The Death Penalty and Human Rights" (1996) 12 S.African J.Hum.Rts. 193 at 209.

their motion, but it is clear that the death penalty will remain a major political issue[667] despite the fact that President Mandela has vowed that the death penalty will not be reintroduced in his lifetime.[668]

How the Court would have responded to a drafting of the final Constitution which specifically accommodated the death penalty for murder is unclear. Such a clause, whilst technically possible, would have had to be drafted extremely carefully given that *Makwanyane* found the death penalty for murder to violate so many sections of the Interim Constitution, and would have seriously undermined the Court.[669] The Constitutional Committee of the Constitutional Assembly, in the working draft of the final Constitution, proposed two alternative wordings for the right to life clause: one upholding the right to life and abolishing the death penalty; the other providing an exception to the right for persons convicted of a capital crime.[670] Ultimately, the clause remained unqualified, but equally makes no mention of the abolition of the death penalty. Section 11 of the final Constitution reads "[e]veryone has the right to life".

After extensive debate, the Constitutional Assembly adopted the final Constitution on May 8, 1996. The Constitutional Court, however, refused to certify the text as complying with the

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667 J. Hatchard & S. Coldham, "Commonwealth Africa" in P. Hodgkinson & A. Rutherford, eds., *Capital Punishment: Global Issues and Prospects* (Winchester: Waterside Press, 1996) 155 at 162.

668 E. Maluleke, "Gallows Visit to go on Without Mandela" Sunday Times (South Africa) (6 October 1996) 4.

669 See J. Kollapen, "Crime, Violence and the Death Penalty" (1996) 2 L.H.R. Rights 5 (South African Publication).

670 *Working Draft of the New Constitution*, Article 10. See Maduna, *supra* note 666 at 209.

Constitutional Principles contained in Schedule 4 of the Interim Constitution and only certified pursuant to amendments adopted by the Constitutional Assembly on October 11, 1996.[671] The Court received a number of communications premised upon the text's 'failure' to reinstate the death penalty. However, reinstatement of the death penalty was one of several objections which were not supported by the Constitutional Principles. As the Court was required to evaluate the text in light of the Constitutional Principles, it held that it could not express any view as to the merits of these "Miscellaneous Points".[672] The certified text was signed into law by President Mandela on December 10, 1996 in a ceremony as symbolic for its location, Sharpeville, as its date, International Human Rights Day.

During the drafting and certification processes the death penalty remained contentious. However, as we have seen, the final right to life clause is almost identical to that considered in *Makwanyane*. The limitations clause is substantially different, no longer referring to the elusive 'essential content of the right' but requiring the limitation to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[673] Section 37 (5) establishes the right to life and human dignity as non-derogable *in absolu*. Despite *Makwanyane*, it remains to be seen how the death penalty for treason could survive.

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671 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] 11 B.C.L.R. 1419 (CC); *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1997] 1 B.C.L.R. 1 (CC).

672 *Ibid.* at para. 104.

673 *Constitution of the Republic of South Africa*, 1996 (Act 108 of 1996) section 36 (1).

The reaction to *Makwanyane* clearly indicated that the Court had not rendered the issue of capital punishment moot. Despite the commitment of the present A.N.C. government, the death penalty is likely to remain a contentious issue in the legislative fora and a future government of differing composition may be inspired to seek its reintroduction. This is perhaps unlikely whilst the A.N.C. maintains a solid majority, but should their popularity wane to a point where their majority is threatened and the reintroduction of the death penalty is perceived as a winning issue, or proves essential to the formation of a coalition government, it is not inconceivable that the death penalty will rear its head once more.

Given the decision of the Court in *Makwanyane* and the unqualified text of the final Constitution, capital legislation alone would not be sufficient; a constitutional amendment would have to be enacted. In terms of the final Constitution the amendment of any provision of the Bill of Rights requires a bill passed with the support of two thirds of the National Assembly and six of the nine provinces in the National Council of Provinces.[674] However, as the Court recognised in *Makwanyane*, public opinion is currently very much in favour of capital punishment[675] and it is conceivable that this majority could be attained.

Whether or not the Court was anticipating such long-term eventualities, it must have been conscious in its determination in *Makwanyane* that the text of the Final Constitution was not dependant upon its judgement. It is suggested that the Court has attempted to engender a culture

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674 s. 74 (2).

675 *Supra* note 595 and accompanying text.

of individual rights and human dignity which would inspire, even mould, South Africa's thought processes, attempting to set social, as well as legal, precedent. If the people of South Africa can realise the futility of capital punishment, and its discordance with the values of their infant democracy, then the Court will have a greater long-term effect than it could achieve only through law.

