International Abolitionist Advocacy: The Rise of Global Networks to Advance Human Rights and the Promise of the Worldwide Campaign to Abolish Capital Punishment

John D. Bessler*

Abstract

The modern international human rights movement began with the U.N. Charter and the U.N. General Assembly's adoption of the Universal Declaration of Human Rights. Although the movement to abolish the death penalty is rooted in the Enlightenment, global advocacy to halt executions and to abolish capital punishment has accelerated exponentially in recent decades. This Article discusses the origins of global networks to advance human rights and highlights the growing international advocacy, including by nation-states and non-governmental organizations ("NGOs"), for a worldwide moratorium on executions and to abolish capital punishment altogether. The total number of countries conducting executions in the past few decades has declined dramatically, putting retentionist states, such as China, Iran, Saudi Arabia, Iraq, North Korea, and the United States, in an increasingly isolated position in the international community. Many nations now even refuse to extradite criminal suspects without assurances that the death penalty will not be sought. With more than 90 countries having already ratified or acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"), aiming at the

* Professor of Law, University of Baltimore School of Law; Adjunct Professor, Georgetown University Law Center; Visiting Scholar, Human Rights Center, University of Minnesota Law School; Of Counsel, Stinson LLP. The author thanks University of Minnesota Law School Regents Professor Fionnuala Ní Aoláin, the Faculty Director of the Law School's Human Rights Center; Amanda Lyons, its Executive Director; and Abby Nelson, its Program Director, for hosting me at the Law School's Human Rights Center in the 2024–2025 academic year. The author also thanks Hirohiko Katayama, associated with Amnesty International's Tokyo office, and Wendy Erickson and the other staff members of the *Minnesota Journal of International Law* for their superb cite checking and editorial assistance.

abolition of the death penalty, and with scores of domestic and international NGOs now actively promoting abolition, the global movement to abolish capital punishment has made significant strides and holds tremendous promise, though much more work remains to be done. This Article highlights the path forward for advocates seeking the death penalty's abolition in law—and *de facto*—across the globe, with a focus on international law and classifying the use of capital prosecutions, death sentences, and executions as acts of torture and clear violations of fundamental human rights. In particular, the Article discusses advocacy efforts before the United Nations, highlights the role of NGOs in leading that effort, and advocates for the recognition of a peremptory, or *jus cogens*, norm of international law prohibiting capital punishment in light of the modern conception of torture.

Introduction

The modern international human rights movement began after the Holocaust and World War II when that war and grotesque Nazi atrocities, leading to the killing of six million Jews[1] and millions of others,[2] galvanized support for the founding of the United Nations.[3] "The prolonged, bloody horror of World War II and the Holocaust," Professor Harold Koh of Yale Law School observes, "triggered a global revulsion against death that helped prompt the rise of the international human rights movement."[4] Even before the U.N.'s

1. Urbanski v. State, 286 A.3d 626, 630 n.3 (Md. Ct. Spec. App. 2022) ("Adolf Hitler and Nazi supporters in Germany killed six million Jews, along with five million other victims, during the Holocaust . . . ."); Madison P. Bingle, Comment, *Holes in the United States' 'Never Again' Promise: An Analysis of the DOJ's Approach Toward Atrocity Accountability*, 73 ADMIN. L. REV. 869, 870 n.2 (2021) ("The United States Holocaust Museum defines the Holocaust as 'the systematic, state-sponsored persecution and murder of six million Jews by the Nazi regime and its allies and collaborators.'").

2. Terese Pencak Schwartz, *The Holocaust: Non-Jewish Victims*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/non-jewish-victims-of-the-holocaust (last visited Feb. 17, 2025); Alycia T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 13 MICH. STATE J. INT'L L. 197, 209 (2005); Abbe L. Dienstag, Comment, Fedorenko v. United States: *War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 122 n.10 (1982).

3. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 (2014); *see also* Laura Dalton, Note, Stanford v. Kentucky *and* Wilkins v. Missouri*: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 172–73 (1990).

4. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1093 (2002).

creation in 1945, various human rights[5] were shaped by transnational movements and nongovernmental organizations ("NGOs") of an international character.[6] For example, in 1888, American suffragists started the International Council of Women ("ICW") to celebrate the fortieth anniversary of the first women's rights convention in Seneca Falls, New York, in 1848.[7]

NGOs have played a key role in advancing human rights around the world.[8] "[T]he first international NGOs," one source recalls, "were the Christian churches and their spiritual orders." "Other examples for 'early' NGOs," that source notes, "are the British and Foreign Anti-Slavery Society (1823), the International Committee of the Red Cross (1863), the International Worker's Association (1864), the International Peace Bureau (1892), and the Union of International Associations (1907)."[9] Scholars Margaret Keck and Kathryn Sikkink discuss how international activism shaped both the anti-slavery and women's suffrage movements.[10] "The international campaign," they observe of the latter movement, "is a key part of the explanation of how votes for women moved from unimaginable to imaginable and then to standard state behavior."[11] In 2023, William Schabas, a leading

---

5. *E.g.*, Shruti Rana, *The Populist Backlash to Gender Equality in International Fora: Analyzing Resistance & Response at the United Nations*, 35 MD. J. INT'L L. 156, 162 (2020) ("[O]ver the last 150 years, global movements focused on women's suffrage, labor rights, and the attainment of equal legal status in marriage and other areas.").

6. *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 1–3, 43–44 (1998); *see also* Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 314 n.14 (1997) ("Although the U.N. Charter acknowledges NGOs for the first time, they have long played a role in international affairs.").

7. Kathi L. Kern, *"The Cornerstone of a New Civilization": The First International Council of Women and the Campaign for "Social Purity,"* 84 KY. L.J. 1235 (1996); *see also id.* ("From its modest beginnings, the ICW grew into a premier international organization which claimed to represent thirty-six million women by 1925.").

8. WILLIAM A. SCHABAS, THE INTERNATIONAL LEGAL ORDER'S COLOUR LINE: RACISM, RACIAL DISCRIMINATION, AND THE MAKING OF INTERNATIONAL LAW 13 (2023) [hereinafter SCHABAS, THE INTERNATIONAL LEGAL ORDER'S COLOUR LINE] (noting the role of civil society to the development of human rights); Andrew Malec, *Expanding International LGBTQ Rights: International Human Rights Law, Equal Protection, and Freedom of Expression*, 29 MICH. STATE INT'L L. REV. 77, 102–03 (2021) (noting the ability of NGOs to lobby governments to pass legislation protecting human rights, to collect information and file reports, and to support applications and communications to international courts and bodies).

9. Olz, *supra* note 6, at 314 n.14.

10. Margaret Keck & Kathryn Sikkink, *Historical Precursors to Modern Transnational Social Movements*, *in* GLOBALIZATIONS AND SOCIAL MOVEMENTS 35 passim (John A. Guidry et al. eds., 2000).

11. *Id.* at 50.

advocate for the death penalty's global abolition,[12] summarized the remarkable rise of NGOs: "Today, many of the major human rights organizations active on the international scene are headquartered in the capital cities of Europe and North America. These organizations did not exist in the 1940s." "Then," Schabas emphasized of the post-war period, "it was African American organizations that took the lead in bringing human rights petitions and campaigns to the doors of the United Nations."[13] The NAACP's co-founder, W.E.B. Du Bois, and Walter White and Mary McLeod Bethune represented the NACCP—a leading American civil rights organization—at the 1945 San Francisco Conference that led to the United Nations Charter, with one scholar emphasizing that "the NAACP had surveyed 151 African American organizations for their views and those organizations had urged the NAACP to push for an end to racial discrimination and the abolition of colonialism."[14]

Some countries, such as Saudi Arabia, continue to use executions and gruesome corporal punishments,[15] including flogging and amputation of limbs.[16] "In many countries such as Saudi Arabia, Sudan, Yemen, Mali, and Iran, amputation is used as a form of punishment," one academic has written, adding that, "[i]n 2011, Amnesty International reported at least six cross-amputations (right hand and left foot) for highway robbery in Saudi Arabia, and, in 2012, it reported seven amputations in Mali for theft and robbery."[17] "In interpreting *Sharia*," another scholar writes, "Indonesia, Iran, Libya, Nigeria, Pakistan, Saudi Arabia, Yemen and several other States have regarded corporal punishment as a normal penalty for a wide variety of offences, including flogging and whipping for adultery and drinking

12. *See generally* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 383–84 (3d ed. 2002) [hereinafter SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW].

13. SCHABAS, THE INTERNATIONAL LEGAL ORDER'S COLOUR LINE, *supra* note 8, at 13.

14. Darin E.W. Johnson, *How U.S. Civil Rights Leaders' Human Rights Agenda Shaped the United Nations*, 1 HOW. HUM. & C.R. L. REV. 33, 35–36 (2016–2017); *see also* Ursula Tracy Doyle, *Strange Fruit at the United Nations*, 61 HOW. L.J. 187, 223 (2018) (noting the NAACP's involvement at the San Francisco Conference).

15. Some non-Western locales have a tradition of using public executions and draconian corporal punishments. Issa Al-Aweel, *Federalism: Necessary Legal Foundation for the Central Middle Eastern States*, 31 PACE INT'L L. REV. 293, 344 (2019) (discussing public executions and amputations in Saudi Arabia); Margaret M. DeGuzman, *Harsh Justice for International Crimes?*, 39 YALE J. INT'L L. 1, 5–6 (2014) (discussing the use of hard labor and harsh punishments, including the death penalty, in China, North Korea, Iran and Saudi Arabia).

16. Melanie Reid, *Crime and Punishment, A Global Concern: Who Does It Best and Does Isolation Really Work?*, 103 KY. L.J. 45, 57 (2015).

17. *Id.*

alcohol, and the amputation of limbs for theft."[18]

Western penal systems, however, have abandoned public executions and various non-lethal corporal punishments,[19] with many countries also abolishing the death penalty[20] or significantly restricting its use.[21] "[S]ince 1997, through Italy's initiative, and since 1999 through the EU's endeavor," scholars Christian Behrmann and Jon Yorke explain in their article about the death penalty's abolition in the European Union, "the United Nations Commission on Human Rights ('UNCHR') approved a resolution calling for a moratorium on executions with a view to completely abolishing the death penalty."[22] A 2011 report of the Inter-American Commission on Human Rights,[23] a 2015 U.N. publication titled *Moving Away from the Death Penalty*,[24] and ongoing academic efforts to have the death penalty declared a

---

18. Anna Karapetyan, *A Recurring Phenomenon: The Lawful Sanctions Clause in the Definition of Torture and the Question of Judicial Corporal Punishment under International Human Rights Law*, 36 POLISH Y.B. INT'L L. 137, 147 (2016).

19. *See generally* John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297 (2013) [hereinafter Bessler, *The Anomaly of Executions*].

20. As of December 31, 2023, there were 144 countries classified in the category of "Total abolitionist in law or practice" and 55 classified as "Retentionist countries." *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries.

21. *E.g.*, ANDREW NOVAK, THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN 163–64 (2014); *see also* Salvatore Caserta & Mikael Rask Madsen, *When the Sun, the Moon and the Stars Align: Litigating LGBTQIA+ Rights and the Death Penalty in East Africa and the Caribbean*, 35 EUR. J. INT'L L. 727, 730–34 (2024) (discussing legal challenges to the mandatory death penalty).

22. Christian Behrmann & Jon Yorke, *The European Union and Abolition of the Death Penalty*, 4 PACE INT'L L. REV. ONLINE COMPANION 1, 57 n.281 (2013); *see also id.* ("This occurred every year until 2005, as the UNCHR held its final meeting in March 2006. Then due to the transition period the EU focus changed to the General Assembly."). In 2006, the U.N. Commission on Human Rights—the body responsible for overseeing treaty-based human rights—was replaced by the Human Rights Council. Eric Retter, Comment, *You Can Check Out Any Time You Like, But We Might Not Let You Leave: Cuba's Travel Policy in the Wake of Signing the International Covenant on Civil and Political Rights*, 23 EMORY INT'L L. REV. 651, 654 (2009).

23. Inter-Am. Comm'n H.R., *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II., Dec. 68 (Dec. 31, 2011).

24. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES, U.N. Sales No. E.15.XIV.6 (2015) [hereinafter MOVING AWAY FROM THE DEATH PENALTY]; *U.N. Secretary-General, European Union Ambassador Call for Abolition of 'Barbaric" Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 11, 2017), https://deathpenaltyinfo.org/news/u-n-secretary-general-european-union-ambassador-call-for-abolition-of-barbaric-death-penalty.

violation of international law[25] show the resolve of U.N. officials and abolitionists to eliminate the death penalty's use, with two-thirds of the world's countries now abolitionist *de jure* or *de facto*.[26]

On December 17, 2024, the United Nations General Assembly adopted its tenth resolution calling for a global moratorium on the death penalty.[27] The vote: 130 votes in favor out of 193 U.N. member states (five more than in a 2022 vote), 32 votes against (five fewer than in 2022), 22 abstentions, and 9 absent.[28] After the landmark vote, Chiara Sangiorgio—an Amnesty International expert—observed: "This vote marks a major turning point for countries around the world and proves that UN member states are steadily moving closer to rejecting the death penalty as a lawful punishment under international human rights law."[29] As Sangiorgio emphasized: "The support from states for the death penalty looks very different from when international treaties allowing for its retention were first adopted. The unprecedented support for this resolution shows that

25. *E.g.*, *International Symposium on Global Movement Towards the Abolition of the Death Penalty: Debate on the (Jus Cogens) Status of its Prohibition*, UNIVERSIDADE DE COIMBRA, https://www.uc.pt/fduc/ij/agenda-ij/international-symposium-on-the-global-movement-towards-the-abolition-of-the-death-penalty-debate-on-the-jus-cogens-status-of/ (last visited Feb. 17, 2025). *See also Activities of the IAPL*, CONGRÈS DU CENTENAIRE DE L'ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, https://congres-aidp.assas-universite.fr/en/presentation/congress/activities (last visited Feb. 17, 2025) (noting that the IAPL has "consistently and strongly advocated" for the death penalty's abolition; held a conference in 1987 attended by Robert Badinter, a French lawyer, politician, and leading abolitionist; and that "many IAPL members have worked in their national capacities for the abolition of the death penalty" in Europe).

26. Olivia Ensign & Terrance Sullivan, *The Death Penalty Is Inhumane. States Should Follow Biden's Example of Mercy.*, HUM. RTS. WATCH, (Dec. 23, 2024, 6:00 PM), https://www.hrw.org/news/2024/12/23/death-penalty-inhumane-states-should-follow-bidens-example-mercy ("Globally, more than two-thirds of countries have abolished or ceased executions, recognizing that capital punishment violates the right to life and the prohibition against cruel, inhuman or degrading punishment as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.").

27. *Two Thirds of the United Nations General Assembly Vote in Favor of the 10th Resolution for a Moratorium on the Death Penalty*, WORLD COAL. AGAINST THE DEATH PENALTY (Dec. 20, 2024), https://worldcoalition.org/2024/12/20/two-thirds-of-the-united-nations-general-assembly-vote-in-favor-of-the-10th-resolution-for-a-moratorium-on-the-death-penalty/.

28. *Id.*

29. *Global: UN Member States Move Closer to Rejecting Death Penalty as Lawful Punishment under International Law*, AMNESTY INT'L (Dec. 18, 2024), https://www.amnesty.org/en/latest/news/2024/12/global-un-member-states-move-closer-to-rejecting-death-penalty-as-lawful-punishment-under-international-law/.

the global journey towards abolition is unstoppable."[30] It was in 1994—thirty years earlier—that the Italian government first presented a resolution to the U.N. General Assembly calling for a global moratorium on the death penalty. That resolution, originating from Hands Off Cain, an NGO, lost by eight votes.[31]

Although an international movement to halt executions worldwide[32] and to abolish the death penalty has gained considerable momentum in recent decades,[33] executions are still carried out in a dwindling number of countries[34] and a declining number of American states.[35] Official figures are not reported by either country,[36] but the

30. *Id.*

31. Behrmann & Yorke, *supra* note 22, at 57; William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMPAR. L. 535, 544–48 (1998).

32. MARIO MARAZZITI, 13 WAYS OF LOOKING AT THE DEATH PENALTY 54 (2015) (noting that, in 1998, the Community of Sant'Egidio launched an appeal for a global moratorium on executions); Brandon Vines, *Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row*, 55 COLUM. J.L. & SOC. PROBS. 591, 633–34 (2022) (discussing U.N. member states voting for a global moratorium on executions and the ICCPR's Second Optional Protocol aiming at the death penalty's abolition).

33. *E.g.*, Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"*, 38 CRIME & JUST. 1, 55 (2009) ("The recognition of the death penalty as a human rights issue, combined with the development of international human rights law and the political weight that has been given to the campaign led by European institutions to get rid of capital punishment completely, is the main explanation for the surge in abolition over the past quarter of a century.").

34. Around the world, fewer countries are conducting executions even as the total number of executions has risen. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2023, at 7 (2024) [hereinafter DEATH SENTENCES AND EXECUTIONS 2023], https://www.amnesty.org/en/documents/act50/7952/2024/en/ ("[I]n 2023 the lowest number of countries on record carried out the highest number of known executions in close to a decade."); *id*. at 9 ("Amnesty International recorded 1,153 executions in 2023, an increase by 31% (270) from the 883 known executions in 2022. It is the highest figure recorded by Amnesty International since the exceptionally high number of 1,634 in 2015, and the first time since 2016 (1,032) that the known total was over 1,000."). Due to a lack of reporting in countries like China, North Korea and Vietnam, the total number of executions worldwide is unknown, with China remaining "the world's lead executioner." *Id.* at 7, 9.

35. Twenty-four executions were carried out in the United States in 2023. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf (last updated Dec. 19, 2024). Only five American states carried out executions in 2023, and only seven American states imposed new death sentences in 2023—the lowest number in twenty years. *The Death Penalty 2023: Year End Report*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report (Dec. 1, 2023).

36. Anthony Lin, *Change in China? Innocence Project Movement Rises to Aid the Wrongfully Convicted*, 101 A.B.A. J. 28, 30 (2015) (noting that "China may execute more people every year than the rest of the world combined," although the number of

People's Republic of China and the Islamic Republic of Iran are widely believed to be the nations where the most executions take place.[37] Amnesty International estimates that China carried out "thousands" of executions in 2023,[38] and Iran executed at least 901 people in 2024.[39] Indeed, public executions still occur in some locales.[40]

executions is "a state secret"); Margaret K. Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 304 (2011) ("Although the actual number of executions remains a state secret, estimates are that China executes many thousands of people annually."); IRAN HUMAN RIGHTS & ECPM (TOGETHER AGAINST THE DEATH PENALTY), ANNUAL REPORT ON THE DEATH PENALTY IN IRAN 2023 (2024), at 11 ("At least 834 people were executed in 2023, a 43% increase compared to 582 in 2022," although only "125 executions (15%) were announced by official sources," with 709 executions "not announced by the authorities.").

37. DEATH SENTENCES AND EXECUTIONS 2023, *supra* note 34. Saudi Arabia also continues to make frequent use of executions. *Saudi Arabia: The International Community Sounds the Alarm*, ECPM (TOGETHER AGAINST THE DEATH PENALTY) (July 2024), https://www.ecpm.org/en/saudi-arabia-execution-rate-still-on-the-rise/ ("Despite a 2018 pledge from Crown Prince Mohammed bin Salman to reduce use of the death penalty, the rate of executions has continued to rise, and in 2023 at least 172 individuals were executed, the third highest known figure globally."). On February 26, 2025, a group of NGOs in the Middle East—noting that a total of 345 individuals were executed in Saudi Arabia in 2024—expressed their grave concern "about the imminent execution of dozens of prisoners in Saudi Arabia on non-lethal drug-related charges, including numerous Egyptian nationals held in Tabuk Prison." *Joint Statement—Urgent Demand to Stop Executions and Investigate Human Rights Abuses in Saudi Arabia*, MIDDLE EAST DEMOCRACY CTR. (Feb. 26, 2025), https://mideastdc.org/publication/joint-statement-urgent-demand-to-stop-executions-and-investigate-human-rights-abuses-in-saudi-arabia/. As the joint statement of the NGOs emphasized: "The Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur (SR) on torture and other cruel, inhuman or degrading treatment or punishment published an Urgent Appeal to Saudi Arabia in December 2024, urging the Kingdom ensure that the Egyptian nationals are not executed and are granted a fair trial with a view to commuting their sentences. Further, the Mandates affirmed that the right to life is a peremptory norm of international law (jus cogens) from which no derogation is permitted." *Id.* "The prisoners," the NGOs said in their joint statement, "live in constant terror as they witness their fellow inmates be taken for execution on a daily basis." *Id.* "Families of the condemned are left in the dark, with little to no information about their loved ones' cases or execution schedules," the statement continued. *Id.*

38. *Global: Executions Soar to Highest Number in Almost a Decade*, AMNESTY INT'L, (May 29, 2024), https://www.amnesty.org/en/latest/news/2024/05/global-executions-soar-highest-number-in-decade/.

39. David Gritten, *Iran Reportedly Executed at Least 901 People in 2024, UN Says*, BBC (Jan. 7, 2025), https://www.bbc.com/news/articles/ced8qw8q62jo.

40. *Public Executions in 2023*, IRAN HUM. RTS., https://iranhr.net/en/articles/6623/ (last visited Feb. 17, 2025) (discussing public executions in Iran; noting an "annual average of 50 to 60" executions "between 2011-2015," and observing that "the number of public executions decreased to 33 in 2016, 31 in 2017 and then 13 in 2018 and 2019," with two people "publicly hanged" in 2022 and seven public executions in 2023 after "[p]ublic executions dropped significantly during the COVID-19 pandemic"); Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 394 n.72 (1996)

Methods of execution used in 2023 were beheading (Saudi Arabia), hanging (Bangladesh, Egypt, Iran, Iraq, Kuwait, Singapore, and Syria), lethal injection (China, United States, and Vietnam), and shooting (Afghanistan, China, North Korea, Palestine, Somalia, and Yemen).[41]

When the U.N. General Assembly adopted the now widely-ratified International Covenant on Civil and Political Rights ("ICCPR") in 1966,[42] its sixth article prohibited the death penalty for juvenile offenders and pregnant women but nonetheless provided: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . ."[43] In the United States, which entered a reservation to the ICCPR when ratifying it,[44] the annual number of death sentences and executions have declined substantially in the past few decades.[45] After a seventeen-year pause at the federal level,[46] thirteen federal executions took place during the first Trump Administration,[47] but no federal executions took place during the Biden Administration and, near the end of his term in office, President Biden commuted more

("over the ten-year period from the late 1970s to the late 1980s, public executions occurred in at least 22 countries . . . .").

41. DEATH SENTENCES AND EXECUTIONS 2023, *supra* note 34, at 10.

42. The ICCPR, which entered into force in 1976, "guarantees a broad spectrum of civil and political rights to individuals within signatory nations." United States v. Duarte-Acero, 296 F.3d 1277, 1282 (11th Cir. 2002). As of January 8, 2025, this covenant has been ratified by 174 countries. U.N. Hum. Rts. Off. of the High Comm'r, Ratification of 18 International Human Rights Treaties, https://indicators.ohchr.org (last updated Jan. 7, 2025) (listing status of ratifications).

43. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

44. The ICCPR was ratified by the United States Senate in 1992, albeit with a number of reservations, understandings, and declarations ("RUDs"). 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992); ICCPR, *supra* note 43; People v. Caballero, 794 N.E.2d 251, 274–75 (Ill. 2002); Toca v. State, 834 So.2d 204, 210. (Fla. Dist. Ct. App. 2002); Beazley v. Johnson, 242 F.3d 248, 263–64 (5th Cir. 2001); Igartúa v. United States, 654 F.3d 99, 101–02 (1st Cir. 2011) (Torruella, J., on denial of en banc consideration). Since that time, American courts have rejected international law challenges to the death penalty, in part based on those RUDs. *E.g.*, Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002); United States v. Cruz-Ramirez, No. CR 08-0730 WMA, 2010 WL 1459446, at *5 (N.D. Cal. Apr. 9, 2010).

45. *Facts About the Death Penalty*, *supra* note 35, at 1 (noting the declining number of executions and death sentences in the United States, with fewer than 25 executions per year since 2019 and fewer than 25 death sentences annually since 2020).

46. Isaac Green, *A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 HARV. L. & POL'Y REV. 623, 634 (2022).

47. Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 624, 635–36 (2022).

than thirty death sentences.[48] At times, American executions—now conducted predominantly but not exclusively by lethal injection[49] and regularly botched[50]—have been carried out using lethal gas,[51] the method Nazis used to commit mass murder during the Holocaust.[52]

The anti-death penalty movement has made tremendous strides since the adoption of the Universal Declaration of Human Rights ("UDHR"),[53] with the world recently celebrating the UDHR's 75th anniversary.[54] Four minutes before midnight on December 10, 1948, the U.N. General Assembly voted forty-eight to zero, with eight abstentions, for the UDHR.[55] The UDHR's preamble recites "that

48. *USA: Biden's Commutation of Federal Death Sentences Welcomed*, AMNESTY INT'L, (Dec. 23, 2024, 1:43 PM), https://www.amnesty.org.uk/press-releases/usa-bidens-commutation-federal-death-sentences-welcomed. In an executive order issued at the start of his second term, President Trump has vowed to bring back the death penalty's use. Exec. Order No. 14164, 90 Fed. Reg. 8463 (Jan. 20, 2025); *see also Restoring the Death Penalty and Protecting Public Safety*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/restoring-the-death-penalty-and-protecting-public-safety/.

49. The Death Penalty Information Center has documented the method of all American executions since 1976. Of those executions, these were the methods: lethal injection (1424), electrocution (163), gas (14), hanging (3), firing squad (3). *Facts About the Death Penalty*, *supra* note 35, at 3.

50. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (2014).

51. Christina Hauser, *Outrage Greets Report of Arizona Plan to Use "Holocaust Gas" in Executions*, N.Y. TIMES (Jun. 2, 2021), https://www.nytimes.com/2021/06/02/us/arizona-zyklon-b-gas-chamber.html; Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability*, 50 TEX. INT'L L.J. 403, 412 (2015); Kendra Magraw, *Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L L. 458, 470–71 (2009). The gas chamber was used in the United States in the 1920s before it was used in Nazi Germany. SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 1 (2010).

52. Alexandra L. Klein, *When Police Volunteer to Kill*, 74 FLA. L. REV. 205, 256 (2022).

53. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

54. *Universal Declaration of Human Rights 75th Anniversary*, AM. SOC'Y OF INT'L L., https://www.asil.org/universal-declaration-human-rights-75th-anniversary (last visited Feb. 17, 2025) (noting that "75 international law experts and 75 Ukrainian counterparts" convened in Lviv, Ukraine, "to coincide with the 75th anniversary of the Genocide Convention and the 75th anniversary of the Universal Declaration of Human Rights").

55. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 571 n.17 (1996); Marina Rabinovich, Note, *Licensing of Journalists under the Trading with the Enemy Act: An Impermissible Form of Censorship*, 3 B.U. INT'L L.J. 457, 469 n.89 (1985).

human rights should be protected by the rule of law,"[56] while Article 3 of the UDHR protects "the right to life, liberty and security of person."[57] And that article did so without mentioning the death penalty[58] as an exception—an intentional drafting choice.[59] The UDHR's drafting committee had initially considered a proposal in 1947 that would have recognized the death penalty as an exception to the right to life. That draft provision, modeled on the U.S. Constitution's Fifth Amendment, read: "Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached."[60]

Despite Article 3's broadly worded protection, an active abolitionist movement in proximity to the UDHR's promulgation,[61] and the fact that a number of countries, including Germany,[62] abolished the death penalty in the post-World War II period,[63] capital

56. UDHR, *supra* note 53, pmbl.; *see also* Cox, *supra* note 55, at 571 n.17.

57. UDHR, *supra* note 53, art. 3; *see also* Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1128–29 (2002) (noting that "[t]he absence of reference to the death penalty in article 3" of the UDHR "recognizes that the punishment is practiced and legal in several nations," but pointing out that [t]he committee notes, or *travaux preparatoires*," from the drafting of the UDHR show "that abolition of capital punishment was favored among the drafters").

58. Hughes v. Dretke, Civil Action No. H-01-4073, 2004 WL 7338388, at *26 (S.D. Tex. Apr. 30, 2004) (noting that the UDHR does not expressly mention or prohibit the death penalty, declaring simply that '[e]veryone has the right to life, liberty and security'") (quoting G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948)).

59. Bishop, *supra* note 57, at 1122; *No End in Sight*, 108 HARV. L. REV. 483, 484 (1994) (reviewing WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993)).

60. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, *supra* note 12, at 383.

61. *Id.* at 383–84 ("In the Drafting Committee, Eleanor Roosevelt commented that there was a movement underway in some states to abolish the death penalty. She suggested that it might be better not to use the term 'death penalty' in the Universal Declaration.").

62. *Id.* at 240 (noting that "Nazi sympathizers, who were anxious to shelter their friends, and left-wing penal reformers," "joined forces to prohibit capital punishment in the May 1949 German *Basic Law*"); Carol D. Rasnic, *Making the Criminal Defendant's Punishment Fit the Crime: The Contrast Between German and U.S. Laws of Sentencing*, 7 N.Y. INT'L L. REV. 62, 66 (1994) (noting that "the German constitution, or *Grundgesetz* ('basic law') in 1949" barred the death penalty's use); *see also* ANDREA D. LYON, THE DEATH PENALTY: WHAT'S KEEPING IT ALIVE 138 (2015) ("In 1990 the German Democratic Republic became unified with the Federal Republic of Germany, where the death penalty had been abolished in 1949.").

63. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 56–57 (2016) ("[T]he pace of abolition accelerated in the wake of World War II (with Austria, Finland, West Germany, and Italy all abolishing or severely

punishment has stubbornly persisted in various nations.[64] It persists even though multiple U.N. secretary-generals and other U.N. officials have repeatedly called for the death penalty's abolition.[65] For example, U.N. Secretary-General Kofi Annan (1938–2018) once asked: "Can the state, which represents the whole of society and has the duty of protecting society, fulfill that duty by lowering itself to the level of the murderer, and treating him as he treated others?"[66] Annan's clear answer: "The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process. And I believe that future generations, throughout the world, will come to agree."[67]

With capital punishment dating back centuries[68] and 1,153

limiting between 1945 and 1950)."); Andrew Drilling, Student Article, *Capital Punishment: The Global Trend Toward Abolition and Its Implications for the United States*, 40 OHIO N.U. L. REV. 847, 861 (2014) ("[O]n the eve of World War II, a mere eight countries had completely abolished the death penalty and another six had abolished it for ordinary crimes."); *id.* at 850 ("By the end of the 1960's, fourteen states repudiated the death penalty.").

64. COMPARATIVE CAPITAL PUNISHMENT, at xiii (Carol S. Steiker & Jordan M. Steiker eds., 2019) ("Now the industrialized West is an almost completely abolitionist zone—with the notable exception of the United States—and the death penalty is waning in many other regions of the globe, though it is also seeing a resurgence in some parts of the Middle East and Africa."); World Coalition Against the Death Penalty, *A Decrease in the Number of Countries with the Death Penalty Worldwide, Despite an Increase in Executions*, WORLD COAL. AGAINST THE DEATH PENALTY (June 20, 2024), https://worldcoalition.org/2024/06/20/a-decrease-in-the-number-of-countries-with-the-death-penalty-worldwide-despite-an-increase-in-executions/ ("Close to three quarters of the countries in the world have now abolished the death penalty in law or practice. As of 31 December 2023, the numbers were as follows: Abolitionist for all crimes: 112[;] Abolitionist for ordinary crimes only: 9[;] Abolitionist in practice: 23[;] Total abolitionist in law or practice: 144[;] Retentionist: 55.").

65. *E.g.*, MOVING AWAY FROM THE DEATH PENALTY, *supra* note 24; *U.N. Secretary-General, European Union Ambassador Call for Abolition of "Barbaric" Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 11, 2017), https://deathpenaltyinfo.org/news/u-n-secretary-general-european-union-ambassador-call-for-abolition-of-barbaric-death-penalty (noting U.N. Secretary-General António Guterres described capital punishment as a "barbaric practice" that "has no place in the 21st century"); *UN Secretary-General: 'I Will Never Stop Calling for an End to the Death Penalty'*, DEATH PENALTY INFO. CTR. (Nov. 6, 2015), https://deathpenaltyinfo.org/news/un-secretary-general-i-will-never-stop-calling-for-an-end-to-the-death-penalty ("Calling the punishment 'simply wrong,' United Nations Secretary-General Ban Ki-Moon has vowed to 'never stop calling for an end to the death penalty.'").

66. JOHN BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM 240 (2023) [hereinafter BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS].

67. *Id.*

68. Roberta M. Harding, *Capital Punishment as Human Sacrifice: A Societal Ritual as Depicted in George Eliot's* Adam Bede, 48 BUFF. L. REV. 175, 186 n.40 (2000).

documented executions taking place worldwide in 2023, a figure that, notably, does not include numerous Chinese executions,[69] the death penalty is still inflicted in scattered locales across the globe despite substantial opposition by many U.N. member states and NGOs.[70] Highly coordinated anti-death penalty efforts began in earnest at the U.N. in the early 1970s,[71] then progressed in the 1980s and in the decades thereafter, country by country,[72] through collective action,[73] as civic leaders, lawmakers, and NGOs spoke out against the practice.[74]

Both individuals and NGOs contributed to the effort. In 1970, Arthur Goldberg, a former Associate Justice of the U.S. Supreme Court and U.S. Ambassador to the U.N., and his former law clerk, Alan Dershowitz, argued that the death penalty should be declared a cruel and unusual punishment.[75] Just a year later, in 1971, the U.N. General

---

69. *Global: Executions Soar to Highest Number in Almost a Decade*, AMNESTY INT'L (May 29, 2024), https://www.amnesty.org/en/latest/news/2024/05/global-executions-soar-highest-number-in-decade/ (reporting on the number of executions carried out in 2023).

70. Amy Bergquist, *From Advocacy to Abolition: How the Universal Periodic Review Can Shape the Trajectory of the Abolition of the Death Penalty*, 53 CAL. W. INT'L L.J. 415, 416–17 (2023) (discussing Zambia's "fourth appearance before the United Nations' Human Rights Council for its Universal Periodic Review (UPR)" and the signing by Zambia's president of a bill abolishing the death penalty less than a month before).

71. James R. P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL'Y & L. 379, 382 n.1 (2004) (citing Resolution G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8588 (1971)); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 1 (2010) ("Over the course of the 1970s, the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before.").

72. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 83 tbl. 6-5 (Hugo Adam Bedau ed., 1997) (detailing the countries that abolished or restricted the death penalty since 1976).

73. Joan Fitzpatrick, *Consular Rights and the Death Penalty after* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 309, 318 (2002) ("The United Nations position since 1971 has been that the main objective to be pursued is the progressive reduction of the number of offenses to which the death penalty applies, with a view to abolishing the punishment."); *id.* ("Since Resolution 1997/12 of 3 April 1997, the UN Commission on Human Rights now annually adopts resolutions reasserting the position and calling for worldwide moratoria.").

74. Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 782 (2006).

75. Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). That article observed that the Eighth Amendment's "constitutional proscription" of cruel and unusual punishments "beyond physical torture" began in *Weems v. United States*, 217 U.S. 349 (1910); that the U.S. Supreme Court emphasized in *Wilkerson v. Utah*, 99 U.S. 130 (1879), that torture imposed "unnecessary cruelty"; and that "[t]he mental torture of life on death row has

Assembly passed the following resolution: "In order to guarantee fully the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries."[76] Not long thereafter, in the 5–4 *Furman v. Georgia* (1972) decision, a six-sentence *per curiam* opinion with all nine justices writing separately, the U.S. Supreme Court declared America's death penalty to be a violation of the U.S. Constitution's Eighth and Fourteenth Amendments[77]—a holding the Supreme Court retreated from in *Gregg v. Georgia* (1976), when the Court held that Georgia's death penalty was constitutional.[78]

The abolitionist movement made significant advancements through the 18th and 19th centuries, until war, fascism, and totalitarianism halted, for a time, major global progress in the 20th century.[79] That movement has since achieved widespread and remarkable success in recent decades,[80] with many nations joining the abolitionist column, especially if one tallies global progress toward the objective of total abolition since the 1970s.[81] "It became explicit that there was an international goal toward abolition," one legal commentator writes, "when in 1971 the United Nations General

been well documented in recent years." *Id.* at 1786–87, 1795.

76. Ogloff & Chopra, *supra* note 71, at 382 n.1.

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

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

79. *E.g.*, Liam P. Deeney, Book Note, 23 SUFFOLK TRANSNAT'L L. REV. 803, 806–07 (2000) (describing Enlightenment opposition to the death penalty; noting how Pennsylvania "abolished capital punishment in 1794 for offenses other than murder," and how eighteenth-century thinkers "continued to inspire leaders of the following century," with Michigan abolishing the death penalty in 1846 and Rhode Island and Wisconsin abolishing the death penalty in the 1850s; and emphasizing that "[o]ver the next twenty years, six nations abolished capital punishment.") (reviewing WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (2d ed. 1997)); *id.* at 807 ("By the end of the 1800's, many European states abolished the death penalty."); *id.* at 807–08 ("The rise of fascism and totalitarianism in the early twentieth century temporarily stalled the abolitionist movement. The oppressiveness of these regimes and the devastation of two world wars, however, motivated nations to prevent such atrocities from reoccurring.").

