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# The Abolition of the Death Penalty: Does “Abolition” Really Mean What You Think it Means?

CHRISTY A. SHORT\*

## INTRODUCTION

Human rights, in all that the phrase embodies, represent a massive and constantly growing body of law. The protection of human rights is constantly expanding, and though obviously of local and national concern, protection of these rights is of paramount importance in the international and global spheres. Human rights law focuses upon a wide spectrum of issues and crises; it encompasses economic, political, cultural, moral, religious, and social topics, and is motivated by crime, race, age, and gender. For example, past human rights instruments have dealt with the use of poison or bacteriological methods of warfare;<sup>1</sup> the granting of civil and political rights to women;<sup>2</sup> suppression of person-trafficking and exploitation of prostitution;<sup>3</sup> territorial asylum;<sup>4</sup> the rights of children;<sup>5</sup> the rights of deaf-blind persons;<sup>6</sup> and safety of civil aviation.<sup>7</sup>

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1. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, or of Bacteriological Methods of Warfare, June 12, 1925, 14 I.L.M. 49.

2. Inter-American Convention on Granting of Political Rights to Women, May 2, 1948, 27 U.S.T. 3301; Inter-American Convention on Granting of Civil Rights to Women, May 2, 1948, Pan.-Am. T.S. 23.

3. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

4. Inter-American Convention on Territorial Asylum, Mar. 28, 1954, 161 B.F.S.P. 566; G.A. Res. 2312, U.N. GAOR, 22nd Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967).

5. G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

6. E.S.C. Res. 24, U.N. ESCOR, 1st Sess., Supp. No. 1, at 41, U.N. Doc. E/1979/79 (1979).

7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 10 I.L.M. 1151; Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, May 10, 1984, 23 I.L.M. 705. For a more exhaustive list of international instruments concerned with human rights from 1921 to 1993, see EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 1663-68 (2d ed. 1996).

One of the most controversial topics in the human rights arena is the use of capital punishment as a method of punishment. While the use of the death penalty is historical,<sup>8</sup> the global push to rid us of its use began only very recently.<sup>9</sup> Debates over the merits of its legitimacy and legality as an international norm never cease, and the stakes increase with every execution.<sup>10</sup>

This Note will explore the increasing global trend toward the abolition<sup>11</sup> of the death penalty as a method of punishment. First, the background and history of the current movement will be discussed. Second, this Note will address the current perspectives of the movement's proponents to examine whether the foundation of the movement is consistent with their goals and progress thus far. Next, the three ways by which a country is bound to follow international law will be discussed.<sup>12</sup> Because publications focusing on the movement tend to criticize U.S. policy,<sup>13</sup> this Note will specifically study whether the United States violates international law when it imposes the death penalty as punishment.

A significant portion of this Note will concentrate on whether the abolition of the death penalty has become customary international law, and what that means for the movement, its proponents, and the United States.

8. The death penalty has existed in positive law since at least 1750 B.C. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 2 (2d ed. 1997) [hereinafter SCHABAS, *ABOLITION OF THE DEATH PENALTY*].

9. The current trend to abolish the death penalty globally began only 50 years ago, in 1948. *Id.* at 1.

10. An example of something at stake is the legitimacy of the United States' position as a world leader in championing human rights. See *infra* notes 87-89 and accompanying text.

11. Abolition is defined as "an abolishing or being abolished." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 3 (3d ed. 1997). Further, to abolish is "to do away with *completely*; put an end to; esp., to make (a law, etc.) null and void." *Id.* (emphasis added).

12. A country is bound by: voluntary consent through ratification of treaties, by customary international law, and the existence of a *jus cogens* norm. See generally Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, in *THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY: HUMAN RIGHTS LAW* 3 (Philip Alston ed. 1996) [hereinafter INTERNATIONAL LIBRARY].

13. See generally Cheryl Aviva Amitay, *Justice or "Just Us": The Anomalous Retention of the Death Penalty in the United States*, 7 MD. J. CONTEMP. ISSUES 543 (Spring/Summer 1996); Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, DENV. J. INT'L L. & POL'Y 555 (1995) [hereinafter Grayer, *Death Penalty Flourishes*]; Laurence A. Grayer, *Against the Global Trend: Support for the Death Penalty Continues to Expand Within the United States*, 7 INT'L LEGAL PERSP. 1 (Spring 1995) [hereinafter Grayer, *Against the Global Trend*]; William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOK. J. INT'L L. 277 (1995) [hereinafter Schabas, *Still a Party?*]; Lauren B. Kallins, Note, *The Juvenile Death Penalty: Is the United States in Contravention of International Law?* MD. J. INT'L L. & TRADE 77 (Spring 1993) [hereinafter Kallins].

Given the historical use of the death penalty as a method of punishment,<sup>14</sup> it appears critical to the global success of this movement to establish that the *complete* abolition of the use of the death penalty is customary international law. If this is true, States that do not voluntarily eliminate the death penalty as a method of punishment will be bound to do so.

Specifically, this Note will analyze the three components of customary international law to judge whether the United States' death penalty practices are in violation of international law. The following three elements must be met to establish that customary international law indeed exists: (1) that the State practice is general; (2) that the State practice is consistent; and (3) that States feel a sense of international legal obligation to conform to the State practice. The State practice analyzed in this Note is the complete abolition of the death penalty; this analysis is significant because of the existence of an inalienable "right to life" and the freedom from the arbitrary taking of that right in various international and regional human rights instruments.

In determining whether State practice of the complete abolition of the death penalty is general, this Note will look at statistics and geography. In determining whether State practice of the complete abolition of the death penalty is consistent, this Note will categorize different State practices. In determining whether States feel a sense of international legal obligation to abolish the death penalty, this Note will look at the pressures placed upon States to abolish the death penalty. In conclusion, this Note shows that the complete abolition of the death penalty is not customary international law. Therefore, countries that continue to utilize capital punishment, including the United States, are not in violation of international law. This study reveals, however, that certain regulations on the use of the death penalty could be customary international law.

## I. BACKGROUND AND HISTORY OF THE CURRENT MOVEMENT

The current movement promoting the complete global abolition of the death penalty has primarily spun off from the passage of the international and regional human rights instruments over the past fifty years. These human rights instruments represent the major source of support for this movement

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14. See generally SCHABAS, *ABOLITION OF THE DEATH PENALTY*, *supra* note 8.

because they frame the debate as the “right to life.”<sup>15</sup> Instead of specifically focusing on the death penalty, the early instruments focused on the existence of one’s “right to life” and the freedom from being arbitrarily deprived of it. This focus likely arose because the death penalty was seen as an exception to this “right to life.”<sup>16</sup> The protocols to these early instruments initiated a more specific focus on the use of the death penalty. Some of these protocols require ratifying parties to abolish the death penalty. States, however, could continue to use the death penalty in instances when they make reservations to these protocols at the time of ratification.

The initial steps of the global trend to abolish the death penalty were to limit the scope of its applicability rather than primarily to advocate its complete abolition. These efforts are explicitly reflected in the international and regional human rights instruments of the past fifty years. One example of such a limitation is that lawmakers argued for the exclusion of juveniles, pregnant women, and the elderly from those eligible to be sentenced to death.<sup>17</sup> Lawmakers also attempted to limit the number of crimes for which the death penalty could be imposed.<sup>18</sup>

#### *A. International Agreements*

The current movement took root with the passage of the Universal Declaration of Human Rights (Declaration) by the United Nations (UN) in 1948.<sup>19</sup> The Declaration proclaims that a “right to life” exists; it is the primary source upon which the promotion of the abolition of the death penalty relies.<sup>20</sup> Article 3 of the Declaration states: “Everyone has the right to life, liberty, and

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15. *Id.* at 1.

16. *Id.* at 7 (naming the following treaties that recognize the death penalty as an exception to the “right to life:” the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights).

17. *Id.* at 2.

18. *Id.* A common limitation is to abolish the death penalty during peacetime, but to allow executions for crimes committed during wartime. See, e.g., G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206-07, U.N. Doc. A/44/49 (1989); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Nov. 4, 1950, 22 I.L.M. 538.

19. The Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810, 1948 [hereinafter Declaration].

20. See SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 1.

the security of person."<sup>21</sup> While the Declaration protects a human's right to life, it does not expressly prohibit the imposition of the death penalty.

The Declaration is not a treaty, but rather a document meant "to provide 'a common understanding' of the human rights and fundamental freedoms referred to in the UN Charter. It serves 'as a common standard of achievement for all peoples and all nations.'"<sup>22</sup> Though the Declaration exists as more of a moral statement than a legal document, parts of it have been deemed customary international law because of the degree to which States have followed it in practice.<sup>23</sup> Acts such as "genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized rights" are considered violations of customary international law.<sup>24</sup> In fact, it has been stated that the Declaration has become a part of "the constitutional structure of the world community."<sup>25</sup>

In December 1966, the United Nations passed the International Covenant on Civil and Political Rights (ICCPR), an example of an international human rights treaty concerned with the "right to life;" it did not enter into force until March 1976.<sup>26</sup> Article 6 of the ICCPR actually regulates the imposition of the death penalty in countries that still impose execution as a punishment.<sup>27</sup> Section 6 of this Article implicitly approves of a country's choice to abolish

21. Declaration, *supra* note 19, at art. 3.

22. THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 29 (1988) (quoting the Preamble of the Declaration).

23. *Id.* at 31-32.