Justice Langa perceived the function of the state, and presumably the Court as an organ of state, as "a role model for [] society".[676] In *Williams*, the Court recognised that "[c]ourts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights'",[677] and the Court has referred, approvingly, to a lower court decision in which Justice Froneman found that "the Constitution must be interpreted so as 'to give clear expression to the values it seeks to nurture for a future South Africa'".[678] In contrast to the U.S. Supreme Court, the South African Court has sought to guide, rather than be guided by, prevailing public opinion. Justice Langa, writing for the Court in *Williams*, would find difficulty with the American approach of deferring to evidenced public opinion noting "[t]he relationship between 'contemporary standards of decency' and public opinion is uncertain, and I am not convinced that they are synonymous".[679]

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676 *Makwanyane, supra* note 8 at 751.

677 *Williams, supra* note 579 at 635.

678 *Zuma, supra* note 580 at 412, citing *Qozoleni* v. *Minister of Law and Order* [1994] 1 BCLR 75 (E).

679 *Williams, supra* note 579 at 643.

Social discourse is being manipulated by the Court as it attempts to raise the collective consciousness. One judgement is insufficient premise for such a theory, but it is equally evident from the unanimous decisions in *Zuma* and *Williams* that the Court views itself as a catalyst for the human rights culture it envisions for South Africa. In *Makwanyane*, the Constitutional Court interpreted the text, and its underlying values, in an inspirational, hortatory judgement. The judgement presented not a restrictive indicator of domestic practice, but an opportunity for South Africa to aspire towards a new paradigm in the protection of human rights and human dignity. Harcourt has referred to *Makwanyane* as

> a model of 'mature adjudication'[;] ... mature because it incorporates liberal aspirations within the larger context of an open and transparent discussion [and] ... in its attentiveness to, and respect for, the experiences and opinions of judicial colleagues in the international community.[680]

Justices Kriegler and Sachs found that, despite the clear intention of the framers of the Constitution to leave the matter of the death penalty open, the text of the Constitution was sufficient to determine the unconstitutionality of capital punishment.[681] Had the entire Court been of that persuasion, such a lengthy expository of extranational law and practice would have been unnecessary except as an opportunity to reinforce the text's abolitionism. The Court would not have had the occasion to determine the values of the new South Africa and exert its influence on the developing society. That it did bodes well for future Bill of Rights jurisprudence, and South Africa.

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680 Harcourt, *supra* note 662 at 256.

681 *Supra* note 573 and accompanying text.

Makwanyane may be expected to be of great significance in capital litigation. It provides foreign and international fora with a decision that the death penalty is illegal *per se*; not by virtue of its method of execution, the age, race or social status of the defendant, the death row phenomenon or the failure of procedural requirements. Courts wishing to engage in transjudicial communication have the opportunity to follow the South African example. In addition, the Court has evidenced the role of constitutional fora in promoting values: a vertical effort at educating the society in which it operates. The U.S. courts, in particular, could learn from this exemplar. It is ironic, but fitting, that such a momentous decision should come from the highest court of a newly liberalised nation which once "had the doubtful honour of being a world leader in the number of judicial executions carried out".[682]

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682 *Makwanyane*, *supra* note 8 at 778, O'Regan, J.

Chapter 5 Cosmopolitan Constitutionalism

In the course of this thesis, I have attempted to illustrate the desirability of adopting a cosmopolitan approach in constitutional adjudication. In this chapter, I will identify the components, and benefits, of cosmopolitan constitutionalism, concluding that the budding approach of the South African Constitutional Court, as reflected in the *Makwanyane* judgement, is an ideal illustration.

Cosmopolitan constitutionalism presupposes consideration of international law and values in domestic jurisprudence. There is, of course, a hierarchy in evidence: as we will see, courts are under a rigorous duty to adjudicate in conformity with international obligations. International trends, whilst potentially imposing a progressive duty upon domestic courts, are less binding although, as norms of the global community, they retain persuasive moral, if not legal, force. Transjudicial communication amongst domestic courts, lacking the cogency of international law and norms but important in its own right, is a third factor.

A. Transjudicial Communication

It is the contention of this thesis that transjudicial communication is an integral component of cosmopolitan constitutionalism. That - figuratively, at least - no jurisdiction is an island is

evidenced by the increasing interdependency of nations, and the global village phenomenon. In addition, the paradigmatic shift in the world order has inspired incremental awareness of human rights judgements. Jurisprudence is not formulated in a vacuum, but is often critically assessed in the constitutional debate of international and foreign tribunals. Consequently, in the absence of transjudicial discourse, domestic courts risk producing decisions which are discordant with, and criticised by, their extranational contemporaries. According to Murray Hunt

> although 'globalisation' and 'interdependence' may seem fashionable epithets, they reflect the undeniable present reality that, in today's world of political and economic transnationalism, states can no longer consider themselves masters of their own destiny.[683]

Anne-Marie Slaughter defines the phenomenon of transjudicial communication as "communication among courts - whether national or supranational - across borders".[684] The spectrum of possibilities raised is wide, ranging from respect for binding decision making within a formal structure such as the European Union to the simple interest of one national court in its peers' adjudication. In the latter context, the influence is more informal, but is well suited to human rights cases in which one hopes "a sense of common judicial identity and enterprise" is in evidence.[685] That this phenomenon is not automatically the case, however, is apparent from the U.S. capital jurisprudence discussed in chapter 3 which has remained steadfastly immune

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683 Hunt, *supra* note 387 at 4.