80. *See* John D. Bessler, *The Long March Toward Abolition: From the Enlightenment to the United Nations and the Death Penalty's Slow Demise*, 29 U. FLA. J.L. & PUB. POL'Y 1, 1–2 (2018) [hereinafter Bessler, *The Long March Toward Abolition*] (documenting abolitionist efforts at the U.N.).

81. Anna Hunt, *Declining Competency: Protecting Defendants with Worsening Mental Illness on Death Row from the Death Penalty*, 64 B.C. L. REV. 1723, 1734 n.69 (2023) ("At least 70% of foreign countries have abolished the death penalty."); State v. Gregory, 427 P.3d 621, 636 n.10 (Wash. 2018) ("Internationally, dozens of countries have abolished capital punishment, including all European Union nations.").

Assembly declared that the main objective of Article 3 of the UDHR was to progressively restrict the use of the death penalty, 'with a view to . . . abolishing this punishment in all countries.'"[82] Transnational anti-death penalty advocacy networks formed and multiplied,[83] and the continent of Europe coalesced around the death penalty's abolition on the ground that the punishment violated human rights.[84] "The desirability of the total abolition . . . has also been reaffirmed on repeated occasions by various United Nations bodies and organs," Mary Robinson, then the U.N. High Commissioner for Human Rights, observed in 1999.[85] A year later, U.N. Secretary-General Kofi Annan called for a global moratorium on December 18, 2000, after receiving a petition signed by 3.2 million people[86] and delivered by Sister Helen

82. Brian Daniel Anderson, Roper v. Simmons: *How the Supreme Court of the United States Has Established the Framework for Judicial Abolition of the Death Penalty in the United States*, 37 OHIO N.U. L. REV. 221, 240 (2011) (citing Capital punishment, G.A. Res. 2857, U.N. GAOR, 26th Sess., U.N. Doc. A/RES/2857 (Dec. 20, 1971)). "This resolution has been reaffirmed by the UN General Assembly once, by the UN Commission on Human Rights twice (the latest in 1998), and was reaffirmed by the European Union in 1998." Geoffrey Sawyer, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PA. STATE INT'L L. REV. 459, 474 (2004); *id.* at 474 n.93 ("By the UN General Assembly through Resolution 32/61 (December 8, 1977), by the UN Commission on Human Rights in resolutions 1997/12 (Apr. 3, 1997) and Resolution 1998/8 (Apr. 3, 1998), and by the European Union in the Guidelines to EU Policy towards Third Countries on the Death Penalty ("EU Guidelines"), adopted in 1998.") (citation omitted).

83. ANDREW NOVAK, *Litigation and the Abolition of the Mandatory Death Penalty*, *in* TRANSNATIONAL HUMAN RIGHTS LITIGATION 65, 70 (2020) (describing "[t]he transnational advocacy network promoting death penalty abolition" that "emerged in the 1970s").

84. James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1236–37 (2015) ("By the mid-1990s, the nations of Western Europe had all come to the same place, aligned in their opposition to the state imposition of death.").

85. Joseph Margulies, *Memories of an Execution*, 20 LAW & INEQ. 125, 131–32 n.7 (2002) (citing Mary Robinson, U.N. High Commissioner for Human Rights, Message to the Press Conference Organized by the Death Penalty Information Center (Oct. 12, 1999), and quoting her as saying: "While the death penalty is yet to be banned under international law, the trend towards this goal is obvious. The adoption in 1989 of the Second Optional Protocol to the [ICCPR] aiming at the abolition of the death penalty was a clear recognition by the international community of the need to eliminate the use of capital punishment, totally and globally").

86. Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 45 n.7 (2001). That call to action did not come out of nowhere. Ved P. Nanda, *International Law and the Implementation of the American Bar Association Resolution Regarding the Death Penalty*, 4 ILSA J. INT'L & COMPAR. L. 573, 576 (1998) (noting that, in 1994, a draft U.N. resolution "called for a worldwide moratorium on capital punishment and for a global ban on the death penalty by the year 2000," but that "the resolution was rejected by the General Assembly's Social, Humanitarian, and Cultural Committee by a vote of 44 to 33," with 74 abstentions).

Prejean and representatives of Amnesty International and the Sant'Egidio Community.[87]

Although U.S. jurisdictions are split on capital punishment,[88] with American executions becoming rare[89] and the death penalty becoming dormant in several retentionist states,[90] the U.S.—still clinging to state-sanctioned killing—is now a clear outlier in the international community,[91] especially among highly industrialized countries.[92] The continent of Europe has outlawed the use of death sentences and executions through two protocols to the European Convention on Human Rights, formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol No. 6 abolished capital punishment in peacetime,[93] and Protocol No. 13 extended abolition in Europe even in times of war.[94] Many non-

87. *Annan Supports Halt to Death Penalty*, WASH. POST (Dec. 18, 2000), https://www.washingtonpost.com/archive/politics/2000/12/19/annan-supports-halt-to-death-penalty/ab7ce520-1033-4f30-9fac-94f71d93a567/.

88. Twenty-seven American states, plus the U.S. Government and the U.S. Military, retain the death penalty, while 23 states and the District of Columbia are now abolitionist. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 19, 2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.

89. *See id.* (showing that in the past five years, there were fewer than twenty-five executions per year: 22 executions in 2019, 17 in 2020, 11 in 2021, 18 in 2022, and 24 in 2023).

90. Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 69 (2020) ("Twenty-eight states currently have capital punishment, but since 2015, only twelve have carried out executions. Some of these dormant death penalty states are ambivalent about capital punishment and not really making serious efforts to resume executions.").

91. Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J. C.R. & SOC. JUST. 1, 19–20 (2023) (noting that when *Furman v. Georgia* (1972) invalidated American death penalty statutes, "only a small minority of countries had fully abolished capital punishment," but that "three decades later, the United States had become an outlier in the other direction, as an astonishing number of jurisdictions moved into the abolitionist camp").

92. Aside from the United States, Japan and China are often described as the other highly industrialized nations to retain the death penalty. Bunji Sawanobori, *Solitary Confinement in Japan: Incarceration Within Incarceration and Global Standards*, 7 VA. J. CRIM. L. 1, 2 (2019); Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 159–60 (2016); William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805, 808 (2014). The United States is "the only Western industrialized country that still has the death penalty." *Id.*

93. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. 1, Apr. 28, 1983, E.T.S. No. 114.

94. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, E.T.S. No. 187.

European countries and, increasingly, American states have also abolished or abandoned the punishment of death.[95] As USC law professor Mugambi Jouet writes of how the ideas of leading American abolitionists—people advocating for the total rejection of capital punishment—spread and what, as in Europe, undergirded their opposition to capital punishment: "The approach to the death penalty that Anthony Amsterdam, William Brennan, and Thurgood Marshall adopted would crystallize elsewhere in the Western World. In Europe, notably, both national governments and continental governmental bodies stress that the death penalty is a categorical violation of human rights and human dignity."[96]

In the Inter-American human rights system, a nation's abolition of capital punishment is, by treaty for signatory nations, an irreversible, one-way street because of the wording of the American Convention on Human Rights. Article 4 of that convention, titled "Right to Life," states in subsection 2 that "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes," while subsection 3 reads: "The death penalty shall not be reestablished in states that have abolished it."[97] Indeed, the ICCPR has itself been interpreted—in General Comment 36, adopted by the U.N. Human Rights Committee[98] after inputs from scores of NGOs and nation-states[99]—to bar the death penalty's reintroduction in any country that has abolished it.[100]

Unlike in prior centuries, when executions were widely accepted

---

95. *See* Talia Roitberg Harmon & Michael L. Radelet, *More Indicators of the Falling Support for the Death Penalty*, 53 CAL. W. INT'L L.J. 405, 406 (2023) (noting that, as of 1977, only 16 countries had totally abolished the death penalty, but that the number has "risen to 108—more than half the world's countries," and observing: "More than two-thirds are abolitionist in law or practice").

96. Mugambi Jouet, *A Lost Chapter in Death Penalty History:* Furman v. Georgia, *Albert Camus, and the Normative Challenge to Capital Punishment*, 49 AM. J. CRIM. L. 119, 170 (2022) [hereinafter Jouet, *A Lost Chapter in Death Penalty History*]. *See generally* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996); Evan J. Mandery & Zachary Baron Shemtob, *Supreme Convolution: What the Capital Cases Teach Us About Supreme Court Decision-Making*, 48 NEW ENG. L. REV. 711 (2014) (discussing Anthony Amsterdam, William Brennan, and Thurgood Marshall's opinions of the death penalty).

97. American Convention on Human Rights art. 2–3, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.

98. U.N. Hum. Rts. Comm., *General Comment No. 36*, ¶ 34, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

99. *Id.*

100. Ahmed Fathalla, *The United Nations Human Rights Committee: The Evolution of the Punishment of the Death Penalty*, 17 INTERCULTURAL HUM. RTS. L. REV. 47, 49–50 (2022). Ahmed Fathalla was the Chair of the United Nations Human Rights Committee from 2019 to 2020. *Id.* at 47 n.*.

as part and parcel of any legal system, capital punishment is increasingly seen by countries and leading publicists of international law as a blatant violation of fundamental human rights,[101] including the universally proclaimed right[102] to be free from torture and other cruel, inhuman, and degrading treatment ("CIDT") or punishment.[103] "[T]orture is a label that is 'usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.'"[104]

---

101. WILLIAM A. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS 96 (2021) [hereinafter SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS] ("The abolition of the death penalty is probably an 'emerging norm'. The quinquennial reports of the Secretary General of the United Nations indicate a consistent trend towards abolition."); *id.* at 117–18 ("By 2020, there were 167 abolitionist States as opposed to thirty-one that continued to use the death penalty. Moreover, most of the thirty-one retentionist States manifested dramatic reductions in the number of executions and in the crimes for which capital punishment could be imposed."); Jouet, *A Lost Chapter in Death Penalty History*, *supra* note 96, at 170 ("In Europe, notably, both national governments and continental governmental bodies stress that the death penalty is a categorical violation of human rights and human dignity."); Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 730 (2019) ("With the exception of the United States, all modern Western democracies—European nations, Canada, Australia, New Zealand—have abolished the death penalty and identify it as an inherent human rights violation.").

102. Morales v. Brown, Case No. 1:14-cv-01717-LJO-SAB, 2015 WL 6167451, at *11 (E.D. Cal. Oct. 20, 2015) ("Among the rights that are universally proclaimed by all nations is a fundamental right of all individuals to be free from torture.").

103. *Id.* ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."); *see also* United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *1 (S.D. Fla. July 5, 2007) ("It is beyond peradventure that torture and acts that constitute cruel, inhuman or degrading punishments, acts prohibited by *jus cogens*, are similarly abhorred by the law of nations.") (citations omitted); Doe I v. Qi, 349 F. Supp.2d 1258, 1296 (N.D. Cal. 2004) (noting that acts of torture constitute "*jus cogens* violations" and that "alleged acts of torture, cruel, inhuman or degrading treatment and arbitrary detention . . . violate the law of nations on which a broad degree of international consensus exists"); Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp.3d 481, 489 (E.D. Va. 2023) (describing "torture, CIDT, and war crimes" as "violations of *jus cogens* norms of international law"); Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF 2, 5 (2012) ("I believe it is necessary for the international community to discuss this issue [of capital punishment] further and for states to reconsider whether the death penalty *per se* fails to respect the inherent dignity of the human person and violates the prohibition of torture or CIDT."); *id.* at 3 (noting that although "[s]ome States and other international actors" argue that the lawful sanctions clause of the U.N. Convention Against Torture "provides an exception for the death penalty when conducted in accordance with the laws of the State imposing the sanctions," the "proper understanding" of that language is that it "refers to sanctions that are lawful under *both* national and international law").

104. Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 234 (D.C. Cir. 2003) (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92–

There is already an absolute prohibition on torture in international law, with the prohibition against torture considered a *jus cogens* norm.[105] *Jus cogens* norms "enjoy the highest status within international law,"[106] and existing *jus cogens* norms include prohibiting maritime piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, racial discrimination, extrajudicial killing, and torture.[107]

---

93 (D.C. Cir. 2002).

105. *Emmanuel*, 2007 WL 2002452, at *10 (describing prohibition against torture as "a *jus cogens* norm"); Nuru v. Gonzales, 404 F.3d 1207, 1222–23 (9th Cir. 2005) ("[T]orture is illegal under the law of virtually every country in the world and under the international law of human rights.").

106. Al Shimari v. CACI Premier Tech., Inc., 368 F. Supp.3d 935, 962 (E.D. Va. 2019) (quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)); *see also* Devi v. Silva, 861 F. Supp.2d 135, 142 (S.D.N.Y. 2012) ("*Jus cogens* norms are peremptory norms of international law which enjoy the highest status in international law and prevail over both customary international law and treaties.") (quoting Sabbithi v. Al Saleh, 605 F. Supp.2d 122, 129 (D.D.C. 2009)).

107. Timothy J. Schorn, *Grave Breaches and Sexual Violence: Recognition and Accountability*, 14 GEO. MASON INT'L L.J. 1, 12 (2023) ("The bar for *jus cogens* is fairly high . . . .While there is no universal agreement about what constitutes a peremptory norm, it is accepted that no derogation of that norm is allowed. Slavery, piracy, apartheid, torture, *refoulement*, genocide, and wars of aggression are all recognized as peremptory norms."); Phillip Bustos, *Passport Confiscations at the American Embassy in Yemen: How They Hold Up Under the ICCPR*, 30 WILLAMETTE J. INT'L L. & DISP. RESOL. 117, 130 (2023) ("Several legal principles have reached the status of *jus cogens*, meaning that they are norms to which states cannot object. These principles are prohibitions against slavery, genocide, torture, piracy, and terrorism."); Benjamin F. Gussen, *Getting to Phi: The Case for Excusatory Derogations from ICCPR Rights*, 5 CARDOZO INT'L & COMPAR. L. REV. 801, 819–20 (2022) ("International law instruments have defined some violations of human rights as crimes to ensure that there can be no derogation from these rights. Such 'crimes include genocide, aggression, crimes against humanity, war crimes, piracy, slavery (and slave-related practices) and torture.'"); Kimberly M. Lennox, *Combatting Global Sex Trafficking: The United Nations as a Powerless Entity or an Untapped Resource?*, 10 PA. STATE J.L. & INT'L AFFS. 317, 329–30 (2022) (listing the prohibitions against "genocide, slavery, torture, crimes against humanity, maritime piracy, and apartheid" as *jus cogens* norms); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp.2d 331, 333 n.2 (S.D.N.Y. 2005) ("*Jus cogens* norms include the prohibition on genocide, torture, slavery, crimes against humanity, and extrajudicial killing."); C.D.A. v. United States, Civil Action No. 21-469, 2023 WL 2666064, at *18 n.22 (E.D. Pa. Mar. 28, 2023) ("[I]t is generally agreed upon that *jus cogens* includes the prohibition of aggression, genocide, crimes against humanity, racial discrimination, slavery, and torture.") (citing Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 146–47 (2019)); Rosenfeld v. Talamantes, CV 22-0497 DSF (Ex), 2022 WL 2903144, at *11 (C.D. Cal. May 23, 2022) ("'The Ninth Circuit has held that 'torture, murder, genocide, and slavery' violate *jus cogens* norms.") (citing United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996)); Calcaño Pallano v. AES Corp., C.A. Nos. N09C-11-021 JRJ & N10C-04-054 JRJ, 2011 WL 2803365, at *13 (Del Super. Ct. July 15, 2011) (describing the prohibitions against genocide, torture, and crimes against humanity as "*jus cogens* norms");

With existing *jus cogens* norms already barring extrajudicial killings, torture, and summary executions,[108] it is past time to consider capital punishment—like lynchings[109]—as a violation of *jus cogens*. In fact, an immutable characteristic of capital punishment is that it involves the use of official death threats,[110] with mock amputations and mock executions—utilizing threats of bodily harm, though not leaving any physical marks on the victim's body[111]—already

Gonzalez Paredes v. Vila, 479 F. Supp.2d 187, 194 (D.D.C. 2007) (referring to "slavery, human trafficking, war crimes, torture, etc." as "violations of *jus cogens*"); United States v. Ballaizac-Hurtado, 700 F.3d 1245, 1261 (11th Cir. 2012) (Barkett, J., concurring) ("[O]nly the so-called *jus cogens* crimes of 'piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, apartheid, and torture' have thus far been identified as supporting universal jurisdiction.") (citations omitted).

108. Warfaa v. Ali, 811 F.3d 653, 661–62 (4th Cir. 2016) (holding that the former colonel of Somali military was not entitled to foreign official immunity from claims of Somali national under the Torture Victim Protect Act, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and that the former colonel's actions exceeded his authority and violated *jus cogens* norms of international law prohibiting extrajudicial killing and torture), *aff'g* 33 F. Supp.3d 653, 661–62 (E.D. Va. 2014) (discussing "the concept of jus cogens norms of international law, which are certain 'universally agreed-upon norms' 'accepted and recognized by the international community of States as a whole'"; observing that "[e]xtrajudicial killing has long been condemned by international law"; and finding that allegations relating to torture and extrajudicial killing "amount to *jus cogens* violations which would not constitute sovereign acts"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J., concurring) ("[C]ommentators have identified at least four acts that are now subject to unequivocal international condemnation: torture, summary execution, genocide and slavery.").

109. Lynching is a form of extrajudicial killing. Anthony Hall, *A Stand for Justice—Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 S. REGION BLACK L. STUDENTS ASS'N L.J. 95, 100 (2013); David Pimentel, *The Blues and the Rule of Law: Musical Expressions of the Failure of Justice*, 67 LOY. L. REV. 191, 202 (2020); *see also* Ursula Tracy Doyle, *Strange Fruit at the United Nations*, 61 HOW. L.J. 187, 190 n.12, 235–36 n.354 (noting that "[l]ynching is the extrajudicial killing of a human being" and that, "by 1950, a reported 4,075 African Americans had been lynched in the United States since 1877" before suggesting that the U.N. General Assembly might have asked, among other things, "whether Jim Crow practices—e.g., regarding lynching and torture—are *jus cogens* violations" and observing: "That torture is a *jus cogens* violation is quite clear today.") (citation omitted).

110. *See generally* JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION (2017) [hereinafter BESSLER, THE DEATH PENALTY AS TORTURE]; John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U. L. REV. 1 (2019) [hereinafter Bessler, *Taking Psychological Torture Seriously*]; John D. Bessler, *Torture and Trauma: Why the Death Penalty is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1 (2019) [hereinafter Bessler, *Torture and Trauma*].

111. Katherine J. Eder, Comment, *The Importance of Medical Testimony in Removal Hearings for Torture Victims*, 7 DEPAUL J. HEALTH CARE L. 281, 311–12 (2004) (discussing psychological torture and noting, "[t]orture causes psychological symptoms as well as physical.") (citing PHYSICIANS FOR HUMAN RIGHTS, EXAMINING

appropriately considered to be acts of psychological torture.[112] It has been observed that "forms of torture" include "mock executions by placing a gun in his mouth and pulling the trigger,"[113] with mock executions considered to be "classic examples" of psychological torture.[114] In the non-state actor context, American jurists have previously declared in criminal cases that "the infliction of psychological torture" involves leaving the victim "aware of, but helpless to prevent, impending death."[115]

This Article raises an important question: if *simulated* executions are acts of torture (and they are), why not *real* ones? Death row inmates can obviously appeal from their death sentences, but they are, in fact, utterly helpless to prevent their deaths as their fates lie in the hands of others. Again and again, American courts—sitting in judgment in criminal cases and assessing whether a victim was subjected to psychological torture—have reiterated the common-sense notion that psychological torture is inflicted when one is made aware of one's impending death but that person is helpless to prevent that death.[116] When that exact same definition of psychological torture is applied to those facing capital charges and sentences of death, it is crystal clear that death row inmates—to say nothing of their family members, who also experience severe torment as they anticipate the deaths of loved ones in the years and then final

---

ASYLUM SEEKERS 63 (2001)).

112. Jason R. Odeshoo, *Truth or Dare? Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 224, 242 (2004) (noting that the Human Rights Committee, the body established by the ICCPR to monitor and enforce its provisions, has "found the infliction of certain forms of psychological suffering," including "mock executions and amputations," "to constitute torture") (citing Estrella v. Uruguay, Comm. No. 74/1980, U.N. GAOR Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/18/D/74/1980 (1980) (finding man "was subjected to torture" during his detention by, among other things, subjecting him to "a mock amputation with an electric saw")); Massie v. Government of Democratic People's Republic of Korea, 592 F. Supp.2d 57, 64 (D.D.C. 2008) (crew members of U.S. Naval vessel captured by North Korea were subjected to torture, with acts of torture including putting a gun to a sailor's head and pulling the trigger; when the trigger "merely clicked," it caused the sailor to lose consciousness).

113. Cannon v. Burge, No. 05 C 2192, 2006 WL 273544, at *3 (N.D. Ill. Feb. 2, 2006).

114. Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 79–80.

115. State v. Gladden, 340 S.E.2d 673, 694 (N.C. 1986).

116. *E.g.*, Shanklin v. Dunn, 6:20-cv-2020-LSC, 2024 WL 1321152, at *55 (N.D. Ala. Mar. 27, 2024) ("Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death.") (quoting Norris v. State, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)); Deardorff v. State, 6 So. 3d 1205, 1227 (Ala. Crim. App. 2004) (referring to the same quote); State v. Bell, 603 S.E.2d 93, 121 (N.C. 2004) ("[P]sychological torture [is] where the victim is left to her 'last moments aware of but helpless to prevent impending death.'") (quoting State v. Hamlet, 321 S.E.2d 837, 846 (N.C. 1984)).

moments before executions occur[117]—meet that definition and suffer severe pain or suffering amounting to torture.[118] Consequently, the systematic use of death threats against those facing capital charges or convicted thereof should, posthaste, be stigmatized not merely as cruel and inhuman treatment or punishment (or as cruel and unusual punishment under American law) but as *torture*—the aggravated form of cruelty.[119] As the U.N. itself has made clear, torture is "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[120]

Despite intransigence from some quarters, a record number of countries voted for a global moratorium on executions in 2022[121] (and then did so again in 2024)[122] as the abolitionist movement has picked up steam.[123] In the past few decades, the American death penalty—as one commentator notes—has been "a subject of diplomacy, international activism, and litigation in international forums,"[124] with countries in the European Union collectively taking a firm stance against capital punishment while simultaneously seeking abolition, through various means, in the United States and elsewhere.[125] In America, some state legislatures and state courts—despite recent U.S. Supreme Court decisions upholding the constitutionality of capital

117. Bessler, *Torture and Trauma*, *supra* note 110, at 17, 38–39, 58–62.

118. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 175–76.

119. *Id.* at 280.

120. Mousa v. Trump Administration, Case No. 1:19-cv-01349-LJO-SAB (PC), 2019 WL 6051611, at *9 (E.D. Cal. Nov. 15, 2019).

121. *E.g.*, *Human Rights*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/human-rights (last visited Feb. 17, 2025) (noting that, in 2007, the U.N. General Assembly adopted a resolution calling for a worldwide moratorium on the death penalty, and that "[i]n each of the eight General Assembly biennial sessions since, the UN has approved new versions of this resolution, with its December 15, 2022 vote receiving 125 votes in favor, 37 against, and 22 abstentions").

122. *Adoption of the Tenth UNGA Resolution on a Moratorium on the Use of the Death Penalty*, INT'L COMM'N AGAINST DEATH PENALTY (Dec. 17, 2024), https://icomdp.org/adoption-of-the-tenth-unga-resolution-on-a-moratorium-on-the-use-of-the-death-penalty/.

123. For a summary of the abolitionist movement, see John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195 (2009) [hereinafter Bessler, *Revisiting Beccaria's Vision*].

124. Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 547 (2004).

125. Christian Jay Myers, Comment, *Debunking the Skepticism of International Law: An Application of the Three Dominant Paradigms of Sociology to Public International Law*, 127 PA. STATE L. REV. 899, 918 (2023) ("The European Union, consisting of 27 States, unequivocally supports abolishing the death penalty.").

punishment and lethal injection protocols[126]—have themselves chosen to abolish or declare unconstitutional the punishment of death.[127] For example, the Supreme Court of Washington ruled in *State v. Gregory* (2018): "The death penalty is invalid because it is imposed in an arbitrary and racially biased manner."[128] "In concluding that the death penalty is unconstitutional," Connecticut Supreme Court justices also stressed in *State v. Santiago* (2015) that they "recognize that the legal and moral legitimacy of any future executions would be undermined by the ever present risk that an innocent person will be wrongly executed."[129]

Around the world, the death penalty has been regularly in the news for a host of reasons. Along with the ten moratorium resolutions that have been introduced in, and passed by, the U.N. General Assembly,[130] a number of American states have imposed moratoriums on executions.[131] In addition, more and more countries,[132] including

126. Baze v. Rees, 553 U.S. 35 (2008); Glossip v. Gross, 576 U.S. 863 (2015); Bucklew v. Precythe, 587 U.S. 119 (2019).

127. United States v. Sampson, Cr. No. 01-10384-MLW, 2015 WL 7962394, at *9 (D. Mass. Dec. 2, 2015) (citing State v. Santiago, 318 Conn. 1, 56 (2015)); People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).

128. State v. Gregory, 427 P.3d 621, 627 (Wash. 2018).

129. State v. Santiago, 122 A.3d 1, 66 (Conn. 2015).

130. *E.g.*, *Helping the World Achieve a Moratorium on Executions*, WORLD COAL. AGAINST THE DEATH PENALTY (Dec. 20, 2022), https://worldcoalition.org/campagne/helping-the-world-achieve-a-moratorium-on-executions/ ("On 15 December 2022, the United Nations General Assembly adopted the 9th resolution for a moratorium on the use of the death penalty with 125 votes in favor."); *see supra* note 122 and accompanying text discussing the tenth moratorium resolution.

131. *E.g.*, John Gramlich, *California Is One of 11 States that Have the Death Penalty But Haven't Used It in More Than a Decade*, PEW RSCH. CTR. (Mar. 14, 2019), https://www.pewresearch.org/short-reads/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ (discussing California's moratorium); *The Death Penalty in 2023*: *Year End Report*, DEATH PENALTY INFO. CTR. 13, https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf (last visited Feb. 17, 2025) (discussing Pennsylvania's moratorium).

132. *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976 (last visited Feb. 17, 2025) (listing countries that have abolished the death penalty since 1976).

Armenia[133] and Mongolia,[134] have explicitly rejected the death penalty's use.[135] As part of abolitionist efforts, several jurisdictions now openly refuse to extradite individuals to other countries if the accused might face the prospect of a capital prosecution and a potential death sentence.[136]

While anti-death penalty advocates urged the United States to vote in favor of the U.N. General Assembly's latest moratorium resolutions in 2022 and 2024, those lobbying efforts failed.[137]

---

133. Aurélie Plaçais, *Entry into Force of Armenia's Ratification of the European Protocol for Abolition in All Circumstances*, WORLD COAL. AGAINST DEATH PENALTY (Mar. 22, 2024),
https://worldcoalition.org/2024/03/22/entry-into-force-of-armenias-ratification-of-the-european-protocol-for-abolition-in-all-circumstances/.
In 2005, Armenia's constitution was amended to abolish capital punishment. Maia Khasia & Tsira Chanturia, *The Abolition of the Death Penalty and Its Alternative Sanction in South Caucasus: Armenia, Azerbaijan and Georgia*, PENAL REFORM INT'L 8 (Mar. 2012), https://cdn.penalreform.org/wp-content/uploads/2013/05/South-Caucasus-Research-Report-Death-Penalty-and-Alternatives-ENGLISH.pdf.

134. *Mongolia: Historic Vote Abolishes Death Penalty*, AMNESTY INT'L (Dec. 4, 2015), https://www.amnesty.org/en/latest/press-release/2015/12/mongolia-historic-vote-abolishes-death-penalty/;
Elbegdorj Tsakhia, *Opinion: My Country Abolished the Death Penalty. So Can Yours*, CNN, https://www.cnn.com/2023/10/29/opinions/opinion-my-country-abolished-the-death-penalty-so-can-yours-tsakhia/index.html (last updated Oct. 30, 2023, 4:52 AM);
Godfrey Marawanyika, *Zimbabwe Scraps Death Penalty 19 Years After Its Last Execution*, BLOOMBERG (Feb. 6, 2024, 12:48 PM), https://www.bloomberg.com/news/articles/2024-02-06/zimbabwe-scraps-death-penalty-19-years-after-its-last-execution.

135. *Death Penalty*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/death-penalty/ (last visited July 7, 2024) (noting that "112 countries had abolished the death penalty in law by the end of 2023").

136. Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189, 204 (2020); *see also* Ahmed Fathalla, *The United Nations Human Rights Committee: The Evolution of the Punishment of the Death Penalty*, 17 INTERCULTURAL HUM. RTS. L. REV. 47, 50 (2022) (noting in regard to General Comment 36 to the ICCPR, adopted by the Human Rights Committee, that "the Committee's view can be summarized as follows in relation to the States Parties" that "have abolished the death penalty": "They cannot deport, extradite or transfer persons to a [c]ountry in which they are facing criminal charges that carry the death penalty unless credible and effective assurances against the imposition of the death penalty have been obtained").

137. *U.S. Votes No, as Record Number of Nations Adopt UN Resolution for Global Moratorium on the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/news/u-s-votes-no-as-record-number-of-nations-adopt-un-resolution-for-global-moratorium-on-the-death-penalty (last updated Sept. 25, 2024);
Continued Strong Support for Global Moratorium on the Death Penalty, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-

Nevertheless, a record 125 nations overwhelmingly adopted the 2022 moratorium resolution—and then 130 countries, another record, chose to vote that way on the more recent December 2024 resolution.[138] These U.N. General Assembly votes signal an even greater promise for abolitionist efforts in the years to come, especially as the number of abolitionist countries continues to rise.[139] Abolitionist countries, such as Italy, have vocally advocated for a worldwide halt to executions for decades,[140] with the next moratorium resolution almost certain to come before the United Nations in 2026.[141]

The death penalty is a centuries-old practice now under siege. This Article highlights the effectiveness of international advocacy against capital punishment since the 1970s, when the U.N. General Assembly, after adopting the ICCPR, called for progressively restricting capital punishment[142] and Amnesty International launched its own global campaign against the punishment of death.[143] Forward

---

death-penalty-in-2024/international (last visited Feb. 17, 2025).

138. The votes on the moratorium resolutions are available on the website of the International Commission Against the Death Penalty. *UNGA Moratorium Resolution*, INT'L COMM'N AGAINST THE DEATH PENALTY, https://icomdp.org/unga/#2022 (last visited Feb. 17, 2025); *Adoption of the Tenth UNGA Resolution on a Moratorium on the Use of the Death Penalty*, INT'L COMM'N AGAINST DEATH PENALTY, https://icomdp.org/adoption-of-the-tenth-unga-resolution-on-a-moratorium-on-the-use-of-the-death-penalty/ (last visited Feb. 17, 2025).

139. The 22nd World Day Against the Death Penalty—an opportunity for civil society, political leaders, and anti-death penalty activists to mobilize against capital punishment—was celebrated on October 10, 2024. *"The Death Penalty Protects No One": A Look Back at Mobilization Efforts on the 22nd World Day Against the Death Penalty*, ECPM (TOGETHER AGAINST THE DEATH PENALTY) (Nov. 2024), https://www.ecpm.org/en/the-death-penalty-protects-no-one-a-look-back-at-mobilization-efforts-on-the-22nd-world-day-against-the-death-penalty%EF%BF%BC%EF%BF%BC/.

140. Emily Bengel, *Dying for the Rule of Law: Crime and Capital Punishment in Japan and Italy*, 29 MICH. STATE INT'L L. REV. 47, 71 (2021); Paul Marcus, *Capital Punishment in the United States, and Beyond*, 31 MELB. U. L. REV. 837, 848 n.60 (2007); *see also* Toni M. Fine, *Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment*, 30 COLUM. HUM. RTS. L. REV. 421, 426–27 (1999) (discussing Italy's role with respect to the 1994 moratorium resolution).

141. Carol Zimmermann, *Advocates Displeased with U.S. Vote Against Global Death Penalty Ban*, CATH. NEWS SERV. (Dec. 20, 2022), https://catholicreview.org/advocates-displeased-with-u-s-vote-against-global-death-penalty-ban/ (noting that the moratorium resolution "comes up every two years" in the U.N. General Assembly).

142. Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 273 (1993).

143. Behrmann & Yorke, *supra* note 22, at 9 n.30 ("At the 1977 Stockholm Conference Amnesty International laid the platform for their campaign against the death penalty.").

progress has been slow at times,[144] but Amnesty International's groundbreaking campaign led to the drafting and promulgation, in 1977, of the Declaration of Stockholm.[145] That Declaration, a significant milestone in which abolitionists from around the globe gathered at a conference in Sweden and called for the death penalty's universal abolition, was produced just months after the U.S. Supreme Court's *Gregg v. Georgia* (1976) decision declared executions to be constitutional.[146] *Gregg* was a clear setback for America's abolitionist movement, but one counterbalanced by the Declaration of Stockholm's clear and forceful renunciation of the punishment of death.

This Article also highlights the tension—indeed, the irreconcilable conflict—between Articles 6 and 7 of the ICCPR, as originally adopted. While Article 6 restricts the death penalty's use for certain categories of offenders, it nonetheless—on its face—permits death sentences for "the most serious" crimes.[147] Meanwhile, Article 7, like the UDHR, absolutely bars, without exception, the use of torture and CIDT.[148] A little historical background illuminates the inherent

144. Russell G. Murphy, *Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, 32 SUFFOLK TRANSNAT'L L. REV. 599, 608 (2009) ("Progress towards abolition is halting and slow."); *cf.* Jordan Steiker, *The American Death Penalty from a Consequentialist Perspective*, 47 TEX. TECH. L. REV. 211, 221 (2014) ("[J]udicial abolition should be welcomed in favor of the slow, seemingly inexorable decline of this unnecessary and costly anachronistic punishment.").

145. *Conference on the Abolition of the Death Penalty, Declaration of Stockholm*, AMNESTY INT'L (Dec. 11, 1977), https://www.amnesty.org/en/documents/act50/001/1977/en/. The Declaration of Stockholm—the product of an Amnesty International conference "composed of more than 200 delegates and participants from Africa, Asia, Europe, the Middle East, North and South America, and the Caribbean region"—stated that "[t]he death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life"; declared "total and unconditional opposition to the death penalty"; pledged "[i]ts commitment to work for the universal abolition of the death penalty"; called upon NGOs, "both national and international, to work collectively and individually to provide public information materials directed towards the abolition of the death penalty"; and asked "[a]ll governments to bring about the immediate and total abolition of the death penalty," and that "[t]he United Nations unambiguously to declare that the death penalty is contrary to international law." *Id.*; *see also* REPORT OF AMNESTY INTERNATIONAL CONFERENCE ON THE DEATH PENALTY, STOCKHOLM, SWEDEN, 10-11 DECEMBER 1977, § 11 (1978).

146. Gregg v. Georgia, 428 U.S. 153 (1976); *see also* James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 CAP. U. L. REV. 595, 601 (2000) ("Within months of the *Gregg* decision, the 1977 Stockholm Declaration called for universal abolition of the death penalty as the worthy goal of every modern civilized state.").

147. ICCPR, *supra* note 43, art. 6(2).

148. ICCPR, *supra* note 43, art. 7 ("No one shall be subjected to torture or to cruel,

conflict between those two ICCPR articles, why that conflict arose, and why it now needs to be resolved through the universal adoption of an existing ICCPR protocol aimed at the death penalty's abolition.[149] In 1966, before Amnesty International launched its anti-death penalty campaign, the U.N. General Assembly, in the ICCPR and at a time when capital punishment was still in use by many countries, had set out important restrictions on capital punishment[150] following considerable debate.[151] Article 6 of the ICCPR, plainly contemplating the death penalty's eventual abolition, provided in part: "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide."[152]

Other significant provisions of Article 6 of the ICCPR provided that "[n]o one shall be arbitrarily deprived of his life"; that "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence"; and that "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."[153] "Nothing in this article," another portion of Article 6 of ICCPR made clear, "shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."[154] Although Article 6 of the ICCPR thus contemplated and strongly encouraged abolition at a time when, as a practical matter, scores of nations were still using capital punishment, Article 7 of the ICCPR, the covenant's very next provision,

---

inhuman or degrading treatment or punishment.").

149. *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, art. 1(2) (Dec. 15, 1989) ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.") [hereinafter Second Optional Protocol].

150. Michelle Enchill, Book Notes, 44 STAN. J. INT'L L. 205, 206 (2008) (reviewing LILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA (2007)) (noting that the ICCPR bars the arbitrary infliction of the death penalty and restricts the execution of juvenile offenders and pregnant women). The ICCPR was adopted by U.N. General Assembly Resolution 2200A (XXI) on December 16, 1966, although the ICCPR did not enter into force until March 23, 1976. Igartúa v. United States, 626 F.3d 592, 620 n.34 (1st Cir. 2010) (Torruella, J., concurring in part). The ICCPR was not ratified by the U.S. Senate until June 8, 1992. *Id.* at 620.

151. Alice Storey, *The USA's Engagement with the UN's Human Rights Committee on the Question of Capital Punishment*, 17 INTERCULTURAL HUM. RTS. L. REV. 53, 57–58 (2022).

152. ICCPR, *supra* note 43, art. 6(2).

153. *Id.*, arts. 6(1), 6(4), 6(5).