24. *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT]).

25. *Id.* (quoting Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 16-17 (1982)).

26. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

27. Art. 6, § 1: "Every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life;" Art. 6, § 2: A "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime;" Art. 6, § 4: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence;" Art. 6, § 5: A "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." *See id.*

the death penalty, but it does not require a country to eliminate the use of capital punishment to become a party to the Covenant.<sup>28</sup>

As of December 31, 1997, 140 countries were parties to the ICCPR, with fifty-nine signatories.<sup>29</sup> The United States signed the ICCPR on October 5, 1977, but did not ratify it until June 8, 1992.<sup>30</sup> However, the degree to which the United States is bound by the treaty is severely limited by four interpretive declarations, at least five reservations, and five understandings.<sup>31</sup> Two of these reservations in particular relate to the ICCPR's limitations on the use of the death penalty.<sup>32</sup> In the reservation to Article 6, the United States agreed to refrain from imposing capital punishment on pregnant women, but reserved the right to execute persons less than eighteen years old.<sup>33</sup> With respect to Article 7 of the ICCPR, which prohibits the use of torture and "cruel, inhuman or degrading treatment or punishment,"<sup>34</sup> the United States reserved that it will abide by Article 7 to the extent that the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment.<sup>35</sup> In other words, the United States will continue to impose punishment on its convicted criminals in accordance with the interpretation of its own Constitution. This reservation in effect prevents Article 7 from limiting the imposition of capital sentences in the United States.

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28. "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." *Id.*

29. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: Status as of Dec. 31 1997, at 121 (1998) [hereinafter MULTILATERAL TREATIES].

30. *Id.* at 122.

31. See Schabas, *Still a Party?*, *supra* note 13, at 280. For a closer look at these reservations, understandings, and declarations, see MULTILATERAL TREATIES, *supra* note 29, at 131-32.

32. See SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 277.

33. "That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." MULTILATERAL TREATIES, *supra* note 29, at 131.

34. ICCPR, *supra* note 26.

35. "That the United States considers itself bound by 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, and/or Fourteenth Amendments to the Constitution of the United States." MULTILATERAL TREATIES, *supra* note 29, at 131.

The Second Optional Protocol to the ICCPR (Optional Protocol) came into effect on July 11, 1991.<sup>36</sup> Thirty-one countries had ratified or acceded to this Optional Protocol as of December 31, 1997.<sup>37</sup> The Optional Protocol forbids the execution of anyone within the jurisdiction of a ratifying State,<sup>38</sup> unless the State specifically reserves the right to impose the death penalty "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."<sup>39</sup>

### B. United Nations Resolutions

The Member States of the UN have also addressed use of the death penalty in a human rights context. In 1984, the UN passed a resolution guaranteeing certain protections for individuals who have been sentenced to death.<sup>40</sup> This resolution not only provides certain protections for people sentenced to death, but also provides regulations for the use of the death penalty. Regulation Number One of this resolution states, for example, that countries still using the death penalty may only impose a death sentence for the commission of "the most serious crimes," with the additional limitation that only crimes having an element of intent "with lethal or other extremely grave consequences" qualify.<sup>41</sup> Furthermore, Regulation Number Three wholly prohibits the use of the death penalty for persons under eighteen, pregnant women, new mothers, and insane persons.<sup>42</sup> In protecting those already sentenced to death, the resolution calls for several guarantees: imposition of the death penalty only after guilt has been determined upon a standard of "clear and convincing evidence leaving no room for an alternative explanation of the facts;" the death sentence may not be carried out until a competent court has given a final judgment and that judgment has come from a fair trial, as defined in the ICCPR; the death sentence may not be carried out

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36. Second Optional Protocol to the International Covenant on Civil and Political Rights, approved Dec. 15, 1989, G.A. Res. 44/128, U.N. GAOR 44th Sess., Annex, Supp. No. 49 at 207, U.N. Doc. A/44/49 (1989) (*entered into force* July 11, 1991) [hereinafter *Optional Protocol*].

37. MULTILATERAL TREATIES, *supra* note 29, at 229.

38. *Optional Protocol*, *supra* note 36, at art. 1, § 1.

39. *Id.* at art. 2, § 1.

40. *See* Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Annex, Supp. No. 1 at 33, U.N. Doc. E/1984/84 (1984) [hereinafter *Safeguards Resolution*].

41. *Id.*

42. *Id.*



during an appeal, pardon, or commutation proceeding.<sup>43</sup> It also guarantees the right to an appellate process, the right to seek pardon or commutation of the death sentence, and the right to have minimal suffering inflicted upon the individual.<sup>44</sup>

More recently, on April 3, 1998, the UN Commission on Human Rights passed a resolution specifically on the death penalty.<sup>45</sup> This resolution urges those States that have not yet become parties to the ICCPR or the Optional Protocol to do so.<sup>46</sup> Additionally, the resolution reinforces the limitations of the ICCPR and the Convention on the Rights of the Child by restating five regulations on the use of the death penalty.<sup>47</sup> Most significantly, the resolution calls for both the restriction of the number of offenses that are death penalty-eligible and the imposition of a moratorium on all executions, "with a view to completely abolishing the death penalty."<sup>48</sup>

### C. Regional Agreements

Several regional treaties exist that also support the mission to protect the "right to life." The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is probably the best known and most successful regional human rights treaty. It entered into force on September 3, 1953.<sup>49</sup> As of March 3, 1997, thirty-four of forty European countries had ratified the European Convention, and the other six countries

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43. *Id.* at Nos. 4, 5, and 8.

44. *Id.* at Nos. 6, 7, and 9.

45. United Nations, High Commissioner for Human Rights, Question of the Death Penalty, Commission on Human Rights Resolution 1998/8 [hereinafter Question of the Death Penalty]. This resolution passed by a vote of 26 to 13, with 12 abstentions. *New Human Rights Declaration Approved in Geneva*, DEUTSCHE PRESS-AGENTUR, Apr. 3, 1998, available in LEXIS, Europe Library, DPA File. Among those States voting against the resolution were the United States, China, Pakistan, and Rwanda. Mark Tran, *U.S. Singled Out as Death Penalty is Condemned*, GUARDIAN (London), Apr. 4, 1998, at 16 [hereinafter Tran].

46. Question of the Death Penalty, *supra* note 45, at No. 2.

47. *Id.* at No. 3 (listing the following regulations: prohibition on the use of the death penalty for "any but the most serious crimes;" prohibition on the use of the death penalty for persons under eighteen or for pregnant women; provision for the right to seek pardon or commutation of a death sentence; and observation of the Safeguards Resolution (discussed *supra*)).

48. *Id.* at No. 4.

49. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953 [hereinafter European Convention].

had signed it.<sup>50</sup> According to its Preamble, the purpose of the European Convention is "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."<sup>51</sup> The European Convention specifically protects the "right to life," but only implicitly protects individuals from arbitrary imposition of the death penalty. The Council of Europe interprets Article 2 not "to protect unconditionally life itself or to guarantee a certain quality of life. Instead, these provisions [Article 2 and Protocol No. 6]<sup>52</sup> aim to protect the individual against any arbitrary deprivation of life by the State."<sup>53</sup>

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (Protocol No. 6) entered into force March 1, 1985.<sup>54</sup> While every country eligible to ratify the European Convention has at least signed it, Protocol No. 6 has not quite reached this level of success. Only twenty-four of forty countries had ratified Protocol No. 6 as of March 3, 1997, and only six of the remaining sixteen countries had signed it.<sup>55</sup>

Protocol No. 6 actually sharpens the limits imposed by the European Convention on the use of capital punishment. Article 2, Section 1 of the European Convention allows for the intentional deprivation of life "in the execution of a sentence of a court following [one's] conviction of a crime for which this penalty is provided by law."<sup>56</sup> Conversely, Protocol No. 6 requires a ratifying State to abolish the death penalty from its laws. The exception to this complete abolition is if a State provides for the death penalty for "acts committed in time of war or of imminent threat of war."<sup>57</sup> While both Protocol No. 6 and the European Convention protect the "right to life," both only implicitly protect individuals from arbitrary imposition of the death penalty.

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50. COUNCIL OF EUROPE, CHART OF SIGNATURES AND RATIFICATIONS OF EUROPEAN TREATIES, Updating as of 3 Mar. 1997, Simplified Tables by Subject-Matter, No. 5, at 6-7 (1997) [hereinafter CHART].

51. See European Convention, *supra* note 49.

52. See *infra*.

53. COUNCIL OF EUROPE, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17 (1991).

54. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, ETS 114 [hereinafter Protocol No. 6].