684 Slaughter, *supra* note 3 at 101.

685 *Ibid.* at 102.

to extranational influence even where it would have lent support to domestic decision-making.[686]

There is an important hierarchical distinction to be made between the forms of discourse adopted. Slaughter differentiates between what she terms "horizontal" and "vertical" communication.[687] Vertical communication occurs "between national and supranational courts",[688] for example between the European Court of Human Rights and the national courts of member States of the Council of Europe.[689] The relationship between such courts tends to be treaty-based; in this example, upon the *European Convention on Human Rights*. The resulting legal and political requirement that courts respect the supranational body is compounded by the fact that, in the absence of vertical communication, the domestic influence of the supranational court is restricted. According to Slaughter, "the practical effectiveness of these tribunals will depend in large part on the extent to which national courts take account of their decisions".[690]

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686 For example, one may consider the death row phenomenon jurisprudence of the Human Rights Committee which would have lent support to the U.S. Supreme Court's resistance to such claims. See *supra* notes 153 and 371 and accompanying text. Equally, the decision of the HRC in *Ng*, that lethal gas asphyxiation was an unacceptable method of execution, would have reinforced the decision of the Ninth Circuit in *Fierro, Ruiz & Harris*. See *supra* notes 9 and 196 and accompanying text.

687 Slaughter, *supra* note 3 at 103 *et seq*. She also identifies the possibility of mixed horizontal-vertical discourse where the jurisprudence of a supranational body, as influenced by national practice, is observed by other national courts. The supranational tribunal is thus acting as a "conduit" for horizontal communication. *Ibid.* at 111.

688 *Ibid.* at 106.

689 Arguably, reverse vertical communication between the domestic court and the supranational body may also occur. See below at *infra* note 711 and accompanying text.

690 Slaughter, *supra* note 3 at 107.

Vertical communication exists in continuum, depending upon the formal status of the international tribunal's judgements (we may contrast the binding judgements of the European Court of Human Rights on States party to litigation before that court with the views of the Human Rights Committee which, it is hoped, States will respect but which lack 'teeth') and domestic reception (whether judgements are given direct or indirect effect). Judgements of the European Court of Human Rights, for example, are formally binding on States party to litigation but not other member States of the Council of Europe. Nonetheless, there exists a general duty on all member States to conform, not least because their own law and practice may be similarly challenged.

Horizontal communication, in contrast, principally "takes place between courts of the same status, whether national or supranational, across national or regional borders".[691] Accordingly, dialogue between the Constitutional Court of South Africa, the United States Supreme Court and the Judicial Committee of the Privy Council would be termed horizontal. Equally, horizontal discourse may occur between regional or international fora; the Inter-American Commission and the European Court of Human Rights, for example. Such courts are not bound by each other's decisions but may wish to consider how their contemporaries have dealt with similar issues.

In addition, horizontal communication may occur between courts of differing status which do

691 *Ibid.* at 103.

not have the treaty-based relationship upon which vertical exchange is generally premised. As we have seen, *Soering* has been cited by national courts of non-member States of the Council of Europe which are under no formal obligation to defer to the judgements of the European Court of Human Rights. This exchange may be considered quasi-horizontal where the domestic court is referring to the judgement in a comparative manner. However, it takes on characteristics of vertical exchange where the judgement is being used as an interpretive guide to international obligations, whether based on custom or on a treaty such as the *ICCPR*.

Transjudicial discourse implies open dialogue; indeed judges may assist in the development of standards, and the exhortation for internationalisation of domestic jurisprudence, through attending international conferences. According to Hunt, "[a]t a time of great upheaval in the world's political ordering, comparative constitutionalism has enjoyed a revival, and the globe-trotting judge has been a full participant in the international exchange of ideas".[692] The *Bangalore Declaration and Plan of Action*,[693] adopted by the International Commission of Jurists at their conference "Economic, Social and Cultural Rights and the Role of Lawyers", is perhaps the best illustration of this phenomenon. The document marked the recognition of eminent jurists that economic, social and cultural rights were not being accorded sufficient attention and, albeit not binding, urged the legal profession to take account of such rights in their human rights efforts, rather than restricting their focus to civil and political rights. In addition, the *Plan of Action* made concrete proposals as to how economic, social and cultural

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692 Hunt, *supra* note 387 at 24. Citations omitted.