154. *Id.*, art. 6(6).

unequivocally stated that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[155]

By the time it ratified the ICCPR, the United States was—as it continues to be—in the retentionist column, at least when considered as a whole in spite of individual states abolishing capital punishment. The U.S. Supreme Court's *Gregg v. Georgia* decision, which followed four years after the Court's *Furman* ruling, represented a big step backwards in the U.S., even as the international community, slowly but surely, moved toward abolition.[156] Following the U.N. General Assembly's adoption of the ICCPR, but before the ICCPR entered into force,[157] the U.S. Supreme Court outlawed capital punishment in *Furman*.[158] The Court held that American death penalty laws, as then applied, violated the U.S. Constitution's Eighth and Fourteenth

155. *Id.*, art. 7. When the U.S. Senate ratified the ICCPR, it declared that this phrase meant "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." Sharifi v. State, 993 So.2d 907, 920 (Ala. Crim. App. 2008); *accord* Estate of Cabello v. Fernandez-Larios, 157 F. Supp.2d 1345, 1361 (S.D. Fla. 2001) (quoting S. COMM. ON FOREIGN REL., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102nd Cong. (2d Sess. 1992), *as reprinted in* 31 I.L.M. 645, 646 (1992)).

156. *But cf.* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 20 (2002) (noting that, in spite of the post-*Gregg* growth of support in the U.S. for the death penalty, "the National Coalition Against the Death Penalty, later renamed the National Coalition to Abolish the Death Penalty, was formed" after *Gregg*; that other organizations, including "Amnesty International, the American Civil Liberties Union, the Southern Poverty Law Center, and the NAACP Legal Defense Fund," fought against capital punishment; and that "[w]hile the death penalty abolition movement remained relatively small through the 1980s and early 1990s, the movement's activities slowly increased").

157. Article 7 of the ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." ICCPR, *supra* note 43, art. 7. Due in part to a U.S. reservation to the ICCPR, the death penalty has, to date, not been classified by American courts under the rubric of torture. *E.g.*, State v. Allen, 626 S.E.2d 271, 287 (N.C. 2006) (holding that while Article 7 of the ICCPR "condemns torture," "we do not believe it is torturous to allow defendant to appeal his conviction and sentence"). Notably, however, the Vienna Convention on the Law of Treaties ("VCLT") forbids reservations "incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1151 U.N.T.S. 331 [hereinafter VCLT]. The Vienna Convention, signed by the United States on April 24, 1970, but not yet ratified by it, "is widely regarded, even by nonparties, as reflective of customary international law." Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 281 n.3 (1991). "Although the United States does not accept the entire Vienna Convention as customary law, the *Restatement (Third)* cites the Convention extensively and with respect to reservations lists, inter alia, 'the requirement confirmed by the Court that a reservation must be compatible with the object and purpose of the agreement.'" *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. b (AM. L. INST. 1987)).

158. Furman v. Georgia, 408 U.S. 238, 239 (1972).

Amendments.[159] The former amendment bars "cruel and unusual punishments," while the latter one guarantees "equal protection of the laws" and—as interpreted by the U.S. Supreme Court—incorporates the Eighth Amendment's tripartite prohibitions against excessive bail, excessive fines, and cruel and unusual punishments against the states.[160] Justice William Brennan's lengthy concurrence in *Furman* refers to "torture," "tortures," "torturous punishments," and "punishments of torture."[161] Also, the California Supreme Court's earlier ruling in *People v. Anderson* (1972) observed that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."[162] The terse, *per curiam* opinion in *Furman*, however, did not classify the death penalty *as* torture (instead categorizing the death penalty, as applied, merely as a "cruel and unusual punishment").[163]

Yet, just a few years later, relying in part on the United Nations' non-binding[164] Declaration on the Protection of All Persons from

---

159. *Id.*

160. U.S. CONST. amend. VIII; *see also* John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487 (2016) (discussing the interaction of the Eighth and Fourteenth Amendments).

161. *Furman*, 408 U.S. at 260, 263–65, 271–73, 279, 281 (Brennan, J., concurring).

162. People v. Anderson, 493 P.2d 880, 894 (Cal. 1972), *superseded by constitutional amendment as stated in* Strauss v. Horton, 207 P.3d 48, 90 (Cal. 2009). Many jurists have already seen the death penalty as a torturous practice. As the California Supreme Court wrote in *Anderson*: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out." *Id.* Way back in 1890, the U.S. Supreme Court itself acknowledged that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place." In re Medley, 134 U.S. 160, 172 (1890).

163. *Anderson*, 493 P.2d at 883; *see also* John D. Bessler, *What-Ifs and Missed Opportunities: The U.S. Supreme Court, Death Sentences and Executions, and the Fiftieth Anniversary of* Furman v. Georgia*, in* DEATH PENALTY IN DECLINE? THE FIGHT AGAINST CAPITAL PUNISHMENT IN THE DECADES SINCE *FURMAN V. GEORGIA* 21–22 (Austin Sarat ed., 2024) (discussing *Furman*).

164. Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMPAR. L. REV. 275, 300–01 (1994) (discussing the adoption of the non-binding declaration proclaimed in its preamble as a "guideline for all States and other entities exercising effective power"). Amnesty International, the NGO that launched an anti-death penalty campaign in the 1970s, was also instrumental in exposing acts of torture. Thomas F. Brier, Jr., *Obtaining Relief under the Convention Against Torture: On the Issue of Volition*, 7 PA. STATE J.L. & INT'L AFFS. 418, 424–25 (2019).

Being Subjected to Torture (1975),[165] another federal court—the U.S. Court of Appeals for the Second Circuit—forthrightly declared in *Filártiga v. Peña-Irala* (1980) that "official torture is now prohibited by the law of nations."[166] Then, in 1984, the U.N. General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the Convention Against Torture or CAT), which specifically defines *torture* as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" on someone for a prohibited purpose.[167] Despite these important legal developments, in the post-*Furman* era, thirty-five states reenacted capital punishment statutes and Congress passed a law making aircraft piracy resulting in death a capital

165. G.A. Res. 3452 (XXX) (Dec. 9, 1975); *see also* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) (noting how the Second Circuit in *Filártiga v. Pena-Irala* (1980) relied on the U.N. declaration "as a definitive statement of norms of customary international law prohibiting states from permitting torture").

166. Filártiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) ("[W]e conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous . . . ."); *accord id*. at 883 ("Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. The international consensus surrounding torture has found expression in numerous international treaties and accords.") (citation omitted); *see* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 399 n.152 (1985) ("On December 10, 1984, the thirty-sixth anniversary of the signing of the Universal Declaration, the UN General Assembly adopted a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which not only codifies the norms of customary international law expressed in the Declaration on Torture (and confirmed in *Filártiga*), but also provides for procedures to implement its prohibition of torture.") (citing Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975), *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS § 480.1 (1985)); Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) ("[W]e ruled [in *Filártiga*] that '*official* torture is now prohibited by the law of nations.'") (quoting *Filártiga*, 630 F.2d at 884); Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 222 n.196 (1994) (observing that *Filártiga* was "[t]he first case to use customary law to protect individual liberties") (citing *Filártiga*, 630 F.2d at 888–89).

167. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, 94 T.I.A.S. 1120.1, 1465 U.N.T.S. 85 [hereinafter CAT]. The CAT entered into force on June 26, 1987, and it was ratified by the United States on October 21, 1994. Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 F. Supp.2d 375, 382 (E.D.N.Y. 2008); *see also* Jon Bauer, *Obscured by "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence under the Convention Against Torture*, 52 COLUM. HUM. RTS. L. REV. 739, 791–92 (2021) (noting that "[t]he CAT developed from a declaration on torture adopted by the U.N. General Assembly in December 1975" and that the declaration "was a response to a campaign to abolish torture launched by Amnesty International in the early 1970s").

offense.[168] In this post-*Furman* context, the U.S. Supreme Court—while renouncing torture as an Eighth Amendment violation—retreated from *Furman* and reversed course, upholding the constitutionality of Georgia, Florida, and Texas death penalty statutes in *Gregg* and two companion cases.[169]

This Article is divided into two parts. Part I traces the growth of the international human rights system and movement, with a specific focus on historic transnational advocacy networks to achieve progress in protecting human rights. Part II then describes the modern international campaign to abolish capital punishment, detailing the role of nation-states and NGOs in leading that effort.[170] In highlighting these activities, Part II also lays out the advocacy and legal framework (i.e., classifying the death penalty under the rubric of torture) for the movement to be successful in barring state-sanctioned killing. In particular, this Article calls for the recognition of

168. Gregg v. Georgia, 428 U.S. 153, 179–80 (1976).

169. State v. Addison, 7 A.3d 1225, 1231 (N.H. 2010) (noting that, in 1976, the U.S. Supreme Court upheld the post-*Furman* statutes of Georgia, Florida, and Texas but rejected as unconstitutional the mandatory death penalty statutes of North Carolina and Louisiana); Gregg v. Georgia, 428 U.S. 153, 206–07 (1976); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976). In *Gregg*, the Supreme Court wrote that the "American draftsmen" of the Eighth Amendment, in adopting the "cruel and unusual punishments" prohibition also found in the English Bill of Rights (1689), "were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment.'" *Gregg*, 428 U.S. at 169–70. The Supreme Court continues to denounce torture and barbaric punishments as Eighth Amendment violations. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) ("The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. 'Punishments of torture,' for example, 'are forbidden.' These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.") (citing Hope v. Pelzer, 536 U.S. 730 (2002); quoting Wilkerson v. Utah, 99 U.S. 130, 136 (1879)). However, in rejecting legal challenges to capital punishment, the Court has—to date—only read the "cruel and unusual punishments" prohibition in the death penalty context to bar antiquated methods of executions such as burning alive, disemboweling, and drawing and quartering that had fallen out of use for a long period of time before the Eighth Amendment's adoption. Bucklew v. Precythe, 587 U.S. 119, 130–31 (2019).

170. Faraz Shahlaei, *When Sports Stand Against Human Rights: Regulating Restrictions on Athletes' Speech in the Global Sports Arena*, 38 LOY. L.A. ENT. L. REV. 95, 105–06 (2018) ("In its charter, the U.N. expressly acknowledges NGOs as legitimate sources for consultation in their areas of competency.").

a *jus cogens* norm[171] prohibiting the death penalty's use.[172] This was the outcome sought by a group of more than 20 international law scholars at the 8th World Congress Against the Death Penalty held in Berlin, Germany, in November 2022.[173] In their statement, the scholars emphasized: "[t]he temporary exception in ICCPR article 6(2) which allows for the application of the punishment for the 'most serious crimes,' is now starkly brought into focus through article 6(6) which states '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment.'"[174] The printed statement of the scholars also stressed that "[t]his is a time-sensitive feature, which allows us to question the retentionist member states' claims they can justifiably continue to use the death penalty in perpetuity."[175]

---

171. *Jus cogens* norms are "those peremptory international law norms from which states may not derogate." Al Shimari v. CACI Premier Technology, Inc., 368 F. Supp.3d 935, 944 (E.D. Va. 2019). The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." VCLT, *supra* note 157, art. 53; *accord* Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012) ("A jus cogens norm, also known as a 'peremptory norm of general international law,' can be defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'"). A *jus cogens* norm "stems from values held to be fundamental and universal, violations of which are 'acts that the laws of all civilized nations define as criminal.'" Estate of Hernandez-Rojas v. United States, No. 11-cv-0522-L (DHB), 2014 WL 3699929 (S.D. Cal. July 24, 2014) (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 2014)). "Norms of such a character define the basic rights of the human person. They are the concern of all states, and they bind even those nations that consistently object to them." *Id.*

172. Although capital punishment has previously been considered a "lawful sanction," it is impossible to administer the death penalty without making use of official and torturous death threats—a reality I have described elsewhere in calling for the recognition of a *jus cogens* norm prohibiting capital punishment. *See* John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norming Barring Executions*, 79 MONT. L. REV. 7 (2018) [hereinafter Bessler, *The Abolitionist Movement Comes of Age*]; John D. Bessler, *The Law's Evolution: From Medieval Executions to a Peremptory, International Law Norm Against Capital Punishment*, 3 BECCARIA: REVUE D'HISTOIRE DU DROIT DE PUNIR 255 (2017) [hereinafter Bessler, *The Law's Evolution*].

173. *Abolition of the Death Penalty as a Peremptory Norm of General International Law (Jus Cogens)—On the Occasion of the 8th World Congress Against the Death Penalty* (Berlin, 15–18 November 2022), UNIVERSIDAD DE CASTILLA [hereinafter 8th World Congress],
https://blog.uclm.es/luisarroyozapatero/wp-content/uploads/sites/188/2022/11/Manifiesto_EN.pdf (last visited Feb. 17, 2025).

174. *Id*. at 2.

175. *Id*.

I. "THE WORLD OF THE FUTURE IS IN OUR MAKING":[176] THE BIRTH OF TRANSNATIONAL ADVOCACY NETWORKS AND THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS

A. A SHORT HISTORY OF TRANSNATIONAL ADVOCACY NETWORKS

International law can be a tremendous force for good, although change often takes considerable time.[177] The history of the use of international law to prohibit slavery is a powerful example of how treaties can shape societies.[178] "In the nineteenth century," one scholar, Jocelyn Getgen Kestenbaum, explains, "states began taking concrete legal steps toward abolition, first by suppressing the slave trade, prohibiting the Trans-Atlantic and East African Slave Trades through unilateral declarations and bilateral or multilateral treaties."[179] "The movement for the abolition of slavery," another legal commentator, Renee Colette Redman, concurs, "began at the beginning of the nineteenth century when many European nations and the United States outlawed the importation of African slaves."[180] "At the same time," Redman observes, "many of the same nations entered into bilateral and multilateral treaties that denounced the institution of slavery and provided for the cessation of the slave trade between themselves."[181] "The work of the League of Nations was the turning point," Redman emphasizes, noting that the work, which

176. In *Tomorrow Is Now* (1963), Eleanor Roosevelt wrote: "The world of the future is in our making. Tomorrow is now." BEN FFRANCON DAVIES ET AL., TIMELINES OF EVERYONE: FROM CLEOPATRA AND CONFUCIUS TO MOZART AND MALALA 213 (2020).

177. *E.g.*, Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 517 (2022) ("International law . . . served to legitimate the violent, large-scale abduction and forced removal of millions of Africans to the Americas between the 16th and 19th centuries."); John D. Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 SANTA CLARA L. REV. 467, 575 (2021) [hereinafter Bessler, *The Rule of Law*] ("The law can be slow to change, just as it takes time for a country—or the international system—to build up a Rule of Law ethic and tradition.").

178. Contemporary forms of slavery still exist, but the prohibition of slavery has long been considered a *jus cogens* norm of international law. A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law*, 39 VA. J. INT'L L. 303, 305, 310–11 (1999).

179. Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 517–18 (2022).

180. Renee Colette Redman, *The League of Nations and the Right to Be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law*, 70 CHI. KENT L. REV. 759, 760 (1994).

181. *Id*.

began in 1924, led to the Slavery Convention of 1926.[182] "[W]hile the promulgation of the Slavery Convention was significant," Redman adds, "the real significance of the League's work is that it elevated the right to be free from enslavement to a fundamental human right under customary international law by persuading most of the world to abolish slavery and the slave trade."[183] "International law," William Schabas, a leading scholar, explains in his magisterial survey of customary international law, "has two principal sources, treaties and custom, the latter identified on the basis of 'practice accepted as law'."[184]

The women's suffrage movement, which had learned valuable lessons from anti-slavery activists, is another example of how global activism altered world history. "[T]he movement for the abolition of the slave trade and slavery involved transborder activism by nongovernmental, civil-society organizations that is linked in important ways to contemporary international activism," writes another scholar, Jenny Martinez, who observes of what happened in the interim: "Later campaigns for reform in other areas—for example, the movement for women's suffrage—grew directly out of the abolition effort, as activists who had learned organizing techniques in the context of abolitionism turned to other issues."[185] As Margeret Keck and Kathryn Sikkink, the authors of *Activists Beyond Borders* (2014),[186] explain: "The transnational antislavery campaign provided a 'language of politics' and organizational and tactical recipes for other transnational campaigns as well. The women's suffrage campaign initially drew many of its activists and tactics from the antislavery movement."[187] The successful women's suffrage

182. *Id*. at 761; *see also id*. 761–62 ("The signatories to the [Slavery] Convention [of 1926] agreed to prevent and suppress the slave trade and to work 'progressively' towards the complete abolition of slavery within their jurisdictions. Even though it was the first time international legislation sought to abolish slavery and the slave trade, the mere promulgation of the Slavery Convention did not establish slavery as a violation of customary international law. The notion of modern international law, of which customary international law is a part, developed in the nineteenth century during the same period in which the eradication of slavery was progressing.").

183. *Id*. at 763–64; *see also id.* at 764 (discussing "extensive follow-up work after the Slavery Convention was signed" and observing that "[t]he League's work was significant even though it did not completely eradicate slavery").

184. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS, *supra* note 101, at 1.

185. Jenny S. Martinez, *Human Rights and History*, 126 HARV. L. REV. F. 221, 234 (2013).

186. KECK & SIKKINK, *supra* note 6.

187. Margaret Keck & Kathryn Sikkink, *Historical Precursors to Modern Transnational Social Movements and Networks*, *in* GLOBALIZATIONS AND SOCIAL MOVEMENTS: CULTURE, POWER, AND THE TRANSNATIONAL PUBLIC SPHERE 35, 37–38 (John A.

movement was, itself, fueled by a quest for human dignity and a revulsion to discrimination,[188] including at an international anti-slavery convention,[189] and then led by women with significant international expertise.[190]

Just as the anti-slavery and women's suffrage movements drew strength from transnational activism and global solidarity,[191] the use of international treaties and advocacy to advance human rights and health is nothing new.[192] For example, in the nineteenth and twentieth centuries, International Sanitary Conferences "generated the first uses of international law for public health purposes, and led to the creation of the first international health organizations."[193] There has been an even greater focus on international legal instruments since World War II to promote human rights, with more extant treaties and the tradition of international cooperation—and international agreements—having a well-established pedigree.[194]

Guidry et al. eds., 2000).

188. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance*, 10 IND. J. GLOB. LEGAL STUD. 45, 68-69 (2003) ("In April 1919, a joint delegation of the International Council of Women and the Inter-Allied Conference of Women Suffragists made a presentation to the Commission on the League of Nations.").

189. Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 659 (1996) (discussing gender discrimination at the World Anti-Slavery Convention in London in 1840 and how women delegates such as Lucretia Mott, the founder of the first Female Anti-Slavery Society, and Elizabeth Cady Stanton, the wife of an abolitionist leader, were never seated and "were forced to sit passively in the galleries").

190. *E.g.*, Jeanne M. Woods, *Travel that Talks: Toward First Amendment Protection for Freedom of Movement*, 65 GEO. WASH. L. REV. 106, 115 n.78 (1996) (noting how "Jane Addams, a founder of Hull House and the first woman to receive the Nobel Peace Prize, traveled throughout Europe in an effort to mediate an end to the hostilities leading to World War I" and "led a delegation of American women to the International Women's Suffrage Association Conference in the Hague in April 1915") (citation omitted).

191. *E.g.*, Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 462–63 (2008).

192. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1576–77 (2006) (discussing equality and observing, "[T]he impression that the American civil liberties community turned only recently to international human rights as sources of instruction ignores the history of abolition and of women's suffrage, two great human rights movements that changed America's law.").

193. David P. Fidler et al., *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics*, 35 J.L. MED. & ETHICS 616, 619 (2007).

194. *See, e.g.*, Caroline Bettinger-Lopez, et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL'Y 337, 343 (2011) (noting that W.E.B. Du Bois articulated an international human rights objection to domestic racial segregation as early as 1923).

In prior centuries, the anti-slavery and women's suffrage movements[195] were both very international in character,[196] even though their effects were felt closer to home.[197] In part, the growth of NGOs and advocacy networks drove the success of such movements,[198] with the number and activities of NGOs expanding in the decades to come.[199] Whereas "[i]nternational law, as its name suggests, deals with relations between sovereign states, not between states and individuals," the "international human rights movement is premised on the belief that international law sets a minimum standard . . . for the treatment of human beings generally."[200] "Today, a huge body of international treaties governs the protection and promotion of human rights," explains Professor William Schabas, noting how that was not the case before World War II.[201]

The anti-slavery campaign—which began in eighteenth-century America[202] and England[203] but attained substantial success in the

195. Susan Hinely, *The Global "Parliament of Mothers": History, the Revolutionary Tradition, and International Law in the Pre-War Women's Movement*, 87 CHI.-KENT L. REV. 439, 439 (2012).

196. *E.g.*, Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 337 n.231 (2003).

197. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 442 (2004) ("the antislavery campaign and the women's movement were international; our national advocates drew heavily on their foreign counterparts for ideas and arguments").

198. Jochen von Bernstorff, *New Responses to the Legitimacy Crisis of International Institutions: The Role of 'Civil Society' and the Rise of the Principle of Participation of "The Most Affected" in International Institutional Law*, 32 EUR. J. INT'L L. 125, 140 (2021) (noting how NGOs like Amnesty International and Human Rights Watch "became ever more important actors" in the 1980s and 1990s, and how more than 4,000 NGOs were represented at the World Conference on Women in Beijing in 1995).

199. Joseph S. Nye, Jr., *The Information Revolution and the Paradox of American Power*, 97 AM. SOC'Y INT'L L. PROC. 67, 70 (2003) (noting that, in 1956, NGOs "numbered nearly a thousand," and "in 1970, nearly two thousand," but pointing out that number had grown "to some twenty-six thousand during the 1990s alone").

200. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1396-97 (5th Cir. 1985); *see also id.* at 1397 (listing "generally accepted" standards of human rights, including "such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained").

201. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS, *supra* note 101, at 1; *see also id.* ("None of these legal texts existed when the Charter of the United Nations was adopted, on 26 June 1945, although shadows of the system had begun to emerge following the First World War initiatives, and even earlier, on such matters as the rights of religious minorities, the protection of refugees, and the suppression of the slave trade.").

202. Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257, 273 (2010) (discussing the formation of "America's first anti-slavery society, a tiny coalition of Quakers," in 1775).

203. Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9

following century,[204] in part through the amplification of compelling slave narratives[205]—is regularly designated as "the first successful international human rights campaign."[206] "Most historians of human rights describe the nineteenth century anti-slavery movement as the first organized international human rights campaign, as activists in multiple countries worked to abolish both the slave trade and slavery itself."[207] "[T]he first major antislavery movement, began when the Society for Effecting the Abolition of the Slave Trade was formed when twelve men gathered on May 22, 1787 at 2 George Yard in London."[208] As that source records the society's initial tight-knit group but its lofty goal: "Thomas Clarkson, William Wilberforce, and ten others agreed on a preposterous mandate—to abolish slavery in the British Empire at a time when even the Church of England had slaves."[209]

While there are multiple antecedents to the modern international human rights law movement,[210] the campaigns to abolish slavery and the Transatlantic slave trade, to fight racial and gender discrimination, and to establish humanitarian principles for the law of

---

NW. U. J. INT'L HUM. RTS. 123 (2011).

204. Danielle M. Conway, *Black Women's Suffrage, the Nineteenth Amendment, and the Duality of a Movement*, 13 ALA. C.R. & C.L. L. REV. 1, 17 (2021) ("Even though Congress abolished the African slave trade in 1808, expansion into western territories took hold, and slavery extended with it."); City of Memphis v. Greene, 451 U.S. 100, 131 (1981) (White, J., concurring) ("The Civil Rights Act of 1866, was enacted pursuant to § 2 of the Thirteenth Amendment. That Amendment had been adopted by the States in 1865 after the close of the Civil War. It announced the legal demise of slavery."); Cheryl I. Harris, *"Too Pure an Air:" Somerset's Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 443 (2007) ("[S]lavery did not formally end in England until 1833 when Parliament finally abolished it.").

205. One scholar has explored the relationship between the anti-slavery and anti-death penalty movements. Narratives of the formerly enslaved shaped the anti-slavery movement, just as the compelling stories of death row exonerees have influenced the trajectory of the anti-death penalty movement. *See* BHARAT MALKANI, SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITION (2021).

206. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 554 (2008); *see also* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 13-14 (2012) (arguing that the nineteenth century's anti-slavery movement "was the first successful international human rights campaign"); *accord* SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 330 (3d ed. 2013).

207. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 n.30 (2014).

208. Kara, *supra* note 203, at 123.

209. *Id.*

210. *See* Philip Alston, Book Review, *Does the Past Matter?*, 126 HARV. L. REV. 2043, 2043 (2013) (reviewing JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012)).

war were watershed moments.[211] "The struggle against slavery and the slave trade in the late eighteenth century is . . . usually referred to as one of the most important antecedents of international human rights law," Swedish law professor Vladislava Stoyanova stresses,[212] with other scholars noting how the international community came together to bar cruel treatment and protect prisoners of war,[213] including in the Third Geneva Convention,[214] and to pass conventions prohibiting discrimination based on race and gender.[215] The

211. *E.g.*, Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 544–45 (2001) (noting the following four antecedents: (1) "the laws of war—international humanitarian law"; (2) protections for "nationals residing in foreign states"; (3) "the attribution of individual criminal liability to Nazi war criminals"; and (4) the development of minority rights treaty regimes to protect national minorities during the League of Nations era"); Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38 MICH. J. INT'L L. 359, 361 (2017) ("The struggle against slavery and the slave trade in the late eighteenth century is thus usually referred to as one of the most important antecedents of international human rights law."); Edwin Rekosh, *Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe*, 13 UCLA J. INT'L L. & FOREIGN AFFS. 55, 59 n.9 (2008) ("International human rights treaties promulgated by the United Nations had their historical antecedents in the French Declaration des Droits de l'Homme, the U.S. Bill of Rights and international treaties and customary international law on issues such as the slave trade and the conduct of war, among others, but the first efforts to systematize international norms on human rights date from the aftermath of World War II."); Zack Bowersox, *Workers' Rights and the Olympic Games: The International Olympic Committee and Institutional Law Making*, 52 CAL. W. INT'L L.J. 423, 435 n.55 (2022) ("The first humanitarian code of conflict, the Lieber Code, only applied to the U.S. North in the U.S. Civil War in 1863. Also in 1863 was the first Geneva Convention. In 1874 a conference in Belgium produced the Declaration Concerning the Laws and Customs of War.").

212. Stoyanova, *supra* note 211, at 360.

213. *E.g.*, Jessica O'Connor, Note, *Do as We Say, Not as We Do: The Changing Role of America as Torture Prosecutor to Torture Perpetrator*, 16 RUTGERS J.L. & RELIGION 216, 224–25 (2014).

214. Srividhya Ragavan & Michael S. Mireles Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 662 (noting that while "torture" is "undefined," Article 17 of the Third Geneva Convention "prohibits the infliction of physical or mental torture for the purpose of obtaining information" and provides that a prisoner of war "may not be 'threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind'").

215. Berta Esperanza Hernández-Truyol & Mariana Ribeiro, *María Lugones's Work as a Human Rights Idea(l)*, 18 BERKELEY LA RAZA L.J. 29, 33 n.22 (2007) (discussing the U.N. General Assembly's adoption of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), 5 I.L.M. 352 (1966), entered into force Jan. 4, 1969, and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), U.N.G.A. Res. 280, 19 I.L.M. 33 (1980), adopted by the U.N. General Assembly on Dec. 18, 1979, and entered into force Sept. 3, 1981). "According to the Inter-American Court, 'the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*." Francisco J. Rivera Juaristi, "Dignity and Equality," *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 28 (Humberto Cantú

international character of the anti-slavery campaign became an incredibly valuable, and pioneering, template for many future human rights campaigns, including the movement to abolish capital punishment.[216] "[T]he slave-trade treaty regime," Jenny Martinez recalls, "was the result of a social movement using many of the tools of advocacy common in international human rights activism today—petitions, speaking tours, boycotts, rallies, and so forth."[217] America's own anti-lynching campaign drew moral support from abroad, as prominent speakers, such as Ida B. Wells, traveled, wrote, spoke out against lynch mobs, and gave lectures.[218]

It can take time for a *jus cogens* norm to develop, with the *jus cogens* concept itself gaining lasting traction in international legal discourse since the Statute of the International Court of Justice delineated the sources of international law[219] and the Vienna Convention on the Law of Treaties specifically referenced the

---

Rivera ed., 2024).

216. *E.g.*, Randall H. Cook, Note, *Dynamic Content: The Strategic Contingency of International Law*, 14 DUKE J. COMPAR. & INT'L L. 89, 118–19 (2004).

217. Jenny S. Martinez, *Human Rights and History*, 126 HARV. L. REV. F. 221, 226 (2013).

218. Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC'Y REV. 275, 302 (2019) ("Radical activist Ida B. Wells had drummed up a considered amount of domestic and international support for her anti-lynching crusade."); David L. Hudson Jr., *Ida B. Wells: Fearless Journalist from Memphis Who Changed the World*, 54 TENN. BAR. J. 14, 16 (2018) ("Wells continued her attacks against lynching as a journalist in Chicago and an international lecturer in Great Britain. She compiled an anti-lynching tract called *The Red Record* (1895) that detailed the practice of lynching across the country."); Carolyn L. Karcher, *The National Citizen's Rights Association: Precursor of the NAACP*, 5 ELON L. REV. 107, 131 (2013) (noting that "Ida B. Wells launched her international anti-lynching campaign with a lecture tour of the British Isles in Spring 1893"); *see also* Sarah L. Silkey, *Southern Politicians, British Reformers, and Ida B. Wells's 1893–1894 Transatlantic Antilynching Campaign*, *in* THE U.S. SOUTH AND EUROPE: TRANSATLANTIC RELATIONS IN THE NINETEENTH AND TWENTIETH CENTURIES 145, 160 (Cornelis A. van Minnen & Manfred Berg eds., 2013) ("Wells's antilynching activism increased the perceived international 'costs' of lynching for the South during a critical period of social and economic upheaval."). Activists such as Sister Helen Prejean—who observed in a recent interview that she has "watched six human beings be killed by execution"—have been similarly indefatigable in speaking out against capital punishment as a violation of universal human rights, including as a violation of human dignity. *Interview of Sister Helen Prejean by Symposium Editor Andres Lopez*, 17 INTERCULTURAL HUM. RTS. L. REV. 31, 35, 40 (2022).

219. Article 38 of the Statute of the International Court of Justice delineates these four sources of international law: (a) "international conventions, whether general or particular"; (b) "international custom, as evidence of a general practice accepted as law"; (c) "the general principles of law recognized by civilized nations"; and (d) "judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

concept.[220] "The development of the concept of *jus cogens* norms," one federal district court emphasized in 2019, "has proceeded as the 'status of individuals under international law has undergone a fundamental change' since World War II, such that 'individuals are now said to possess substantive international rights vis-à-vis states.'"[221] "This change," the court observed, "has corresponded with a shift in the emphasis of international law from 'the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States.'"[222] "[T]he 'irreducible element' of international law," the court stressed, "has become 'the sovereignty of the individual, not the sovereignty of states.'"[223] "Prior to discovery of the Nazi atrocities inflicted upon millions of people," one legal commentator writes, "the only rights afforded individuals were those their national governments provided."[224]

B. HUMAN RIGHTS, THE U.N. CHARTER, AND THE UDHR

Many political theorists and thinkers[225] have developed the

220. VCLT, *supra* note 157, art. 53 ("[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). Article 64 of the Vienna Convention also states: "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64. One judge, drawing upon history, gives this example of the law's development: "When the Constitution was enacted, there was no *jus cogens* norm prohibiting slavery. Today there is, and that would restrict the States' sovereignty to reinstitute slavery with or without the Constitution." Colt v. New Jersey Transit Corp., No. 72, 2024 WL 4874365, at * 16 n.4 (N.Y. Ct. App. Nov. 25, 2024) (Wilson, C.J., concurring).

221. Al Shimari v. CACI Premier Technology, Inc., 368 F. Supp. 3d 935, 955 (E.D. Va. 2019).

222. *Id.* at 955–56.

223. *Id.* at 956.

224. David W. Johnston, Comment, *Cuba's Quarantine of AIDS Victims: A Violation of Human Rights?*, 15 B.C. INT'L & COMPAR. L. REV. 189, 190 (1992); *see also id.* at 190 ("The idea that there exist certain immutable human rights which transcend national boundaries, and which all states must respect, is a relatively new phenomenon within the international community."); *id.* at 190–91 ("Documents such as the Magna Carta, the Bill of Rights, and the Charter of Privileges address the rights of citizens living within a society as distinct from the rights of individuals as human beings. Protecting the rights of individuals was not a traditional function of international law.").

225. *E.g.*, ZHIYONG DONG, HUMAN RIGHTS AND ABSOLUTE VALUE 202 (2021) ("[T]he term 'human rights' was first postulated by Hugo Grotius some 370 years ago in his

concept of "human rights" over the centuries,[226] with international human rights closely associated with the United Nations, the UDHR, and later-adopted international human rights covenants and treaties.[227] Just as the birth of international law, often traced to theologian St. Thomas Aquinas and Dutch diplomat Hugo Grotius,[228] is centuries old,[229] so too are movements for social and penal

book *The Rights of War and Peace*."); Melissa Robbins, Comment, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 297 n.174 (2005) ("During the 17th and 18th centuries, political thought was dominated by European philosophers such as Locke ('the father of liberal democracy' and the first to use the term 'human rights' within its current meaning), Rousseau, Grotius, Voltaire and Hume, whose theories laid the groundwork for modern human rights law."); Michaël Fischer, Note, *The Human Rights Implications of a "Cultural Defense"*, 6 S. CAL. INTERDISC. L.J. 663, 691–92 (1998) ("The term 'human rights' is a modern name for the natural rights or natural law philosophies that were postulated by such thinkers as Locke, Mill, and Jefferson in the seventeenth and eighteenth centuries. These philosophers based their ideas on the general notion that all people, through nothing more than being a member of the human family, have certain universal rights to decent treatment.").

226. Mark D. Kielsgard, *Critiquing Cultural Relativism: A Fresh View from the New Haven School of Jurisprudence*, 42 CUMB. L. REV. 441, 449 (2012) (discussing the writings of St. Thomas Aquinas on natural law; Hugo Grotius, "the father of international law"; and Rousseau, Locke, and Hobbes, who developed "social contract theories").

227. Elizabeth J. Ireland, Note & Comment, *Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of* R.R. v. Poland, 38 N.C. J. INT'L L. & COM. REG. 651, 660 (2013) ("The term 'human rights' first entered the realm of international law in 1945 under the United Nations Charter, a universal treaty made by member states. Since then human rights have been further developed through treaty bodies such as the Human Rights Committee, the Convention on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child."); Jorge A. Vargas, *Privacy Rights under Mexican Law: Emergence and Legal Configuration of a Panoply of New Rights*, 27 HOUS. J. INT'L L. 73, 96 n.71 (2004) ("[T]he modern term 'human rights' was coined by the United Nations (UN) in the UN Charter of 1945, and especially in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.").

228. Juan Carlos de las Cuevas, *Exceptional Measures Call for Exceptional Times: The Permissibility under International Law of Humanitarian Intervention to Protect a People's Right to Self-Determination*, 37 HOUS. J. INT'L L. 491, 495–96 (2015); James W. Smith III, *Unilateral Humanitarian Intervention and the Just Cause Requirement: Should the Denial of Self-Determination to Indigenous People Be a Valid Basis for Humanitarian Intervention? Yes*, 33 AM. INDIAN L. Rev. 699, 703 (2007).

229. Anthony Anghie, *Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations*, 41 TEX. INT'L L.J. 447, 448–49 (2006) (describing the Peace of Westphalia, which ended the Thirty Years Year, "as signifying the birth of international law and the modern state system") (citing LOUIS HENKIN ET. AL, INTERNATIONAL LAW: CASES AND MATERIALS (2d ed. 1987); Leo Gross, *The Peace of Westphalia 1648–1948*, 42 AM. J. INT'L L. 20 (1948)).

reform.[230] Opposition to torture[231] and capital punishment dates back to the Enlightenment,[232] with the Quakers[233] and writers such as Voltaire, Baron de Montesquieu, the Italian philosopher Cesare Beccaria, and Dr. Benjamin Rush—a signer of the Declaration of Independence[234]—offering their own critiques of capital punishment.[235] The modern movement to promote and protect

230. Craig S. Lerner, *The Puzzling Persistence of Capital Punishment*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y 39, 40 (2024) ("For over 250 years, Western intellectuals have been pronouncing capital punishment a barbarity doomed to be swept into the dustbin of history. Cesare Beccaria was the first to make the case for the abolition of the death penalty, and the cause was quickly taken up by such luminaries as Voltaire, Jeremy Bentham, and Victor Hugo. Success was achieved in far-flung locations—Portugal banned the death penalty in 1867 and within the United States, the State of Michigan did so in 1846 . . . .").

231. *E.g.*, Richard Delgado, *Watching the Opera in Silence: Disgust, Autonomy, and the Search for Universal Human Rights*, 70 U. PITT. L. REV. 277, 284 (2008) (noting Voltaire's "work started a social re-evaluation of torture, and by the late 1700s several nations, including Sweden, Prussia, Austria, and Bohemia, had abolished it") (reviewing LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007)); Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 172, at 8–9 (discussing the translation of Beccaria's book that opposed capital punishment and torture and noting that the first jurisdictions to abolish torture were Sweden in 1734 and Prussia in the 1740s and 1750s).

232. *See, e.g.*, Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMPAR. L. 46, 55 (2023).

233. Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 155 (2000) ("In seventeenth-century England, the Quakers and the Levellers also opposed capital punishment. As one Leveller argued: 'If the power of life and death be only in the hand of the Lord, then surely he is a murderer of the creation that takes away the life of his fellow creature man, by any law whatsoever.'"); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 517 n.231 (2005) ("Due to Quaker influence, Pennsylvania played a leading role in curtailing the use of the death penalty."); *see also* JOHN BELLERS, ESSAYS ABOUT THE POOR, MANUFACTURES, TRADE, PLANTATIONS, AND IMMORALITY, AND OF THE EXCELLENCY AND DIVINITY OF INWARD LIGHT (1699) (using Christian morals and philosophy to argue against capital punishment in his essay "Some Reasons against putting of Felons to Death"); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 74 (1989) ("On both sides of the Atlantic, many of those who worked for the revision of the penal laws and abolition of capital punishment were Quakers: John Fothergill and John Coakley Lettsom in England, Caleb Lownes in Philadelphia, Thomas Eddy in New York.").

234. Behrmann & Yorke, *supra* note 22, at 52 ("In 1787, the American abolitionist, Benjamin Rush, lectured against the death penalty. In 1797, he published a pamphlet, *Considerations on the Injustice and Impolicy of Punishing Murderers by Death*, in which he argued that the punishment was 'contrary to reason.'").

235. Elsewhere, I have documented the influence of Enlightenment figures, including Voltaire, Montesquieu, and Beccaria, in shaping anti-death penalty discourse. JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION (2014); JOHN D. BESSLER, THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD (2018); JOHN D. BESSLER, THE

international human rights is of a far more recent vintage than Enlightenment efforts made at a time when slavery was still in use, overt discrimination was rampant, and women could not yet vote in elections.[236] In the United States, women were not guaranteed the right to vote until the Nineteenth Amendment's ratification in 1920, the same year women became formally eligible for membership in the American Society of International Law.[237]

To be sure, the United Nations has played a key role in advancing human rights. The U.N. Charter was adopted and entered into force in

---

BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE (2019) [hereinafter BESSLER, THE BARON AND THE MARQUIS]; BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66; Bessler, *The Long March Toward Abolition*, *supra* note 80; Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 172.

236. Jessica A. Platt, *Female Circumcision: Religious Practice v. Human Rights Violation*, 3 RUTGERS J.L. & RELIGION 5, 14 n.57 (2001) ("The International Human Rights Movement began during the Second World War 'with the realization of the enormities of Hitler and the shock of the Holocaust.'") (citing LOUIS HENKIN ET AL., HUMAN RIGHTS 274 (1999)); Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY L. 9, 36 (2010) ("The modern international human rights movement began with the United Nations (U.N.) Charter in 1945."); Laura Rose Matteis, *Stay Away from the Neck: Why Police Chokeholds and Other Neck Restraints Violate International Human Rights*, 38 T. JEFFERSON L. REV. 101, 119 (2015) ("The international human rights movement began to gain strength when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on December 10, 1948. This Declaration was the first to list the basic civil, political, economic, social, and cultural rights that all human beings should be able to enjoy."); Henry T. King, Jr., *Robert Jackson's Transcendent Influence Over Today's World*, 68 ALB. L. REV. 23, 30 (2004) ("Nüremberg marked the start of the international human rights movement that is flourishing today."); Henry T. King, Jr., *American Bar Association's Commemoration of the 60th Anniversary of the Nuremberg Trials, November 11, 2005, Georgetown School of Law, Washington, DC*, 40 INT'L LAW. 1, 2 (2006); Henry T. King, Jr., *The Nuremberg Context from the Eyes of a Participant*, 149 MIL. L. REV. 37, 46 (1995); Burrus M. Carnahan, *United States v. Whiting: International Agreements, Human Rights, and Military Law*, 23 A.F. L. REV. 271, 279 (1982-1983) ("Although this international human rights movement began in the 1920s with the activities of the International Labour Organization, it received its greatest impetus with the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948. By 1978, over fifty international agreements and acts recognizing, developing, or creating human rights were in existence.").

237. Louise Arimatsu, *Transformative Disarmament: Crafting a Roadmap for Peace*, 97 INT'L L. STUD. 833, 854 n.71 (2021).

1945,[238] and the U.N. General Assembly adopted the UDHR in 1948[239] even as debate over the ICCPR had already gotten underway.[240] Eleanor Roosevelt, who served as the 1st Chair of the U.N. Commission on Human Rights[241] and praised the U.S. Senate's 89-2 vote in July 1945 ratifying the U.N. Charter,[242] went on to play a pivotal role in the UDHR's adoption.[243] She led the U.S. delegation in advocating for the UDHR,[244] although the drafting of the UDHR involved many people, including Canadian academic John Humphrey[245] and French jurist

238. Jo L. Southard, *Human Rights Provisions of the U.N. Charter: The History in U.S. Courts*, 1 ILSA J. INT'L & COMPAR. L. 41, 46 (1995) ("The U.N. Charter was signed in San Francisco on June 26, 1945. The rise of Nazism, the deaths of millions of ethnic minorities in World War II, and the Nuremberg and Tokyo trials after the war all contributed to the formation of the United Nations."); Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980) ("The Charter entered into force on October 24, 1945, and resolves to reaffirm faith in fundamental human rights and in the dignity of the human person. Almost all nations in the world are now parties to the U.N. Charter.").

239. Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948); *see also* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES lxxi (William A. Schabas ed., 2013) (discussing the UDHR's drafting); MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 235–36 (2002) (describing the drafting and adoption of the UDHR); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 23 (2005) ("[T]he modern international human rights framework emanates from the Universal Declaration of Human Rights ('Universal Declaration').").

240. Fitzpatrick & Miller, *supra* note 142, at 289 ("The drafting process of the ICCPR actually began as early as 1947 . . . ."). The drafting process for the ICCPR led to the imposition of significant restrictions on the death penalty's use in international law. *See id.* at 290 ("[I]n 1949 the Commission defined further limits on the permissible application of the death penalty, including a restriction to the most serious crimes, a requirement of sentence by a competent court, a prohibition on retroactive death penalties, limitation of penalties to those consistent with the principles of the Universal Declaration, and a preservation of the possibility of amnesty, commutation, or pardon. During the lengthy debates, only occasional mention was made of the prospect for total abolition, with the USSR deciding not to push the issue in light of the General Assembly's failure to include abolition in the Universal Declaration."); *id.* at 288–89 ("[T]he period of the 1950s and the 1960s was characterized by two significant developments: (1) confrontation of the death penalty as a human rights issue in the drafting of the ICCPR, leading to important limitations on its permissible scope and tentative adherence to abolition as a goal; and, (2) recognition of the death penalty as a matter of legitimate concern for international penology.").

241. PINGHUA SUN, CHINESE CONTRIBUTIONS TO INTERNATIONAL DISCOURSE OF HUMAN RIGHTS 49 (2022).

242. *Eleanor Roosevelt and the United Nations*, BILL OF RTS. INST., https://billofrightsinstitute.org/essays/eleanor-roosevelt-and-the-united-nations (last visited Feb. 17, 2025).

243. Storey, *supra* note 151, at 54.

244. Amit Khardori, *What Does the State Owe to Its People? Toward a "Responsibility to Develop"*, 46 BYU. L. REV. 1027, 1077–78 (2021) (discussing Eleanor Roosevelt's role regarding the UDHR).

245. STEVEN WHEATLEY, THE IDEA OF INTERNATIONAL HUMAN RIGHTS LAW 76–77

René Cassin.[246] The UDHR, a biography of Chinese diplomat and UDHR contributor Peng Chun Chang reports, "was one of the earliest and most forceful global reactions to the Holocaust, fascism, and the horrors of the Second World War."[247] The Nazis forced Jews into ghettos, operated concentration camps, conducted mass murder and sham trials, and carried out summary executions.[248] "It is estimated that the Germans executed in their preferred method upwards of sixteen thousand people by guillotine," one source recounts.[249]

The non-binding UDHR[250] laid the groundwork for the promotion and protection of international human rights, including for rights set forth in the ICCPR,[251] that are now recognized by customary international law.[252] Customary international law is generally binding

---

(2019).

246. *Id.* at 77.

247. HANS INGVAR ROTH, P. C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1–2 (Univ. of Pa. trans., 2018); *see also id.* at 4 (introducing Peng Chung Chang's work).

248. Charles N. Pede, *The Significance of the Nuremberg International Military Tribunals on the Practice of Military Law*, 229 MIL. L. REV. 253, 258 (2021).

249. *Id.* (citing COMPARATIVE CAPITAL PUNISHMENT 170 (Carol S. Steiker & Jordan M. Steiker eds., 2019); *see also* Patrick S. Metze, *Nothing Changes—It All Remains the Same: Modern Capital Punishment (Human Sacrifice by a Different Name)*, 47 TEX. TECH. L. REV. 179, 195 n.166 (2014) ("Johann Reichhart, known as the executioner of Scholl, executed over 3,000 people, most of them during the period between 1939 and 1945. Most of these sentences were carried out by a shortly, largely metal, redesigned German version of the French guillotine.") (citing RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600–1987, at 772 (1996)); Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 HAMLINE J. PUB. L. &. POL'Y 163, 172 (1993) ("During World War II, the civil courts sentenced 16,000 people to death, and military courts sentenced another 16,000 people to death. Due to these experiences, the Federal Republic of Germany abolished the death penalty.").

250. *E.g.*, Harris v. Parker, Case No. 3:22-cv-00064-SMY, 2022 WL 2528236, at *2 (S.D. Ill. July 7, 2022) ("Plaintiff cannot state a claim under the Universal Declaration of Human Rights because it is a non-binding declaration that provide no private rights of action.") (citing Konar v. Illinois, 327 F. App'x 638, 640 (7th Cir. 2009)).

251. *See* Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 576–77 (2009).

252. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1164, 1179 (C.D. Cal. 2005) ("[T]he Court holds that there is a customary international law norm against torture."); Jon Bauer, *Obscured by "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence under the Convention Against Torture*, 52 COLUM. HUM. RTS. L. REV. 738, 742 n.9 (2021) ("International human rights law on torture allows no exceptions to the non-refoulement duty because torture 'constitutes the most direct attack at the very essence of human dignity.'") (citing Walter Suntinger, *The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?*, 49 AUSTRIAN J. PUB. INT'L L. 203, 204 (1995)); *id.* ("All of the major international and regional human rights instruments, going back to the 1948 Universal Declaration of Human Rights, proscribe torture. The prohibition has become part of

on states,[253] with the prohibition of torture considered to be customary international law,[254] and having already achieved the lofty status of a *jus cogens* norm.[255] As three legal commentators wrote in 2012 in the *Virginia Journal of International Law*: "The prohibition on torture has been widely accepted as customary international law and *jus cogens*."[256] The international community, with many international NGOs now actively working against both torture and capital punishment throughout the world,[257] has already renounced torture

customary international law, and is widely recognized as one of the few norms, together with the prohibitions of slavery and genocide, that has attained *jus cogens* status—a peremptory norm that admits of no exceptions and is binding on States, regardless of their consent.") (citing Juan E. Méndez & Andra Nicolescu, *Evolving Standards for Torture in International Law*, *in* TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 215, 217 (Metin Başoğlu ed., 2017)).

253. Erika Voreh, *The United States' Convention Against Torture RUDs: Allowing the Use of Solitary Confinement in Lieu of Mental Health Treatment in U.S. Immigration Detention Centers*, 33 EMORY INT'L L. REV. 287, 295 (2019).

254. *See* David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 362 (2011) ("Federal courts in the United States have recognized the prohibition against torture as a norm of customary international law. The Restatement of the Foreign Relations Law of the United States declares that international law is violated if, as a matter of State policy, a State practices, encourages, or condones torture or other cruel, inhuman, or degrading treatment or punishment.").

255. *Id.* ("[T]he prohibition against torture and other ill-treatment qualifies as a matter of *jus cogens*, that is, a peremptory norm of international law that trumps even treaty obligations. *Jus cogens* embraces customary laws that are so universal and are derived from values so fundamental to the international community that they are considered binding on all nations, irrespective of a State's consent . . . ."). International and American courts have recognized "the status of torture and other forms of ill-treatment as *jus cogens* violations of international law." *Id.*; *see also* Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 111 (2004) ("[T]he fundamental norms identified by Nuremburg, such as the prohibition of genocide, enslavement and torture, are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.").

256. Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture under International and Domestic Law*, 52 VA. J. INT'L L. 791, 798 n.29 (2012) ("[P]rohibition [on torture] has become part of customary international law, as evidenced and defined by the Universal Declaration on Human Rights.") (citing Filártiga v. Peña-Irala, 630 F.2d 876, 882 (2d Cir.1980) (alteration in original); Prosecutor v. Furundžija, Case No. IT-95-17/I-T, Judgment ¶ 144 (Int'l Trib. For the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia since 1991, Dec. 10, 1998) ("the prohibition on torture is a peremptory norm or *jus cogens*")).

257. Jon Yorke, *An Experience of Time in the Capital Judicial Process*, 24 TEX. J.C.L. & C.R. 189, 199 n.50 (2019) ("[T]he World Coalition Against the Death Penalty, an alliance of more than 150 NGOs, bar associations, local authorities and unions" aims "to strengthen the international dimension of the fight against the death penalty."); Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic*

and CIDT through international humanitarian law,[258] including the four Geneva Conventions of 1949,[259] and international human rights law by way of numerous treaties and declarations.[260] Importantly, the U.N. Convention Against Torture absolutely bars torture, declaring that neither war nor public emergency can justify it.[261] Along with launching its campaign against capital punishment in the 1970s, Amnesty International has also opposed torture since that time,[262] effectively raising public awareness of official acts of torture by governments around the world through its detailed investigations and reports.[263]

Violence, 12 AM. U. J. GENDER SOC. POL'Y &. L. 309, 333–34 n.123 (2004) (discussing the World Organisation Against Torture, "the largest international coalition of NGOs fighting against torture, summary executions, forced disappearances and all other forms of cruel, inhuman and degrading treatment"); Nicole De Silva & Misha Ariana Plagis, *NGOs, International Courts, and State Backlash Against Human Rights Accountability: Evidence from NGO Mobilization Against Tanzania at the African Court on Human and Peoples' Rights*, 57 L. & SOC'Y REV. 36, 48–49 (2023) (discussing the work of Reprieve UK and Sandra Babcock, the Faculty Director of the Cornell Center, to challenge Tanzania's death penalty, and how, in 2017, "these international NGOs built a coalition with local Tanzanian partners (NGOs and lawyers) under the Makwanyane Institute, a legal capacity-building forum").

258. *See, e.g.*, Louis-Phillippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9, 12–14, 15 n.14 (2005).

259. *See* Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 22–23 (2006).

260. *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 307–08 (1994) (stating that human rights groups have spearheaded an anti-torture campaign that has led to instruments codifying and expanding the international norm against torture).

261. CAT, *supra* note 167, art. 2 ("No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justified for torture."); Jane C. Kim, Note, *Nonrefoulement under the Convention Against Torture: How U.S. Allowance for Diplomatic Assurances Contravene Treaty Obligations and Federal Law*, 32 BROOK. J. INT'L L. 1227, 1233–35 (2007) (discussing international law's prohibition of torture through treaties, declarations, domestic laws, and customary international law).

262. *See* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 777 n.117 (1994) ("The impetus for the Declaration on Torture came . . . from the 'Campaign for the Abolition of Torture' begun by Amnesty Internation in 1972.") (citing G.A. Res. 3452 (XXX), annex (Dec. 9, 1975)); AMNESTY INT'L, REPORT ON TORTURE (1975); AMNESTY INT'L, TORTURE IN THE EIGHTIES (1984); AMNESTY INT'L, COMPREHENSIVE REPORT ON HUMAN RIGHTS VIOLATIONS AROUND THE WORLD (1992).

263. *See* David Weissbrodt & Detlev F. Vagts, Book Review, 85 AM. J. INT'L L. 218, 219 (1991) ("Amnesty International began its yearlong Campaign for the Abolition of Torture in 1972. In November 1973, the UN General Assembly adopted its first specific resolution on torture. A year later, the General Assembly initiated a standard-setting process that between 1975 and 1988 yielded a series of declarations, codes and principles about torture and ill-treatment of prisoners and other detainees, including

The UDHR and the ICCPR both set the stage for more resolute international advocacy by NGOs against both torture and capital punishment.[264] After serving as the chairperson of the UDHR's drafting committee and successfully spearheading the effort,[265] Eleanor Roosevelt—deeply concerned about an array of human rights issues[266]—made a compelling case for the UDHR in presenting it to the U.N. General Assembly even though she was well aware of its limitations.[267] At a 1948 session of the U.N. General Assembly, she emphasized that the instrument was not legally binding: "In giving our approval to the Declaration today it is of primary importance that we

---

the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . .") (reviewing RITA MARAN, TORTURE: THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR (1989)); Lippman, *supra* note 164, at 304 ("In 1976, Amnesty International published a report on allegations of torture in Brazil."); Trent Buatte, *The Convention Against Torture and* Non-Refoulement *in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 731 (2021) ("By the 1970s the international community—led by both States and non-government organizations like Amnesty International—sought to highlight the prevention and punishment of torture as a stand-alone issue."); Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 96–97 (2001) (discussing Amnesty International's work against torture).

264. Michael H. Posner, Book Review, 63 MD. L. REV. 203, 203 (2004) (reviewing LARRY GOSTIN, THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL (Stanley S. Herr et al. eds., 2003) ("Historically, the international human rights movement—led by nongovernmental organizations (NGOs) like Amnesty International—focused principally on core civil rights violations, including issues related to state-sponsored killing, torture, and arbitrary detention."); Till Müller, *Customary Transnational Law: Attacking the Last Resort of State Sovereignty*, 15 IND. J. GLOB. LEGAL STUD. 19, 24, 38 (2008) (noting that the International Committee of the Red Cross, "one of the oldest and probably most prominent of NGOs," monitors compliance with "international humanitarian law, the prohibition of torture, etc." and that "[i]n the field of human rights, NGOs like Amnesty International and Human Rights Watch play an important role in publicizing human rights violations").

265. ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 38 (2010) (noting that the drafting committee of eight members, from Australia, Chile, China, France, Lebanon, the UK, the United States, and the USSR, were appointed, and that "[t]he chairperson of the Commission and the drafting committee was Eleanor Roosevelt, but the Universal Declaration of Human Rights ('UDHR') was the product of a team effort involving many people working from an outline draft produced by Professor Humphrey, as well as a British draft"); *see also* Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1095 (2005) ("It was Eleanor Roosevelt . . . who led the successful effort for the United Nations to adopt the Universal Declaration of Human Rights.").

266. *See, e.g.*, KERI DEARBORN, ELEANOR ROOSEVELT: A LIFE IN AMERICAN HISTORY xxiii (2022) ("Eleanor Roosevelt fought diligently for anti-lynching legislation but failed to find political support.").

267. *Id.* at xxvi ("When the UN Human Rights Commission elected her to chair the committee drafting the Universal Declaration of Human Rights, she applied her entire life experience to the job.").

keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation."[268] "It is," she stressed, "a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations."[269]

On December 10, 1948, after all the contentious debates and revisions,[270] the U.N. General Assembly adopted the UDHR, which contains thirty articles detailing a diverse array of human rights.[271] After reciting in its preamble that "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," the UDHR—in Article 3—recites without exception: "Everyone has the right to life, liberty and security of person."[272] Article 5 thereafter proclaims: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[273] In the decades to come, legal experts from NGOs would become U.N.-appointed special rapporteurs, bringing their professional expertise to bear on human

268. Eleanor Roosevelt, *U.S. Representative to the General Assembly, Statement During the General Assembly's Adoption of the UDHR (Dec. 9, 1948)*, *in* 19 DEP'T OF STATE BULL. 751, 751 (1948); ALLEN S. WEINER ET AL., INTERNATIONAL LAW 783 (8th ed. 2023).

269. WEINER, *supra* note 268; *see also* Eric M. Johnson, *Examining Blasphemy: International Law, National Security and the U.S. Foreign Policy Regarding Free Speech*, 71 A.F. L. REV. 25, 40 (2014).

270. *See, e.g.*, JOHANNES MORSINK, ARTICLE BY ARTICLE: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS FOR A NEW GENERATION 38–39 (2022) ("John Humphrey's first submission on the right to life went like this: 'Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached' (E/CN.4/21/9). Unlike today, when roughly two-thirds of the world's 195 countries have abolished the death penalty, Humphrey found only two constitutions (Ecuador and Uruguay) of the twenty-six he paired with this Article 3 that seemed to have completely done away with it. So when he wrote his first draft, he was following the data."); *id.* ("When this Article 3 was read in the First Drafting Committee Session, Chairperson Roosevelt 'remarked that she understood that there was a movement underway in some States to wipe out the death penalty completely' (E/CN.4/AC.1/SR.2/10). René Cassin of France observed that 'if the principle of universal abolition of the death penalty could be adopted it should not impose a strict obligation on States which wished to maintain the death penalty' . . . ."); *id.* (noting that Cassin was "given the task of doing the rewrites"; that the relevant article of the UDHR was changed to state that "everyone has the right to life, to personal liberty and to personal security"; and that "different working groups kept the issues of the death penalty and abortion" out of the UDHR's text).

271. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1–2 (Thomas Risse et al. eds., 1999).

272. UDHR, *supra* note 53, pmbl., art. 3.

273. *Id.* art. 5.

rights abuses such as torture and executions.[274]

Long before the UDHR and the rise of NGOs, the anti-death penalty movement had been active for many generations. Since the publication of Cesare Beccaria's widely translated book, *Dei delitti e delle pene* (1764),[275] and since the first locales, Tuscany and Austria (then under monarchical rule) did away with capital punishment in their legal codes in the 1780s,[276] civic and political leaders have wrestled with whether or not the death penalty is a necessary criminal sanction.[277] "[I]n 1808," one English history observes, "the Quaker William Allen and the barrister Basil Montagu had founded the Society for Diffusing Information on the Subject of the Punishment of Death (the Capital Punishment Society) and in 1819 this was to merge with the Prison Discipline Society."[278] "In 1845," one source notes of what later occurred across the Atlantic, "the first national organization opposing the death penalty was created: the American Society for the Abolition of Capital Punishment."[279]

Sadly, in the modern era, some American scholars[280] and "originalist" jurists,[281] looking to eighteenth-century sources, have

274. "While NGOs have long been the main source of information for country and thematic rapporteurs, it is now also the case that many current rapporteurs previously worked at human rights NGOs. Nigel Rodley, the current Special Rapporteur on Torture, was formerly Amnesty International's legal adviser. Bacre Waly Ndiaye, the current Special Rapporteur on Executions, was vice-chair of Amnesty International's executive committee. Others were active in national human rights groups." *See* Allison L. Jernow, Note, *Ad Hoc and Extra-Conventional Means for Human Rights Monitoring*, 28 N.Y.U. J. INT'L L. & POL. 785, 809 (1996).

275. *See generally* John D. Bessler, *The Marquis Beccaria: An Italian Penal Reformer's Meteoric Rise in the British Isles in the Transatlantic Republic of Letters*, 4 DICIOTTESIMO SECOLO 107 (2019) [hereinafter Bessler, *The Marquis Beccaria*] (discussing *Dei delitti e delle pene* and its reception in Britain and America).

276. Bessler, *Revisiting Beccaria's Vision*, *supra* note 123, at 200–01 ("In his own lifetime, Beccaria witnessed only modest success . . . . In 1786, persuaded by Beccaria's ideas, Grand Duke Leopold of Tuscany did adopt a Tuscan penal code that totally eliminated the death penalty, and in 1787, Holy Roman Emperor Joseph II, Leopold's brother, followed suit, abolishing Austria's death penalty save for crimes of revolt against the state.").

277. One Enlightenment maxim articulated by Montesquieu—and then publicized by Beccaria in his book, *Dei delitte e delle pene*, translated into English as *An Essay on Crimes and Punishments*—is that any punishment that goes beyond necessity is "tyrannical." BESSLER, THE BARON AND THE MARQUIS, *supra* note 235, at 9.

278. WILLIAM CORNISH ET AL., LAW AND SOCIETY IN ENGLAND 1750–1950, at 552 (2d ed. 2019).

279. Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1226 (2006).

280. *See, e.g.*, RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982).

281. *E.g.*, Ellis Washington, *Natural Law Considerations of Juvenile Law*, 32 WHITTIER L. REV. 57, 112–13 (2010) (noting the originalist views of Justices Antonin

stubbornly defended the use of executions since the 1970s in the post-*Furman* era,[282] while ignoring important, post-World War II developments in the law of torture and simultaneously failing to uncover the true origins of the "cruel and unusual punishments" concept. The U.S. Supreme Court has long traced the Eighth Amendment's prohibition against "cruel and unusual punishments"—a precursor to the bar on torture and cruel, inhuman or degrading punishments found in international law instruments—to the English Declaration of Rights and its statutory counterpart, the English Bill of Rights (1689).[283] However, that concept appears far earlier in (1) the printed marginalia and index of an early seventeenth-century Venetian history, *The Generall Historie of the Magnificent State of Venice* (1612);[284] (2) a popular satire, *Abuses Stript, and Whipt* (1613), written by an English courtier and poet, George Wither, and published in multiple editions and reprinted in *Juvenilia* (1622), a collection of Wither's early verse;[285] and (3) two 1642 remonstrances of Irish

---

Scalia and Clarence Thomas in the context of discussing the dissents to the U.S. Supreme Court's *Roper v. Simmons* decision holding that the imposition of the death penalty for crimes committed while an offender was under the age of eighteen is unconstitutional); Jerry Merrill, Comment, *The Past, Present, & Future of Lethal Injection:* Baze v. Rees' *Effect on the Death Penalty*, 77 UMKC L. REV. 161, 191 (2008) ("Justice Thomas' and Justice Scalia's view of the Constitution would permit them to tolerate any form of execution that was widely used after the completion of the Constitution in 1787.").

282. *E.g.*, Kennedy v. Louisiana, 554 U.S. 407, 469 (2008) (Alito, J., dissenting) (disputing the majority's holding that executing an individual for the crime of child rape is unconstitutional because the "holding is not supported by the original meaning of the Eighth Amendment"); Baze v. Rees, 553 U.S. 35, 88 (2008) (Scalia, J., concurring) (in supporting the death penalty's constitutionality, emphasizing that "[t]he same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death"); *see also* Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91, 155 (2019) (discussing Justice Scalia's originalist views).

283. *Gregg*, 428 U.S. at 169 ("The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary.").

284. THOMAS DE FOUGASSES, THE GENERALL HISTORIE OF THE MAGNIFICENT STATE OF VENICE: FROM THE FIRST FOUNDATION THEREOF UNTILL THIS PRESENT 287 (W. Shute trans., London, G. Eld & W. Stansby 1612).

285. GEORGE WITHER, ABUSES STRIPT, AND WHIPT: OR SATIRICAL ESSAYES (London, G. Eld 1613) (containing a reference to "That cruel'st and unusual'st punishment" in the context of referring to a horrific method of execution, the "brazen bull"); GEORGE WITHER, JUVENILIA 141 (London, "Printed by T.S." 1622) (reprinting the same "cruel'st and unusual'st punishment" reference). The "brazen bull" was a horrifying method of execution in ancient times said to be put to use by a tyrant named Phalaris. *See* 2 EDWARD A. FREEMAN, THE HISTORY OF SICILY: FROM THE EARLIEST TIMES 74-75 (1891) (noting that "brazen bull" was "the work of an artist named Perillos or Perilaos" and that "[t]he bull was hollow, with a door in the shoulder, through which the victim was pushed within"; that "[t]he brass was then heated, and by some ingenious device the

Catholics in Ulster following an Irish rising in 1641 that occurred shortly before the outbreak of the English Civil War (1642–1651).[286] In those sources that long pre-date the English Bill of Rights, the cruel and unusual punishments concept refers to both horrific methods of execution but also in association with various *non-lethal* corporal punishments. Notably, the American penal system has already abandoned the use of non-lethal corporal punishments.[287]

In the eighteenth century, *torture* was understood by lawyers and lawmakers in that era to mean principally *judicial* torture in continental Europe's civil-law systems—that is, the use of physical torment against the body to secure confessions.[288] "While alien to members of the legal profession in our era," one academic writes, "judicial torture frequently was used in early modern Europe to extract confessions."[289] Today, however, the modern definition of torture is much broader and encompasses both physical and psychological torture.[290] Whereas the eighteenth century saw the

---

cries of the sufferer were made to imitate the roaring of the bull"; and that "Phalaris first put the artist himself into the bull, and afterwards employed it as a means of punishment").

286. *The Heads of the Causes Which Moved the Northern Irish, and Catholicks of Ireland, to Take Arms. Anno 1641*, *in* 2 DESIDERATA CURIOSA HIBERNICA: OR, A SELECT COLLECTION OF STATE PAPERS 78, 82 (1772) (paragraph 18 of the document refers to "heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments"); VINCENT SCULLY, THE IRISH LAND QUESTION, WITH PRACTICAL PLANS FOR AN IMPROVED LAND TENURE, AND A NEW LAND SYSTEM 264 n.* (1851) (quoting the paragraph from *Desiderata Curiosa Hibernica* referencing "cruel and unusual punishments"); *To the King's Most Excellent Majesty, The Humble Remonstrances of the Northern Catholicks of Ireland, Now in Arms*, *in* 1 A CONTEMPORARY HISTORY OF AFFAIRS IN IRELAND FROM 1641 TO 1652, at 451, 456 (John T. Gilbert ed., Dublin 1879) (paragraph 19 refers to "heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments"). These earlier usages of the cruel and unusual punishments phraseology, appearing long before the English Bill of Rights (1689), are discussed in detail in a forthcoming law review article. *See* John D. Bessler, *Lost and Found: The Forgotten Origins of the "Cruel and Unusual Punishments" Prohibition*, 14 BRIT. J. AM. LEGAL STUD. (forthcoming 2025) (available in draft form on SSRN).

287. *See generally* Bessler, *The Anomaly of Executions*, *supra* note 19.

288. Bessler, *Torture and Trauma*, *supra* note 110, at 24–25; *see also* John D. Bessler, *The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality*, 29 WASH. & LEE J.C.R. & SOC. JUST. 65, 66 (2023) [hereinafter Bessler, *The Gross Injustices of Capital Punishment*].

289. Peter S. Poland, *A Matter of Life, Death, and Legal Procedure: What Every Texas Lawyer Should Know About the European Witch Hunts*, 77 TEX. BAR J. 784, 786 (2014).

290. *See Closing Plenary: Preventing Torture in the Fight Against Terrorism*, 109 AM. SOC'Y INT'L L. PROC. 355, 363 (2015) ("Torture is not only physical; it is mental and emotional. There have been important legal developments in that area."). *See also* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 612 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (noting that Article 17 of the Third Geneva Convention of 1949 prohibits "physical or mental torture," and that the United States has been a party to the 1949

publication of tomes on the law of torture, replete with elaborate illustrations on how to use instruments of torture,[291] the first article of the U.N. Convention Against Torture contains a very broad and specific definition of torture that clearly applies to punishments that inflict severe pain or suffering, whether physical or mental.[292]

Some originalists, skeptical of international law instruments forged in the wake of World War II, have openly criticized the use of international sources in American case law,[293] even though the U.S. Constitution itself refers to the "Law of Nations"[294] and its Supremacy Clause provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land;

Geneva Conventions since 1955); Jenny-Brooke Condon, *When Cruelty is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 65 (2021) ("[A]s the medical literature confirms, psychological torture often causes more long-term harm than techniques imposing physical pain.").

291. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 52 (noting that Empress Maria Theresa's penal code of 1768, the *Constitutio Criminalis Theresiana*, authorized methods of torture such as flogging, the legscrew, the thumbscrew, and stretching on the rack; that the published code contained graphic depictions of torture devices and methods of torture; and that Holy Roman Empress Maria Theresa of Austria, the ruler of the Habsburg Empire, did not abolish torture until 1776, mainly at the urging of Austrian law professor Joseph von Sonnenfels); Bessler, *The Gross Injustices of Capital Punishment*, *supra* note 288, at 100 (explaining that Maria Theresa's abolition of torture, however, did not put an end to physical punishments such as flogging); Mirjan Damaška, *The Death of Legal Torture*, 87 YALE L.J. 860, 868–69 n.16 (1978) (discussing Maria Theresa) (reviewing JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME (1977)).

292. CAT, *supra* note 167, art. 1. Although the Third Geneva Convention and the U.N. Convention Against Torture prohibited mental torture, the concept of mental torture long preceded such international humanitarian law and international human rights law instruments. *E.g.*, J. G. ZIMMERMAN, SOLITUDE; OR, THE EFFECTS OF OCCASIONAL RETIREMENT ON THE MIND, THE HEART, GENERAL SOCIETY, IN EXILE, IN OLD AGE, AND ON THE BED OF DEATH 241 (1797) (referring to "a species of mental torture more painful than any bodily torture could have produced"); WILLIAM GODWIN, MEMOIRS OF THE AUTHOR OF A VINDICATION OF THE RIGHTS OF WOMAN 151 (2d ed. corr. 1798) (referring to "the mental torture she endured" and noting that "she was twice" in "an interval of four months . . . prompted by it to purposes of suicide"); MARY ROBINSON, POEMS 30 (new ed. 1793) (referring to "mental torture"); THE BRITISH MERCURY, Vol. VIII, No. 6, p. 167 (Feb. 7, 1789) ("[H]is conscience preying on him for the horrid crime, he has declared that he would rather make an expiation at the gallows, than undergo the mental torture he has since endured."); "The Laputian. No. II. Eloquence and Reasoning of a Debating Society," *in* 1 ROBERT BISSET, THE HISTORICAL, BIOGRAPHICAL, LITERARY, AND SCIENTIFIC MAGAZINE: MISCELLANEOUS LITERATURE FOR THE YEAR 1799, at 105 (1779) (referring to a "forlorn sufferer" destined "to languish out a life of mental torture"); Thomas Bellamy, *"Albert*, "6 GEN. MAG. 194 (Jan. 1792) (referring to "torment" and "mental torture").

293. Justin Mello, *A Quantitative Accounting of the Use of International Sources in Supreme Court Civil Rights Cases from 2000 to 2016*, 28 S. CAL. INTERDISC. L.J. 203, 203 (2018).

294. U.S. CONST. art. I, § 8, cl. 10 (establishing Congress's power to "define and punish . . . Offences against the Law of Nations").

and the Judges in every State shall be bound thereby."[295] The originalist theory of constitutional interpretation, applied to the death penalty by American academic Raoul Berger (1901–2000), is closely associated with the late Justice Antonin Scalia, former Attorney General Edwin Meese, and rejected U.S. Supreme Court nominee Robert Bork.[296] "According to the originalist view," death penalty abolitionist Hugo Adam Bedau once wrote, "'the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually described, but instead as referring, in a kind of code or disguise, to the [F]ramers' own assumptions and expectations about the correct application of those principles.'"[297]

History shows that wars have often stymied or thwarted anti-death penalty activism, but steady progress toward abolition has nonetheless been made,[298] with a large number of countries abandoning capital punishment[299] after the prospect of its global

295. U.S. CONST. art. VI, cl. 2.

296. BERGER, *supra* note 280, at 9; *see also* Craig Green, Book Review, *Who Were the Real Founders?*, 121 COLUM. L REV. 2269, 2311 (2021) ("Originalism's identity as a political and intellectual movement emerged during the Reagan era, developed by judges like Robert Bork and Antonin Scalia, and perhaps especially by Attorney General Edwin Meese. Meese delivered a landmark speech to the American Bar Association about his 'Jurisprudence of Original Intention,' which highlighted constitutional federalism as the first legal topic that needed originalist revision.") (reviewing GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES (2021)). For a critique of Raoul Berger's arguments, see Hugo Adam Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1153 (1983) (reviewing RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982)).

297. Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 THOMAS M. COOLEY L. REV. 789, 789–90 (1996) (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 13 (1996)).

298. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 134 (2002) (noting that, in the United States, Michigan abolished the death penalty in 1846 and that Rhode Island and Wisconsin followed suit in 1852 and 1853, respectively); MARVIN H. BOVEE, CHRIST AND THE GALLOWS: OR, REASONS FOR THE ABOLITION OF CAPITAL PUNISHMENT, at vii–viii (1870) ("[B]efore the work was ready for the press, the unhappy civil war had been inaugurated between the two sections of our Union. To have presented a work of this kind during the continuance of such a struggle, would have been 'ill-timed,' to say the least; and thus has the work been permitted to quietly sleep in manuscript until the present time."); Kirchmeier, *supra* note 156, at 17 ("Perhaps, the years of conflict in Vietnam had some effect, because, in the past wars tended to take the wind out of the sails of the anti-death penalty movement."); Joanmarie Ilaria Davoli, *Evolving Standards of Irrelevancy?*, 41 QUINNIPIAC L. REV. 81, 106–07 (2022) ("[T]he UK abolition movement gained ground in the early twentieth century, but the World Wars intervened. After World War II, the abolition movement was revived. In 1948, the Royal Commission on Capital Punishment convened and studied the issue.").