55. See CHART, *supra* note 50, at No. 114.

56. European Convention, *supra* note 49, at art. 2, § 1.

57. Protocol No. 6, *supra* note 54, at art. 2.

Efforts have been made to protect human rights in other regions as well. For the Organization of American States (OAS), the American Convention on Human Rights (American Convention) is the regional equivalent to the European Convention.<sup>58</sup> It entered into force on July 18, 1978,<sup>59</sup> and as of January 1, 1996, twenty-five countries had ratified it.<sup>60</sup> While the United States is part of the OAS, it has not signed either the American Convention or the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty (Additional Protocol).<sup>61</sup>

Article 4 of the American Convention specifically concerns the abolition of the death penalty. Paragraph 1 states that "every person has the right to have his life respected. . . . No one shall be arbitrarily deprived of his life."<sup>62</sup> Article 4 prohibits the use of the death penalty in the following instances: for "political offenses or related common crimes;"<sup>63</sup> on pregnant women, children under the age of eighteen, and elderly over the age of seventy,<sup>64</sup> and for crimes which are not "the most serious."<sup>65</sup> Paragraph 2 limits the scope of the death penalty to those crimes for which it can be presently used; the crimes for which one can be eligible for execution cannot be expanded under this same section.<sup>66</sup> Paragraph 3 prohibits the death penalty from being reestablished in countries that have abolished it.<sup>67</sup>

Only a short time ago, on October 6, 1993, the Additional Protocol became effective.<sup>68</sup> The Additional Protocol, like the Optional Protocol and Protocol No. 6, is a more restrictive agreement than its original Convention. Under the Additional Protocol, no ratifying country may impose the death

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58. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 331 (1984).

59. American Convention on Human Rights, *done on Nov. 22, 1969*, O.A.S. Treaty Series No. 36 at 1, OEA/Ser. L./VII.23 doc. rev. 2 [hereinafter American Convention].

60. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 344.

61. The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty will be discussed *infra*.

62. American Convention, *supra* note 59, at art. 4, para. 1.

63. *Id.* at art. 4, para. 4.

64. *Id.* at art. 4, para. 5.

65. *Id.* at art. 4, para. 2.

66. *Id.*

67. *Id.* at art. 4, para. 3.

68. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *approved June 8, 1990*, O.A.S. Treaty Series No. 73, 29 LL.M. 1447 [hereinafter Additional Protocol].

penalty on any person within its jurisdiction.<sup>69</sup> In addition, ratifying parties cannot make any reservations to the Additional Protocol.<sup>70</sup> Only three countries had ratified it as of January 1, 1996,<sup>71</sup> reflecting that it has not yet been generally accepted.<sup>72</sup>

The American Declaration of the Rights and Duties of Man (American Declaration)<sup>73</sup> is another regional instrument that recognizes one's "right to life." This document is an agreement among OAS States but, like the Declaration, it is not a treaty. Article 1 states that "[e]very human being has the right to life, liberty, and the security of his person."<sup>74</sup> While the American Declaration protects the arbitrary taking of liberty,<sup>75</sup> it does not protect the arbitrary taking of life. Further, the American Declaration does not address the use of the death penalty as a method of punishment. The African Charter on Human and Peoples' Rights (African Charter),<sup>76</sup> which was modeled after the ICCPR,<sup>77</sup> and which incorporates the provisions of the Declaration,<sup>78</sup> is another regional treaty protecting the "right to life." The African Charter entered into effect on October 21, 1986, and as of April 13, 1992, forty-six States had ratified it.<sup>79</sup> The African Charter, like the American Declaration, does not address the abolition of the death penalty.

#### D. Summary of History and Background

Although not dispositive of what constitutes customary international law, international and regional instruments, in addition to UN documents, aid in such an analysis. At least five provisions of these international and regional agreements are relevant in examining the State practice in which States are

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69. *Id.* at art. 1.

70. *Id.* at art. 2, § 1.

71. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 347.

72. A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 205 (4th ed. 1996) [hereinafter HUMAN RIGHTS IN THE WORLD].

73. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States, Bogota, Colombia (1948), OAS/Ser.L.V/II.92.

74. *Id.* at art.I.

75. *Id.* at art. XXV.

76. Banjul Charter on Human and Peoples' Rights, June 27, 1981, 21 ILM 58, O.A.U. Doc. CAB/LEG/67/3/Rev. 5.

77. See HUMAN RIGHTS IN THE WORLD, *supra* note 72.

78. *Id.* at 242.

79. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS, ELEVENTH CUMULATIVE SUPPLEMENT 318 (1995).

actually engaged and whether the abolition of the death penalty has become customary international law. First, because the “right to life” was the basis for the Declaration, the degree to which that right is recognized in subsequent international and regional treaties is important. Related to this right is whether it can be taken away arbitrarily. Next, it is important to look at two things: first, whether States are required to abolish the death penalty to become a party to an international or regional human rights treaty and, second, whether a State has the ability to reinstate the death penalty after its abolition. Finally, the degree to which States are allowed to make exceptions to the abolition is critical because the State practice in question is the complete abolition of the death penalty, not the regulation of the death penalty. A chart summarizing each of these five elements follows.

<b>SUMMARY OF INTERNATIONAL LAW CONCERNING THE ABOLITION OF THE DEATH PENALTY</b>					
	Is there a "right to life"?	Is there a right to be free from the arbitrary taking of the "right to life"?	Must the State abolish the death penalty as a condition to ratify?	Can the death penalty be reestablished at a later time?	Can the State make exceptions to abolition?
<b>The Declaration adopted 1948</b>	Y (Art. 3)	not explicitly	N	not applicable	not applicable
<b>ICCPR effective 1976</b>	Y (Art. 6, para. 1)	Y (Art. 6, para. 1)	N (Art. 6, para. 6)	not applicable	not applicable
<b>Optional Protocol effective 1991</b>	Y (as an addendum to the ICCPR)	Y (as an addendum to the ICCPR)	Y (Art. 1)	N (Art. 1)	Y (Art. 2)
<b>European Convention effective 1953</b>	Y (Art. 2, para. 1)	not explicitly	N	not applicable	not applicable
<b>Protocol No. 6 effective 1985</b>	Y (as an addendum to the European Convention)	not explicitly	Y (Art. 1)	N (Art. 1)	Y (Art. 2)

SUMMARY OF INTERNATIONAL LAW CONCERNING THE ABOLITION OF THE DEATH PENALTY					
<b>American Convention effective 1978</b>	Y (Art. 4, para. 1)	Y (Art. 4, para. 1)	N (Art. 4)	N (Art. 4, para. 3)	Y (Art. 4, para. 2)
	Is there a "right to life"?	Is there a right to be free from the arbitrary taking of the "right to life"?	Must the State abolish the death penalty as a condition to ratify?	Can the death penalty be reestablished at a later time?	Can the State make exceptions to abolition?
<b>Additional Protocol effective 1993</b>	Y (preamble)	Y (as an addendum to the American Convention)	Y (Art. 1)	N (Art. 1)	Y (Art. 2, para 1)
<b>American Declaration adopted 1948</b>	Y (Art. 1)	not explicitly	N	not applicable	not applicable
<b>African Charter effective 1986</b>	Y (Art. 4)	Y (Art. 4)	N	not applicable	not applicable

## II. PERSPECTIVES OF THE MOVEMENT

## A. Existing Publications Regarding the Movement

The existing publications concerning the abolition of the death penalty possess at least three characteristics. First, many of these articles criticize U.S. policy as a retentionist state and focus less on the policies of other countries that retain the death penalty.<sup>80</sup> This focus on the United States is likely because these authors believe that the United States' retention of the death penalty is inconsistent with the United States' general policy of protecting human rights around the globe.<sup>81</sup> This focus also implies a need by the proponents of the movement to sway the United States in order to reach its goals.

These authors also criticize the United States because its position on the use of the death penalty places it in the company of countries like Iraq, Iran, and China.<sup>82</sup> Though this is true, the United States executes considerably less people than China, Iraq, and Iran. The United States executed forty-five people in 1996 and seventy-four people in 1997.<sup>83</sup> This number is significantly small compared to the 4367 executions in China in 1996, whose practice comprised approximately eighty-five percent of all executions in 1996,<sup>84</sup> and at least 1500 executions in Iraq in 1997.<sup>85</sup> Finally, Iran executes approximately 110 people a year; although Iran has a significantly smaller number of executions than China or Iraq, that number is still dozens more per year than the United States.<sup>86</sup> The abundance of this criticism also suggests that the success of the movement depends upon the United States' changing its policy, even though in 1996 the United States' executions represented only about .9 percent of the executions worldwide.

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80. See, e.g., *supra* note 13. See also *Amnesty Urges Bonn to Challenge U.S. on the Death Sentence*, AGENCE FRANCE-PRESSE, May 12, 1998, available in 1998 WL 2279123 (stating that Amnesty International wanted Germany to push for abolition of the death penalty during a visit with President Clinton) [hereinafter *Amnesty Urges Bonn*].

81. See, e.g., Grayer, *Against the Global Trend*, *supra* note 13, at 14.

82. *Id.* at 2.

83. *Cruel and Ever More Unusual*, THE ECONOMIST, Feb. 14, 1998, at S3 [hereinafter *Cruel and Unusual*].

84. *Capital Punishment*, PRESS, Feb. 7, 1998, available in 1998 WL 8008470 (stating that the total number of executions in 1996 was 5,139, and that China executed 4,367 people).

85. Review & Outlook, Editorial, *Murder and the U.N.*, WALL ST. J., Apr. 21, 1998, at A22.

86. *Cruel and Unusual*, *supra* note 83.