693 *Ibid.* at 35.

rights could be better enforced, and encouraged domestic courts to apply international human rights norms when adjudicating these rights.[694]

Transjudicial discourse is, however, equally applicable to the consideration given by judges to extranational jurisprudence. This may manifest itself as formal reference through citation, as in the *Makwanyane* and *Pratt & Morgan* judgements where the Constitutional Court and the Privy Council, respectively, cited to national and supranational courts. Courts not prepared to take this step are not, however, precluded from engaging in discourse. Thus consideration of extranational law can be apparent notwithstanding a failure to cite. As we have seen, this amounts to "tacit emulation".[695] Tacit emulation may result where courts are unwilling to legitimise a different legal system by citing its jurisprudence, or where they perceive explicit reference to extranational precedent as weakening their domestic authority.

The benefits of transjudicial discourse are many. It is of particular relevance where courts are faced with a universal issue or common moral problem. Notwithstanding the importance of domestic constitutional texts, the values upon which we draw tend not to be limited by geographical boundaries. Human rights are an obvious case in point and, in the course of this thesis, we have identified a number of common concerns which arise in connection with the death penalty in particular. For example, any system of capital punishment must address such

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694 See generally P. Hunt, "Reclaiming Economic, Social and Cultural Rights: the *Bangalore Declaration and Plan of Action*" (February 1996) N.Z.L.J. 67.

695 *Supra* note 6 and accompanying text.

issues as the crimes which deserve death, the method of execution and appropriate procedural restrictions. Courts which weigh the merits of foreign approach are guided - by positive or negative example - in their own decision making. The solution to the problem has thus become a joint enterprise between different fora faced with the same dilemma. In addition, courts which engage in vertical dialogue are likely to be more attentive to the international law and trends on the issue at hand. This has the effect of introducing global values into domestic jurisprudence and, correspondingly, strengthening the international regime.

B. Domestic Courts and International Law

Promoting a consideration of international law is not a radical phenomenon in domestic jurisprudence. Traditionally, it has been accepted that courts should endeavour to interpret non-constitutional law so as not to place the state in violation of international law to the extent that, where the former was ambiguous, the latter would be invoked as an interpretive measure. What this thesis proposes, however, is that domestic courts ought to consider international law not merely as an aide to interpretation of domestic statutes or common law, but in order to assess the status of international law and norms on the issue at hand in their *constitutional* interpretation. In addition, rather than limiting their contemplation to hard legal obligations, this thesis urges domestic courts to draw upon global trends towards abolition and act as agents for the crystallisation of these trends.

Murray Hunt has identified a trend within the English courts of incremental acceptance of international law - both treaty based and customary - and determines that English courts have recognised a "duty ... so far as possible to keep in step with the settled practice of other nations".[696] In particular, he has assessed the gradual acceptance of European law by English courts; a movement he considers "a common law development, an evolution of the judiciary's sense of its own constitutional obligations".[697] He identifies in this evolution implications for unincorporated international human rights law which has also become an interpretive tool for English courts. It is not so much that the courts have found themselves bound by international human rights law, but rather that the judiciary has, on occasion, referred to human rights law, and particularly the *ECHR*, as a source of norms either inherent in common law[698] - Hunt refers to a "new-found willingness to discover a happy coincidence between the common law and the *ECHR*"[699] - or integral to the development of common law and interpretation of statute. Accordingly, whilst English jurisprudence is not unanimous in its embrace of extranational law, there is evidence of a trend in which courts may be considered to be interpreting, and guiding, domestic law in light of the norms of the international community.[700] *Pratt & Morgan* is a

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696 Hunt, *supra* note 387 at 16 quoting from *Standard Chartered Bank* v. *International Tin Council* [1987] 1 WLR 641 at 648.

697 *Ibid.* at 123.

698 In *R* v. *Cambridge Health Authority, ex parte B*, [1995] 1 FLR 1055, Justice Laws recognised a
> principle [] that certain rights, broadly those occupying a central place in the ECHR[,] ... are not to be perceived merely as moral or political aspirations nor as enjoying a legal status only upon the international plane of this country's Convention obligations. They are to be vindicated as sharing with other principles the substance of the English common law.

699 Hunt, *supra* note 387 at 232.

700 See Hunt, *ibid.* at Chapter 5 *et seq.*

prime example.[701]

Hunt's theory that domestic courts are under a presumption to give effect to international law and norms need not be restricted to the English context. However, focusing, as it does, upon English law, Hunt's thesis acknowledges, and urges, the use of extranational law in the interpretation of predominantly common law. Accordingly, Parliament retains supremacy and may intervene. The United States and South Africa, in contrast, have text-based constitutions which transcend non-constitutional law. The use of extranational law in the interpretation of constitutional provisions has greater effect as the legislatures face constitutional amendment, rather than the mere passing of legislation, to override the courts' adjudication.

A way of conceptualising my thesis is that part of non-parochial - or cosmopolitan - constitutionalism is that courts ought to be comfortable as members of more than one legal community. In engaging in transjudicial discourse and in embracing international law, courts are identifying a role for themselves in the international arena. Slaughter perceives this as courts "conceiving of themselves as autonomous actors forging an autonomous relationship with their foreign or supranational counterparts".[702] International relations, once the exclusive domain of the executive, are thus being permeated by the judiciary.