299. Harmon & Radelet, *supra* note 95, at 406 (noting of the "worldwide movement that is gradually moving toward the abolition of capital punishment": "According to Amnesty International, in 1977, 'only 16 countries had totally abolished the death

abolition was contemplated in the 1940s.[300] Over time, the ideological and intellectual opposition to the death penalty has shifted—moving from religious-based arguments rooted in interpretations of biblical passages to secular ones focused on deterrence and proportionality to newer ones focused on universal human rights, torture and discrimination, and human dignity.[301] The death penalty's administration, in any event, is plagued by intractable problems,[302] including arbitrariness, racial discrimination, wrongful convictions and botched executions,[303] and even if all of those sundry problems could be "fixed" somehow, it is simply impossible to administer a death penalty system without resorting to torturous, state-sanctioned

penalty. Today, that number has risen to 108—more than half the world's countries. More than two-thirds are abolitionist in law or practice.' In September 2022, Equatorial Guinea became the twenty-fifth African country to eliminate the death penalty.").

300. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, *supra* note 12, at 382–83.

301. *E.g.*, Arthur L. Rizer III, *Does True Conservatism Equal Anti-Death Penalty?*, 6 HOW. SCROLL: SOC. JUST. L. REV. 88, 110 (2004) (discussing interpretations of the Bible as regards the death penalty); Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 758 n.11 (1996) ("Religious arguments, mostly based upon varying interpretations of the Bible, tended to dominate the debate for many years."); Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1407 (2005) ("The 1959 report to the American Law Institute faithfully reflected the topics that were regarded as important in the death penalty debate: deterrence, proportionality, error, finality, and discrimination against minorities . . . . By the 1990s, the frame of reference for discourse about capital punishment had shifted from domestic criminal justice to international human rights.").

302. *See, e.g.*, William W. Berry III, *The European Prescription for Ending the Death Penalty*, 2011 WIS. L. REV. 1003, 1024–25 (2011) (reviewing ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE (2010)).

303. *See, e,g.*, John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL'Y 183 (2016); Ronald J. Tabak, *Racial Discrimination in Implementing the Death Penalty*, 26 HUM. RTS. 5 (1999); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987); Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1186 (2005); Brandon L. Garrett, *The Banality of Wrongful Executions*, 112 MICH. L. REV. 979, 979–80 (2014); Rob Warden & Daniel Lennard, *Death in America under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 228 (2018). *See also* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 865–66 (2010) ("[I]t was DNA exonerations—especially those of death row defendants—that propelled the issue of wrongful convictions to the national agenda. DNA testing made it virtually impossible to doubt the innocence of those exonerated, and the realization that several of these individuals came within months or even days of execution drew attention to the issue in a way that numerical reports could not.").

threats of death.[304] Notably, it is respect for human dignity that anchors the *jus cogens* norm prohibiting torture and CIDT.[305]

The adoption of the UDHR and modern conceptions of universal human rights, torture, human dignity,[306] and the Rule of Law—a concept requiring that governmental officials be subjected to the same laws as everyone else—make the death penalty's continued administration unjust and untenable in the twenty-first century.[307]

---

304. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 9–10; *accord* Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 13–14.

305. John R. Mills et al., *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 374 (2009) ("[T]he *jus cogens* norm prohibiting torture and cruel, inhuman or degrading treatment is derived directly from the international respect for human dignity."); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 628 (1991) ("The basis for the right [to be free from torture] is traced to 'the inherent dignity of the human person.") (quoting CAT, *supra* note 167, pmbl.); Michelle Lewis Liebeskind, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REVISTA JURIDICA U.P.R. 645, 672 (1994) ("[T]he right to freedom from torture and other forms of cruel, inhuman or degrading treatment is regarded as a civil and political right, a norm of customary law and of *jus cogens*. The right is rooted in 'the inherent dignity of the human person' (Torture Convention, Preamble)."). *See also* Alyssa Bell & Julie Dona, *Torturous Intent:* Refoulement *of Haitian Nationals and U.S. Obligations under the Convention Against Torture*, 35 N.Y.U. REV. L. & SOC. CHANGE 708, 728 (2011) ("CAT is the result of a concerted international effort, in which the U.S. played a leading role, to promote human dignity through the eradication of torture. The prohibition against torture is *jus cogens*, and thus deserves the utmost respect and adherence."); Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 202 (2010) ("According to multilateral human rights treaties, state parties may not suspend the guarantee against torture, in any circumstance. There are also recent cases from various jurisdictions that state that the prohibition against torture is a *jus cogens* norm. In short, the use of torture is an anathema to the idea that individuals must be treated with dignity.").

306. Torture is "a direct attack on the core of the dignity and integrity of human beings." Manfred Nowak, *What's in a Name? The Prohibitions on Torture and Ill Treatment Today*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 307, 307 (Conor Gearty & Costas Douzinas eds., 2012). *See also* Viktor Mayer-Schonberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMPAR. L. REV. 59, 101 (1995) ("Bodily integrity and human dignity are at the core of *jus cogens* norms. Multilateral treaties have outlawed the practice of torture regionally as well as globally. There seems to be a well-established consensus among the scores of nations that feel bound by these conventions, ICJ rulings, and academic commentaries, that the prohibition of torture has attained the stature of *jus cogens."); Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 154 (2002) ("*Jus cogens* norms are derived from basic concerns about human dignity and this includes the most fundamental human rights protections, such as protection from torture and slavery.").

307. Bessler, *The Rule of Law*, *supra* note 177, at 565–78 (discussing the death

"Within the UN system, the first important discussions of the issue of capital punishment took place in 1947 and 1948, in the context of the drafting of the Universal Declaration of Human Rights," Professor William Schabas writes, explaining Eleanor Roosevelt's pivotal role in chairing the U.N. Commission on Human Rights[308] and in shaping that document: "In the Drafting Committee, Eleanor Roosevelt commented that there was a movement underway in some states to abolish the death penalty. She suggested that it might be better not to use the term 'death penalty' in the Universal Declaration."[309] While original proposals for the UDHR—among them, from the U.S.—included language recognizing the death penalty as an exception to the right to life,[310] such language was ultimately excised from the final version at Roosevelt's urging,[311] with any allusion to the death penalty sagely removed, in part because of growing abolitionist sentiment and because countries were unable to reach agreement on specific issues.[312] "The Universal Declaration makes no mention of the death

---

penalty as the ultimate violation of the Rule of Law).

308. WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES lxxxiii–xv (William A. Shabas eds., 2013) ("The first United Nations Commission on Human Rights was composed of eighteen members . . . . The Commission's first session took place from 27 January to 10 February 1947. The meetings were held at Lake Success, where the United Nations had established temporary premises in a factory that had been the home of the Sperry Gyroscope Company during the War. Just outside the border of New York City on Long Island, it is about 25 kilometres by road from the permanent United Nations headquarters located on First Avenue in Manhattan . . . . Eleanor Roosevelt was confirmed as Chairman of the Commission. The Vice-Chairman was P. C. Chang of China.") (noting that "it was agreed to constitute a drafting committee composed of the Chairman, the Vice-Chairman and the Rapporteur," Charles Habib Malik; that "[t]hereby, Roosevelt, Chang and Malik were charged 'with the assistance of the Secretariat, the task of formulating a preliminary draft international bill of human rights, in accordance with the instructions and decisions of the first session of the Commission, to be submitted to the second session of the Commission for thorough examination"; and that "[a]fter the Commission adjourned, Eleanor Roosevelt invited her two colleagues, Chang and Malik, as well as John Humphrey, for a meeting in her Washington Square apartment," and that "[b]efore the tea party had finished, it was agreed that Humphrey would prepare a preliminary draft").

309. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, *supra* note 12, at 383–84.

310. *Id.* at 381–84.

311. *Id.* at 384.

312. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 92 (2001) ("The [Drafting] Commission decided to retain the general statement 'Everyone has the right to life, to liberty, and security of person' rather than try to reach agreement on specific issues such as euthanasia, abortion, or the death penalty. This was a defeat for the representatives of Chile and Lebanon, who had pushed for express protection of the lives of the unborn, and for the Soviet-bloc delegates, who had argued for a ban on capital punishment.") (footnote omitted); William A. Schabas, *International Legal Aspects*, *in* CAPITAL

penalty," Schabas observes of the final outcome of the drafting sessions.[313] It turns out that was a prescient choice, especially in light of the death penalty's barbarous and torturous characteristics and all of the anti-death penalty activism that occurred in the decades thereafter.[314] Indeed, any reference to the death penalty in the UDHR would have marred that post-World War II expression of universal human rights, particularly since the death penalty is totally incompatible with the right to life and respect for human dignity.[315]

The non-binding UDHR, as adopted, contains more than one article potentially implicating capital punishment—articles that later found expression in binding treaties. In addition to Article 3's generally worded provision protecting the right to life,[316] Article 5 of the UDHR specifically states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[317] Although the UDHR is a non-binding instrument,[318] two major covenants—the International Covenant on Economic, Social, and

---

PUNISHMENT: GLOBAL ISSUES AND PROSPECTS 19 (Peter Hodgkinson & Andrew Rutherford eds., 1996) ("René Cassin reworked Humphrey's draft and removed any reference to the death penalty. Cassin's proposal found its way, virtually unchanged, into the final version of the *Declaration*, despite some subsequent attempts to return to the original proposal."); Kevin Reed, Richard Wilson & Joan Fitzpatrick, *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395, 415 (1994) ("During the drafting of Article 3 of the Universal Declaration on the Right to Life, explicit mention of an exception for the death penalty was deleted to reflect an underlying consensus that abolition was a common, if sometimes remote, goal for all member states. Eleanor Roosevelt, the first Chairperson of the United Nations Commission on Human Rights, moved the deletion of references to the death penalty in light of the 'movement underway in some states to wipe out the death penalty completely.'"); Bishop, *supra* note 57, at 1129–30 ("[T]he drafters decided not to mention the death penalty, and by not doing so, the eventual abolition of the death penalty was envisioned. As stated by Eleanor Roosevelt, the Chair of the Human Rights Committee charged with drafting the Universal Declaration, '[T]here was a movement underway in some States to abolish capital punishment and, therefore, it might be better not to mention the death penalty.'").

313. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, *supra* note 12, at 382; William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 801 (1998) [hereinafter Schabas, *International Law and Abolition of the Death Penalty*].

314. Schabas, *International Law and Abolition of the Death Penalty*, *supra* note 313, at 28.

315. Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 60–64.

316. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) ("Everyone has the right to life, liberty and security of person.").

317. *Id.* art. 5.

318. *See, e.g.*, Siyu Yang v. Ardizzone, 540 F. Supp.3d 372, 378 (W.D.N.Y. 2021) (noting that the UDHR is "a non-binding United Nations resolution" that "creates no legal obligations or private civil cause of action"); Driver v. Solomon, No. 1:21-cv-01932-TWP-DML, 2021 WL 3565484, at *2 (S.D. Ind. Aug. 12, 2021) ("The United Nations Universal Declaration of Human Rights is non-binding and does not provide a private right of action.").

Cultural Rights[319] and the ICCPR[320]—were adopted by the U.N. General Assembly in 1966[321] and entered into force thereafter, amplifying those protections for human rights.[322] Along with the UDHR, these two covenants and their protocols form what has been called the "International Bill of Human Rights."[323] While the ICCPR contains an entire article on the right to life that does mention the death penalty, that article openly contemplates abolition, stating in part: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . ."[324] The U.N. Commission on Human Rights later commented on the "most serious crimes" language,[325] as did the U.N. Human Rights Committee, the treaty body tasked with monitoring ICCPR compliance.[326] Whereas the UDHR "is widely considered to

319. International Covenant on Economic, Social and Cultural Rights, *adopted on* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

320. ICCPR, *supra* note 43.

321. *See, e.g.*, John Mukum Mbaku, *Making International Human Rights Treaties Relevant to the Protection of Human Rights in African Countries*, 33 MINN. J. INT'L L. 89, 91–92 (2024) [hereinafter Mbaku, *Making International Human Rights Treaties Relevant*].

322. ICCPR, *supra* note 43 (entered into force Mar. 23, 1976); ICESCR, *supra* note 319 (entered into force Jan. 3, 1976).

323. Thomas H. Wilson et al., *Global Thinking: Ethical Issues that May Come into Play When Texas Lawyers Deal with Clients that Have International Interests*, 80 TEX. BAR J. 426, 426 (2017); Donovan A. McFarlane, *Culture, Morality, and the Law: The Treatment of Homosexuals in Jamaica*, 15 INTERCULTURAL HUM. RTS. L. REV. 203, 231–32 (2020).

324. ICCPR, *supra* note 43, art. 6.

325. Mbaku, *Making International Human Rights Treaties Relevant*, *supra* note 321, at 176 (noting that in Resolution 2005/59, the U.N. Commission on Human Rights "expressed 'its concern at the continuing use of the death penalty around the world' and its alarm at the death penalty's 'application after trials that do not conform to international standards of fairness and that several countries impose the death penalty in disregard of the limitations set'") (quoting Human Rights Res. 200/59, U.N. Doc. E/CN.4/RES/2005/59, (Apr. 20, 2005)); *id.* ("With respect to States Parties that still have laws that impose the death penalty, the Commission on Human Rights urged them '[n]ot to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence.'"). That U.N. Commission resolution further urged States Parties "[t]o ensure also that the notion of 'most serious crimes' does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence." *See* Human Rights Res. 200/59, U.N. Doc. E/CN.4/RES/2005/59, para. 7(f) (Apr. 20, 2005).

326. In 1982, the Human Rights Committee, in its General Comment 6, stated that Article 6 of the ICCPR "refers generally to abolition in terms which strongly suggest . . .

have established the groundwork for a universal ban on capital punishment and a foundation for an anti-execution vision," the ICCPR—through Article 6's wording[327] and by expressly acknowledging the existence of abolitionist nations and contemplating further abolitionist efforts[328]—projects a "contempt for capital punishment" by placing restrictions on its use.[329]

International law develops through custom, treaties or conventions, and the advocacy of civil society organizations, sometimes relatively rapidly and sometimes at a glacial pace. Following the U.N.'s formation and the UDHR's adoption, the U.N. General Assembly adopted a number of conventions, including the Convention on the Prevention and Punishment of the Crime of Genocide,[330] the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[331] the Convention on the Elimination of All Forms of Discrimination Against Women

---

that abolition is desirable" and that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exception measure." Off. of the High Comm'r for Hum. Rts., CCPR General Comment No.6: Article 6 (Right to Life), paras. 6, 7, Apr. 30, 1982.

327. Conall Mallory, *Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty*, 17 MELB. J. INT'L L. 51, 65 (2016) (noting that Article 6(2) of the ICCPR "recognises from the outset that the obligation applies to those 'countries wh[ich] have not abolished the death penalty', thereby only allowing for the use of execution by those who had retained the punishment at the time of signature").

328. Article 6(6) states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment." ICCPR, *supra* note 43, art. 6(6). *See also* John Mukum Mbaku, *African Courts and International Human Rights Law*, 48 BROOK. J. INT'L L. 445, 531 (2023) ("Justice Chaskalson also notes that 'although article 6(2) to (5) of the [ICCPR] specifically allow the imposition of the death penalty under strict controls 'for the most serious crimes' by those countries which have not abolished it, it provides in article 6(6) that '[n]othing in article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'") (citing *S v. Makwanyane and Another* 1995 (3) SA 391 (CC), para. 66 (S. Afr.)).

329. Fine, *supra* note 140, at 423–24.

330. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277. *See also* Yuval Shany, *The Road to the Genocide Convention and Beyond*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 3–4 (Paola Gaeta ed., 2009) ("A remarkably short time has passed between the introduction of the word *genocide* by Raphael Lemkin in 1944, and the unanimous adoption by the UN General Assembly of Resolution 96(I) on the Crime of Genocide in 1946.").

331. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted in* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]. CERD was adopted by the U.N. General Assembly on December 21, 1965. Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1043 (9th Cir. 2003).

("CEDAW"),[332] the Convention Against Torture ("CAT"),[333] and the Convention on the Rights of the Child ("CRC").[334]

Some of these conventions mention punishment or capital punishment in particular, with certain provisions addressing varied topics such as torture, life without parole sentences, or cruel treatment. Article 37 of the CRC, for example, prohibits the use of capital punishment and the imposition of life imprisonment without possibility of parole for crimes committed by juveniles under age eighteen.[335] It was in 1973 that the United Nations Economic and Social Council first requested information on the death penalty worldwide,[336] with the World Medical Association opposing physician participation in torture and executions shortly thereafter[337] and Amnesty International producing its Declaration of Stockholm (1977).[338] Article 31 of the Standard Minimum Rules for the

---

332. G.A. Res. 34/180, U.N. Convention on the Elimination of All Forms of Discrimination against Women (December 18, 1979) (entered into force Sept. 3, 1981) [hereinafter CEDAW].

333. The CAT was adopted by the U.N. General Assembly on December 10, 1984, and entered into force on June 26, 1987. Brown v. Victor, Civil No. 3:08-CV-01178, 2008 WL 11450547, at *1 (M.D. Pa. July 1, 2008); *Emmanuel*, 2007 WL 2002452, at *1; Lippman, *supra* note 164, at 312; Trent Buatte, *The Convention Against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 706 (2021). *See also id.* ("From its inception in the 1970's to the final text adopted in 1984, the United States played an active role in the Convention's drafting. However, the U.S. Senate did not vote to ratify CAT until 1990, the United States did not submit its instrument of ratification until 1994, the Senate only passed implementing legislation in 1998, and the executive branch did not promulgate implementing regulations until 1999."). CAT was ratified by the United States on October 21, 1994, and it entered into force for the United States thirty days later. Brown v. Victor, Civil No. 3:08-CV-01178, 2008 WL 11450547, at *1 (M.D. Pa. July 1, 2008).

334. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (entered into force Sept. 2, 1990) [hereinafter CRC].

335. *Id.* art. 37(a) ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.").

336. *See* Tobias Smith, *Body Count Politics: Quantification, Secrecy, and Capital Punishment in China*, 45 L. & SOC. INQUIRY 706, 710 (2020).

337. Robert Ferris & James Welsh, *Doctors and the Death Penalty: Ethics and a Cruel Punishment*, *in* CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 65–66 (Peter Hodgkinson & William A. Schabas eds., 2004) (noting that, "[i]n 1975, the World Medical Association (WMA) adopted the Declaration of Tokyo against medical participation in torture" and that it "set the scene for the unrelated but congruent WMA position against medical participation in executions adopted six years later").

338. *Conference on the Abolition of the Death Penalty, Declaration of Stockholm*, AMNESTY INT'L (Dec. 11, 1977), https://www.amnesty.org/en/documents/act50/001/1977/en/. *See also* ANN MARIE CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS 4 (2001) ("Amnesty International was a pioneer of the establishment of

Treatment of the Prisoners, promulgated in the 1950s, reads: "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences."[339]

Among many others, momentous developments for the abolitionist movement came in 1989, when the European Court of Human Rights prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia, in part because the then six- to eight-year delay[340] that typically accompanied a death sentence amounted to "cruel, inhuman, [or] degrading treatment or punishment"[341]; in 1993 and 1994, when the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, barred the death penalty's use, "even for the most heinous crimes known to civilization, including genocide";[342] in 1994, when the Council of Europe embraced a moratorium on executions and made

international standards, or norms, of human rights."). It opposed the death penalty in its original charter, but only for prisoners of conscience. In 1977, in its Declaration of Stockholm, Amnesty International announced the organization's "unconditional opposition" to capital punishment for all crimes and all offenders. ROBYN LINDE, THE GLOBALIZATION OF CHILDHOOD: THE INTERNATIONAL DIFFUSION OF NORMS AND LAW AGAINST THE CHILD DEATH PENALTY 164 (2016).

339. Economic and Social Council Res. 663C (XXIV), para. 31 (July 31, 1957); Karapetyan, *supra* note 18, at 143.

340. In retentionist countries, death row inmates often spend many years—even decades—on death row before execution or exoneration. Dunn v. Madison, 583 U.S. 10, 15 (2017) (Breyer, J., concurring) ("In 2017, the 21 individuals who have been executed were on death row on average for more than 19 years."); Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689, 1736 (2022) ("The people executed by the Trump administration . . . sat on death row for an average of more than twenty years before their sentences were carried out."); Bengel, *supra* note 140, at 61 ("Prisoners are held on death row for years in Japan, not knowing the date of their execution until hours before it happens."); Jonathan Goldberg-Hiller & David T. Johnson, *Time and Punishment*, 31 QUINNIPIAC L. REV. 621, 635–36 (2013) (noting that Sakae Menda, who was exonerated in 1983, spent 34 years on death row); Craig S. Lerner, *The Puzzling Persistence of Capital Punishment*, 38 NOTRE DAME J.L. ETHICS PUB. POL'Y 39, 61 (2024) ("The most populous nations in the Islamic world, Pakistan and Indonesia, have not executed anyone in five years, but nonetheless have vast death rows, and continue to impose many death sentences.").

341. Soering v. United Kingdom, 11 Eur. Ct. H.R. para. 111 (1989); *see also* Nkem Adeleye, *The Death Row Phenomenon: A Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment*, 58 SAN DIEGO L. REV. 875, 889–92 (2021) (discussing the *Soering* case and noting that Jens Soering—the subject of the litigation—"was granted parole in November 2019 after serving years in prison"). Virginia later abolished the death penalty. *See* Corinna Barrett Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183, 183 (2021).

342. Robert M. Bohm, *Capital Punishment in a Global Context: A Statistical Update*, 50 CRIM. L. BULL., art. 4 (2014) (citations omitted).

the intention to abolish capital punishment a precondition of membership;[343] in 1995, when the Constitutional Court of South Africa, in the post-apartheid period and using international law as an interpretive tool, declared that country's death penalty to be unconstitutional;[344] in 2002, when the World Coalition Against the Death Penalty was created to advocate for the elimination of capital punishment across the globe;[345] and in 2010, when Spanish Prime Minister José Luis Rodriguez Zapatero, at the opening ceremony of the 4th World Congress against the Death Penalty in Geneva, Switzerland, announced the establishment of the International Commission against the Death Penalty ("ICDP").[346]

While Amnesty International and other individual organizations, including the American Civil Liberties Union and the NAACP in the United States,[347] elevated human rights concerns relating to capital punishment decades ago,[348] major rulings questioning the death penalty's legitimacy have been handed down since that time and there is now a well-resourced, internationally coordinated campaign to abolish capital punishment.[349] Organization and coordination matter, and they can—as history reveals—make a real difference over time.[350]

---

343. *Id.*

344. Mbaku, *Making International Human Rights Treaties Relevant*, *supra* note 321, at 186 n.649 (citing State v. Makwanyane, 1995 (3) SA 391 (CC) (S. Afr.)).

345. Bergquist, *supra* note 70, at 417–18 ("In 2002, civil society organizations came together to create the World Coalition Against the Death Penalty, a global coalition to advocate for abolition of the death penalty in every country of the world. Since then, 36 countries have abolished the death penalty for all crimes or for 'ordinary crimes' (excluding military offenses), and the Coalition's membership has expanded to 170 organizations in 56 countries.").

346. Federico Mayor, *The Origins and the Purpose of the International Commission against the Death Penalty*, *in* 2 THE INTERNATIONAL LIBRARY OF ESSAYS ON CAPITAL PUNISHMENT 253 (Peter Hodgkinson ed., 2016).

347. It took some time for the ACLU and the NAACP to advocate for the total abolition of capital punishment. *See* Alan Rogers, *"Success—at Long Last": The Abolition of the Death Penalty in Massachusetts, 1928–1984*, 22 B.C. THIRD WORLD L.J. 281, 330 (2002) (noting that Justice Goldberg's dissent in *Rudolph v. Alabama* (1963) "stimulated" the ACLU and the NAACP's Legal Defense Fund "to make a commitment to an anti-capital punishment campaign and explicitly make the link with race").

348. The 1960s and 1970s were a pivotal time, especially as America's Civil Rights Movement gathered strength. *See, e.g.*, Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 766–67 (1991) (noting that, in 1959, only the "frail voice" of the American League to Abolish Capital Punishment, founded in the 1920s, opposed capital punishment, but that, by the mid-1960s, the ACLU and the NAACP's Legal Defense and Educational Fund "had joined the cause" and that, in the 1970s, "Amnesty International focused the efforts of its worldwide organization to attack the problem").

349. Behrmann & Yorke, *supra* note 22, at 72–73 (discussing the European Union's funding of anti-death penalty efforts).

350. *E.g.*, YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN

Now a well-known human rights organization with affiliates across the globe,[351] Amnesty International—the pioneering NGO—was once a tiny outfit with humble origins, founded in 1961 by a British lawyer, Peter Benenson, before growing exponentially in size and in effectiveness.[352] While Amnesty International launched its first campaign against torture more than fifty years ago, in 1972,[353] that effort was quickly followed by its decision to oppose the death penalty in all circumstances.[354]

During the Enlightenment, when anti-torture and anti-death penalty advocacy first began, capital punishment and torture were seen in completely different legal silos—one not seen as necessarily related to the other.[355] For example, Cesare Beccaria wrote about

---

VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 181 (1991) (noting that the Anti-Slavery Society, "the world's oldest international human rights NGO," was founded in 1839 as the British and Foreign Anti-Slavery Society, organized the first anti-slavery convention in London shortly thereafter, and promoted international campaigns for the abolition of slavery between 1840 and 1890).

351. *Who We Are*, AMNESTY INT'L, https://www.amnesty.org/en/about-us/ (last visited July 31, 2024) ("Amnesty International is a global movement of more than 10 million people in over 150 countries and territories who campaign to end abuses of human rights.").

352. Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 183 (2003).

353. *E.g.*, Audrey J. Golden, *Spaces of Torture, Spaces of Imagination: Refiguring Viewer Response to Suffering in Luis Camnitzer's from the Uruguayan Torture Series*, 49 WAKE FOREST L. REV. 713, 715 n.11 (2014) ("Amnesty International ('AI') launched its first campaign against torture on Human Rights Day in 1972, but '[m]ost notorious were the cruel methods of torture practiced by the military junta under General Augusto Pinochet Ugarte, who had overthrown the democratically elected Government of Salvador Allende in Chile on 11 September 1973.'").

354. Fitzpatrick & Miller, *supra* note 142, at 330 ("The decision by Amnesty International in 1977 to oppose the death penalty under all circumstances also affected European attitudes."). Amnesty International continues to oppose the death penalty "in all cases without reservation." Stephanie Zywien, *Executing the Insane: A Look at Death Penalty Schemes in Arkansas, Georgia and Texas*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 100 n.55 (2007); Jennifer Tyus, Note, *Going Too Far: Extending Shari'a Law in Nigeria from Personal to Public Law*, 3 WASH. U. GLOB. STUD. L. REV. 199, 213 (2004). Amnesty International has long considered the death penalty "to be akin to torture." Laurence A. Grayer, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POL'Y 555, 562 n.72 (1995); *see also* Brian Hauck, Cara Hendrickson & Zena Yoslov, *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEG. 479 (1999) ("Amnesty International's Joshua Rubenstein . . . called the death penalty 'a form of torture.'"); Walter Berns, et al., *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463, 471 (1997) (Nancy Bothne, Amnesty International's Midwestern regional director, called the death penalty "an act of torture" and "a violation of international standards and universal human rights").

355. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra*

torture and the death penalty in separate chapters of his famous book, first translated into English in 1767 as *An Essay on Crimes and Punishments*.[356] Today, though, due to the work of NGOs such as Amnesty International, Human Rights Watch, and the many members of the World Coalition Against the Death Penalty, capital punishment is increasingly viewed squarely through the human rights lens of torture and CIDT.[357] As Juan Méndez, now a Professor of Human Rights Law at American University – Washington College of Law, wrote in 2012 before even more countries abandoned capital punishment: "There is evidence . . . of an evolving standard within regional and local jurisprudence and state practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and CIDT."[358] Indeed, after adopting two protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953),[359] European countries now adhere to Amnesty International's absolutist stance against capital punishment, first articulated in the Declaration of Stockholm in 1977.[360]

II. THE INTERNATIONAL MOVEMENT TO ABOLISH CAPITAL PUNISHMENT AND THE PATH TO GLOBAL ABOLITION

A. THE ABOLITIONIST MOVEMENT AND THE ROLE OF NGOS

Today, the anti-death penalty movement is led by a group of

note 66, at 175.

356. *See generally* Bessler, *The Marquis Beccaria*, *supra* note 275.

357. *See* Méndez, *supra* note 103, at 2–6.

358. *Id.* at 2.

359. The European Convention on Human Rights, as it is commonly known, was adopted in 1953 and originally contemplated the death penalty's use. Article 2 of the European Convention read: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222; Krista L. Patterson, Note, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1222 (2006).

360. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 1, 1985, E.T.S. No. 114 (concerning the abolition of the death penalty); Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, E.T.S. No. 187 (concerning the abolition of the death penalty in all circumstances).

NGOs that include Amnesty International,[361] Human Rights Watch,[362] The Advocates for Human Rights,[363] Together Against the Death Penalty (or, as it is known in French, *Ensemble Contre la Peine de Mort* (ECPM)),[364] Hands Off Cain,[365] the Community of Sant'Egidio,[366] Harm Reduction International,[367] the International Federation of Action by

361. Joan F. Hartman, *'Unusual' Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 669 n.54 (1983) ("Amnesty International is an independent, nongovernment organization that works to 'oppose the . . . the death penalty on the ground . . . that it is the most cruel, inhuman and degrading of all forms of punishment.'"). For a description of Amnesty International's work leading to the Declaration of Stockholm, see BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 2, 5–7.

362. Human Rights Watch regularly does reports—and raises public awareness of—individuals facing execution. *E.g.*, *Iran: 2 Detainees Executed, 11 Await Imminent Execution*, HUM. RTS. WATCH (Jan. 23, 2024), https://www.hrw.org/news/2024/01/23/iran-2-detainees-executed-11-await-imminent-execution; *Iraq: Unlawful Mass Executions Resume*, HUM. RTS. WATCH, (Jan. 24, 2024), https://www.hrw.org/news/2024/01/24/iraq-unlawful-mass-executions-resume.

363. *Working for Worldwide Death Penalty Abolition*, THE ADVOCS. FOR HUM. RTS., https://www.theadvocatesforhumanrights.org/Death_Penalty ("The Advocates for Human Rights opposes the use of the death penalty anywhere and everywhere.") (last visited Feb. 17, 2025); *World Coalition Against the Death Penalty*, THE ADVOCS. FOR HUM. RTS., https://worldcoalition.org/membre/the-advocates-for-human-rights/ (last visited Feb. 17, 2025) ("In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a death penalty project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment."). The Advocates for Human Rights has served on the Steering Committee of the World Coalition Against the Death Penalty for more than a decade. Bergquist, *supra* note 70, at 418–19.

364. *History*, ECPM (TOGETHER AGAINST THE DEATH PENALTY), https://www.ecpm.org/en/history/ (last visited Feb. 17, 2025) ("ECPM (Together Against the Death Penalty) has been campaigning since 2000 for the universal abolition of the death penalty through advocacy, awareness-raising activities and by uniting international abolitionist forces.").

365. *Litigation and the Abolition of the Mandatory Death Penalty*, 75 IUS GENTIUM 65, 70 (2020) ("Hands Off Cain, an active abolitionist organization, was founded in Brussels in 1993 and is now headquartered in Rome.").

366. The Community of Sant'Egidio, founded in Rome in 1968 and now working in more than seventy countries, is "an international lay Catholic group that advocates ending the death penalty worldwide." Since 1999, it has arranged the lighting of the Colosseum of Rome whenever a government abolished the death penalty or commuted a prisoner's sentence. Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 TOL. L. REV. 485, 539 n.364 (2010); Shiela M. Murphy & Scott M. Priz, *Restorative Justice in Chicago and Abroad: Comparing the Work of the Community of Sant'Egidio to the Restorative Justice in the United States*, 50 J. MARSHALL L. REV. 511, 521 (2017).

367. Harm Reduction International issues important reports. *E.g.*, PATRICK GALLAHUE ET AL., THE DEATH PENALTY FOR DRUG OFFENSES: GLOBAL OVERVIEW 2012, TIPPING THE SCALES FOR ABOLITION (2012); Michelle Miao, *The Penal Construction of Drug-Related Offenses in the Context of "Asian Values"—The Rise of Punitive Anti-Drug*

Christians Against Torture ("FIACAT"),[368] Penal Reform International,[369] Reprieve,[370] and the International Federation of Human Rights ("FIDH").[371] These NGOs—along with work by prominent individual abolitionists such as Sister Helen Prejean[372] and the late Robert Badinter[373]—have steadily advanced the abolitionist cause, leading the world closer toward a halt to executions in many locales.[374] For instance, ECPM promoted the first World Congress Against the Death Penalty in Strasbourg, France, in 2001,[375] and it has played an instrumental role in global anti-death penalty advocacy and

---

Campaigns in Asia, 1 INT'L COMPAR. POL'Y & ETHICS L. REV. 47, 48–49 (2017).

368. *E.g.*, Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1088 n.282 (2003) (describing FIACAT as "an ecumenical network for the abolition of torture and the death penalty" that has associations in France, Germany, the Netherlands, and Switzerland).

369. *Our Work*, PENAL REFORM INT'L, https://www.penalreform.org/issues/death-penalty/what-are-we-doing/ (last visited Feb. 17. 2025) ("We work collaboratively with governments, policymakers, inter-governmental organisations, civil society and the media to advocate for an end to the use of the death penalty worldwide and the implementation of humane alternative sanctions in its place.").

370. NOVAK, *supra* note 83, at 70 ("Two London-based organizations, Penal Reform International (established 1989) and Reprieve (1999) issue reports on various aspects of the death penalty and assist British nationals on death row overseas."); Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 439–40 (2015) (describing the launch of Reprieve's Stop the Lethal Injection Project in 2010); Megan Doyle, *Guerilla Warfare: The Importance of Pharmaceutical Company Support, or Lack Thereof, in the Constitutionality of the Death Penalty in the United States*, 27 U. FLA. J.L. & PUB. POL'Y 191, 209–10 (2016) (discussing Reprieve's work).

371. NOVAK, *supra* note 83, at 70 ("A French-led organization, International Federation for Human Rights (FIDH), regularly sends investigatory missions to retentionist countries.").

372. *Sister Helen Prejean: Biography*, MINISTRY AGAINST THE DEATH PENALTY, https://www.sisterhelen.org/biography/ (last visited Feb. 17, 2025).

373. *Robert Badinter, Former French Justice Minister, and Death Penalty Abolitionist, Dies at 95*, DEATH PENALTY INFO. CTR. (Feb. 12, 2024), https://deathpenaltyinfo.org/news/robert-badinter-former-french-justice-minister-and-death-penalty-abolitionist-dies-at-95.

374. Bergquist, *supra* note 70, at 418–19, 424–25; Bessler, *The Gross Injustices of Capital Punishment*, *supra* note 288, at 96 n.93. *See also* Hood & Hoyle, *supra* note 33, at 30–31 (discussing the efforts of NGOs such as Amnesty International, Hands Off Cain, the International Federation for Human Rights, *Ensemble Contre la Peine de Mort* (Together Against the Death Penalty), Human Rights Watch, and the World Coalition Against the Death Penalty).

375. MARAZZITI, *supra* note 32, at 57. "Twenty-six representatives of as many international associations, including the Community of Sant'Egidio, signed the Strasbourg Declaration on June 22, 2001, committing to 'create a worldwide coordination of abolitionist associations and campaigners,'" the result of which was the creation, in 2002, of the World Coalition Against the Death Penalty. *Id.*

organizing all the World Congresses since that time.[376] After the first World Congress took place in Strasbourg, the following World Congresses took place every third year: Montreal, Canada (2004); Paris, France (2007); Geneva, Switzerland (2010); Madrid, Spain (2013); Oslo, Norway (2016); Brussels, Belgium (2019); and Berlin, Germany (2022).[377] "To ensure the best possible preparation for the World Congresses," ECPM's websites observes, "a regional congress is held prior to the World Congresses to focus attention on a particular region of the globe: in 2012 in Rabat (Morocco), in 2015 in Kuala Lumpur (Malaysia) and in 2018 in Abidjan (Ivory Coast)."[378]

Key to the anti-death penalty movement's success is coordination and winning the battle of ideas with a compelling and strategic vision. As with any social reform movement, a good communications strategy and an effective organization are critical. In the latter respect, it is important to note that, while national and state organizations to abolish the death penalty existed in prior centuries, an intricate, global infrastructure now exists that is actively seeking the death penalty's abolition through international law and U.N. mechanisms—an organizational effort that can coordinate messaging and advocacy at lightning speed through the Internet, social media platforms, and other twenty-first century methodologies and technologies.[379] The

376. In 2009 in the French legal system, ECPM and another group, Solidarité Chine, challenged a Paris exhibition of dead bodies called "Our Body" sponsored by Encore Events. The plaintiffs suggested that the exhibited bodies may have been young men who were executed, and they alleged that Encore Events failed to prove that the concerned persons had consented to having their dead bodies exhibited. *See* Lisa A. Giunta, Note, *The Dead on Display: A Call for the International Regulation of Plastination Exhibits*, 49 COLUM. J. TRANSNAT'L L. 164, 185–86 (2010).

377. *Abolition Congresses*, ECPM (TOGETHER AGAINST THE DEATH PENALTY), https://www.ecpm.org/en/our-actions/abolition-congresses/ (last visited Mar. 1, 2025).