Authors have also suggested that the retention of the death penalty in the United States will negatively affect the future ability of the United States to act as a global leader.<sup>87</sup> For example, some countries have reacted to U.S. policy by refusing to extradite criminals who would be prosecuted for a capital offense<sup>88</sup> and by considering an industrial boycott in States that practice the death penalty.<sup>89</sup>

The second characteristic of publications concerning the abolition of the death penalty is that many authors discuss the merits of the policy to justify the abolition of the death penalty, rather than examine the existence of the phenomenon. At least seven different arguments have been made in favor of the abolition of the death penalty. First, because the act of executing someone is irrevocable, the risk of executing an innocent person is too high.<sup>90</sup> Second, because the death penalty does not truly deter crime, it should not be imposed to prevent the commission of future crimes.<sup>91</sup> Third, the death penalty is unconstitutional under the Eighth Amendment.<sup>92</sup> Fourth, the imposition of the death penalty is arbitrary and inequitable.<sup>93</sup> Fifth, execution ignores the

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87. *See id.*

88. *See, e.g.,* Sharon A. Williams, *Extradition and the Death Penalty Exception in Canada: Resolving the Ng and Kindler Cases*, 13 LOY. L.A. INT'L & COMP. L.J. 799 (June 1991). Extradition is not just a problem for the United States; other countries that utilize the death penalty face the same problems with their criminals who flee to other countries, possibly for the express protection of extradition laws. *See, e.g.,* Marcia Kurop, *Turkey on Trial: The Ocalan Case Highlights Problems With EU Membership*, CHRISTIAN SCIENCE MONITOR, Dec. 24, 1998, at 11 (discussing problems Turkey is having with Italy because of the EU's extradition laws).

89. *See, e.g.,* Stephen Dear, Editorial, *Let Us Honor The Universal Declaration and Abolish Executions: Are We Safer for Killing?*, GREENSBORO NEWS & RECORD, Dec. 15, 1998, at A15.

90. *See, e.g.,* Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7, 13-16 (1996).

91. *See, e.g.,* ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 200-01 (2nd ed. 1996) (discussing a study by W.L. Bowers and G.L. Pierce which discredited proof from an earlier study that the death penalty was an effective deterrent to murder) [hereinafter *WORLDWIDE PERSPECTIVE*]. This earlier study was performed by Isaac Ehrlich, and it proved a high negative correlation between execution rates and murder rates in the United States during the period of 1935 to 1969. *Id.* at 197. *See also* Grayer, *Death Penalty Flourishes*, *supra* note 13, at 564 (citing Roger Hood, *The Injustice of the Death Penalty*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 175 (1995)).

92. *See, e.g.,* WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS* (1996).

93. *See, e.g.,* Mary K. Newcomer, *Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L.J. 611 (1995); Grayer, *Death Penalty Flourishes*, *supra* note 13, at 564-67.

possibility of rehabilitation of convicted criminals.<sup>94</sup> Sixth, the death penalty is not justified because rather than seeking justice, it seeks revenge by legalizing a specific act of government-sponsored murder.<sup>95</sup> Finally, and most important to the analysis that follows, authors contend that executions violate the inalienable "right to life."<sup>96</sup>

The third characteristic of publications concerning the abolition of the death penalty is that they argue that the abolition of the death penalty is customary international law. If this is true, then countries that impose the death penalty as a method of punishment violate international law.<sup>97</sup>

While this Note will also analyze whether the abolition of the death penalty is customary international law, it is unique from other publications in three ways. First, this Note does not discuss the merits of maintaining or abolishing the death penalty, nor does it take a stance in favor of or against the death penalty as a method of punishment. Second, because of the historical justification for abolition as the need to protect the inalienable "right to life," this Note defines the State practice as the *complete* abolition of the death penalty. Third, this Note finds that the above-defined State practice fails the test; complete abolition of capital punishment is *not* customary international law.

### *B. The "Right to Life" as a Natural Right*

As discussed throughout this Note, the international instruments and publications from which this movement gains support overwhelmingly emphasize the importance of the "right to life" as the basis for the entire human rights movement. This "right to life" is expressed as a natural right

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94. See, e.g., Dando, *supra* note 90, at 19.

95. See, e.g., *id.* at 13.

96. See, e.g., Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 HAMLIN J. PUB. L. & POL'Y 163, 170-71 (Fall 1993) [hereinafter *Emerging Norm*].

97. See Viktor Mayer-Schönberger, *Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman*, 43 OKLA. L. REV. 677 (1990) (arguing that the United States (Oklahoma in particular) violated customary international law when it executed Charles Coleman after a 24 year moratorium on imposition of the death penalty in Oklahoma) [hereinafter *Crossing the River of No Return*]. See also Grayer, *Against the Global Trend*, *supra* note 13, at 14 (stating that the United States has violated international law by continuing to execute juveniles).

which, therefore, cannot be seized by the government.<sup>98</sup> “If human rights are merely rights that originate from international law, then they are merely legal rights that can be waived, suspended, and forfeited.”<sup>99</sup> A natural right supersedes geographical and political boundaries at any level. Every person possesses natural rights, and every person deserves protection of these rights; this makes protection of the natural “right to life” a global concern.

For example, the first clause of the preamble in the Declaration states: “Whereas, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>100</sup> The American Convention recognizes that “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”<sup>101</sup> The Additional Protocol expressly links the right to life with the death penalty in its preamble: “Considering: That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty.”<sup>102</sup> It also articulates “[t]hat everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason.”<sup>103</sup>

For proponents, it follows that when governments violate the natural “right to life” by imposing the death penalty, more protections of this natural right must be established to prevent further governmental violations. For proponents, the response has been to create a global effort to rid of the death penalty in all forms, under all circumstances. “The [r]ight to [l]ife is an [i]nalienable, [u]niversal [r]ight [f]rom [w]hich [a]ll [o]ther [r]ights [s]pring.”<sup>104</sup> “[I]f the term ‘human rights’ is to have any meaning,” then the concept that anyone can take away these natural rights is implausible.<sup>105</sup> The international and regional human rights instruments of the past fifty years reflect the efforts to protect the “right to life” from the hands of governments across the world.

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98. See *Emerging Norm*, *supra* note 96. “[T]he origins of human rights can be traced to early philosophical and legal theories of ‘natural law’ or ‘God’s law,’ a law higher than the substantive laws of states.” William D. Auman, *International Human Rights Law: A Development Overview and Domestic Application Within the U.S. Criminal Justice System*, 20 N.C. CENT. L.J. 1 (1992).

99. *Emerging Norm*, *supra* note 96, at 170.

100. Declaration, *supra* note 19, at preamble.

101. American Convention, *supra* note 59, at preamble.

102. Additional Protocol, *supra* note 68, at preamble.

103. *Id.*

104. *Emerging Norm*, *supra* note 96, at 170.

105. *Id.*

Therefore, the only definition of State practice that is consistent with the preservation of the "right to life" is the practice of complete abolition. This definition is logical because proponents have shifted their focus from regulating the death penalty to completely eliminating the death penalty as a method of punishment. That the death penalty is seen as "an affront to human dignity" suggests that the imposition of the death penalty is no longer considered an exception to the "right to life."<sup>106</sup> If the death penalty is an affront to human dignity, then it cannot continue; the "right to life," as a natural right, is absolute.

What is peculiar, however, is the progress that proponents of the abolition movement claim to have achieved since the passage of the Declaration. Proponents argue that the prohibition against capital punishment is international law by virtue of the instruments that support the movement, as well as by the practice of States not to execute their convicted criminals. However, many of the instruments that protect the "right to life" allow the imposition of the death penalty for certain crimes or in times of war. The practices of some States that show support for abolition of the death penalty are inconsistent with the absolute preservation of the "right to life." They either impose the death penalty for certain crimes, or they have not removed the death penalty from their laws, thereby maintaining it as a valid option for the future.

If the movement premises its goals upon the idea of natural rights, and indeed it does, then it is far from achieving the end it seeks. The State practice of abolishing the death penalty completely is very different from the State practice of regulating the death penalty. Imagine the world in a state of complete abolition: it would be free from executions; no laws at any level would authorize an execution; the meaning of the "right to life" would be preserved; it would be a victory of individual rights over State rights. But the

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106. *See id.* at 171. The following passage suggests that the only abolition that conforms with human rights norms is complete abolition, because the death penalty in any form is against the purpose of human rights documents in general:

If the goals of most human rights documents are either to protect human beings or to encourage the development and survival of the human race, certainly a State that imposes the death penalty is breaching every value human rights instruments claim to hold dear. A state that imposes the death penalty on its citizens is, in effect, stating that the person sentenced to death has no value and does not have the capacity to rehabilitate herself. And by acting as hangman, the State itself demonstrates that it neither respects nor values human life, nor believes that the State has the duty to encourage the development of the individual.

world in a state of regulated use of the death penalty paints a different picture: governments would still have the ability to execute convicted criminals, though the number eligible would be reduced; courts would remain responsible for hearing appeals in such cases because procedural safeguards would be maintained to prevent the execution of defendants who were mistakenly convicted; and the death penalty would once again be cemented as an exception to the "right to life." While each of these State practices has similar ends in mind, these ends really are quite different. And this is why it is critical to define the State practice so carefully.