The rise of the human rights movement has been accompanied by a new conception of

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701 See *supra* note 149 and accompanying text.

702 Slaughter, *supra* note 3 at 123.

nationalism, and a paradigmatic shift away from traditional national sovereignty. Inherent in this transformation Randall identifies a "new disciplinary matrix" which "essentially recognises individuals as the 'subjects' of basic human rights [and] ... domestic institutions as the potential guardians of those rights".[703] He is not alone; according to Hunt, in the absence of a comprehensive international legal system, "international law in the emerging new paradigm is dependent on the domestic legal order of the nation-states to give practical effect to its norms".[704] Thus, the role of domestic courts has correspondingly altered in order to facilitate their action as what Randall describes as "double agents", faithful to domestic law, yet agents of the international order wherever possible.[705]

Whereas the executive has traditionally attempted to balance international obligations against domestic practice, the judiciary is potentially in a better position to marry the two. Subjecting domestic law to scrutiny under international obligations, the role of judges in human rights protection is multi-faceted. They may include extranational law and practice in their jurisprudence. Some members of the judiciary have responded enthusiastically to their new calling. As we have seen, the South African Constitutional Court and the Privy Council have engaged in transjudicial discourse and international inquiry in seminal death penalty cases. In addition, domestic courts may adjudge what were once considered purely international issues. International human rights treaties which have direct effect under domestic law, for example,

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703 Randall, *supra* note 23 at 200.

704 Hunt, *supra* note 387 at 5.

705 Randall, *supra* note 23 at 204.

require national courts to adjudicate extranational law.

According to Randall, whilst domestic courts may not be vertically bound by international human rights jurisprudence, they "may appropriately enforce norms that are emitted by centralized institutions".[706] Indeed, in this thesis we have identified courts which have allowed international norms and extranational law to influence their decision-making and, through their judgements, assisted in the promulgation of such values in their domestic society. This is of particular relevance in the field of capital jurisprudence where the interpretive presumption in favour of abolition, coupled with the hard and soft law upon which a multitude of accessory challenges may be premised, offers courts an ideal opportunity to invoke international law and norms. For example, for domestic courts unwilling to abolish the death penalty *ex facie*, the opportunity exists to attack it on grounds of racial discrimination. Were the U.S. Supreme Court to revisit their decision in *McCleskey*, it is unlikely that the death penalty could survive in America.

Further, Randall identifies an *obligation* on domestic courts, as agents of states which have undertaken international human rights obligations, to uphold human rights norms in their jurisprudence.[707] According to Hunt, "in international law, the courts, as public authorities, are as much a part of the state as the executive government, with equal responsibility for ensuring that the rights protected by international law are secured in the domestic legal system, so far as

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706 *Ibid.* at 203.

707 *Ibid.* at 208.

it is within their power to do so".[708] The reservations entered by the U.S. to the *ICCPR* demonstrate executive knowledge of the fact that the capital punishment system does not meet international standards. The courts, in deferring to national practice, are thus facilitating human rights violations. It is significant that, as a matter of state responsibility, where courts neglect to enforce international obligations, "the judiciary will be a partner in or an agent of the state's illegal international acts".[709]

C. Cosmopolitan Constitutionalism in Capital Cases

Harcourt identifies death penalty cases as "hard cases" which "provoke sharp conflict between interpretive choices, strain constitutional interpretation and produce heated moral debate in the public sphere".[710] In adjudicating such cases, judges are required to assess, and distinguish between, dearly-held values. This is especially true of the death penalty, where polar political arguments are raised by the abolitionist and retentionist lobbies, and where the opinions voiced by the public and their elected representatives tend to diverge from the opinions of academics and those responsible for carrying out death sentences.

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708 Hunt, *supra* note 387 at 195.

709 P. Michell, "English Speaking Justice: Evolving Responses to Transnational Forcible Abduction After *Alvarez-Machain*" (1996) 29 Cornell Int'l L.J. 383 at 435. Citations omitted.

710 Harcourt, *supra* note 662 at 255.

In chapter 2 we recognised the existence of an abolitionist norm within the international community. The encouragement towards abolition of the death penalty is evidenced through 'soft' norms and 'hard' legal restrictions. The death penalty is permitted in certain circumstances - for the most serious crimes, for example - but expressly prohibited in others - for example, for political crimes or crimes committed by juveniles. In addition, the extensive procedural limitations mean that retention of capital punishment involves meeting strict requirements of international law. Notwithstanding the deferential jurisprudence of the Human Rights Committee, the normative abolitionist trend, underscored by the hard law constraints, has resulted in an interpretive presumption against capital punishment.