378. *Id.* ECPM has published proceedings of its World and Regional Congresses. *Id.*

379. CORNISH ET. AL, *supra* note 278, at 552; Patterson, *supra* note 279, at 1226. *See also* Sarah J. Garcia, Comment, *The Death Penalty Seals Racial Minorities' Fate: The Unfortunate Realities of Being a Racial Minority in America*, 25 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 151, 157 (2023) (noting that Horace Greeley "was instrumental in leading the death penalty abolition movement in the late 1840s"); JAMES GREGORY, VICTORIANS AGAINST THE GALLOWS: CAPITAL PUNISHMENT AND THE ABOLITIONIST MOVEMENT IN NINETEENTH CENTURY BRITAIN 1 (2012) (discussing the Society for the Abolition of Capital Punishment, created in April 1846 for promoting the death penalty's abolition); Sheherezade C. Malik & D. Paul Holdsworth, Note, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 698 n.41 (2015) ("the Anti-Capital Punishment Society of America" was "one of several abolitionist organizations that emerged in the Progressive Era"); Shirley Dicks, *National Coalition to Abolish the Death Penalty*, *in* CONGREGATION OF THE CONDEMNED: VOICES AGAINST THE DEATH PENALTY 221, 221 (Shirley Dicks ed., 1991) ("The National Coalition to Abolish the Death Penalty was founded in 1976 in response the

World Coalition Against the Death Penalty, whose membership now consists of 191 organizations in 56 countries, was formed in Rome in 2002, with the ICDP, founded in Madrid in 2010, becoming a force multiplier and helping to disseminate persuasive arguments, frame thematic campaigns, and advance abolitionist initiatives and ideas.[380] The World Coalition coordinates international advocacy against the death penalty,[381] including among NGOs,[382] and each year it sponsors

resumption of executions in the United States. The NCADP was originally based in New York City as part of the American Civil Liberties Union. The NCADP moved to Philadelphia and incorporated separately from the ACLU in 1982 . . . ."); Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 61 (2009) ("Earlier this year, a national abolitionist organization founded by Sister Helen Prejean launched a campaign to persuade medical licensing boards in each state to declare it unethical for doctors to participate in executions. The stated goal of the campaign is to 'mak[e] it impossible for states to carry out their own protocols for capital punishment.'"); Matthew E. Feinberg, *Comments: The Crime, the Case, the Killer Cocktail: Why Maryland's Capital Punishment Procedure Constitutes Cruel and Unusual Punishment*, 37 U. BALT. L. REV. 79, 82–83 (2007) (discussing the NAACP's "two-pronged attack on the death penalty"); *The Death Penalty in 2024*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024/international (last visited Feb. 17, 2025),

380. Bergquist, *supra* note 70, at 418; Bessler, *The Abolitionist Movement Comes of Age, supra* note 172, at 13; *Member organizations*, WORLD COALITION AGAINST THE DEATH PENALTY, https://worldcoalition.org/who-we-are/member-organizations/ (last visited Mar. 30, 2025) (listing 192 members). Of additional importance is the Network for the Abolition of Capital Punishment and Cruel Punishment. That initiative coordinates and distributes the work of academic specialists on abolition. *Meet the Network*, REPECAP: NETWORK FOR THE ABOLITION OF THE DEATH PENALTY AND CRUEL PUNISHMENT, https://www.academicsforabolition.net/en/know-the-network (last visited Feb. 17, 2025).

381. Membership in the World Coalition Against the Death Penalty continues to grow. *E.g.*, Andrew Drilling, Student Article, *Capital Punishment: The Global Trend Toward Abolition and Its Implications for the United States*, 40 OHIO N.U. L. REV. 847, 861 (2014) (noting that "a World Coalition Against the Death Penalty, 99 organizations strong, was founded in 2002"); Bergquist, *supra* note 70, at 418 (noting that "the Coalition's membership has expanded to 170 organizations in 56 countries"). In addition, twenty-five abolitionist organizations and international NGOs, including ECPM, recently formed the World Consortium to Abolish the Death Penalty. *A New Consortium to Fight Against the Death Penalty*, ECPM (TOGETHER AGAINST THE DEATH PENALTY), (July 2024) https://www.ecpm.org/en/a-new-consortium-to-fight-against-the-death-penalty/. Led by the World Coalition Against the Death Penalty and funded by the European Union, this initiative aims "to amplify the voice and influence of the abolitionist movement worldwide." *Id.* The Consortium will operate in 40 target countries. *Id.*

382. NGOs play a special role in raising awareness of human rights issues and appearing before U.N. bodies and regional human rights systems. *E.g.*, Christof Heyns, *The African Regional Human Rights Systems: The African Charter*, 108 DICK. L. REV. 679, 697 (2004) (noting that "NGOs have a special relationship" with the African Commission on Human and Peoples' Rights, that "[l]arge numbers have registered for affiliate status," and that "NGOs are often instrumental in bringing cases to the Commission"); Behrmann & Yorke, *supra* note 22, at 69–70, 70 n.357 (noting the role

the World Day Against the Death Penalty, an international observance held on October 10th.[383] Recent World Day events have thoughtfully reinforced the linkage between torture and capital punishment, thus shaping public views of the horrors of state-sanctioned killing.[384]

The ICDP likewise promotes and supports "any action which aims at obtaining the abolition of the death penalty in all regions of the world."[385] Members of the ICDP, founded after the Spanish

---

of NGOs such as Amnesty International and Penal Reform International in anti-torture and anti-death penalty advocacy); Kai-Ping Su, *Why the State Stops to Kill: The Death Penalty and the Rule of Law in Taiwan*, 23 BERKELEY J. CRIM. L. 110, 128 (2018) ("There are multiple NGOs in Taiwan that have campaigned for the abolition of capital punishment or at least the reduction of its use, including but not limited to *Taiwan Association for Human Rights* (TAHR), *Taiwan Alliance to End the Death Penalty*, *Judicial Reform Foundation* (JRF), [and] *Taiwan Innocent Project*.").

Transnational litigation networks have also played a major role in curtailing the death penalty. *E.g.*, Andrew Novak, *Applying the Lens of Transnational Advocacy Networks to Human Rights Litigation*, *in* TRANSNATIONAL HUMAN RIGHTS LITIGATION 11, 28 (2020) (discussing advocacy work against the mandatory death penalty).

383. Carmen D. Hernandez, *Calling for a Moratorium on Capital Prosecutions and Executions*, 31 CHAMPION 5, 6 (2007). Each World Day Against the Death Penalty has a theme. Jack King, *NACDL News*, 31 CHAMPION 8, 8–9 (2007) ("This year's World Day focus was on generating support for the Nov. 15 moratorium resolution."). Other abolitionist events take place on November 30, the anniversary of November 30, 1786, when Peter Leopold (also known as Leopold II), the Grand Duke of Tuscany, issued an edict abolishing the death penalty in his dominion. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 75; *see also* SANJEEV P. SAHNI & MOHITA JUNNARKAR, THE DEATH PENALTY: PERSPECTIVES FROM INDIA AND BEYOND 43 (2020) ("In November 2002, the first International 'Cities for Life, Cities against the Death Penalty' Day was launched by the [C]ommunity [of Sant'Egidio]. 30th November was chosen as a date as it coincided with the anniversary of the first death penalty abolition in the world that occurred in the 'Grand Duchy of Tuscany' on November 30, 1786."). In his edict, the Grand Duke of Tuscany also abolished torture. EDICT OF THE GRAND DUKE OF TUSCANY, FOR THE REFORM OF CRIMINAL LAW 16 (1789) ("We confirm by our supreme authority, and by a special resolution, the abolition of the torture . . . and we allow no exception of any kind of torture, nor of any case or effects, for which it was formerly practised in criminal matters.").

384. Venus Aves, *Reinforcing the Link Between Torture and the Death Penalty: 21st World Day Against the Death Penalty*, WORLD COAL. AGAINST THE DEATH PENALTY (Nov. 17, 2023), https://worldcoalition.org/2023/11/17/reinforcing-the-link-between-torture-and-the-death-penalty-21st-world-day/ ("'There is no way in today's world to apply the death penalty in a legal way, in a way that does not violate international law.' This was the bold and unequivocal assertion of former UN Special Rapporteur on Torture Juan Méndez in an online discussion with UN experts and exonerees organized by the World Coalition on October 10, 2023 for the 21st World Day Against the Death Penalty (World Day)."); *20th World Day Against the Death Penalty—Death Penalty: A Road Paved with Torture*, WORLD COAL. AGAINST THE DEATH PENALTY (June 10, 2022), https://worldcoalition.org/campagne/20th-world-day-against-the-death-penalty/ ("On 10 October 2022, the World Day will be dedicated to reflecting on the relationship between the use of the death penalty and torture or other cruel, inhuman, and degrading treatment or punishment.").

385. INT'L COMM'N AGAINST THE DEATH PENALTY, https://icomdp.org (last visited

Government launched its human rights-focused initiative to abolish capital punishment worldwide[386] and which produces extensive reports to aid in that effort,[387] have included New Mexico Governor Bill Richardson (1947–2023)[388] and Robert Badinter (1928–2024), a distinguished abolitionist who, from 1981 to 1986, served as France's Minister of Justice, during which time he successfully led the effort to abolish France's death penalty.[389] The ICDP is an independent body composed of people of international prestige with extensive human rights experience, including former presidents, prime ministers, government ministers, and former judges and other officials.[390] "The ICDP opposes capital punishment in all situations and urges the immediate establishment of a universal moratorium on executions as a step towards total abolition of the death penalty," a former Spanish politician and director-general of UNESCO, Federico Mayor Zaragoza, explains.[391] "The abolitionist movement," Amy Bergquist of The Advocates for Human Rights writes of the world's collective anti-death penalty activism, "deploys a variety of advocacy strategies to achieve abolition, including, for example, workshops with lawmakers, litigation, film festivals, and restrictions on exports of goods that might be used in executions."[392] "Advocacy within U.N. rights mechanisms," she explains, "is a common strategy, enabling civil society organizations to lobby U.N. experts and diplomats to press governments to abolish the death penalty."[393]

The total abolition of capital punishment may, at times, still seem

---

Feb. 17, 2025).

386. *Organizations to Contact*, *in* THE DEATH PENALTY AT ISSUE 111, 113 (Megan Manzano ed., 2018).

387. *ICDP Reports*, INT'L COMM'N AGAINST THE DEATH PENALTY, https://icomdp.org/reports/ (last visited Feb. 17, 2025). Its publications include Report on Children, Youth and the Death Penalty (2023) and periodic reports on How States Abolish the Death Penalty (2013, 2018, 2020). *Id.*

388. *Bill Richardson*, INT'L COMM'N AGAINST THE DEATH PENALTY, https://icomdp.org/comission/bill-richardson-2/ (last visited Feb. 17, 2025).

389. ROBERT BADINTER, ABOLITION: ONE MAN'S BATTLE AGAINST THE DEATH PENALTY (Jeremy Mercer trans., 2008); *Summary Biographical Information of Nuremberg Symposium Presenters*, 39 LOY. L.A. INT'L & COMPAR. L. REV. at xvii, xx (2017); Press Release, Int'l Comm'n Against the Death Penalty, ICDP Announces the Passing of Commissioner Robert Badinter (Feb. 9, 2024) (on file with *Minnesota Journal of International Law*).

390. *ICDP Factsheet*, INT'L COMM'N AGAINST THE DEATH PENALTY, https://icomdp.org/factsheet/ (last visited Feb. 2, 2025).

391. Federico Mayor Zaragoza, *The Abolition of the Death Penalty: A Question of Respect for Human Rights*, *in* DEATH PENALTY: A CRUEL AND INHUMAN PUNISHMENT 11, 12 (L. Arroyo Zapatero et al. eds., 2013); ENRIQUE ÁVILA LÓPEZ, MODERN SPAIN 93 (2016).

392. Bergquist, *supra* note 70, at 418.

393. *Id.*

a long way off. But international human rights movements, as the anti-slavery, women's suffrage, and anti-corporal punishments movements show,[394] can fundamentally change cultures—and make outliers or outcasts of societies that resist new or established norms.[395] In fact, Amy Bergquist, the Vice President of the World Coalition Against the Death Penalty, has recently documented the success of the use of the Universal Periodic Review ("UPR") in getting countries to abolish or restrict their use of capital punishment.[396] Her study concluded that "in some circumstances the UPR does appear to influence" the timing of a country's decision to abolish the death penalty.[397] "The U.N. General Assembly established the UPR when it created the Council under Resolution 60/251," Bergquist explains, noting that the Human Rights Council "consists of forty-seven countries elected by the U.N. General Assembly, with regional representation."[398] Resolution 60/251 called for the UPR to be "a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned," and "based on objective and reliable information."[399] The U.N. Human Rights Council's UPR is "a peer-review mechanism that assesses the protection and promotion of human rights in all 193 UN Member States, including intergovernmental and civil society input."[400]

In discussing the success of the multi-step UPR mechanism[401] in getting countries to move away from capital punishment, Bergquist documented the multi-faceted role of NGOs in that process.[402] Noting that countries made 3,973 recommendations relating to the death penalty over the first three UPR cycles,[403] Bergquist observes that "[a]bolition is a process" and that "the process of amending domestic law may involve multiple steps, depending on the nature of the

394. *See* END CORPORAL PUNISHMENT, https://endcorporalpunishment.org (last visited Feb. 17, 2025).

395. *E.g.*, Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759, 823 (2007).

396. Bergquist, *supra* note 70.

397. *Id.* at 417.

398. *Id.* at 419.

399. G.A. Res. 60/251, ¶ 5(e) (Apr. 3, 2006).

400. Alice Storey, *Improving Recommendations from the UN's Universal Periodic Review: A Case Study on Domestic Abuse in the UK*, 35 PACE INT'L L. REV. 193, 195 (2023).

401. Bergquist, *supra* note 70, at 419–20 ("The first UPR session took place in April 2008, and since that time every U.N. Member States has completed three UPR 'cycles.' Each cycle takes approximately five years, and the fourth cycle began in November 2022."); *see also id.* at 420–22 (describing the steps of the UPR process).

402. *Id.* at 422–23 (discussing the role of NGOs in the UPR process).

403. *Id.* at 426.

country's legislative system."[404] Bergquist also points out that "the country may also elect to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, or OP2."[405] The ICCPR's Second Optional Protocol ("Second Optional Protocol" or "OP2"), adopted by the U.N. General Assembly in 1989, bars the death penalty's use,[406] giving only one limited opportunity at the outset of ratification for making a reservation for the death penalty's application in time of war.[407] "Since the UPR began," Bergquist writes, "22 countries have ratified or acceded to OP2, and 21 countries have abolished the death penalty for all crimes or ordinary crimes."[408] Her ultimate conclusion: "Nearly fifteen years of experience show that the UPR can influence the timing of some countries' decisions to abolish the death penalty or ratify OP2."[409] In 2022, in an important milestone, Kazakhstan became the 90th nation-state to ratify the ICCPR's Second Optional Protocol.[410] In May 2024, Côte d'Ivoire became the 91st country to accede to the Second Optional Protocol,[411]

---

404. *Id.* at 427–28.

405. *Id.* at 429; *see also id.* at 429 (noting that because ratification of the ICCPR's Second Optional Protocol is "irrevocable," "advocates often view ratification as the final step" in a country's abolitionist journey).

406. Second Optional Protocol, *supra* note 149, art. 1(1) ("No one within the jurisdiction of a State Party to the present Protocol shall be executed."); *id.* art. 1(2) ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."). The Second Optional Protocol was adopted in 1989. Storey, *supra* note 151, at 59.

407. Second Optional Protocol, *supra* note 149, art. 2(1) ("No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."); *id.* art. 2(2) ("The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.").

408. Bergquist, *supra* note 70, at 431.

409. *Id.* at 479.

410. *Kazakhstan Became the 90th State to Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights*, INT'L COMM'N AGAINST THE DEATH PENALTY (Mar. 30, 2022), https://icomdp.org/kazakhstan-became-the-90th-state-to-ratify-the-second-optional-protocol-to-the-international-covenant-on-civil-and-political-rights. In mid-2024, Côte d'Ivoire became the 91st nation-state to ratify the Second Optional Protocol. Press Release, United Nations Office of the High Commissioner, Côte d'Ivoire: Model to Follow for Definitive Abolition of the Death Penalty, Says Special Rapporteur (July 31, 2024), https://www.ohchr.org/en/press-releases/2024/07/cote-divoire-model-follow-definitive-abolition-death-penalty-says-special.

411. *Côte d'Ivoire Accedes to the Second Optional Protocol to the ICCPR*, WORLD COAL. AGAINST THE DEATH PENALTY (July 8, 2024), https://worldcoalition.org/2024/07/08/cote-divoire-accedes-to-the-second-optional-protocol-to-the-iccpr/.

and in December 2024, Zambia became the 92nd country to do so.[412] It was in 2024 in Japan that the world's longest-serving death row inmate, 88-year-old Iwao Hakamata, was exonerated after spending more than forty-five years on death row.[413]

B. THE PATH FORWARD TO AN INTERNATIONAL BAR ON THE DEATH PENALTY AND THE RECOGNITION OF A *JUS COGENS* NORM PROHIBITING CAPITAL PUNISHMENT

The UDHR's promulgation proved to be a foundational moment for the development of international human rights law.[414] But that

412. *Zambia Commits to Irreversible Abolition of the Death Penalty for All Crimes*, WORLD COAL. AGAINST THE DEATH PENALTY (Dec. 23, 2024), https://worldcoalition.org/2024/12/23/zambia-commits-to-irreversible-abolition-of-the-death-penalty-for-all-crimes/.

413. Lex Harvey et al., *He's the World's Longest-Serving Death Row Inmate. A Court Just Exonerated Him.*, CNN (Sept. 26, 2024), https://www.cnn.com/2024/09/25/asia/worlds-longest-death-row-prisoner-japan-intl-hnk/index.html; Arata Yamamoto & Reuters, *Japanese Man Acquitted of 1966 Murders After Decades on Death Row*, NBC NEWS (Sept. 26, 2024), https://www.nbcnews.com/news/world/japan-man-acquitted-murders-decades-death-row-rcna172811. Article 36 of Japan's Constitution (*Nihonkoku Kempō*) reads: "The infliction of torture by any public officer and cruel punishments are absolutely forbidden." THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70, at 261 (Hiroshi Itoh & Lawrence Ward Beer eds., 1978). In 2011, the constitutionality of hanging—Japan's method of execution—was unsuccessfully challenged as a cruel punishment by Sunao Takami. ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 190 (5th ed. rev. 2016); *see also id.* ("After hearing expert evidence from a former prosecutor and a highly regarded medical expert (Dr Walter Rabl) the Osaka District Court held that hanging does not violate article 36 of Japan's constitution . . . on the grounds that some degree of suffering during an execution by hanging is inevitable and 'has to be put up with'."). "In Japan," a Japanese lawyer, Takeshi Kaneko, observes, "executions are announced on the morning of the day of execution." "As a result," he explains, "prisoners on death row live in daily fear that they may be executed." *DPRU Q&As: Takeshi Kaneko, Lawyer, Japan: Part One*, DEATH PENALTY RSCH. UNIT, UNIV. OF OXFORD (Nov. 12, 2024), https://blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2024/11/dpru-qas-takeshi-kaneko-lawyer-japan-part-one. In April 2024, the Osaka District Court dismissed a lawsuit by death row inmates claiming that same-day notifications of executions violated Japan's constitution. Karin Kaneko, *"Death-Row Inmates' Lawsuit Targeting Same-Day Notifications of Executions Dismissed"*, JAPAN TIMES (Apr. 15, 2024), https://www.japantimes.co.jp/news/2024/04/15/japan/crime-legal/ruling-death-row-execution/. For an excellent discussion of Japan's death penalty, see Hirohiko Katayama, Ending the Death Penalty in Japan: Human Rights, Public Opinion, and Abolition (Revised Version) (Apr. 2020) (LLM thesis, National University of Ireland), https://www.researchgate.net/publication/340935993_Ending_the_Death_Penalty_in_Japan_revised.

414. Catherine Baylin Duryea, *Mobilizing Universalism: The Origins of Human Rights*, 40 BERKELEY J. INT'L L. 95, 99, 103 (2022). As a commentator notes of the UDHR:

non-binding declaration was just a start, with many other human rights instruments and conventions to follow—some provisions of which dealt with torture, while others addressed corporal or capital punishment, or at least some aspect thereof. Just a year after the UDHR's adoption, the Geneva Convention Relative to the Treatment of Prisoners of War, better known as the Third Geneva Convention (1949), proclaimed: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."[415] Another article of the Third Geneva Convention states: "Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden."[416]

Following the adoption of the ICCPR and then the 1975 U.N. declaration pertaining to torture,[417] the United Nations adopted the Convention Against Torture that gave a specific definition of torture in its very first article.[418] The convention[419] defines *torture* as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a prohibited purpose, namely, obtaining information or a confession; as punishment; to intimidate or coerce; or to discriminate.[420] There were various drafts of the Convention Against Torture, including ones proposed by Sweden, as well as much debate before U.N. member states voted on

---

"[I]ts moral force was the underpinning to the development of international human rights law in that the document set forth threshold objectives for governments in the development of their human rights policies and practices." Stephanie J. Spencer, Note, A and Others v. Secretary: *The Use of Torture Evidence Against Criminal Defendants*, 21 TEMP. INT'L & COMPAR. L.J. 205, 224 (2007).

415. Geneva Convention [No. III] Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 17 of the Third Geneva Convention further provided: "Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind." *Id.*

416. *Id.* art. 87; *see also* Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427, 430 (2006) ("Common Article 3 of the Geneva Conventions prohibits the use of torture in any circumstance without actually defining what constitutes torture. All four of the Geneva Conventions also dictate that the use of torture is a grave breach."); Lindsey O. Graham & Paul R. Connolly, *Waterboarding: Issues and Lessons for Judge Advocates*, 69 A.F. L. REV. 65, 84 (2013) ("[N]either the Geneva Conventions nor Common Article 3 defines the term "torture.'").

417. G.A. Res. 3452 (XXX) (Dec. 9, 1975).

418. CAT, *supra* note 167, art. 1.

419. *E.g.*, Oona A. Hathaway, *The Promise and Limits of the International Law of Torture, in* TORTURE: A COLLECTION 199 (Sanford Levinson ed., 2004) (noting more than 130 countries are parties to the CAT).

420. CAT, *supra* note 167, art. 1.

the convention's final definition of torture.[421] The Convention Against Torture, with its definition of torture encompassing both physical and mental forms, has now been ratified or acceded to by 174 States Parties.[422]

The U.N. Convention Against Torture contains a "lawful sanctions" carve-out,[423] but jurists and publicists[424] have made clear that a sanction cannot itself be torturous in nature to qualify because that would defeat the convention's object and purpose.[425] Corporal punishments, for example, have been classified as torture or CIDT, including by U.N. Special Rapporteurs on Torture,[426] in spite of some countries attempting to classify them as "lawful sanctions."[427] The U.N. Committee Against Torture has recommended "the prompt abolition of corporal punishment,"[428] with one legal commentator,

421. THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 24–40 (Manfred Nowak et al. eds., 2d ed. 2019) [hereinafter CAT COMMENTARY]; *see also id.* at 40–41 (noting that "[s]ome Governments made reservations relating to the definition of torture in Article 1" and that the United States "ratified the CAT only subject to a number of 'understandings' as previously advised by the Senate" but that "[a] number of predominantly European Governments rightly objected to these far-reaching reservations").

422. UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en (last visited Feb. 17, 2025) (listing the ratification status of the CAT).

423. CAT, *supra* note 167, art. 1 (providing that *torture* "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions").

424. Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 88–90 (citations omitted).

425. *E.g.*, Tun v. U.S. Immigr. and Naturalization Service, 445 F.3d 554, 571 (2d Cir. 2006).

426. CAT COMMENTARY, *supra* note 421, at 462.

427. *Id.* at 461 (noting that "Islamic and other States" have taken "the position that corporal punishment was covered under the lawful sanctions clause in Article 1" of the CAT, "and, therefore, could not be considered as a violation of Article 16" of the CAT that prohibits CIDT, and that during the discussion of Jordan's report in 1995, the Committee Against Torture "expressed concern that the continuing application of capital and corporal punishment 'could constitute in itself a violation in terms of CAT' and recommended that the Government review its policy relating to corporal punishment"); *id.* ("In 2005 the Committee welcomed the abolition of corporal punishment in *Uganda* following the 1999 judgment of the Supreme Court in *Kyamanywa v Uganda*."); *id.* at 461–62 ("The clearest conclusion that corporal punishment was not in conformity with the Convention was reached when the Committee discussed the reports of *Saudi Arabia*, *Yemen*, and *Qatar* in the early 2000s . . . .").

428. Karapetyan, *supra* note 18, at 148 ("In its concluding observations on Namibia, the Committee against Torture recommended 'the prompt abolition of corporal punishment.' Furthermore, in its consideration of the report of Zambia it found corporal punishment to be a clear violation of Article 16 regardless of the length of the cane used as specified in the Zambia's Prison Act."); *id.* at 148–49 (noting that

Anna Karapetyan, observing that "the lawful sanctions clause is not a *carte blanche* given to States Parties to determine the lawfulness of sanctions under domestic law, and the clause cannot be invoked by the States in order to disguise continuous violence."[429]

Moreover, many countries and American states now explicitly make executions *unlawful*.[430] Bottom line: because the administration of *any* death penalty regime makes use of credible death threats, capital prosecutions and the use of death sentences and death warrants cannot possibly eliminate the well-recognized psychological torment associated with such death threats.[431] In the United States, for example, death warrants are often issued after the completion of direct appellate review of capital cases, with those warrants—depending on state law—typically scheduling executions for thirty to ninety days from the date the relevant warrant is issued.[432] Because capital punishment systems systematically make use of such death threats to announce in advance the timing of a death row inmate's execution, capital prosecutions and the threat or imposition of death sentences should be classified as acts of torture.[433] Mock, or *simulated*,

---

the Committee Against Torture, in review of Saudi Arabia's report, concluded that "the amputation of limbs and flogging, were incompatible with the CAT").

429. *Id.* at 148. The Convention of Torture would be completely toothless—and would fail to protect people against torture—if a country were simply allowed to denominate an objectively torturous act as a "lawful sanction."

430. *E.g.*, James Park Taylor, *Intersection of Hybrid Rights: Dignity and Protection Against Excessive Punishment*, 46 MONT. LAW. 20, 24 (2021) ("The trends in the United States are towards abolition of the death penalty. On the international law, the trend is even more pronounced. 106 countries have abolished the death penalty. The death penalty is prohibited by several international agreements including the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights, Protocol No. 13 to the European Convention on Human Rights, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty."); Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 223 (2007) ("The death penalty is prohibited in all Nordic countries, including during wartime.").

431. The American Constitution Society and the Washington, D.C.-based Death Penalty Information Center have promoted this idea in recent years through content posted on their websites. *E.g.*, Russ Feingold, *Honoring World Day Against the Death Penalty*, AM. CONST. SOC'Y (Oct. 12, 2023), https://www.acslaw.org/inbrief/honoring-world-day-against-the-death-penalty/; *Discussions with DPIC Podcast: Classifying Capital Punishment as Torture with John Bessler*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/news/discussions-with-dpic-classifying-capital-punishment-as-torture-with-john-bessler (last updated Sept. 25, 2024).

432. Bessler, *Torture and Trauma*, *supra* note 110, at 89 n.488.

433. Alyssa M. Knappins, Comment, *Setting the Record Straight: Why Threats of Physical Violence Made Towards Inmates Violate the Eighth Amendment*, 27 ROGER WILLIAMS U. L. REV. 113 (2022); *see* Mueller v. Syrian Arab Republic, 656 F. Supp.3d 58, 70 (D. D.C. 2023) ("ISIS's torture methods included interrogations, psychological torture—including 'death threats, solitary confinement, being forced to watch the

executions are already classified as acts of torture,[434] so it is only logical that the threat of an *actual* execution should also qualify as torturous in nature.[435] The threat of a real execution, like the kind of threats associated with mock executions, plainly inflicts severe pain or suffering.[436] The high suicide and attempted suicide rate of individuals confined on death row only confirms the severe pain and suffering associated with living under a sentence of death.[437]

The U.N. Convention Against Torture does not specifically define what is meant by "mental" torture,[438] and some have argued that the

physical torture and execution of others, threats that the captives would have a similar fate, and mock executions'—and physical torture.") (quoting report). When a government brings a capital charge or a judge imposes a sentence of death, the threat of death is *always* a credible one. *See generally* Bessler, *Taking Psychological Torture Seriously*, *supra* note 110. Unlike in immigration matters involving the likelihood of torture, there is, in the death penalty context, thus no need to assess the likelihood that a person will be subjected to torture based on country conditions or testimonial evidence. *See also* Phillip R. Takhar, Michael J.P. Hazel & Mairead K. Dolan, *Using Country Conditions Evidence to Improve Appellate Review of Convention Against Torture Cases*, 98 DENV. L. REV. 433, 444 (2021).

434. *E.g.*, Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 12–13; DEBORAH E. ANKER & JEFFREY S. CHASE, LAW OF ASYLUM IN THE UNITED STATES (June 2024 Update) § 7:23 —*Severe mental pain or suffering* (noting practices identified by the first U.N. Special Rapporteur on Torture as constituting mental torture).

435. *E.g.*, Rania Khalek, *The Death Row Torture of Warren Hill*, THE NATION (Aug. 14, 2013), https://www.thenation.com/article/archive/death-row-torture-warren-hill/ (noting that Brian Evans, the head of Amnesty International USA's Death Penalty Abolition Campaign, characterized mock executions and repeated trips to the death chamber as torture).

436. Ahcene Boulesbaa, *Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture*, 5 FLA. INT'L L.J. 293, 306–07 (1990).

437. Carol S. Steiker & Jordan M. Steiker, *Capital Clemency in the Age of Constitutional Regulation: Reversing the Unwarranted Decline*, 102 TEX. L. REV. 1449, 1468 (2024) ("Extended death row confinement in small cells with limited human contact has generated acute mental health problems for death row inmates and high rates of suicide.") (citing Christine Tartaro & David Lester, *Suicide on Death Row*, 61 J. FORENSIC SCI. 1656, 1656–57 (2016) (gathering data from 1978–2010 and finding a mean suicide rate of 129.7 per 100,000 inmates per year, compared to a suicide rate of 24.62 in the general population of American males over age fifteen during the same time period); *A Death Before Dying: Solitary Confinement on Death Row*, AM. C.L. UNION 6–7 (July 22, 2013),
https://www.aclu.org/wp-content/uploads/publications/deathbeforedying-report.pdf [https://perma.cc/EE4D-Y4ZP] (discussing adverse psychological and physiological consequences suffered by people subjected to solitary confinement); JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 225 (2012) ("Condemned inmates, suffering from bouts of depression, often take their own lives . . . . One Florida study showed that 35 percent of death row inmates in that state attempted suicide and that 42 percent considered suicide.").

438. Deena N. Sharuk, *No Sleep for the Wicked: A Study of Sleep Deprivation as a Form of Torture*, 81 MD. L. REV. 694, 743 (2022) (noting that the U.N. Convention

concept of mental torture is too ambiguous or vague to apply.[439] Indeed, in ratifying the Convention Against Torture, the United States chose to define the concept narrowly,[440] something noted by American law professors in analyzing the difference between the wording of the U.N. Convention Against Torture and various U.S. prohibitions of torture, whether statutory or by regulation.[441] American regulations implementing the CAT do track the CAT in some ways, providing, for instance, that "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[442] However, those U.S. regulations go further, defining "lawful sanctions" as "judicial imposed sanctions and other enforcement actions authorized by law, including the death penalty."[443] But the U.N. Convention Against Torture makes no mention of the death penalty; instead, it makes the prohibition against torture absolute and non-derogable.[444]

The death penalty's use, objectively considered, is completely

---

Against Torture does not define mental torture or mental pain or suffering in detail).

439. *See, e.g.*, Davis v. Western Union Tel. Co., 32 S.E. 1026, 1028 (W. Va. 1899).

440. *E.g.*, Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 135–36 (2008) (discussing the CAT and how the U.S. defined mental torture narrowly when it ratified the CAT); *accord* Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Led to Torture*, 20 HARV. HUM. RTS. J. 89, 129–30 (2007).

441. *E.g.*, David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L.J. 333, 342 (2019) ("[T]he U.S. Torture Act offers a narrow definition of mental torture that is not found in CAT."); David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 825 (2012) ("[T]he law Congress enacted narrows and distorts the meaning of CAT's core formula in the case of mental torture. It includes a cramped, convoluted, and arbitrary definition of mental pain or suffering, so narrow that few techniques of mental torment qualify as torture under the law.").

442. 8 C.F.R. § 1208.18(a)(3).

443. *Id.*

444. To date, in spite of the death penalty's objectively torturous characteristics, U.S. courts have not found the death penalty to qualify as torture or to violate international law—in part based on the "lawful sanctions" language in the U.N. Convention Against Torture. *E.g.*, Ohio v. Kirkland, 15 N.E.3d 818, 836 (Ohio 2014) (finding that Ohio's death penalty did not violate the Convention Against Torture or the International Convention on the Elimination of All Forms of Racial Discrimination); Buell v. Mitchell, 274 F.3d 337, 370–72 (6th Cir. 2001) (holding that the death penalty did not violate the ICCPR or a "customary international law norm"); People v. Perry, 38 Cal. 4th 302, 322 (2006) (holding that the death penalty did not violate the ICCPR); Sorto v. State, 173 S.W.3d 469, 490 (Tex. Crim. App. 2005) (holding that the death penalty did not violate the U.N. Convention Against Torture); Park v. Garland, 72 F.4th 965, 981 (9th Cir. 2023) (substantial evidence supported Board of Immigration Appeals' finding that South Korean citizen was unlikely to be tortured in South Korea because of his California drug convictions, for purposes of determining his entitlement to relief under the Convention Against Torture, even though South Korea allowed the death penalty for drug trafficking crimes).

incompatible with the right to be free from torture and CIDT. If the concept of psychological torture is to be taken seriously (as it must), then surely the credible, continuous threats of death associated with capital punishment—the state's ultimate sanction—must qualify.[445] Capital prosecutions, death sentences, and death warrants are, in reality, nothing more than *sustained* and *continuous* threats of death, and as a death row inmate's execution date approaches, the psychological terror associated with an impending, then imminent, execution becomes aggravated—in truth, literally off the charts.[446] "U.N. Conventions," one scholar emphasizes, "have consistently included the prohibition of 'mental torture' within the scope of the prohibition of torture, and the term can be, and has been, defined with sufficient precision: 'The infliction of mental suffering through the creation of state of anguish and stress by means other than bodily assault.'"[447]

Of course, a single death threat, all by itself, causes extreme mental suffering (with accompanying adverse physiological effects)[448] amounting to torture,[449] especially since such a threat is backed by immense government power.[450] The prolonged amount of

445. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 174–75.

446. In one case, where a death row inmate spent twenty-two years on death row, had nine rescheduled execution dates, and had repeated stays, a court in Texas rejected the inmate's claims that he suffered psychological torture under international law while openly conceding the inmate's "gruesome and disturbing ordeal." Faulder v. Johnson, 99 F. Supp.2d 774, 776–77 (S.D. Tex. 1999).

447. Boulesbaa, *supra* note 436, at 309 (citing U.N. Commentary, Chapter VI, ¶¶ 13, 31 (1955); quoting Op. Com., Nov. 5, 1969, Greek Case, YB XII, at 461; Op. Com., Jan. 25, 1976, Case of Ireland v. United Kingdom, Y.B. XIX at 512).

448. Mental torture can have adverse physiological effects and vice versa. *See, e.g.*, Luban & Shue, *supra* note 441, at 830.

449. *See* Perez v. Sessions, 889 F.3d 331, 336 (7th Cir. 2018) ("The threat of imminent death is one way in which torture by means of mental pain or suffering can be inflicted.") (citing 8 C.F.R. § 1208.18(a)(4)(iii)); Cabrera Vasquez v. Barr, 919 F.3d 218, 224 n.3 (4th Cir. 2019) ("Death threats to one's self or others may constitute torture under the CAT."); *cf.* Lemus-Arita v. Sessions, 854 F.3d 476, 481 (8th Cir. 2017) ("Persecution is 'an extreme concept that involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of a protected characteristic,' and though a single death threat may constitute persecution, a threat that is 'exaggerated, nonspecific, or lacking in immediacy may be insufficient.'") (quoting La v. Holder, 701 F.3d 566, 570–71 (8th Cir. 2012)); Parada v. Sessions, 902 F.3d 901, 909 (9th Cir. 2018) ("It is clear that the harms Quiroz Parada and his family *actually* suffered—murder, physical assault, home invasions, and specific death threats—rise to the level of persecution under our precedent.") (emphasis in original); Nugroho v. Holder, 474 F. App'x 509, 510 (9th Cir. 2012) (noting that "death threats . . . constitute changed circumstances" allowing for filing of asylum application outside otherwise applicable time limits).

450. Threats backed by governmental power are highly credible and can be the

time that accused suspects in capital cases spend awaiting their fate—as well as the lengthy periods of time that death row inmates spend in prison while under sentence of death—simply *aggravates* the already torturous nature of official death threats.[451] The terminology "dead man walking," popularized by Sister Helen Prejean, describes the torturous limbo faced by condemned inmates awaiting execution.[452]

Because the death penalty, with its inherently torturous characteristics, should properly be classified under the rubric of torture, a *jus cogens* norm prohibiting capital punishment in all

---

basis for a CAT claim. Tourchin v. Att'y Gen., 277 F. App'x 248, 249, 253 (3d Cir. 2008) (the motion of a citizen of Belarus, a successful businessman, to reopen the proceedings to pursue a claim under the Convention Against Torture should have been granted given allegations of past torture that involved threats backed by government power, i.e., by KGB agents who tried to extort money and threatened him and his loved ones).

451. Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85, 95 (2014) ("Almost every state with the death penalty . . . makes it mandatory to set an execution date within a few months after each appeal is lost. This results in multiple execution dates for most death row inmates and no way for them to know which will be their last."). The average time American inmates spend on death row has been growing over the last several decades. Dunn v. Madison, 583 U.S. 10, 15 (2017) (Breyer, J., concurring) ("In 1987, the average period of imprisonment between death sentence and execution was just over seven years. A decade later, in 1997, the average delay was about 11 years. In 2007, the average delay rose to a little more than 13 years. In 2017, the 21 individuals who have been executed were on death row on average for more than 19 years."); *see also* Joseph Brossart, *Death Is Different: An Essay Considering the Propriety of Utilizing Foreign Case Law in Eighth Amendment Jurisprudence*, 29 U. DAYTON L. REV. 345, 351 (2004) (noting that the European Court of Human Rights found the "death row phenomenon" oppressive on the basis of the fact that, in Virginia from 1977 to 1989, six to eight years was the average time between trial and execution); Erin Kelly, *Re-Evaluating the Regulation of Executions*, 36 SYRACUSE J. SCI. & TECH. L. 86, 102 (2019–2020) ("In 2013, the average time between imposition and execution was over fifteen years."). In America's founding period, "no sentence-to-execution delay exceeding three months enjoyed 'long usage' in the eighteenth century." Jacob Leon, Bucklew v. Precythe's *Return to the Original Meaning of "Unusual": Prohibiting Extensive Delays on Death Row*, 68 CLEV. STATE L. REV. 485, 489 (2020).

452. HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993); *see also* Helen Prejean, *Capital Punishment: The Humanistic and Moral Issues*, 27 ST. MARY'S L.J. 1, 18 (1995) ("[T]he title of my book, *Dead Man Walking*, comes from the guards' comments about men who get out of their cells and walk out to death row. The guards say, 'Dead man walking.'"); *accord* Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon"*, 48 STAN. L. REV. 1625, 1647–48 (1996) (reviewing MUMIA ABU-JAMAL, LIVE FROM DEATH ROW (1995)). In considering capital punishment, Sister Prejean has compellingly argued: "[I]f we are to have a society which protects its citizens from torture and murder, then torture and murder must be off-limits to *everyone*. No one, for any reason, may be permitted to torture and kill—and that includes government." PREJEAN, *supra*, at 452 (emphasis in original)

circumstances should be recognized immediately.[453] After all, torture itself has long been barred by customary international law. As noted earlier, the prohibition against torture is already recognized as a *jus cogens* norm of international law,[454] so *any* torturous practice should be classified as such because the prohibition against torture is absolute and non-derogable.[455] To be sure, the *jus cogens* concept, at times, can be a slippery one. "There is no agreement on the criteria for identifying which norms of general international law have a peremptory character," one professor, Anthony Aust, points out, adding by way of clarification: "Whether a norm has such character depends on the particular nature of the subject matter."[456]

Whereas state impunity for human rights abuses was the norm before World War II, the horrors of the Holocaust, and the Nuremberg war crimes tribunal,[457] the post-World II period saw the elevation of international human rights standards[458] and the explicit recognition

453. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 209–30.

454. *Emmanuel*, 2007 WL 2002452, at *1, 10 (describing prohibition against torture as "a *jus cogens* norm"); Nuru v. Gonzales, 404 F.3d 1207, 1222–23 (9th Cir. 2005) ("torture is illegal under the law of virtually every country in the world and under the international law of human rights").

455. Prosecutor v. Delalić et al., Case No. IT-96-21-T, Trial Chamber Judgement, ¶ 454 (Nov. 16, 1998) ("[T]he prohibition on torture is a norm of customary law. It further constitutes a norm of jus cogens, as has been confirmed by the United Nations Special Rapporteur for Torture. It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances."); *see also* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 324 (2017) (noting that "customary international law prohibits torture" and that the prohibition is "*a jus cogens* norm of international law, meaning that it is understood as absolute and nonderogable").

456. ALLEN S. WEINER, DUNCAN B. HOLLIS & CHIMÈNE I. KEITNER, INTERNATIONAL LAW 107 (2023) (quoting ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 278–79 (3d ed. 2013)).

457. *E.g.*, Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342, 342–43 (2002).

458. These standards included one regulating the treatment of prisoners. *E.g.*, Serra v. Lappin, 600 F.3d 1191, 1197 (9th Cir. 2010) (noting that the Standard Minimum Rules for the Treatment of Prisoners was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 "to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions"); Renfro v. West Valley Detention Ctr. Classification Staff, Case No. 5:21-cv-01414-JGB-JDE, 2022 WL 18228280, at *4 (C.D. Cal. June 3, 2022) ("In December 2015, the United Nations General Assembly adopted the revised Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules, which 'establish[es] basic principles and minimum standards for the treatment of prisoners in order to ensure that the human rights of all incarcerated persons are respected[.]"). The Nelson Mandela Rules provide that "[i]n no circumstances may restrictions or disciplinary sanctions amount

of the *jus cogens* concept in international law.[459] "Growing attention has been paid in recent years to the concept of 'peremptory,' or *jus cogens*, norms," a recent international law casebook emphasizes, taking note of their recognition in Articles 53[460] and 64[461] of the Vienna Convention on the Law of Treaties (1969)[462] and explaining: "Peremptory norms are not an independent 'source' of international law. Rather, they are rules—whatever their source—that possess a different normative character from 'ordinary' international law rules."[463] "*Jus cogens* norms," that casebook stresses, "are said to be so fundamental that they bind all states, and no nation may derogate

---

to torture or other cruel, inhuman or degrading treatment or punishment." G.A. Res. 70/175 (Dec. 17, 2015).

459. Al Shimari v. CACI Premier Tech., Inc., 368 F. Supp.3d 935, 955–56 (E.D. Va. 2019).

460. Article 53 of the Vienna Convention on the Law of Treaties, titled "Treaties conflicting with a peremptory norm of general international law ('jus cogens')," provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

VCLT, *supra* note 157, art 53.

461. Article 64 of the Vienna Convention on the Law of Treaties, titled "Emergence of a new peremptory norm of general international law ('jus cogens')," provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." VCLT, *supra* note 157, art. 64. In short, customary rules of *jus cogens*—said to be "a body of higher rules of public international law from which no derogation is permitted"—amount to "intransgressible principles of customary international law." Theodore Konstadinides, *When in Europe: Customary International Law and EU Competence in the Sphere of External Action*, 13 GERMAN L.J. 1177, 1182 (2012); *see also* Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 31 (2008) ("Like Article 53, the function of Article 64 is to 'protect the general interests of the international community through safeguarding the uniform operation of *jus cogens* . . . .'"); Destaw A. Yigzaw, *Hierarchy of Norms: The Case for the Primacy of Human Rights Over WTO Law*, 38 SUFFOLK TRANSNAT'L L. REV. 33, 55 (2015) ("Obviously, *jus cogens* norms are intransgressible, and at least some of them (such as basic rules of humanitarian law) seem to emanate from elementary considerations of humanity.").

462. VCLT, *supra* note 157; *see also* Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72 (2005) ("[E]ven where the Vienna Convention is not applicable, the principles of Articles 53 and 64 would be effective as customary law.").

463. ALLEN S. WEINER, DUNCAN B. HOLLIS & CHIMÈNE I. KEITNER, INTERNATIONAL LAW 107 (2023) ("Although the notion had previously received attention from academic commentators, it was first recognized by states in VCLT Articles 53 and 64.").

from or agree to contravene them."[464]

For decades, the bar on torture, which, by law, admits no exceptions, has been one such *jus cogens* norm that is designed to protect individuals from human rights abuses.[465] "The legal framework prohibiting torture and cruel, inhuman, or degrading treatment or punishment (CIDT or 'other ill-treatment') is one of the most developed in international human rights laws," Juan Méndez, a former Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010–2016),[466] has written, adding: "While acts of torture and other ill-treatment are proscribed in the main international and regional legal instruments, the prohibition is also a norm of customary international law and enjoys the rare status of a *jus cogens* or peremptory norm of international law, along with the prohibition of slavery and genocide."[467] "*Jus cogens* norms," Méndez observed, "can be defined as norms that embrace customary international laws that are so universal and derived from values so fundamental to the international community that they are considered binding on all nations, irrespective of a State's consent."[468] "The treatment of torture," Méndez stressed, "is unique among other human rights violations in international law because each act of torture must be investigated, prosecuted, and punished."[469] "States are absolutely prohibited from deporting, extraditing, or otherwise transferring a person to the jurisdiction of another State where that person is at risk of suffering torture or ill-treatment," he wrote in 2016 of the *non-refoulement* principle that safeguards people from being subjected to torture in another country,[470] taking note of "the fact that global trends towards" the death penalty's abolition "have been significantly impacted by the evolution of an international standard towards considering the death penalty *per se* a violation of the prohibition of torture and other ill-treatment—and that it is in fact

464. *Id.*

465. Scott M. Henry, Case Comment, *Hey, Hey, the Gang's All Here! The Fourth Circuit Fights for Former Gang Members in* Martinez v. Holder, 24 B.U. PUB. INT. L.J. 285, 292 (2015) ("[T]he Convention Against Torture (CAT) protects individuals who demonstrate that they will suffer extreme human rights abuses in their home country, either at the hands of the government or as a result of the state's acquiescence to such abuse.").

466. *Juan Mendez, Former Special Rapporteur (2010–2016)*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Feb. 25, 2016), https://www.ohchr.org/en/special-procedures/sr-torture/juan-mendez-former-special-rapporteur-2010-2016.

467. Juan E. Méndez, *How International Law Can Eradicate Torture: A Response to Cynics*, 22 SW. J. INT'L L. 247, 250 (2016).

468. *Id.*

469. *Id.*

470. *Id.* at 261.

developing into a norm of customary international law, if it has not done so already."[471]

At the 8th World Congress Against the Death Penalty in 2022, more than twenty legal scholars[472] sought the recognition of a *jus cogens* norm prohibiting the death penalty and recited a number of reasons for doing so. Among other things, they pointed out that the 8th World Congress "occurs in the year of the 15th anniversary of the UN General Assembly's first vote on the Resolution on the moratorium against the death penalty"; that "[d]uring this period Amnesty International recorded that the abolitionist countries in the world had increased from 144 to 170"; that "[m]ethods of execution are cruel and cannot protect the condemned from the psychological and physiological impact of the death penalty"; and that the death penalty "is inherently a cruel and inhumane invasion of the condemned person, and when it is administered there are negative impacts upon the families and the community."[473] "For all of the above reasons," the statement read, "the undersigned understand that the proscription of the death penalty from punitive systems is a demand based on the right to life and the right not to subject human beings to torture or inhuman treatment, which we consider to be rights integral to jus cogens."[474] The scholars ended their appeal with these words: "We therefore call for a global abolition of the death penalty. The death penalty has no place in our world today."[475] An updated version of this statement was later presented in Paris, France, in June 2024, on the occasion of the International Association of Penal Law Centenary Congress.[476]

---

471. *Id.* at 265; *see also id.* at 265–66 (noting that "a strong case can be made that under present conditions States shall find it impossible to impose or execute the death penalty without violating absolute *jus cogens* norms").

472. The scholars were from around the world (i.e., Argentina, Brazil, Colombia, Croatia, Germany, France, Mexico, The Netherlands, Spain, the United Kingdom, and the United States). 8th World Congress, *supra* note 173.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Abolition of the Death Penalty as a Peremptory Norm of General International Law (Jus Cogens), Declaration of Paris on the Occasion of the International Association of Penal Law Centenary Congress (Paris, 25–29 June 2024)*, REPECAP: NETWORK FOR THE ABOLITION OF THE DEATH PENALTY AND CRUEL PUNISHMENT, https://www.academicsforabolition.net/wp-content/uploads/2024/06/DIPTICO-MANIFIESTO-INGLES-2024-web.pdf. In Paris, the presentation was made by leading academics and abolitionists, including Luis Arroyo Zapatero, Professor at the Castilla La Mancha University; Raphaël Chenuil-Hazan, ECPM's Executive Director; Anabela Miranda Rodrigues; and William Schabas, Professor of International Law at Middlesex University in London. *AIDP Congress—Day 2, Centenary Congress of the IAPL*, CONGRÈS DU CENTENAIRE DE L'ASSOCIATION INTERNATIONALE DE DROIT PÉNAL (June 26, 2024),

As activists continue to push for the death penalty's abolition, they must redouble their efforts and make the case that all capital punishment regimes violate universal human rights—the rights to life; to be free from torture and other forms of cruelty; to be treated in a non-arbitrary, non-discriminatory manner; and to human dignity.[477] Lawyers and anti-death penalty activists must also take concrete steps to stop executions through litigation and through abolitionist and moratorium campaigns.[478] Every capital case in which innocence, discrimination, arbitrariness, cruelty, prosecutorial misconduct, or a denial of human dignity is shown puts another nail in the death penalty's coffin.[479] In the United States, the Washington, D.C.-based Death Penalty Information Center has documented 200 exonerations from American death rows since 1976, with U.S. District Court Judge Jed Rakoff observing more than twenty years ago, in *United States v.*

---

https://congres-aidp.assas-universite.fr/en/events/centenary-congress-iapl-day-2.

477. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66.

478. Anti-death penalty campaigns have been successful in the past. For example, the NAACP Legal Defense and Education Fund developed a campaign against the death penalty. Litigation first produced a moratorium on executions, then the Supreme Court's decision in *Furman*. Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1695 (2004). The NAACP's Legal Defense Fund ("LDF") "had long decried capital punishment's disproportionate imposition on African-American males," and "[i]n *Furman v. Georgia*, LDF's lead attorney, Anthony Amsterdam, argued to the Court that the death penalty was 'cruel and unusual' . . . ." Evan L. Mandery & Zachary Baron Shemtob, *Supreme Convolution: What the Capital Cases Teach Us About Supreme Court Decision-Making*, 48 NEW ENG. L. REV. 711, 715–16 (2014).

479. The U.S. Supreme Court's decision in *Glossip v. Oklahoma* (2025), granting Oklahoma death row inmate Richard Glossip a new trial after the prosecution permitted false testimony from a key witness at trial came after Glossip had nine separate execution dates and—as reflected by the fact that he'd ordered his "last meal" three times—came extremely close to being executed on multiple executions. Glossip v. Oklahoma, No. 22-7466, 2025 WL 594736 (U.S. Feb. 25, 2025); Perry Chiaramonte, *"Supreme Court Overturns Cause Celebre Richard Glossip's Conviction After 27 Years on Death Row, Nine Execution Dates, and Three Last Meals*," N.Y. SUN (Feb. 26, 2025), https://www.nysun.com/article/supreme-court-overturns-cause-celebre-richard-glossips-conviction-after-27-years-on-death-row-nine-execution-dates-and-three-last-meals. In Europe, the death penalty is already seen as an affront to human dignity. Jouet, *A Lost Chapter in Death Penalty History, supra* note 96, at 157 ("The European Union and Council of Europe, the two main transnational bodies on the continent, proclaim: "The death penalty is an affront to human dignity. It constitutes cruel, inhuman and degrading treatment and is contrary to the right to life.'"). Abolitionists should continue to show how capital punishment violates human dignity, a concept that forms the basis for universal human rights. Adeno Addis, *Justice Kennedy on Dignity*, 60 HOUS. L. REV. 519, 541 n.66 (2023) (noting that the preamble of the U.N. Charter refers to the "dignity and worth of the human person" and that the preamble of the Universal Declaration of Human Rights refers to "the inherent dignity and of the equal and inalienable rights of all members of the human family").

Quinones (2002), that "evidence has emerged that clearly indicates that . . . innocent people—mostly of color—are convicted of capital crimes they never committed, their convictions affirmed, and their collateral remedies denied, with a frequency far greater than previously supposed."[480] In addition, facts and studies presented in individual capital cases continue to show the death penalty's arbitrary and discriminatory administration.[481]

At the international level, transnational advocacy and litigation networks should continue contesting death sentences and executions in countries where the death penalty is still being sought.[482] Since the death penalty constitutes a violation of fundamental and universal human rights, international law should strictly forbid its use,[483] and abolitionist countries should continue to refuse to extradite individuals who might face capital charges and death sentences in retentionist countries.[484] After the death penalty's abolition was reframed as an "international human rights issue" in Europe, one scholar notes, the Council of Europe and individual European countries "came to support abolition throughout the continent and worldwide" and "refused to cooperate with foreign countries seeking to apply the death penalty, including the United States, such as by denying extraditions or requests for evidence."[485] To push retentionist countries to abandon executions altogether, abolitionist countries and NGOs should continue to use the Universal Periodic Review ("UPR") that allows review of U.N. member states' protection and promotion of human rights. The outcome of UPR proceedings is written in reports, allowing countries to be shamed into changing their state practices.[486] Faced with widespread opposition to juvenile

480. United States v. Quinones, 196 F. Supp.2d 416, 417 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

481. *E.g.*, Glossip v. Gross, 576 U.S. 863, 917–20 (2015) (Breyer, J., dissenting) (collecting studies showing that the death penalty is applied in an arbitrary and discriminatory manner and that "[g]eography also plays an important role in determining who is sentenced to death").

482. *E.g.*, ANDREW NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION: CHALLENGING THE DEATH PENALTY AND CRIMINALIZATION OF HOMOSEXUALITY IN THE COMMONWEALTH (2020).

483. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66.

484. Craig S. Lerner, *The Puzzling Persistence of Capital Punishment*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y 39, 57 (2024) ("Last year, Canada refused to extradite an accused murderer to Thailand without an assurance that the death penalty would not be pursued.").

485. Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMPAR. L. 46, 52 (2023).

486. Alice Storey, *Challenges and Opportunities for the United Nations' Universal Period Review: A Case Study on Capital Punishment in the United States*, 90 UMKC L. REV.

executions around the world and following the prohibition on such executions in the U.N. Convention on the Rights of the Child, the U.S. Supreme Court itself once looked to both American constitutional law and global practices to hold sentencing juveniles to death unconstitutional.[487]

Individual efforts to oppose capital punishment and to expose the evils associated with it can collectively lead to major change over time. For example, Amnesty International's annual reports on death sentences and executions[488] and Oxford University's Death Penalty Research Unit ("DPRU")—as well as the Cornell Center on the Death Penalty Worldwide[489]—have made significant contributions to the abolition movement by providing much-needed data, information, and academic research to further the abolitionist cause.[490] The Death Penalty Project ("DPP"), based in London, has also provided a lifeline to vulnerable death row inmates facing execution, saving thousands of prisoners from execution around the world.[491] Along with the DPP, another London-based NGO, Reprieve, has also been successful in its work in capital cases[492] and in pressuring pharmaceutical companies to stop supplying drugs for use in lethal injections.[493] One source summarizes Reprieve's success in reducing the availability of

---

129, 129 (2021).

487. Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

488. *E.g.*, DEATH SENTENCES AND EXECUTIONS 2023, *supra* note 34.

489. The Cornell Center on the Death Penalty Worldwide documents the death penalty's status around the world, using a map to depict states classified as "Abolitionist," "Abolitionist for common law crimes," "De facto abolitionist," and "Retentionist." *Death Penalty*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, https://deathpenaltyworldwide.org (last visited Feb. 17, 2025).

490. *E.g.*, DEATH PENALTY RSCH. UNIT, https://www.law.ox.ac.uk/death-penalty-research-unit/death-penalty-research-unit (last visited Feb. 17, 2025); *Carolyn Hoyle*, UNIV. OF OXFORD FAC. OF L., https://www.law.ox.ac.uk/people/carolyn-hoyle (last visited Feb. 17, 2025);
Jon Yorke, UNIV. OF OXFORD FAC. OF L., https://www.law.ox.ac.uk/people/jon-yorke (last visited Feb. 17, 2025).

491. *Who We Are*, THE DEATH PENALTY PROJECT,
https://deathpenaltyproject.org/who-we-are/ (last visited Feb. 17, 2025).

492. Caserta & Madsen, *supra* note 21, at 740 ("As in the Caribbean, many death penalty cases have been litigated by a close network of African and UK lawyers associated with the DPP as well as others such as Reprieve, also based in London, the Cornell Centre on Death Penalty Worldwide and a host of local groups.").

493. Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMPAR. L. 46, 97 (2023) ("Following a campaign by Reprieve, a British human rights group, Europe barred the export of drugs used for lethal injection in America."); Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 34–35 (2020) (discussing the work of Reprieve and its director, Maya Foa, and noting that "Reprieve's abolitionist work has been a factor in the lethal injection stalemate" and "in slowing executions").

pharmaceuticals for use in lethal injections: "[T]he British anti-death penalty group Reprieve launched its *Stop the Lethal Injection Project*. Manufacturers that had been selling drugs for executions found themselves on the receiving end of a shaming campaign. Later, both the United Kingdom and the European Union banned the export of drugs for executions."[494]

Above all else, the death penalty must be reclassified in international law not just as a cruel and inhuman practice, but as a torturous punishment—and it is past time this occur. Torture and other acts of cruelty violate human dignity, and the death penalty—a total denial of a person's humanity—is, through its administration, the ultimate form of cruelty.[495] The preamble of the U.N. Charter makes specific reference to "fundamental human rights" and observed in the mid-1940s that "the peoples of the United Nations" had reaffirmed their "faith" in "the dignity and worth of the human person, in the equal rights of men and women."[496] In 1988, just four years after the U.N. adopted the Convention Against Torture, but before the U.S. Senate ratified that convention in 1994,[497] the U.S. Court of Appeals for the District of Columbia—citing Article 53 of the Vienna Convention on the Law of Treaties ("VCLT")[498]—referred to "those few norms that arguably do meet the stringent criteria for *jus cogens*."[499] In that case, *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, the D.C. Circuit emphasized that the Restatement (Third) of

494. Austin Sarat et al., *The Fate of Lethal Injection: Decomposition of the Paradigm and Its Consequences*, 11 BRIT. J. AM. LEGAL STUD. 81, 94 (2022); *see also* Gibson & Lain, *supra* note 84, at 1236–37 (discussing the success of European governments in stopping the export of drugs for use in lethal injections).

495. *E.g.*, G.A. Res. 3452 (XXX), art. 1(2) (Dec. 9, 1975) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."); *id.* art. 2 ("Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.").

496. Jeffrey A. Brauch, *Preserving True Human Dignity in Human Rights Law*, 50 CAP. U. L. REV. 115, 116 (2022).

497. Antoine v. United States, 204 F. Supp.2d 115, 118 (D. Mass. 2002) ("The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States Senate on October 21, 1994, was deposited with the United Nations by President Clinton that day, and became effective one month later, on November 20, 1994.").

498. Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988).

499. *Id.*; Al Shimari v. CACI Premier Tech., Inc., 368 F. Supp.3d 935, 956 (E.D. Va. 2019) (listing murder and torture as "universally condemned practices" whose prohibitions have "achieved the status of *jus cogens*").

Foreign Relations Law (1987),[500] compiled by legal academics and leading practitioners for the American Law Institute,[501] "acknowledges two categories of such norms: 'the principles of the United Nations Charter prohibiting the use of force,' and fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination."[502]

Since then, American courts,[503] the Inter-American Court of

---

500. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102, cmt. k, n.6 (AM. L. INST. 1987) (discussing *jus cogens* norms).

501. Satya T. Mouland, *Rethinking Adjudicative Jurisdiction in International Law*, 29 WASH. INT'L L.J. 173, 175 n.10 (2019).

502. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940–41 (D.C. Cir. 1988) (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102, cmt. k (AM. L. INST. 1987) and citing RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 702 (AM. L. INST. 1987). Section 702 of the Restatement (Third) of Foreign Relations Law reads:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights.

See also RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 702, cmt. n (AM. L. INST. 1987) ("*Customary law of human rights and* jus cogens").

503. Doe I v. Cisco Systems, Inc., 73 F.4th 700, 716 n.7 (9th Cir. 2023) ("We have previously recognized that the prohibition against state torture has attained jus cogens status—the highest and most universal norm of international law.") (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715–17 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993); United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995); Rusesabagina v. Republic of Rwanda, Civil Case No. 22-469 (RJL), 2023 WL 2562692, at *10 (D. D.C. Mar. 16, 2023) ("[T]he prohibition of torture is a paradigmatic example of jus cogens, defined by our Circuit Court as 'peremptory norms [that] are nonderogable and enjoy the highest status within international law.'") (quoting Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940, 942 (D.C. Cir. 1988)); *id.* at *11 ("Our Circuit Court, other courts, and other authorities unanimously consider the prohibition on torture as a *jus cogens* norm from which no derogation is permitted.") (citing Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994); Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151 (7th Cir. 2001); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 702(d), cmt. n (AM. L. INST. 1987); *see also* United States v. Correa, Crim. Action No. 20-CR-00148-CMA, 2024 WL 839360, at *9 (D. Colo. Feb. 28, 2024) ("The Supreme Court and circuit courts have discussed the universal repugnancy of torture, placing it on par with genocide and slavery.") (citing Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1401–02 (2018); Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)); *Filartiga*, 630 F.2d at 890 ("Among the rights universally proclaimed by all nations, as we have noted, is the

Human Rights,[504] the European Court of Human Rights,[505] the International Court of Justice,[506] the U.N. International Law Commission ("ILC"),[507] the U.N. Committee Against Torture,[508] and

---

right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.").

504. Humberto Briceno Leon, *The Jurisdiction of the Inter-American Court of Human Rights Should Outlive Defection*, 52 U. MIA. INTER-AM. L. REV. 1, 6 (2020) ("[I]n 2003, the Inter-American Court decided that, '[t]he absolute prohibition of torture, in all its forms, is now part of international *jus cogens*.'") (quoting Maritza Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 92 (Nov. 27, 2003)); *see also* Caesar v. Trinidad & Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70 (Mar. 11, 2005) ("there is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law").

505. Eur. Ct. of Hum. Rts., *Guide on Article 3 of the European Convention on Human Rights—Prohibition of Torture*, ¶ 9, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng#:~:text=The%20prohibition%20of%20torture%20has,%2C%20§%2059%2C%202022 (last updated Aug. 31, 2023) ("The prohibition of torture has achieved the status of *jus cogens* or of a peremptory norm in international law.") (citing Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture [GC], § 59, 2022); *see also* Case of Volodina v. Russia, Judgment, Eur. Ct. H.R., 3d Sect. ¶ 8 (July 9, 2019) (separate opinion of Pinto de Albuquerque, J., joined by Dedov, J.) ("According to General Comment 2 of the UN Committee against Torture, the State's systematic omission, consent or acquiescence of privately inflicted harm raises concerns under the Convention against Torture, a Convention that enjoys *jus cogens* status and is deemed as upholding principles of customary international law."); *cf.* Case of Gäfgen v. Germany, Judgment, Eur. Ct. H.R. (Grand Chamber), Strasbourg, June 1, 2010, ¶ 108 ("[A] threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture.").

506. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. 422, ¶ 99 (July 20) ("In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)"); *see also* Emily Lowder, *The Prosecution of War Crimes and Grave Breaches: A Jus Cogens Obligation*, 29 U.C. DAVIS J. INT'L L. & POL'Y 24, 46 (2022) ("The ICJ in the Corfu Channel decision described peremptory norms as 'elementary considerations of humanity, even more exacting in peace than in war.'") (citing Corfu Channel (U.K. v. Albania), Judgment, 1949 (Apr. 9), I.C.J. 4, 22 (Apr. 9)); Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 95 (Feb. 3) ("[A] *jus cogens* rule is one from which no derogation is permitted.").

507. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] Y.B. Int'l L. Comm'n Vol. II, Part Two, U.N. Doc. A/56/10, at 58, 85 ("peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination").

508. Evan Ezray, Note, *The Admissibility of Foreign Coerced Confessions in United States Courts: A Comparative Analysis*, 52 COLUM. J. TRANSNAT'L L. 851, 893 (2014) ("'The Committee Against Torture has . . . noted that the obligations to prevent torture are

numerous legal commentators have repeatedly classified the prohibition of torture as a peremptory, or *jus cogens*, norm of international law.[509] "*Jus cogens* find expression in Article 53 of the VCLT," yet another source notes, adding of the international law concept: "It establishes a hierarchy of peremptory norms that have priority over other more general norms of international law. Prohibitions such as unlawful use of force, slavery, or the performance of an act criminal under international law (such as torture and war crimes) are usually cited as having such status . . . ."[510] The ILC situates *jus cogens* as "hierarchically superior to other rules of international law."[511]

The recognition of a *jus cogens* norm against capital punishment would confirm what the objective facts make clear: capital punishment is a torturous practice. For decades now, even though several countries continue to authorize and permit the death penalty's

absolute and jus cogens. Labeling the obligation to prevent torture as a jus cogens norm indicates that it is a fundamentally important norm from which no derogation is permitted. That is to say, torture and other cruel, inhuman, or degrading treatment constitute conduct which states, regardless of circumstances, are not permitted to condone."); William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 16 (2015) ("[T]he Committee against Torture has issued General Comments that offer interpretations and clarifications regarding treaty provisions. In General Comment No. 2 . . . the Committee emphasized the *jus cogens* nature of the prohibition against torture and its non-derogable nature.") (citing Comm. Against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (2008); *id.* at 18 n.67 ("The Committee against Torture has indicated that 'even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture.'") (quoting Rep. of the Comm. against Torture, U.N. Doc. A/45/44, GAOR, 45th Sess., Supp. No. 44 (June 21, 1990).

509. *E.g.*, Kari Kammel et al., *Trademark Counterfeiting Enforcement Beyond Borders: The Complexities of Enforcing Trademark Rights Extraterritorially in a Global Marketplace with Territorial-Based Enforcement*, 33 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 595, 605 n.61 (2023) ("Peremptory norms are values and laws that the international community nearly universally accepts and recognizes . . . . Examples of peremptory norms include 'the right to self-determination' and prohibitions of genocide, slavery, and torture.") (citing Dire Tladi (Special Rapporteur), Fourth Rep. on Peremptory Norms of Gen. Int'l L. *(Jus Cogens)*, at 26, U.N. Doc. A/CN.4/727 (Jan. 31, 2019)); Daniel J. Alvarez, *China, Hong Kong, and the Foreign Offender's Ordinance: How Proposed Amendments to Hong Kong's Extradition Laws Threatened International Human Rights*, 34 N.Y. INT'L L. REV. 41, 49 (2021) (noting that the prohibitions against torture and CIDT constitute *jus cogens* norms).

510. Dale Stephens, *The International Legal Implications of Military Space Operations: Examining the Interplay Between International Humanitarian Law and the Outer Space Legal Regime*, 94 INT'L L. STUD. 75, 91 (2018).

511. Int'l Law Comm'n, Rep. on the Work of its Seventy-First Session, at 142, U.N. Doc. A/74/10 (2019) ("Peremptory norms of general international law *(jus cogens)* reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law.").

use, the prohibition against torture has held the heightened *jus cogens* norm classification. For example, in 1992, the U.S. Court of Appeals for the Ninth Circuit gave this assessment: "[W]e conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."[512] More recently, in 2022, the European Court of Human Rights issued an advisory opinion at the request of the Armenian Court of Cassation. That advisory opinion observed that "the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm in international law."[513] "The emergence of the prohibition of torture as *jus cogens* has been reflected extensively in international, regional, and domestic jurisprudence," Thomas Weatherall writes in *Jus Cogens: International Law and Social Contract* (2015), emphasizing: "[t]he International Court of Justice had occasion to recognize the peremptory status of the prohibition, on the basis of *opinio juris sive necessitatis* evidenced by the practice of States, in *Questions Relating to the Obligation to Prosecute or Extradite* (2012)."[514] The recognition of *jus cogens* norms[515]—as one

512. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992); *see also* Nuru v. Gonzalez, 404 F.3d 1207, 1222 (9th Cir. 2005) ("[W]e have previously held that the prohibition on torture has attained the status of jus cogens under international law."); Estate of Anastacio Hernandez-Rojas, No. 11-CV-0522-L(DHB), 2013 WL 5353822, at *5 (S.D. Cal.) ("[T]he prohibition against torture is a jus cogens norm of international law."); Garcia v. Chapman, 911 F. Supp.2d 1222, 1242 (S.D. Fla. 2012) ("State torture violates such a jus cogens norm.").

513. Advisory Opinion on the Applicability of Statutes of Limitation to the Prosecution, Conviction and Punishment in Respect of an Offence Constituting, in Substance, an Act of Torture, Advisory Opinion, 2022 E.C.H.R. 12 (Apr. 26).

514. THOMAS WEATHERALL, *JUS COGENS*: INTERNATIONAL LAW AND SOCIAL CONTRACT 235 (2015).

515. "Examples of jus cogens norms include prohibition against genocide, torture, slavery, and summary-executions." Ben-Haim v. Edri, 183 A.3d 252, 258 (N.J. Super. Ct. App. Div. 2018); *see also* Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012) (discussing the concept of *jus cogens* norms and observing that prohibitions against "torture, summary execution and prolonged arbitrary imprisonment" are among "these universally agreed-upon norms"); *id*. at 777 ("[I]n enacting the TVPA [Torture Victim Protection Act], Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of jus cogens norms.") (citing S. Rep. No. 102–249, at 8 (1991)); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009) ("jus cogens . . . include[s], at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention"); Mireskandari v. Mayne, CV 12-3861 JGB (MRWx), 2016 WL 1165896, at *17 (C.D. Cal. Mar. 23, 2016) (noting that "it is only those acts which are so heinous that they violate jus cogens norms of international law—such as prohibitions against torture, genocide, indiscriminate executions, and prolonged arbitrary imprisonment—that operate to deprive a foreign official of common law immunity").

commentator put it—"can be conceptualized as transforming the international system from a set of horizontal rules among states into a system comprising both horizontal and vertical components with *jus cogens* occupying a higher level, capable of trumping any lower-level horizontal rule."[516]

International law's longtime classification of the prohibition of torture as a *jus cogens* norm has important—indeed, fatal—consequences for the death penalty. "Unlike customary international law which, 'like international law defined by treaties and other international agreements, rests on the consent of states,'" the Ninth Circuit emphasized in 2005, "*jus cogens* norms apply universally to states and individuals."[517] "Therefore," that court stressed, "the proscription against torture 'transcend[s] such consent' of states and individuals."[518] As that court, finding that "[t]he official sanctioning of torture necessarily defeats the object and purpose of the Convention [Against Torture]," made crystal clear: "torture cannot be 'inherent in or incidental to lawful sanction' and is *never* a lawful means of punishment."[519] Because international law's prohibition of torture is non-derogable[520] and the right to be free from it is considered a universal human right,[521] and because an immutable characteristic of

516. Anthony J. Colangelo, *Procedural Jus Cogens*, 60 COLUM. J. TRANSNAT' L. 377, 400 (2022).

517. Nuru v. Gonzales, 404 F.3d 1207, 1222 (9th Cir. 2005).

518. *Id.*

519. *Id.* Certain acts, because of their objectively cruel and torturous characteristics, can never be legitimately classified as lawful sanctions. *E.g.*, SHANE DIZON & POOJA DADHANIA, *Deferral of removal under Convention Against Torture*, *in* 2 IMMIGRATION LAW SERVICE § 10:236 (2d ed. 2025) (revised chapter) ("Rape is sufficiently severe to constitute torture and can never be a lawful sanction under the Convention Against Torture.") (citing Matter of H-C-R-C-, 28 I. & N. Dec. 809, 2024 WL 3072080 (B.I.A. 2024)); *Matter of H-C-R-C-*, 28 I. & N. Dec. at 813 ("Rape clearly rises to the level of torture. It is 'an extreme form of cruel and inhuman treatment' that causes 'severe pain or suffering' and is therefore mistreatment sufficiently severe to qualify for protection under the CAT where the other elements are established."); *cf.* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) ("Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity."), *abrogated on other grounds by* Auguste v. Ridge, 395 F.3d 123, 148 (3d Cir. 2005).

520. *E.g.*, Julia Duffy & Sam Boyle, *Australia's Resistance to Implementing the Monitoring Mechanisms in the Optional Protocol to the Convention Against Torture: Restrictive Practices and People with Disabilities 'in the Community'*, 62 U. LOUISVILLE L. REV. 661, 666 (2024).

521. Katharine E. Tate, Comment, *Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention?*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 194, 203 (2013); Darin E.W. Johnson, *The Problem of the Terror Non-State: Rescuing International Law from ISIS and Boko Haram*, 84 BROOK. L. REV. 475, 496 (2019); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMPAR. L. 47, 48 (1995/1996).

capital punishment (no matter the method of execution) is its use of official death threats that inflict psychological torture,[522] the use of capital prosecutions, death sentences, and death warrants—all of which utilize or constitute threats to kill, even if made by way of paper and legalese with legal captions on it—must logically be classified as being barred by the pre-existing *jus cogens* prohibition against torture.[523] That capital punishment has been misclassified as a non-torturous practice in the past, before the development of the modern definition of torture[524] crystallized in the U.N. Convention Against Torture,[525] is no excuse for countries and courts, which in other contexts freely acknowledge the harmful effects of psychological or

---

522. *See generally* Bessler, *Taking Psychological Torture Seriously*, *supra* note 110; *see also* Thompson Chengeta, *When at Loggerheads with Customary International Law: The Right to Run for Public Office and the Right to Vote*, 43 BROOK. J. INT'L L. 399, 441–42 (2018) ("In many cases, courts have held that a threat of torture can amount to torture, since the prohibition of torture covers both physical pain and mental suffering. For example, the Inter-American Court of Human Rights observed that threatening a person with torture causes moral anguish, which may amount to psychological torture.") (citations omitted). The anticipation of death, no matter how physically painful or painless an actual death might be, can constitute torture. Comollari v. Ashcroft, 378 F.3d 694, 697 (7th Cir. 2004) ("Even if death itself is painless . . . the anticipation of it can be a source of acute mental anguish; if the threat of imminent albeit painless death were deliberately employed to cause such anguish, it would be a form of torture.") (citing 8 C.F.R. § 208.18(a)(4)(iii) (2021)).