### *C. The Death Penalty as Cruel, Inhuman, or Degrading Punishment*

Another basis for the complete abolition of the death penalty as international law is that imposition of the death penalty and subsequent executions are considered a form of cruel, inhuman, or degrading punishment. Many countries, including Canada, believe that the Declaration's Article 5 unilaterally denounces the death penalty when it states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."<sup>107</sup> According to the Declaration, if the death penalty is a form of cruel, inhuman, or degrading punishment, then the abolition of the death penalty may indeed be customary international law.<sup>108</sup> But the United States has not accepted the international definition of "cruel, inhuman, or degrading punishment;" rather, the United States uses the interpretations of, and the law surrounding, the Fifth, Eighth, and Fourteenth Amendments to limit the scope of this phrase.<sup>109</sup> Furthermore, the U.S. Supreme Court's most recent holding concerning the constitutionality of the death penalty is that it is not cruel and unusual punishment or arbitrary per se.<sup>110</sup>

### III. THE UNITED STATES HAS NOT CONSENTED TO ABOLISH THE DEATH PENALTY

When a country signs and then ratifies a particular treaty, it must follow the dictates of the treaty and may be subject to sanctions or prosecution for

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107. Michael Ignatieff, *Protecting Human Rights: U.S. Is not Above Rights Tribunal*, BANGKOK POST, Dec. 16, 1998, available in 1998 WL 17211905.

108. See RESTATEMENT, *supra* note 24 and accompanying text.

109. See *supra* note 35 and accompanying text.

110. See *infra* Part III.

violation of the treaty. Of the nine agreements discussed in this Note, the United States is eligible to ratify six.<sup>111</sup> Yet, the United States has only voluntarily bound itself to two agreements: the Declaration and the ICCPR.<sup>112</sup> While both the Declaration and the ICCPR recognize the right to life, the United States was not obligated to completely abolish the death penalty to become a party to the agreement. Furthermore, to the extent that these agreements address the use of the death penalty, the United States issued reservations along with its acceptance in order to limit the extent to which it was bound to the dictates of these agreements.

While the United States has only bound itself to two international agreements, it must follow the Constitution. Similarly, each individual state must also comply with its own constitution. In the United States, the legitimacy of the death penalty as a method of punishment is primarily an issue of the Fifth, Eighth, and Fourteenth Amendments. The United States' reservation to the ICCPR concerning the interpretation of the language about cruel and unusual punishment reflects this perspective.<sup>113</sup>

In a 1972 case, *Furman v. Georgia*, the United States Supreme Court decided that the death penalty was unconstitutional for two reasons. First, it violated the equal protection clause because it was discriminatory; second, it violated the due process clause because it was arbitrary and irrational.<sup>114</sup> This vague holding effectively caused a majority of states to throw out their sentencing statutes and develop new ones.<sup>115</sup> But the Supreme Court rethought the death penalty just a short time later. It decided that the death penalty was not unconstitutional per se, although it certainly could be unconstitutional as

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111. This does not include the two United Nations resolutions discussed earlier in this Note, the Safeguards Resolution and the Question of the Death Penalty, as the United States would have only voted in favor or against the resolution, and does not have to "bind" itself to these resolutions in the same manner as the other agreements. The United States voted against the Question of the Death Penalty. Tran, *supra* note 45.

112. The United States has not yet ratified the Optional Protocol, the American Convention, the Additional Protocol, or the American Declaration.

113. See *supra* notes 30-35 and accompanying text. The 8th Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. This Note does not analyze whether the death penalty is cruel and unusual punishment, as some would most certainly argue, because the U.S. Supreme Court has already answered this question. See *infra*.

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

115. See Ariane M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 290 (1996).

applied.<sup>116</sup> In *Gregg v. Georgia*, the Supreme Court struck down mandatory death sentences as a violation of the framework established in *Furman*, but allowed the death penalty to stand as a potential method of punishment, if applied under the right circumstances.<sup>117</sup>

Despite its basic assumption that the death penalty is constitutional, the Supreme Court has demonstrated a concern for its arbitrary imposition. It has "elevat[ed] the question of the procedural application of the death penalty to the constitutional level."<sup>118</sup> In addition to striking down mandatory death sentences, the Supreme Court requires trial courts to consider facts specific to the case when determining whether to impose the death penalty.<sup>119</sup> While this discussion of U.S. death penalty case law is not exhaustive, it does reflect that the Supreme Court is far from constitutionally requiring the complete elimination of the death penalty from U.S. criminal and sentencing laws.<sup>120</sup>

#### IV. THE COMPLETE ABOLITION OF THE DEATH PENALTY IS NOT CUSTOMARY INTERNATIONAL LAW

Customary international law obligates a country to follow that custom, regardless of its consent. Customary international law has been defined as "a general and consistent state practice of states followed by them from a sense of legal obligation."<sup>121</sup> Three elements must be satisfied before a phenomenon like the complete abolition of the death penalty can be deemed custom: (1) the State practice must be consistent; (2) the State practice must be general; and (3) the State must feel a legal obligation (*opinio juris*) to follow that practice. The State practice in question must be clearly defined in order to most accurately determine whether customary international law exists. Because the complete abolition of the death penalty is the only logical conclusion that can be reached from the premises upon which proponents of

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

117. *Id.*

118. Schreiber, *supra* note 115, at 288 (citing WELSH S. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* 33 (1984)).

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

120. On Friday, December 18, 1998, in South Carolina, the United States executed its 500th convicted criminal since the imposition of the death penalty was reinstated in 1977. *South Carolina Execution 500th Death Penalty Since 1977 Ruling*, *HERALD-TIMES* (Bloomington, Ind.), Dec. 19, 1998, at A3. South Carolina is 1 of 38 states in the United States which utilizes the death penalty as a method of punishment. *Id.* Approximately 3,500 people are sitting on death row in the United States. *Id.*

121. See *RESTATEMENT*, *supra* note 24, § 102(2).

this trend rely, the State practice analyzed in this Note is the complete abolition of the death penalty. This Note will now analyze whether the complete abolition of the death penalty meets the three necessary requirements.<sup>122</sup>

#### A. *Consistent State Practice*

In order for a State practice to be deemed consistent, it must be uniform enough to discern within it a common principle or norm which influences State behavior.<sup>123</sup>

The “number of States needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule.” Arguably then, with the United States as a world leader in establishing human rights norms, a great number of States would be required in order to refute the [United States].<sup>124</sup>

Consistency is probably the most important of the three elements for analyzing the subject of this Note. Two methods exist to analyze consistency: a study of the *words* of the State and a study of the *actions* of the State. How a State uses words or actions is critical for the purpose of examining the trend to completely abolish the death penalty because, in certain instances, what States say and how they act are different. For example, some States have not executed anyone in ten years, but still maintain the death penalty as a possible method of punishment on its books.<sup>125</sup> It is unclear whether the actions of the State should prevail over a State’s words, or vice versa, because both have been used in testing whether a particular State practice constitutes customary international law. This Note considers the words of the State to be more indicative of State practice than actions.

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122. In contrast, it is possible that the practice in question could be the regulation of the use of the death penalty. However, this is illogical because the premise upon which proponents rely is that the “right to life” is absolute and natural. An absolute and natural right is one that no exceptions can be made to take that right away from the person who owns it.

123. See Kallins, *supra* note 13, at 93.

124. *Id.* at 95 (quoting Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 17 (1974)).

125. These States are called *de facto* abolitionist States. See *infra*.



State practice concerning the use of the death penalty can be broken down into the following four categories: retentionist, abolitionist for ordinary offences; complete abolitionist; and *de facto* abolitionist.<sup>126</sup> A retentionist State is the most liberal in its use of the death penalty; while it may have restrictions on the use of the death penalty, proponents most vigorously attack these States as violators of international law. A State acting as an abolitionist for ordinary offenses uses the death penalty in certain instances, like in times of war, or for crimes considered to be of a most serious nature. While a complete abolitionist has abolished the death penalty in both words and actions, a *de facto* abolitionist State maintains the death penalty as a valid option under the law, but it has not actually executed anyone within the previous ten years.<sup>127</sup>

As of December 1995, ninety States were retentionist, fourteen States were abolitionist for ordinary offenses, fifty-eight States were complete abolitionist, and thirty States were *de facto* abolitionist.<sup>128</sup> On average, two countries abolish the death penalty annually.<sup>129</sup> As of December 1997, ninety States were retentionist,<sup>130</sup> fourteen States were abolitionist for ordinary

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126. See WORLDWIDE PERSPECTIVE, *supra* note 91, at 9.

127. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 295 n. 3.

128. See WORLDWIDE PERSPECTIVE, *supra* note 91.

129. Caroline Moorehead, *Tinkering with Death*, WORLD PRESS REV., July 1995, at 38.

130. These 90 States are: Afghanistan; Albania; Algeria; Antigua and Barbuda; Armenia; Azerbaijan; Bahamas; Bahrain; Bangladesh; Barbados; Belarus; Belize; Benin; Botswana; Bulgaria; Burkina Faso; Burundi; Cameroon; Chad; China; Comoros; Cuba; Democratic People's Republic of Korea; Democratic Republic of the Congo; Dominica; Liberia; Egypt; Equatorial Guinea; Eritrea; Estonia; Ethiopia; Gabon; Ghana; Guatemala; Guyana; India; Indonesia; Iran; Iraq; Jamaica; Japan; Jordan; Kazakhstan; Kenya; Kuwait; Kyrgyzstan; Laos; Latvia; Lebanon; Lesotho; Liberia; Libya; Lithuania; Malawi; Malaysia; Mauritania; Mongolia; Morocco; Myanmar; Nigeria; Oman; Pakistan; Qatar; Russian Federation; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Saudi Arabia; Sierra Leone; Singapore; Somalia; Sudan; Swaziland; Syrian Arab Republic; Tajikistan; Thailand; Trinidad and Tobago; Tunisia; Turkmenistan; Uganda; Ukraine; United Arab Emirates; United Republic of Tanzania; United States of America; Uzbekistan; Vietnam; Yemen; Yugoslavia; Zambia; and Zimbabwe. See U.N. Economic and Social Council, Commission on Human Rights, *Status of the International Covenants on Human Rights: Question of the Death Penalty* (visited Jan. 2, 1999) <<http://www.unhcr.ch/html/menu4/chrrep/98chr82.htm>> [hereinafter Commission on Human Rights].