For judges electing to engage in cosmopolitan constitutionalism, this presumption sends a strong signal that the international community, albeit tolerating the death penalty, advocates its abolition. In addition, this thesis has argued for a second interpretive presumption, in which domestic courts are required to interpret national law in conformity with international law and norms where at all possible. Decisions such as *Soering*, *Makwanyane* and that of the Privy Council in *Pratt & Morgan* emphasise that regional and domestic courts are satisfying both presumptions; embracing international law and values, *and* going beyond strict international legal obligations to reach abolitionist results in capital cases. Indeed, each of these cases is of note in that the judiciary far exceeded the tentative steps of the Human Rights Committee and extended the abolitionist presumption (in *Makwanyane*, to its logical conclusion of abolition of the death penalty).

This brings us to an interesting situation: the Privy Council in *Pratt & Morgan* may be identified as adjudicating in greater conformity with both interpretive presumptions than has the Human Rights Committee, despite the Privy Council's historical conservatism.[711] As the Human Rights Committee had also decided *Pratt & Morgan*, the Privy Council could have easily followed its rejection of the death row phenomenon. Instead, it considered, and surpassed, the jurisprudence of the HRC (and, for that matter, the Inter-American Commission on Human Rights). To this end, the HRC may be viewed as providing a foundation upon which more progressive capital jurisprudence may be constructed, rather than creating a ceiling beyond which no court will proceed. It remains to be seen whether this will come full circle, and the HRC will allow itself to be follow the precedent of the Privy Council. If it does, we will witness vertical transjudicial communication in reverse, so as to speak. Rather than the domestic court looking to the international judiciary, the international will gain from the jurisprudence of the domestic.

In chapters 3 and 4 the different approaches adopted by the U.S. Supreme Court and the South African Constitutional Court became apparent. According to Harcourt, in *Makwanyane* the South African Court chose "a constitutional culture for the nation".[712] The Court was at a clear advantage in that the Constitution advocated comparative constitutionalism and the very history of its drafting promoted an outward-looking perspective, but it is apparent from the decision in *Makwanyane* that, regardless of the text, the Court recognised the value in embracing

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711 See *supra* note 149 and accompanying text.

712 Harcourt, *supra* note 662 at 260.

extranational perspective. In South Africa, synergy between the framers of the Constitution and the judges of the Constitutional Court has resulted in a model - to use Harcourt's terminology, a culture - of cosmopolitan constitutionalism.

The impervious parochialism of the U.S. Court in capital jurisprudence is in sharp contrast to the South African approach. However, notwithstanding the insularity identified in capital cases, the U.S. Supreme Court *has* found itself engaging in comparative constitutionalism. In *Trop*, the case which established the 'evolving standards of decency' test, Chief Justice Warren assessed the impugned punishment within an international context.[713] He noted that banishment was "a fate universally decried by civilised people" and statelessness was "a condition deplored in the international community of democracies".[714] A recent dissent by Justice Breyer made reference to the federal systems of Switzerland, Germany and the European Union.[715] Whilst he acknowledged, "[o]f course, we are interpreting our own Constitution, not those of other nations" he concluded "their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem".[716] According to Professor Tushnet of Georgetown University, Justice Breyer's opinion "reflects the globalization of constitutional law".[717]

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713 *Trop, supra* note 254.

714 *Ibid.* at 102.

715 *Printz* v. *United States*, No. 95-1478 (Decided 27 June 1997); [1997] U.S. LEXIS 4044.

716 *Ibid.* at *127.

717 L. Greenhouse, "Appealing to the Law's Brooding Spirit" New York Times (Sunday, 6 July 1997) E4.

The death penalty is an inherently contentious issue and one which invokes the subjective interpretation of clauses prohibiting cruel and unusual punishment or cruel, inhuman and degrading treatment. As such, it is perhaps not surprising that its constitutionalism invites reference to societal perspective. In chapters 3 and 4 we examined the extent to which public opinion has influenced the capital jurisprudence of the U.S. Supreme Court and the Constitutional Court of South Africa. Whilst both courts paid close attention to community sentiment, a distinction may be drawn between the scope of the communities from which normative signals were received. In the U.S., public opinion is assessed solely within that country's geographic boundaries. In *Thompson*, for example, Justice Scalia was adamant that the Court must heed American values and opinions - indicated by positivist deference to legislative activity and not the judiciary's own assessment - rather than those of the international community.[718] In contrast, the South African Court recognised that domestic opinion favoured retention of the death penalty but preferred to be guided by a more global sentiment, evidenced by international law and norms.[719] To this extent, we may identify not only extranational discourse in the transjudicial sense but also in a social context.

The value of domestic opinion is self-evident. Politically, it is expedient to address the concerns of the populace. However, in so doing, the court is subjecting itself to the will of the people; a will which has, historically, demonstrated the necessity of rights constitutionalism. We may

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718 *Thompson, supra* note 396 and accompanying text.

719 *Makwanyane, supra* note 8 and accompanying text.

consider Nazi Germany an exemplary illustration of the harm which results from unchecked volition.