Lithuania has since voted to abolish the death penalty. *Lithuanian Parliament Abolishes Death Penalty*, DEUTSCHE PRESSE-AGENTUR, Dec. 21, 1998. available in LEXIS, Europe Library, DPA File. Bulgaria has also since decided to abolish the death penalty. Amnesty International, *Death Penalty Abolition*, M2 PRESSWIRE, Dec. 14, 1998, available in LEXIS, Market Library, IACNWS File.

crimes only,<sup>131</sup> sixty-one States were complete abolitionist,<sup>132</sup> and twenty-seven States were *de facto* abolitionist.<sup>133</sup> The only statistical change in the practice of States between the 1995 and 1997 figures is that three States which were once *de facto* abolitionist are now complete abolitionist. A strict look at these numbers, both at the end of 1995 and 1997, reveals that approximately fifty-three percent of States practice some sort of abolition of the death penalty.

But this statistic is skewed, as only complete abolitionists, and not abolitionists for ordinary offenses or *de facto* abolitionists actually comply with the State practice in question. To compute the numbers otherwise<sup>134</sup> would be inconsistent with the necessary definition of the State practice,<sup>135</sup> and it would destroy one of the bases of the movement: the inalienable "right to life." As of the end of 1997, only sixty-one States, or approximately thirty-two percent of States, practiced complete abolition of the death penalty.

This analysis is consistent with looking at the words of the State over its actions. It is necessary to do so in the context of capital punishment because as long as a State maintains the legal option to execute someone, it allows for exercise of that option, thereby violating that person's inalienable "right to life." The only way this right can be preserved is if no government is allowed

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131. These 14 States are: Argentina; Brazil; Canada; Cyprus; El Salvador; Fiji; Greece; Israel; Malta; Mexico; Nepal; Peru; Seychelles; and the United Kingdom of Great Britain and Northern Ireland. Commission on Human Rights, *supra* note 130.

132. These 61 States are: Andorra; Angola; Australia; Austria; Belgium; Bolivia; Cambodia; Cape Verde; Colombia; Costa Rica; Croatia; Czech Republic; Denmark; Dominican Republic; Ecuador; Finland; France; Georgia; Germany; Guinea-Bissau; Haiti; Holy See; Honduras; Hungary; Iceland; Ireland; Italy; Kiribati; Liechtenstein; Luxembourg; Marshall Islands; Mauritius; Micronesia (Federated States of); Monaco; Mozambique; Namibia; Netherlands; New Zealand; Nicaragua; Norway; Palau; Panama; Paraguay; Poland; Portugal; Republic of Moldova; Romania; San Marino; Sao Tome and Principe; Slovakia; Slovenia; Solomon Islands; South Africa; Spain; Sweden; Switzerland; the former Yugoslavia; Republic of Macedonia, Tuvalu; Uruguay; Vanuatu; and Venezuela. *Id.*

133. These 27 States are: Bermuda; Bhutan; Bosnia and Herzegovina; Brunei; Central African Republic; Chile; Congo; Côte d'Ivoire; Djibouti; Gambia; Grenada; Guinea; Madagascar; Maldives; Mali; Nauru; Niger; Papua New Guinea; Philippines; Rwanda; Samoa; Senegal; Sri Lanka; Suriname; Togo; Tonga; and Turkey. *Id.* The Philippines is considering imposing a moratorium on the use of the death penalty, with some calling for a formal abolition of its use altogether. 35 *Solons Support Review of Law on Death Penalty*, BUSINESS WORLD (PHILIPPINES), Dec. 24, 1998, available in LEXIS, World Library, ALLNWS File.

134. In other words: to include abolitionists for ordinary offenses and *de facto* abolitionists in the calculation.

135. See WORLDWIDE PERSPECTIVE, *supra* note 91, at 14. "Many Western European nations have abolished the death penalty completely because they have recognized that, even in circumstances of war, capital punishment inflicted by the State is contradictory to their commitment to maintain human rights." *Id.* (citing AMNESTY INTERNATIONAL, THE DEATH PENALTY IN WARTIME: ARGUMENTS FOR ABOLITION (1994)).

to execute anyone under any circumstances. This is what complete abolitionist States represent. While *de facto* abolitionist States *act* like complete abolitionists, it is telling that these governments have *not acted* to take that final step and eliminate the death penalty from their laws. If States which practice limited retention of the death penalty are included among those that proponents argue follow international custom, then logically, they generally and consistently practice abolition of the death penalty. If this is so, then the State practice subject to the test of customary international law should be the regulation of the use of the death penalty, not the complete abolition of the death penalty. The fact that a majority of States practice some form of abolition is meaningful, but it is even more meaningful that only approximately thirty-two percent of States practice complete abolition.

### *B. General State Practice*

To prove that the State practice in question is general, evidence must show that the State practice is widespread throughout the international system.<sup>136</sup> While it is unclear exactly how many States must practice the act, it is clear that the act need not be universal.<sup>137</sup> Because “both nonparties and parties [to a treaty] influence the creation of customary international law,”<sup>138</sup> all State actors, whether party to a particular treaty or not, contribute to the variety of State practices which must be analyzed in a study of customary international law.<sup>139</sup>

An analysis of States practicing in the above mentioned categories reveals that certain regions have the same State practice with respect to the death penalty. All of Western Europe has abolished the death penalty.<sup>140</sup> Latin America has also advanced the efforts to abolish the death penalty as a form

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136. See RESTATEMENT, *supra* note 24, at § 102 cmt. b.

137. *Id.*

138. Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 248 (1996).

139. Non-State actors, although not actors for purposes of analyzing State practice, play a role in State practice by influencing the policies of the State actors.

140. Mayer-Schönberger, *supra* note 97, at 679. This does not necessarily mean that executions could never take place, as some countries may still have exceptions for war-related crimes. For example, as of March 20, 1998, the death penalty was still a possible sentence for treason and piracy in Britain. *Caning, Hanging Set to be Outlawed in Britain*, AGENCE FRANCE-PRESSE, Mar. 20, 1998, available in LEXIS, Worldwide Library, ALLNWS file (although this report predicts that the death penalty will shortly be erased as a possible punishment for these crimes, it is relevant to the consideration of the State practice that Britain still did not practice “complete” abolition of the death penalty in 1998).

of punishment.<sup>141</sup> William Schabas reports that “we may speak of a zone that is approximately north of the fiftieth parallel where capital punishment no longer exists.”<sup>142</sup> On the other hand, while some States in Eastern Europe and the former Soviet Union have moved in the direction of abolition, most cling “to the old justifications that ‘conditions are not yet ripe’ and ‘the public is not yet sufficiently prepared and educated to accept [abolition].”<sup>143</sup>

While Africa as a continent has moved toward abolition of the death penalty since 1990, the southern part of the continent has taken significant steps to eliminate capital punishment.<sup>144</sup> South Africa, a prime example of this trend, abolished the death penalty when its Constitutional Court unanimously found it to be unconstitutional.<sup>145</sup> The northern part of the continent, however, still utilizes the death penalty.<sup>146</sup> Asia and the Middle East are also known for the imposition of the death penalty. Additionally, China, Iraq, and Iran all use the death penalty regularly.<sup>147</sup>

The death penalty practices of several countries other than the United States have also made headlines. A few examples follow. Libya has recently passed a law which made it easier to impose capital punishment on Muslim fundamentalists.<sup>148</sup> Singapore and China have made drug trafficking a death

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141. See SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 296.

142. This includes the Russian Federation, which has placed a moratorium on the use of the death penalty but has not yet formally abolished its use. *Id.* Although this moratorium is in place, support for reinstatement of the death penalty in Russia is mounting, including support from Krasnoyarsk Governor Alexander Lebed, in order to “help stamp out crime and corruption.” *Lebed Calls for End of Death Penalty Moratorium in Russia*, AGENCE FRANCE-PRESSE, Dec. 29, 1998, available in LEXIS, Europe Library, AFP File. In fact, Lebed not only called for the end of the moratorium, he called for expansion of the number of crimes for which the death penalty could be imposed. *Id.*

143. WORLDWIDE PERSPECTIVE, *supra* note 91, at 23.

144. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 296. In this regional context, Roger Hood places North Africa into the same region as the Middle East and separately categorizes southern Africa. See generally WORLDWIDE PERSPECTIVE, *supra* note 91, at 23-31.

145. Peter Norbert Bouckaert, Note, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287, 304 (1996). Justification for this ruling came from the protection of the “right to life” in the South African Constitution. See *id.* at 311-12.

146. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 297. Of these countries, Nigeria imposes the death penalty most often. *Id.*

147. *Id.*

148. Soliaman Bouchuiguir, *The Libyan League for Human Rights: The Advocacy Project*, AFRICA NEWS SERVICE, Dec. 17, 1998, available in 1998 WL 21357756.

penalty-eligible crime.<sup>149</sup> Furthermore, China has a death penalty for “endangering state security.”<sup>150</sup> A Pakistani military court recently sentenced a thirteen year old boy to death for the murders of three police constables.<sup>151</sup> Pakistan also enacted law which allows for capital punishment of those who commit adultery, as exemplified by Humaira Khokhar, who possibly faces the death penalty for “marrying a man against her father’s wishes.”<sup>152</sup> Zambia requires imposition of a death sentence for the commission of treason, murder, and robbery associated with violence or attempted robbery with violence.<sup>153</sup>

Determining whether a particular State practice is generally used throughout the global system is subjective; remember, for something to be considered “general,” it must be widespread throughout the international system. On the whole, Western Europe, Latin America, and southern Africa have *de jure* abolished the use of the death penalty. Eastern Europe and the former Soviet Union, Asia, northern Africa, and the Middle East have not *de jure* abolished the use of the death penalty. Because State practice is regional, rather than widespread throughout the international system, the State practice of the complete abolition of the death penalty does not qualify as a general practice.

### C. *Opinio Juris*

The third element of the test of customary international law, *opinio juris*, requires a general recognition among States that a certain practice is

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149. *Police Warn Singapore Politician Against Speaking Publicly*, DOW JONES INTERNATIONAL NEWS, Dec. 29, 1998; *Eleven Executed in China for Drug Trafficking*, HINDUSTAN TIMES, Dec. 27, 1998, available in 1998 WL 24256650.

150. Luisetta Mudie, *Trial of Chinese Labour Activist Shrouded in Secrecy*, AGENCE FRANCE-PRESSE, Dec. 27, 1998, available in LEXIS, Europe Library, AFP File. Although the number of crimes for which the death penalty could be imposed in China is more than in other countries, that number is falling. Susan Lannin, *Mainland Leads World in Executions*, HONG KONG STANDARD, Apr. 22, 1998, available in LEXIS, World Library, ALLNWS File (reporting on a presentation by Professor Roger Hood, whose study revealed a trend toward the abolition of capital punishment).

151. *Pak Military Courts Slammed Over Death Penalty to 13-yr-old*, HINDUSTAN TIMES, Dec. 27, 1998, available in 1998 WL 24256647. This death sentence has been severely criticized by the Human Rights Commission of Pakistan, which has stated that the death sentence is “against the international convention and is rarely practised anywhere in the world.” *Id.*

152. John Stackhouse, *Punjabi Court Orders Wife to Face Capital Charge*, GLOBE & MAIL, Jan. 1, 1999, at A8.

153. *Zambia: Call to Abolish the Death Penalty and Protect Gay Rights*, INTER PRESS SERVICE, Dec. 11, 1998, available in LEXIS, World Library, ALLNWS File.

obligatory under international law.<sup>154</sup> *Opinio juris* is the hardest element of the three to prove.<sup>155</sup> “If a State engages in a particular practice ‘which is generally followed but [which] States feel legally free to disregard,’ then the engagement may not be counted toward establishing a state practice.”<sup>156</sup>

The concept of *opinio juris* can be demonstrated in Western Europe, where the State practice and policy surrounding the use of the death penalty as a method of punishment has satisfied this requirement. Nigel Rodley stated that “[i]t may not be too much to say that abolition of the death penalty has become an implicit condition of membership of the European Community.”<sup>157</sup> A current example of such pressure by the European Community is the consideration by Ukraine to abolish the death penalty, amidst threats that it will be “shut out of Europe” if it does not do so.<sup>158</sup>

But, the European Union (EU) is a regional entity. Regional customary law, if it exists, is different from customary international law. It is illogical to argue that because States eligible to join the EU feel a sense of legal obligation to abolish the death penalty, all States in the world therefore have a legal obligation to abolish the death penalty. For Western Europe, the *opinio juris* stems from the conditions imposed on States to join the EU, not from some global justification that would apply to States outside of the EU who are not interested in gaining EU status, and who cannot even do so.

Other pressures placed upon States make a case for the existence of *opinio juris* as well. Non-State entities can play a part in State policy. One of the most prominent entities in the human rights arena, Amnesty International, has been a steadfast promoter of the abolition of the death penalty.<sup>159</sup> Religious

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154. See Mayer-Schönberger, *supra* note 97, at 679 (citing *Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands*, 1969 I.C.J. 44).

155. *Id.*

156. Kallins, *supra* note 13, at 96 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. c (1987)).

157. See *Emerging Norm*, *supra* note 96, at 167 (quoting AMNESTY INTERNATIONAL REPORT 345 (1993)). Nigel Rodley is a former head of Amnesty International's Legal Office. *Id.*

158. Jaroslav Koshiw, *Ukraine About to be Shut Out of Europe*, KYIV POST, Dec. 18, 1998, available in 1998 WL 23945182 (stating that because Ukraine did not abolish the death penalty by November 9, 1998, among other things, the Council of Europe wants to exclude Ukraine from the Council of Europe by June 1999). Ukraine is still considering abolition of the death penalty. *Death Penalty Goes Up for Review Again*, EASTERN ECONOMIST DAILY, Dec. 21, 1998, available in 1998 WL 24087147.

159. See *Amnesty Focuses on U.S. Death Penalty*, IRISH TIMES, May 4, 1998 (“Founded 37 years ago, Amnesty has defended human rights worldwide by highlighting violations by governments and opposition groups and by insisting on a hard-line definition of human rights.”) See also *Amnesty Urges Bonn*, *supra* note 80.

leaders, like Pope John Paul,<sup>160</sup> and religious organizations, like the World Council of Churches,<sup>161</sup> also condemn the use of capital punishment. Additionally, citizens of certain States voice their opinions on their country's State practice through polls<sup>162</sup> and personal lobbying efforts.

#### D. Summary

The movement to completely abolish the death penalty is not customary international law because it does not satisfy the three-part test.<sup>163</sup> Most countries, by virtue of membership to an international or regional treaty, recognize a "right to life" as well as protection from the arbitrary seizure of that right. However, these same countries have not established that complete abolition of the death penalty is a State practice which is uniform enough to discern within it a common principle or norm which influences State behavior. Evidence of this is that four general categories of State practice exist: retentionist; abolitionist for ordinary offences only; complete abolitionist; and *de facto* abolitionist. Some countries have explicitly eliminated the death penalty as a method of punishment and do not actually execute their criminals. Other countries retain capital punishment in their laws even though they have not executed anyone in at least the past ten years. Still other countries refrain from imposing the death penalty for ordinary crimes, but utilize it in other instances. Only approximately thirty-two percent of countries practice complete abolition. Therefore, complete abolition of the death penalty is not a consistent State practice.

What is consistent is the way States regulate and limit the use of the death penalty domestically. When States limit those who are eligible for the death penalty, they often choose from the same categories that other countries have

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160. *Pope Calls for Ban on Death Penalty Prior to Visiting U.S.*, IRISH TIMES, Dec. 28, 1998, at 13.

161. *See WCC Adopts Statement on Human Rights*, AFRICA NEWS SERVICE, Dec. 11, 1998, available in 1998 WL 21357027 (stating that there has been some success against the death penalty, but that "major obstacles still exist, hampering the implementation of human rights standards.").

162. As of February 14, 1998, over 70% of Americans favor capital punishment. *Cruel and Unusual*, *supra* note 83. "The evidence overwhelmingly favours opponents of capital punishment, but in America they keep losing their case in the court of public opinion." *Id.* "Recent polls say that only about 10 percent of Russians and Ukrainians support abolishing capital punishment." Maura Renyolds, *Russia in Limbo Over Future of Its Death Penalty Use*, PEORIA JOURNAL STAR, Mar. 22, 1998, at A7.

163. In support of this contention, William Schabas states that the movement to abolish the death penalty has not yet become customary international law: "The day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom . . . is undeniably in the foreseeable future." SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 3.

used: juveniles (people less than eighteen years old); pregnant women or new mothers; the elderly; the insane; and the mentally retarded.<sup>164</sup> When States limit the crimes for which the death penalty can be imposed, they often provide for similar parameters: crimes committed in times of war or threat of war, or those crimes that are considered the most serious. Another consistent feature of the regulation of the death penalty is the procedural safeguards which have been inserted into the judicial system to provide protection to the convicted criminal.

Furthermore, States on the whole do not feel an international legal obligation to practice complete abolition of the death penalty. The evidence points instead to a legal obligation to *regulate* the use of the death penalty. For example: States limit the groups of people who are eligible to receive a death sentence; assure that criminal defendants are given procedural rights after their convictions; refuse to impose the death penalty arbitrarily; and impose the death penalty only for crimes committed in times of war or threat of war.<sup>165</sup>

The movement to completely abolish the death penalty has also failed to satisfy the requirement that the State practice be general, even though it is true that State practice need not be universal to be generally practiced. Because only thirty-two percent of States practice complete abolition, it is a strict, but reasonable, interpretation to state that complete abolition is not generally practiced. In broader terms, the practice of the complete abolition of the death penalty can most certainly be broken down into regions. Western Europe, southern Africa, and Latin America fall on one side of the line, while Eastern Europe, the former Soviet Union, northern Africa, the Middle East, Asia, and the United States fall on the other. This suggests the potential for finding a general regional State practice, but not a general international or global State practice.