In addition, domestic public opinion does not necessarily prove informed. In his report on the proposed *Second Optional Protocol*, Bossuyt noted that "opinion polls, the results of which too often were used to support prevailing beliefs on the issue, simply reflected the public's strongly held though uncritical views".[720] Misapprehension as to the deterrent effect of the death penalty, its cost and available sentencing alternatives combine to produce popular opinion premised on fallacy.[721] In Texas, where prison overcrowding has resulted in prisoners serving approximately 20% of their sentence and where a life sentence may mean parole after 6 years, there is an understandable prejudice against life sentencing of violent murderers borne of a fear that they will be released on early parole. The reality, that persons convicted of capital murder are not eligible for parole for at least 35 years, is not known amongst the public at large and cannot be communicated to the jury in capital sentencing.[722]

The classic statistical controversy over phraseology is also a cogent concern. In the United States public opinion polls tend to demonstrate a large majority in favour of the death penalty. However, once those polled are presented with alternative sentencing methods that majority is

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720 U.N. Doc. E/CN.4/Sub.2/1987/20 para 77 (c)

721 Such inaccuracy is not the exclusive domain of the public at large; recall the South African judge who wrongly believed that the majority of death sentences were commuted. *Supra* note 551 and accompanying text.

722 R.C. Dieter, "Sentencing for Life: Americans Embrace Alternatives to the Death Penalty" in H.A. Bedau (ed.), *The Death Penalty in America* (New York: Oxford University Press, 1997) 116 at 119.

sharply diminished. For example, in a recent survey conducted by Greenberg Lake and the Tarrance Group 77% of Americans polled supported the death penalty in the abstract. When life imprisonment with a requirement to pay restitution to the victim's family was also offered, support for the death penalty dropped to 41% with 44% favouring the alternative sentence.[723] If public opinion is to influence constitutional jurisprudence, it must be subjected to rigorous evaluation.

In contrast, the international community may be perceived as presenting a more reasoned opinion. It is perhaps elitist to rank international opinion above domestic sentiment, but norms do not develop at the international level in the absence of extensive investigation and debate. They represent rational perspectives whose existence indicates consensus in the global community. For courts which perceive themselves as dual agents of the domestic and international order, international values are fundamental to that capacity and one can thus talk of a cosmopolitan outlook which *requires* that international law be taken seriously. For courts which maintain a more traditional, parochial role in which national boundaries are paramount, the international human rights paradigm still provides a normative framework within which they may - and, according to the presumption in favour of complying with international law wherever possible, should - *elect* to interpret domestic constitutionalism. Public opinion can be engendered by progressive judicial activity, as well as followed in deference.

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723 *Ibid.* at 117.

Conclusion

Cosmopolitan constitutionalism does not envisage cookie-cutter law, in which courts from all over the world will produce identical jurisprudence. Rather, it requires the inclusion of extranational perspective in the interpretation of domestic constitutions and national values, and encourages analysis in light of international law and trends. The South African Court used extranational experience to guide its adjudication, embracing certain ideals whilst shying from the negative example of the United States. Harcourt concludes that the Court "use[d] comparative law to define its own peer group while simultaneously creating its individual identity in the international community".[724] To borrow Harcourt's terminology, the South African Court adopted a "mature" approach to constitutional adjudication,[725] one which was influenced by extranational and domestic considerations and which resulted in a decision as in keeping with the ethos of the new South Africa as with the abolitionist trend of international law.

If we are to address the South African model of cosmopolitan constitutionalism as mature, then correspondingly the parochialism of the U.S. Supreme Court may be considered juvenile. In its insularity, the jurisprudence of the U.S. Court is discordant with the values of the international community, as evidenced by hard law as well as soft norms. In executing juvenile offenders and persons with mental retardation, tolerating racism, sexism and socio-economic disparity, and refusing to address the issue of the death row phenomenon, the dangers of

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724 Harcourt, *supra* note 662 at 267.

725 See generally, Harcourt *ibid.*

parochial constitutionalism are self evident in the Court's history. The reservations issue illustrates that the U.S. government is aware of the situation and is sufficiently committed to capital punishment to acknowledge, maintain and defend such a system in the face of domestic and international pressure.

The answer need not lie in complete abolition, on the one hand, or in countenancing the flawed system currently in operation, on the other. The U.S. courts could adjudicate in accordance with international law and the domestic constitution by restricting the death penalty and attempting to bring the capital justice system into conformity with international requirements. Abolishing the juvenile death penalty would be an important first step. Addressing the issue of discrimination should follow. The U.S. Constitution does not require the execution of children or racist application of punishment; indeed, the Court's own jurisprudence on juvenile justice and the race cases of the civil rights era would support the opposite contention. If the Supreme Court could tear itself away from its capital punishment security blanket it would see that, in many instances, international law and norms articulate values expressed by the Court in non-capital cases. Following their own precedent, and including at least tacit emulation of international law, would result in consistency with the domestic and international orders.