## V. THE UNITED STATES AS A PERSISTENT OBJECTOR

With one exception, customary international law is binding on all States within the international system, regardless of a State's willingness to be

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164. See generally, WORLDWIDE PERSPECTIVE, *supra* note 91, at 85-102.

165. This list is only a sample of those regulations apparent in international and regional human rights instruments and current State practice. The evidence reveals that States feel a legal obligation to regulate imposition of the death penalty, not that States necessarily feel a legal obligation to regulate the death penalty in specific ways.



bound.<sup>166</sup> That exception is a State's status as a persistent objector.<sup>167</sup> States that do not wish to be bound by customary international law can oppose formulation of a rule of customary international law; if the State is recognized as a persistent objector, it will not be bound to follow that rule.

This principle is implicated when considering complete abolition of the death penalty and the United States' position as a retentionist State. If and when the complete abolition of the death penalty becomes customary international law, the United States has strong grounds to invoke persistent objector status. The United States' record in signing and ratifying treaties that oppose complete abolition of the death penalty clearly shows disagreement with many other countries on the merits of complete abolition. The U.S. practice in sentencing convicted criminals to death evidences its strong commitment to the death penalty as a meaningful and necessary tool of its criminal justice system.<sup>168</sup>

While the U.S. Supreme Court has been known to use international law as a source of precedent, it regularly interprets the Fifth, Eighth, and Fourteenth Amendments in cases which challenge the constitutionality of the death penalty. Remember that the United States bound itself to Article 7 of the ICCPR only to the extent that the language within the Article was consistent with these three Amendments. Even though the death penalty was considered unconstitutional for a short period of time, it was unconstitutional because it was imposed arbitrarily and without proper procedural safeguards for the defendant, not because of some specified need to comply with international law.<sup>169</sup> Use of the death penalty was renewed once the Supreme Court began to articulate the procedural safeguards which would prevent arbitrary sentences of execution.<sup>170</sup>

Overall, the United States has a long history of using the death penalty as a means by which to punish its convicted criminals. Public polls in the United

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166. Mayer-Schönberger, *supra* note 97, at 683.

167. *Id.* There is, however, one exception to the persistent objector exception: when a norm is a *jus cogens* norm. See *infra*.

168. This reservation made by the United States to article 6 of the ICCPR regarding the execution of juveniles in an example of this commitment.

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

170. See *Gregg v. Georgia*, 428 U.S. 153 (1976). See also *Lockett v. Ohio*, 438 U.S. 586 (1978).

States reveal an overwhelming support of the death penalty,<sup>171</sup> and presidential policy in the 1990s has been to expand the reach of the death penalty.<sup>172</sup> Another example revealing the United States' objection to the complete abolition of the death penalty is the degree to which individual States impose the death penalty. As of April 1994, only fourteen U.S. jurisdictions operated without death penalty statutes.<sup>173</sup> Since issues of criminal law have always been inherently a state, not federal, concern it is not surprising that each state has its own death penalty laws. This is one reason why the United States has withstood global criticism about its practice of imposition of the death penalty. Individual states create the laws and regulations for life inside its borders, and they tend to have little concern for what the rest of the world thinks. Texas is one example. It leads all states in actual executions.<sup>174</sup> In the case of a Canadian defendant, Texas argued it was not obligated to comply with the dictates of international law, which would have allowed the defendant to seek help from his Canadian embassy.<sup>175</sup> Despite earlier attempts by the Canadian government and Madeline Albright, the U.S. Secretary of State, to stop the execution, Texas refused.<sup>176</sup> The U.S. Supreme Court eventually trumped Texas, and stayed the execution.<sup>177</sup>

Overall, the persistent words and actions of the United States at both the state and federal levels reflect a clear opposition to the complete abolition of the death penalty. The United States has established itself as a persistent objector to this movement. Therefore, even if the complete abolition of the

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171. See Grayer, *Against the Global Trend*, *supra* note 13, at 9-10 (stating that 76% of the public favored the death penalty in 1991).

172. This policy has been promoted by both Republican and Democratic presidents. Both Presidents Bush and Clinton have been committed to the use of the death penalty as a means of punishment within the U.S. criminal justice system. *Id.* at 12-13.

173. See Grayer, *Death Penalty Flourishes*, *supra* note 13, at 560.

174. *U.S. Nears 500 Mark in Executions*, CHICAGO SUN-TIMES, Dec. 16, 1998, at 36. Texas itself carried out 37 of the 74 United States' executions in 1997. *U.S. Use of Death Penalty Inspires an International Debate*, PEORIA JOURNAL STAR, Mar. 8, 1998, at A14.

175. See Ignatieff, *supra* note 107 (stating that Texas feels it is not obligated to comply with the provisions of the Vienna Convention, even though the United States is a party to it).

176. Jonathan D. Tepperman, Opinion, *Texas Law vs. Treaty: Execution of Canadian Murderer Could Be Trouble for Americans Abroad*, CHRISTIAN SCIENCE MONITOR, Dec. 15, 1998, at 9.

177. *Id.*

death penalty becomes customary international law, the United States is not bound to follow other States in completely abolishing the death penalty.<sup>178</sup>

## VI. COMPLETE ABOLITION OF THE DEATH PENALTY IS NOT A *JUS COGENS* NORM

While recognized status as a persistent objector relieves a country from the responsibility of complying with customary international law, this option is irrelevant when the State practice in question has become a *jus cogens* norm. When a State practice is a *jus cogens* norm, compliance with it is peremptory and a country cannot derogate from that State practice.<sup>179</sup> Because *jus cogens* norms are peremptory, States cannot refuse consent to be bound to the State practice in question.<sup>180</sup>

The complete prohibition against the use of the death penalty is not a *jus cogens* norm. The current trend to completely abolish capital punishment has existed for approximately fifty years.<sup>181</sup> Too many States impose the death penalty, and too little evidence from international human rights instruments exists to conclude that the complete abolition of the death penalty is a peremptory norm. William Schabas has stated that this movement does not yet qualify as a *jus cogens* norm: "The day when abolition of the death penalty becomes . . . qualified as a peremptory rule of *jus cogens*, is undeniably in the foreseeable future."<sup>182</sup>

## CONCLUSION

While the concern about the protection of the inalienable "right to life" and the legitimacy of the death penalty as a method of punishment are certainly issues of global importance, the movement toward complete

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178. It is beyond the scope of this Note to examine what the consequences would be for the United States if it became a persistent objector to the abolition of the death penalty. Also beyond the scope of this Note is the degree to which the recognition of the abolition of the death penalty as customary international law would affect individual state policies which presently retain the death penalty as a method of punishment.

179. See INTERNATIONAL LIBRARY, *supra* note 12, at 24.

180. See Mayer-Schönberger, *supra* note 97, at 683. "Some rules of international customary law 'which safeguard values of vital importance for humanity' are so basic and fundamental that any objection by a state is invalid." *Id.* (quoting J. de Arechaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS 9, 64-67 (1978)).

181. SCHABAS, ABOLITION OF THE DEATH PENALTY, *supra* note 8, at 1.

182. *Id.* at 3.

abolition of the death penalty has not yet become a global phenomenon. The trend to completely abolish the death penalty as a method of punishment has only reached certain regions of the world. Generally speaking, Western Europe, Latin America, and the southern part of Africa are abolitionist regions, while Eastern Europe and the former Soviet Union, Asia, the Middle East, and the northern part of Africa are retentionist regions. It is significant that so much pressure is placed on the United States to permanently end its practice of executing convicted criminals; it is as though proponents of the movement view the "capture" of the United States as a necessary step in reaching its goal. In this effort they have failed.

Despite this pressure, the United States is not obligated to completely abolish the death penalty and is not violating international law by imposing and then carrying out death sentences. First, the United States has not consented to do so. Second, the complete prohibition against the use of the death penalty has not yet reached the status of customary international law, so the United States cannot involuntarily be bound to do so. Even if the phenomenon becomes customary international law, the United States as a persistent objector will be protected from having to eliminate the death penalty as an option for punishment of its convicted criminals. Third, the complete abolition of the death penalty is not a *jus cogens* norm, so the United States cannot be bound to eliminate capital punishment this way either.

Possibly, at least three death penalty regulations are customary international law. First is the category concerning the types of crimes for which the death penalty is a possible punishment. One example of this State practice is the exception to the prohibition of the death penalty for wartime crimes. This exception is embedded in the international and regional human rights instruments which began the abolitionist trend. Allowing States to retain the death penalty for war crimes seems general and consistent enough to constitute customary international law. The second category of a regulation is the use of safeguards for convicted criminals who have been sentenced to death. Ensuring that defendants are given a fair trial and are later given access to an appellate process seem to be two of the most prominent procedural safeguards. The third category involves persons who can be sentenced to death. Examples of these regulations are the prohibitions against the death penalty for juveniles, pregnant women, new mothers, the elderly, the insane, and the mentally retarded.

In the end, the proponents of this global trend will have better luck engaging the United States and other retentionist States in a discussion about

the death penalty by focusing on the *regulations* of its use, rather than by pressuring these countries to completely eliminate capital punishment as a method of punishment. Until the proponents of this movement recognize the difference between regulation of capital punishment and the elimination of capital punishment, and adjust their goals accordingly, the movement's proponents will continue to think that "abolition" means something different than what the United States and other retentionist States think it means.