The death penalty is not a "magic formula ... which will restore law and order".[726] The majority of jurisdictions have recognized that fact, as has the international community. Cosmopolitan

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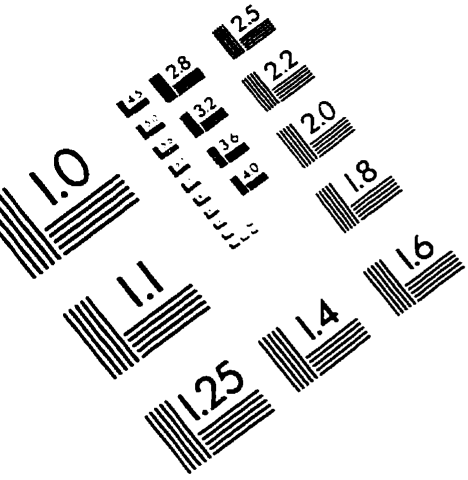
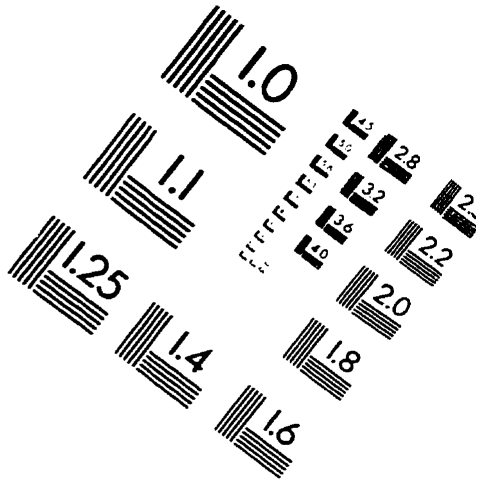
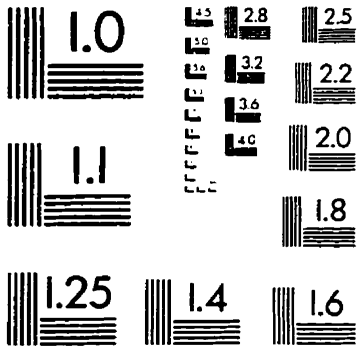
[726] N.J.J. van R. Koornhof, Member of the South African Parliament, *House of Assembly Debates* (17 June 1993) col 11332. In Maduna, *supra* note 666 at 206.

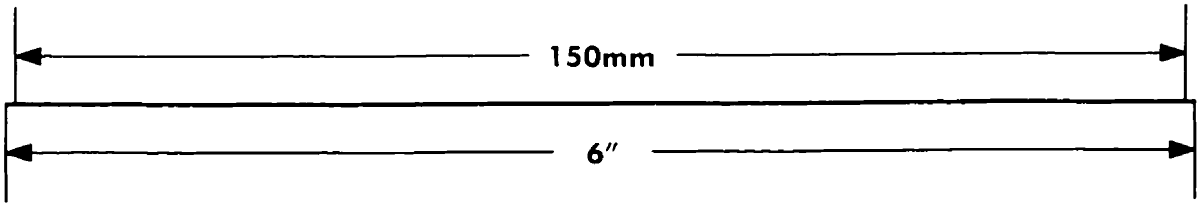
constitutionalism, at the very least, requires that capital punishment be scrutinized in light of the prevailing abolitionist ethos. The U.S. courts are distancing themselves from the international obligations undertaken by their government. The South African Court, in contrast, embraced and extended not only international law but the abolitionist norm. Undoubtedly, the Johannesburg judges are the better role models.

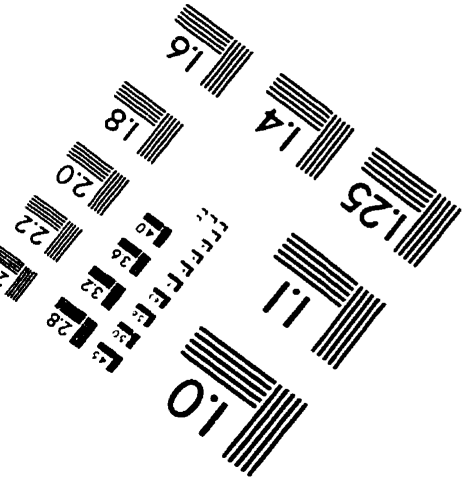
IMAGE EVALUATION TEST TARGET (QA-3)

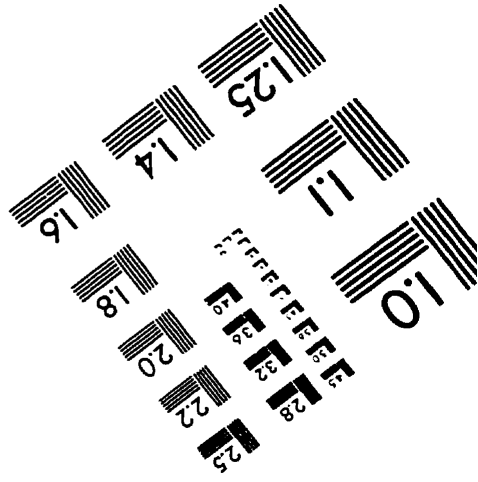












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