523. Bessler, *The Gross Injustices of Capital Punishment, supra* note 288, at 67 (arguing that in light of modern definition of torture, state-sponsored death threats must be classified under the rubric of torture); *see also* Jo v. Gonzales, 458 F.3d 104, 109 (2d Cir. 2006) (specifying that in interpreting regulations that provide that in order for the infliction of "mental pain or suffering" to constitute torture, it must be, *inter alia*, "caused by or resulting from" either the "infliction or threatened infliction of severe *physical* pain or suffering," or the "threat of imminent *death*," or the "*administration or application*, or threatened administration or application, *of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality*," noting that "the definition of torture includes the infliction of pain that is mental rather than physical" and that "[t]he regulations' definition of torture makes clear that for the infliction of mental pain to constitute torture, that pain must have its origins in the actual or threatened infliction of harm on a person") (citing 8 C.F.R. § 208.18(a)(4)(2021) (emphases added)).

524. CACI Premier Technology, Inc. v. Rhodes, 536 F.3d 280, 297 (4th Cir. 2008) ("[T]he dictionary definitions of torture range from 'any severe physical or mental pain,' *Webster's New World College Dictionary* 1512 (4th ed. 2004), to 'TORMENT' or 'an extreme annoyance or severe irritation,' *Webster's Third New International Dictionary* 2414 (2002)."); Niang v. Gonzales, 492 F.3d 505, 516 (4th Cir. 2007) (Williams, C.J., concurring in part and dissenting in part) ("[D]ictionary definitions of 'torture' include anguish 'of body or mind.'") (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1320 (11th ed. 2004)).

525. The Geneva Conventions broadened the law's understanding of brutality and torture, even though the concept of torture was not specifically defined therein. *See, e.g.*, Deena N. Sharuk, *No Sleep for the Wicked: A Study of Sleep Deprivation as a Form of Torture*, 81 MD. L. REV. 694, 699–700 (2022).

mental torture,[526] to continue to misclassify it going forward.[527]

Like the infliction of severe *physical* pain or suffering, the infliction of severe *mental* pain or suffering is within the *jus cogens* norm prohibiting torture.[528] Although many courts, including in the

526. *E.g.*, West v. State, 313 S.E.2d 67, 71 (Ga. 1984) ("[T]orture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm."); Lawlor v. Commonwealth, 738 S.E.2d 847, 887 (Va. 2013) ("Courts of last resort in other states have similarly formulated definitions of torture that include physical and psychological aspects.") (citing State v. White, 668 N.W.2d 850, 857 (Iowa 2003) ("'[T]orture' is either physical and/or mental anguish."); State v. Ross, 646 A.2d 1318, 1361 (Conn. 1994) (holding torture may be psychological as well as physical)); Thomas Weigend, *The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective*, 74 IUS GENTIUM 61, 78 (2019) ("In a judgement concerning the application of international criminal law, the German Federal Court of Justice (*Bundesgerichtshof*) has defined torture in the sense of the 4th Geneva Convention as any intentional infliction of severe physical or mental pain by organs of the state or with their acquiescence.") (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 2001, 46 Entscheidungen Des Bundesgerichtshofes in Strafsachen [BGHSt] 292, 302–03).

527. Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 3 ("The modern definition of torture makes clear that torture can be either physical or psychological in nature. The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987, and which the U.S. ratified in 1994, defines torture in just those terms."); John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 1076 n.562 (2019) ("In ignoring the concept of *psychological* torture, the U.S. Supreme Court in *Bucklew* completely disregarded the modern definition of torture, which includes both physical *or* mental torture.") (emphasis in original).

528. *See, e.g.*, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 12 (H. Danelius & Herman Burgers, eds. 2021) ("Nowadays it is the generally accepted view among international lawyers that the prohibition of torture has developed into a rule of *customary* international law applying equally to States which are not parties to any of these [worldwide or regional] conventions" barring torture; "[t]his universally valid rule can be considered a peremptory norm as defined in article 53 of the *Vienna Convention on the Law of Treaties* of 1969 . . . .") (italics in original); Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 82 (2010) ("Torture is a universally condemned practice. It is a violation of both positive and natural law and yet it is undoubtedly practiced by both states and private individuals with some frequency. There is near universal agreement that torture is not merely wrong, but evil, and there is a generally agreed upon definition for the term that prohibits the intentional infliction of 'severe pain or suffering, whether physical or mental.'"); *id.* at 93 ("There can be no question that international law prohibits torture. It is well established that customary international law prohibits torture and views its use as a jus cogens violation. In his opinion in *Filartiga v. Pena-Irala*, Judge Kaufman canvasses numerous conventions and commentators and finds that they all come to the same conclusion: The law of nations prohibits official torture."); *The Americas and the*

United States, have invoked the *jus cogens* concept, the Inter-American Court of Human Rights has been especially active in doing so, deciding multiple cases that have involved the *jus cogens* concept[529] or the infliction of psychological torture.[530] As Gerald Neuman, the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School, wrote in the *European Journal of International Law*: (1) "The Inter-American Court's contributions also include its numerous references to *jus cogens*";[531] and (2) "The Court has been quite active in identifying *jus cogens* norms in recent years."[532] Noting that the *jus cogens* concept has played varied roles in the Inter-American Court's jurisprudence,[533] Professor Neuman stresses: "The universally binding effect of a *jus cogens* norm is the antithesis of 'state voluntarism'. States cannot exempt themselves from such a norm by declining to ratify a treaty, or by persistent objection. Nor can a region of states contract to modify a *jus cogens* norm."[534] When the U.S. Supreme Court narrowly focuses only on whether there will be excruciating *physical* pain at an execution at the moment of an inmate's death, it totally misses *mental* torture, the other half of the equation when it comes to the modern concept of torture.[535] As the U.S. Supreme Court has stated in the context of the inadmissibility of coerced interrogations, "[t]here is torture of the mind as well as the body; the will is as much affected by fear as by force."[536]

It is for historical reasons that the death penalty, in spite of its inherently torturous characteristics, has long been misclassified as a non-torturous act.[537] Originally, the concept of torture focused on the infliction of severe pain on the body, as occurred frequently during the

---

Human Rights of Older Persons: Historical Overview and New Developments, 45 IUS GENTIUM 215, 253–54 (2015) (discussing the concept of torture in the Inter-American human rights system).

529. Hélène Ruiz Fabri & Edoardo Stoppioni, Jus Cogens *Before International Courts: The Mega-Political Side of the Story*, 84 LAW & CONTEMP. PROBS. 153, 155–56 (2021).

530. *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 92 (Nov. 27, 2003); *see also* Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 40–41 (discussing cases).

531. Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 117 (2008).

532. *Id.* at 118.

533. *Id.* at 117.

534. *Id.*

535. Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 172, at 34–35.

536. Watts v. Indiana, 338 U.S. 49, 52 (1949).

537. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 74–80.

Spanish Inquisition and in medieval and early modern Europe.[538] Also, death sentences were once the usual or customary punishment for various crimes,[539] a societal habit that proved hard to break even as the law of torture morphed from the use of physical torment to secure confessions or information to a total bar on both physical and mental forms of torture in the post-World War II period.[540] Ultimately, any state practice involving the infliction of pain and suffering should be judged by its inherent *characteristics*, not by how it is *characterized* by self-interested state officials.[541] Indeed, it is clear that whether

538. *E.g.*, Bessler, *Torture and Trauma*, *supra* note 110, at 65–66 ("America's founders abhorred and, many cases, stridently and vocally renounced torture, though they did so at a time when they thought of torture as something largely used in civil law countries (in the Spanish Inquisition, for example) that operated predominantly on the body to secure confessions or expose accomplices."); Benjamin White, *Pain Speaks for Itself: Divorcing the Eighth Amendment from the Spirit of the Moment*, 58 SAN DIEGO L. REV. 453, 460 (2021) (discussing the statements of Abraham Holmes at the Massachusetts ratifying convention about the Spanish Inquisition, "racks and gibbets," and "the most cruel and unheard-of punishments").

539. The death penalty was once the mandatory punishment upon conviction for a wide array of common law crimes. Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

540. *E.g.*, Morales v. Brown, Case No. 1:14-cv-01717-LJO-SAB, 2015 WL 6167451, at *11 (E.D. Cal. Oct. 20, 2015) ("'The United Nations has defined torture as 'any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of public official on a person for such purpose as . . . intimidating him or other persons.'") (citation omitted); Shimari v. CACI Premier Technology, Inc., 300 F.Supp.3d 758, 781–82 (E.D. Va. 2018) (discussing torture, CIDT, and "physical or mental pain or suffering").

541. *E.g.*, Mendez v. Garland, 67 F.4th 474, 487 (1st Cir. 2023) ("To obtain relief under CAT, Mendez 'must prove by objective evidence 'that it is more likely than not that he will be torture if he is [removed].'"") (citation omitted); Saban-Cach v. Att'y Gen., 58 F.4th 716, 735 (3d Cir. 2023) ("[O]bjective evidence is relevant to Saban-Cach's specific risk of torture."). Whether someone has a well-founded fear of harm is gauged objectively. Li v. U.S. Dep't of Just., 298 Fed. Appx. 55, 56 (2d Cir. 2008) ("[W]e conclude that there is substantial evidence to support the agency's conclusion that Li failed to demonstrate a well-founded fear of future persecution supported by 'reliance, specific, objective supporting evidence.'") (quoting Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004); *id.* at 56–57 ("Because Li was unable to show the objective reasonable fear of future persecution needed to make out an asylum claim, he was necessarily unable to meet the higher standard required to succeed on a claim for withholding of removal and relief under CAT.") (citations omitted); Li v. U.S. Dep't of Just., 280 Fed. Appx. 109, 111 (2d Cir. 2008) ("Because Li was unable to show the objective likelihood of a threat to her life or freedom needed to make out a claim for withholding of removal, she was necessarily unable to succeed on her claim for relief under the CAT, which rested on the same factual predicate."); Gao v. U.S. Dep't of Just., 126 Fed. Appx. 36, 37 (2d Cir. 2005) ("Gao's single conclusory statement that if returned to China he would be arrested and persecuted, combined with a State Department profile that primarily addressed the inconsistent implementation of legal safeguards to political prisoners, is not sufficient objective evident to satisfy the CAT's standard that he will more likely than not be tortured upon his return to China.") (citation omitted); *see also* Commonwealth v. Crawford, 24 A.3d 396, 402 (Pa. Super.

conduct qualifies as torture must be—and obviously should be—judged by objective, not subjective, evidence.[542]

Because the modern definition of torture includes the infliction of severe mental pain or suffering caused by a threat of imminent death,[543] and because capital charges and the imposition of death sentences involve threats of death that, in time, will always become imminent as scheduled executions approach as officials plan to carry them out, it is clear that any death penalty regime, when objectively considered, will necessarily inflict, at a minimum, psychological torture and CIDT.[544] Indeed, every capital case necessarily involves a highly credible threat of death, an official threat that state officials know, well in advance, will inevitably inflict severe pain and suffering and that will, ultimately, always become imminent as an execution date approaches. It thus makes total sense that abolitionist countries worried about inflicting torture and CIDT are already refusing to extradite individuals to locales where the death penalty might be sought,[545] echoing, in substance, the application of the *non-*

Ct. 2011) (holding that cruelty to animals statute was not unconstitutionally vague and observing: "[T]he terms 'maim,' 'mutilate,' 'torture,' and 'disfigure' all give fair notice of an objective standard of reasonableness in the avoidance of infliction of suffering.").

542. Radiowala v. Att'y Gen., 930 F.3d 577, 585 (3d Cir. 2019) ("Torture is defined as the intentional infliction of severe pain and suffering, whether physical or mental, for illicit purposes, and 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' There is no subjective component to the above assessment. A petitioner is required to meet her burden by objective evidence alone.") (citations omitted); Dahal v. Barr, 931 F.3d 15, 23 (1st Cir. 2019) (noting that to obtain relief under the Convention Against Torture, an individual "most prove by objective evidence that is it more likely than not that he will be tortured if he is deported") (citation omitted); Kaur v. I.N.S., 371 Fed. Appx. 765, 767 (9th Cir. 2010) ("Petitioners claim a subjective fear of arrest and torture, but there is little evidence that such fear is objectively reasonably.").

543. Ali v. Garland, 33 F.4th 47, 53–54 (1st Cir. 2022) ("The definition of 'torture' includes 'mental pain or suffering' that is 'caused by or resulting from,' among other things, '[t]he threat of imminent death' and '[t]he intentional infliction or threatened infliction of severe physical pain or suffering.'") (citing 8 C.F.R. §§ 1208.18(a)(4)(i), (iii)).

544. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 134–84.

545. *E.g.*, Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189, 204 (2020) ("[M]ost countries and many recent international instruments explicitly outlaw the use of the death penalty. Furthermore, many European states refuse to extradite criminal defendants facing a possible capital sentence to the United States, and various NGOs and pressure groups consistently highlight the practice's faults as a means of securing its end."); Artemio Rivera, *Interpreting Extradition Treaties*, 43 U. DAYTON L. REV. 201, 216–17 (2018) ("The development of the 'death row phenomenon' doctrine by the European Court of Human Rights in *Soering*, and the decision by the Human Rights Committee of the United Nations in *Ng*, are supported by various national courts' decisions that have refused to extradite to states that apply the death penalty. Countries such as France, Germany, and Spain, on the other hand,

refoulement principle found in Article 3 of the U.N. Convention Against Torture that protects individuals (e.g., in asylum cases) from being returned to countries where they might be tortured.[546]

Ongoing international advocacy against capital punishment by abolitionist countries is, in fact, gradually moving the needle toward global abolition—at least in international law. "[N]ear the end of its 1994 session," one writer, Toni Fine, notes, the U.N. General Assembly

---

have conditioned the extradition of terrorist suspects to the United States on promises by the U.S. Department of Justice not to seek the death penalty.") (citations omitted).

546. David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFFALO HUM. RTS. L. REV. 1, 10, 16 (1999); *see also* Stephen I. Vladeck, *Habeas Corpus, Due Process, and Extradition*, 98 CORNELL L. REV. ONLINE 20, 26 (2013) ("Article 3 of CAT provides that 'No State Party shall expel, return ('refouler'), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' There are no exceptions to Article 3's 'nonrefoul[e]ment' principle, and there is substantial authority for the proposition that nonrefoul[e]ment is itself a *jus cogens* norm of customary international law."); *see also* Henry A. J. Ramos, *Recent Developments Affecting the International Legal Rights of Asylum-Seekers in Switzerland: An Overview and Critique*, 6 CONN. J. INT'L L. 53, 86 (1990) (discussing "the *duty of non-refoul[e]ment*, not to take actions that result in the return of refugees to persecution"); Al Otro Lado, Inc. v. McAleenan, 394 F. Supp.3d 1168, 1223–24 (S.D. Cal. 2019) (noting "Plaintiffs allege that the duty of *non-refoulement* is a *jus cogens* norm recognized by the law of nations"; that "Defendants simply fail to grapple with Plaintiffs' allegations or arguments on whether *non-refoulement* is a norm that is recognized by the law of nations"; and that the *jus cogens* norm—as asserted by plaintiffs—is grounded in "(1) a range of fundamental international treaties, including Article 33 of the Convention on the Status of Refugees and its Protocol ('Refugee Convention'), Article 13 of the International Covenant on Civil and Political Rights ('ICCPR'), and Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('CAT'); (2) statements by international law bodies, including the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR); and (3) international law commentators"); Al Ortro Lado, Inc. v. Mayorkas, Case No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *21 (S.D. Cal. Sept. 2, 2021) ("Plaintiffs have previously provided extensive citation to sources—including findings and conclusions from the Executive Committee of the United Nations High Commissioner for Refugees ('UNHCR'), the Oxford Encyclopedia of Human Rights, and academic journals and other scholarship—to establish that non-refoulement is a jus cogens norm. The UNHCR, in particular, has expressly concluded that non-refoulement had achieved the status of a jus cogens norm 'not subject to derogation.'") (citations omitted). *But see* Al Otro Lado v. Executive Office for Immigration Review, 120 F.4th 606, 645–46 (9th Cir. 2004) (Nelson, J., dissenting) (rejecting plaintiffs' assertions that *non-refoulement* has been elevated "to a universal status" or has reached *jus cogens* status; concluding that "[b]ecause finding that a norm has *jus cogens* status is harsh medicine, only the rarest of norms will achieve that status"; and stating that while the Restatement (Third) of the Foreign Relations Law of the United States enumerates *jus cogens* norms, including norms prohibiting official torture, murder, slavery, systematic racial discrimination, or causing disappearance of individuals, "[t]he refoulement of aliens who have never entered the United States is a far cry from that status").

considered a resolution calling for the death penalty's worldwide abolition "by the year 2000." "The 1994 Resolution, proposed by the Italian government with substantial assistance from Hands Off Cain," Fine further observes, "consisted of preambular references to prior U.N. resolutions on the death penalty."[547] As Fine emphasizes: "The 1994 Resolution asked retentionist states to: (1) abide by earlier conventions and prohibit the execution of pregnant women, juveniles, and insane people; (2) consider limiting the number of capital offenses; and (3) work toward a moratorium on the death penalty by the year 2000."[548] While the outcome of global abolition (or at least a moratorium on executions) by the turn of the century never came to pass, due to a group of retentionist states led by Singapore blocking the resolution's passage, Italy obtained forty-nine co-sponsors for the 1994 Resolution.[549] The setback, however, only made abolitionists more determined and persistent, with activists, thinking even bigger as new resolutions were put forward, knowing that advances in human rights only occur through struggle.[550] While the U.N. General Assembly's later adoption of a series of non-binding moratorium resolutions has not, to date, been successful in halting executions worldwide, those resolutions have built tremendous momentum for a worldwide moratorium and the death penalty's abolition through the adoption of protocols aimed at ending the death penalty's use. Countries opposing the U.N. moratorium resolutions are now clearly in the minority.

The recognition of the death penalty as both a form of torture and CIDT would make the law more internally consistent and principled in application. After all, non-lethal corporal punishments[551] have already been stigmatized and abandoned in many of the world's penal systems, with countries that continue to authorize such punishments already denounced by other signatories to treaties forbidding torture, corporal punishment, and other forms of CIDT.[552] Decades ago, in

547. Fine, *supra* note 140, at 426–27.

548. *Id.* at 427.

549. *Id.*

550. *See* Christof Heyns & Danie Brand, *The Constitutional Protection of Religious Human Rights in Southern Africa*, 14 EMORY INT'L L. REV. 699, 699, 702 (2000).

551. CAT COMMENTARY, *supra* note 421, 460 ("There are two forms of corporal punishments: administrative and judicial. Judicial corporal punishments are imposed by courts in a sentence after conviction; administrative corporal punishments are disciplinary measures, eg in prisons or schools.").

552. Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT'L L. 1, 20 (2008) (noting of the CRC: "Malaysia and Singapore made reservations against the provision that bans corporal punishment"); Alice Farmer & Kate Stinson, *Failing the Grade: How the Use of Corporal Punishment in U.S. Public Schools Demonstrates the Need*

Tyrer v. United Kingdom (1978), the European Court of Human Rights ruled that judicial corporal punishment contravened Article 3 of the European Convention proscribing "degrading treatment or punishment."[553] That decision was soon followed by others. "The European Court of Human Rights has consistently held that corporal punishment violates children's rights under the European Convention on Human Rights," scholar Michael Tonry writes, noting that Article 19 of the CRC provides that children have a right to be free from "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however slight."[554]

In fact, a number of countries and conventions, including the

for U.S. Ratification of the Children's Rights Convention and the Convention on the Rights of Persons with Disabilities, 54 N.Y.L. SCH. L. REV. 1035 n.68 (2009/2010) (noting that Singapore's CRC declaration considered that the CRC did not prohibit "the judicious application of corporal punishment in the best interest of the child"; that "[a] number of states have interpreted Singapore's declaration as a reservation" to the CRC "and objected to it as contrary to the object and purpose of the Convention"; and that Germany, Belgium, Italy, The Netherlands, Norway, Finland and Portugal registered objections to Singapore's reservations).

553. Christopher Hilliard & Marco Duranti, *Human Rights at the Edges of Late Imperial Britain: The* Tyrer *Case and Judicial Corporal Punishment from the Isle of Man to Montserrat, 1972–1990*, 42 L. & HIST. REV. 343, 343 (2024) (discussing *Tyrer v. United Kingdom*, App. No. 5856/72, A/26, European Court of Human Rights, Apr. 25, 1978); CAT COMMENTARY, *supra* note 421, at 460 ("In 1978, the [European Court of Human Rights] ruled that birching of a juvenile as a traditional punishment on the Isle of Man was no longer compatible with the prohibition of degrading punishment in Article 3 [of the European Convention on Human Rights]."); *see also id.* at 460–61 (noting that in 1982, the Human Rights Committee, in a General Comment, "expressed the unanimous opinion that the prohibition of Article 7" of the ICCPR "'must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure' which was confirmed in the revised General Comment of 1992," and that in 2000, the Committee "confirmed this opinion" in "*Osbourne v Jamaica*, which concerned the judicial sentence of ten strokes with the tamarind switch on the naked buttocks", with the Committee "deciding that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7" of the ICCPR).

554. Michael Tonry, *Why Americans Are a People of Exceptional Violence*, 52 CRIME & JUST. 233, 243 (2023); *see also* A. v. United Kingdom, App. No. 25599/94, Eur. Ct. H.R. (Sept. 23, 1998) (arguing that corporal punishment administered by a parent can violate the prohibition against torture and ill-treatment if a State fails to provide adequate protection). The movement to ban corporal punishment in public schools dates back multiple decades. *E.g.*, Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 593 (2003).

Geneva Conventions,[555] already bar corporal punishment,[556] with the number of countries in that category growing just as the number of countries rejecting the death penalty is rising.[557] As of 2023, "corporal punishment is illegal in all EU school settings and in all EU homes except in Slovakia and the Czech Republic."[558] Article 19 of the CRC—part of the larger framework of international law—explicitly protects against both physical and mental abuse, providing: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[559]

---

555. Bill Quigley, *The Case for Closing the School of the Americas*, 20 BYU J. PUB. L. 1, 23 (2005) (noting Article 87 of the Third Geneva Convention states that "'[c]ollective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden'") (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 87); *id.* at 23–24 ("[I]n the Fourth Geneva Convention similar protections are granted to civilians under military control who are called 'protected persons' under Article 32: 'The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civil or military agents.'").

556. Jessica Dixon Weaver, *A Critical Race Theory Approach to Children's Rights*, 71 AM. U. L. REV. 1855, 1873–74 (2022).

557. *E.g.*, Martha Minow, *Children's Rights Debates, Revisited*, 75 FLA. L. REV. 195, 208 n.70 (2023) ("In 2001, only eleven countries banned corporal punishment; by 2022, this number had risen to sixty-four. An additional twenty-seven states pledged to enact a ban.") (citing *Global Progress Towards Prohibiting All Corporal Punishment*, END CORPORAL PUNISHMENT, http://endcorporalpunishment.org/wp-content/uploads/legality-tables/Global-progress-table-commitment.pdf [https://perma.cc/UA92-GX9G] (last updated Nov. 2024)). A number of international human rights campaigns to protect the rights of children have been successful in recent decades. *Id.* at 205–07 (noting that "drafts of the Convention on the Rights of the Child circulated among United Nations member states, nongovernmental organizations, and other interested groups in 1978; that the United Nations General Assembly adopted a final version of the CRC in 1989; and that "[a]dvocates and scholars involved in the process launched the Child Rights International Network in 1995 to support the Convention's enforcement").

558. Katie Coyle, *The Case for the Prohibition of Corporal Punishment in the U.S.*, 43 CHILD. LEGAL RTS. J. 21, 26 (2023); *see also id.* ("It was the EU country of Sweden that was the first state to completely prohibit corporal punishment in 1979—a decade before the UN Convention on the Rights of the Child was even adopted ('UNCRC').").

559. Giana Cacciato, *Corporal Punishment of Children: A Multinational Comparison Between United States, Canada and Georgia—How the United States Compares to Canada and Georgia*, 44 CHILD. LEGAL RTS. J. 67, 67–68 (2024); *see also* CRC, *supra* note

In truth, capital punishment, corporal punishment, and torturous interrogations all belong to the same family of human rights abuses. While there are non-lethal forms of torture, other forms of torture precede a killing. Back in 1975, the U.N. General Assembly "took an historic step towards the eradication of torture when it adopted the non-binding Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."[560] While that declaration did not achieve all that its drafters had hoped, it helped raise awareness of the problem of state torture around the globe. Ultimately, that declaration, elevating public awareness of both torture and CIDT, led to a revulsion against those practices and—through the international consensus achieved—to the drafting of the U.N. Convention Against Torture.[561] That binding convention proved to be much more effective in combatting torture and CIDT than a mere declaration.[562]

Just as the non-binding U.N. Declaration on Torture led to the drafting and promulgation of the Convention Against Torture, the non-binding resolutions seeking a global moratorium on executions may portend the ultimate demise of capital punishment, at least among non-rogue states, in the international community. Once capital punishment is recognized in international law for what it is—a cruel and torturous practice warranting a *jus cogens* norm prohibiting it—any country that continues to use the death penalty will find itself an outsider or outcast in the community of nations. As with the *jus cogens* norm prohibiting torture, jurists and scholars have identified a *jus cogens* norm barring CIDT.[563] As one legal commentator, Mischa

334, art. 37 ("[N]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment").

560. Lippman, *supra* note 164, at 300.

561. *Id.* at 303–04.

562. *Id.*

563. *E.g.*, Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp.3d 481 (E.D. Va. 2023) (noting that in a prior decision, *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp.3d 935 (E.D. Va. 2019), "the Court held that the United States does not retain sovereign immunity for violations of *jus cogens* norms of international law—which include torture, CIDT, and war crimes—and therefore CACI was not entitled to derivative sovereign immunity for such violations"); Caitlin Hunter, Note, Aldana v. Del Monte Fresh Produce: *Cruel, Inhuman, and Degrading Treatment After* Sosa v. Alvarez-Machain, 44 U.C. DAVIS L. REV. 1347, 1356–57 (2011) ("International law's prohibitions on torture and CIDT are serious prohibitions that countries cannot derogate. The Comments to the Restatement of Foreign Relations identify both torture and CIDT as jus cogens norms (i.e., norms that countries cannot derogate for any reason). Further, almost all international human rights treaties that permit some derogation of international norms still prohibit derogation from the norms against torture and CIDT."); Hilary Hammell, *The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for Its Application in U.S. Courts*, 33 WOMEN'S

Karplus, puts it: "The prohibition on CIDT has acquired *jus cogens* status, also called a peremptory norm of international law, from which no derogation is possible, which illustrates the strong consensus against CIDT."[564] Academics, however, continue to debate whether the prohibition against *refoulement* to CIDT also qualifies as *jus cogens* under customary international law.[565]

Conclusion

Executions used to be the customary punishment for a wide variety of offenses.[566] England's "Bloody Code" once made more than 200 offenses punishable by death,[567] and the post-World War II tribunals in Nuremberg, Germany, and Tokyo, Japan, both resulted in death sentences and executions.[568] But today, more than two-thirds of

---

RTS. L. REP. 244, 268–69 (2012) ("The international norm against cruel, inhuman, and degrading treatment (CIDT) circumscribes the behavior of state actors when they are lawfully depriving a person of liberty . . . .The UDHR, ICCPR, U.S. Constitution (Am. VIII), the Geneva Conventions, and jus cogens norms prohibit torture and CIDT, and the entire content of the Convention Against Torture (CAT) is about the topic. The prohibition of torture and CIDT is one of the oldest international laws in the world, as customary law and jus cogens.").

564. Mischa H. Karplus, *Forgotten in Solitary: Mentally Ill Inmates in Solitary Confinement and How the Law Can Protect Them*, 19 STAN. J. C.R. & C.L. 97, 149 & n.366 (2023) (citing Restatement (Third) of Foreign Relations Law of the United States § 702 cmt. n (Am. L. Inst. 1987)).

565. *Compare* Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, 62 WM. & MARY L. REV. 1067, 1085 (2021) ("[L]egal scholars continue to debate whether, or to what extent, customary international law recognizes *non-refoulement* as a peremptory norm. Conventional wisdom holds that the prohibition against *refoulement* to torture qualifies as a customary norm of jus cogens, such that it applies even to states that are not parties to the Torture Convention. Beyond that relatively uncontroversial principle, however, scholarly consensus has proven to be elusive. Some publicists have argued that the prohibition against *refoulement* to CIDT also qualifies as jus cogens under customary international law, but that proposition does not enjoy universal acceptance."), *with id.* at 1116 ("[V]arious international courts have held that IHRL prohibits returning individuals to face torture or CIDT, suggesting that the prohibition is of a jus cogens character.").

566. BANNER, *supra* note 298, at 5 ("English colonists of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft—all were capital crimes in England. All became capital crimes in the American colonies as well.").

567. JOHN WALLISS, THE BLOODY CODE IN ENGLAND AND WALES, 1760–1830, at 1 (2018) ("Between 1688 and 1820, the number of capital crimes in England and Wales increased exponentially from fifty to over 220.").

568. 2 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 730 (Morten Bergsmo et al. eds., 2014) ("[T]he two tribunals imposed either the death penalty (12 defendants in Nuremberg, seven in Tokyo) or imprisonment ranging from two years up to life imprisonment (seven defendants in Nuremberg and 17 in Tokyo).").

the world's countries have either abolished capital punishment or no longer use it in practice,[569] and the Rome Statute, which set up the International Criminal Court for the punishment of the world's most serious crimes (e.g., genocide, crimes of aggression, crimes against humanity, war crimes), does not even authorize the use of capital punishment.[570] In fact, multiple convention protocols[571] and national constitutions and courts already forbid executions[572] along with torture and CIDT.[573] Jettisoning a longstanding German tradition of capital punishment,[574] Germany's Basic Law has barred executions since 1949.[575] And in the landmark case of *State v. Makwanyane*

569. CARLSON ANYANGWE, CONTEMPORARY WARS AND CONFLICTS OVER LAND AND WATER IN AFRICA 242 (2022).

570. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, *supra* note 12, at 251 (discussing the drafting of the Rome Statute of the International Criminal Court, adopted in 1998); *accord* Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 SW. J. L. & TRADE AM. 1, 42 (2005).

571. James Park Taylor, *Intersection of Hybrid Rights: Dignity and Protection Against Excessive Punishment*, 46 MONT. L. 20, 24 (2021) ("The death penalty is prohibited by several international agreements including the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights, Protocol No. 13 to the European Convention on Human Rights, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.").

572. BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 2 ("In a 2017 amicus brief submitted to the US Supreme Court in support of Abel Daniel Hidalgo's challenge to Arizona's death penalty law, Amnesty International emphasized that—at that time—105 countries had abolished the death penalty, more than two-thirds of the world's nations had ceased using executions (either in law or practice), and fifty-six countries that had repealed the death penalty for all crimes had enshrined the death penalty's abolition in their national constitutions."); Barri Dean, Note, *What Are Those Ingredients You Are Mixing Up Behind Your Veil?*, 62 HOW. L.J. 309, 324 (2018) ("In 1990 the Hungarian Constitutional Court declared that the death penalty violates the 'inherent right to life and human dignity' as provided under the country's constitution. Additionally, in 1995 the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of 'cruel, inhuman or degrading treatment or punishment' under the country's interim constitution."); Hood & Hoyle, *supra* note 33, at 23–24 ("In Albania, one of the last Eastern European countries to abolish the death penalty, it was declared unconstitutional in 2000 by the Albanian Constitutional Court, following a moratorium imposed in 1995 . . . .").

573. *E.g.*, M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMPAR. & INT'L L. 235, 263 (1993) ("The right to be free from torture and cruel and degrading treatment or punishment is provided for in at least eighty-one national constitutions.").

574. Joachim J. Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373, 391 (2004).

575. Joanmarie Illaria Davoli, *Evolving Standards of Irrelevancy?*, 41 QUINNIPIAC L. REV. 81, 104 (2022); *see also* Inga Markovits, *Constitution Making After National*

(1995), South Africa's Constitutional Court declared capital punishment unconstitutional and inconsistent with the rights to life, human dignity, and to be free from cruel and inhuman treatment.[576]

The success of the abolitionist movement over the past few decades is no accident. It is the result of intentional and continuous advocacy as the fight against capital punishment has gone global.[577] "[T]he questioning of the legitimacy of the death penalty dawned in the context of the Enlightenment, at the end of the 18th century," one commentator explains in the *German Law Journal*.[578] In the modern era, however, Amnesty International and the NAACP—as well as individuals such as Justices Arthur Goldberg, Thurgood Marshall, and William Brennan—led the way.[579] "Justice Marshall was part of the Court majority that invalidated all existing death penalty statutes in 1972," Jordan Steiker, one of his former law clerks, writes.[580] "In striking down capital punishment," Justice Marshall emphasized in his lengthy concurrence in *Furman*, "this Court does not malign our system of government."[581] "On the contrary," Marshall wrote, "it pays homage to it."[582] As Justice Marshall concluded in the early 1970s: "In

---

Catastrophes: Germany in 1949 and 1990, 49 WM. & MARY L. REV. 1307, 1338 (2008).

576. State v Makwanyane and Another CCT3/94 [1995] ZACC 3 (Constitutional Court of South Africa).

577. SANDRA J. JONES, COALITION BUILDING IN THE ANTI–DEATH PENALTY MOVEMENT: PRIVILEGED MORALITY, RACE REALITIES 278 (2010) ("In 2000, [Amnesty International], together with the Community of Sant'Egidio and Sister Helen Prejean of the Moratorium 2000 project, presented more than three million signatures to United Nations Secretary-General Kofi Annan supporting a moratorium on the death penalty with a view to total abolition worldwide.").

578. Ester Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, 13 GERMAN L.J. 1225, 1227 n.5 (2012).

579. Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493 (1986); Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993); William J. Brennan, Jr., *Foreword: Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1994); *see also* Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 667 (2010) ("When several members of the Court signaled in 1963 that the death penalty might be disproportionate when used to punish the crime of rape, the nation's leading civil rights organization, the Legal Defense Fund of the NAACP (LDF), embarked on an ambitious 'moratorium' strategy to bring executions in the country to a halt."); Dan Urman, Book Review, 67 J. LEGAL EDUC. 879, 885 (2018) (noting that "Justice Arthur Goldberg's famous 1963 dissent calling for abolition of the death penalty" represented "the first time a Supreme Court Justice suggested the death penalty violated the Constitution") (reviewing MICHAEL MELTSNER, WITH PASSION: AN ACTIVIST LAWYER'S LIFE (2017)); Lee Kovarsky, *Blue State Fantasies and the Death Penalty*, 51 TEX. TECH. L. REV. 125, 127 (2018) (discussing Justice Goldberg's dissent).

580. Steiker, *supra* note 579, at 1132.

581. Furman v. Georgia, 408 U.S. 238, 371 (1972) (Marshall, J., concurring).

582. *Id.*

recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."[583]

Since then, scores of activists and NGOs have been involved in the abolitionist movement and many more countries have joined the abolitionist bandwagon.[584] "As the United States moved into decades of constitutional trench warfare on capital punishment," one source notes, looking at the global context, "the anti-death penalty movement made progress elsewhere."[585] "The transnational advocacy network promoting the abolition of the death penalty," the source emphasizes, "emerged in the 1970s, accelerating through alliances with existing international institutions such as the Catholic Church and the Council of Europe which increased pressure on governments from above."[586] In Rome, where the Community of Sant'Egidio was founded in 1968, that charitable and faith-based community runs the Cities of Life campaign against the death penalty and rallies on November 30th every year in Italy's capital, lighting up monuments to show their collective opposition to capital punishment.[587] As two participants in the Cities of Life campaign observe: "More than 2,000 cities light up public buildings in support of the worldwide abolition of the death penalty, with lighting of buildings such as Rome's Coliseum, Cathedral Square in Barcelona, and St. James Cathedral in Toronto."[588]

In addition to the work of dedicated abolitionist organizations, leading scholars and professional organizations such as the International Bar Association have formally endorsed the abolition of the death penalty.[589] The American Law Institute, for instance,

583. Steiker, *supra* note 579 , at 1136.

584. *E.g.*, Hood & Hoyle, *supra* note 33, at 30–31.

585. NOVAK, *supra* note 83, at 70.

586. *Id.*

587. Murphy & Priz, *supra* note 366, at 521–22.

588. *Id.* at 521–22, 523 ("The Community of Sant'Egidio chooses to fight against the death penalty as a violation of human rights: The death penalty, the extreme epitome of human rights violations, represents a means of torture, contradicts a rehabilatory view of justice, lowers civil society to the level of those who murder, legitimates violence at the highest level and often becomes a tool for the repression of political, ethnic or religious minorities.") (quoting *A long path towards abolition*, Community of Sant'Egidio, http://nodeathpenalty.santegidio.org/pageID/225/langID/en/Campaign.html (last visited May 3, 2017)).

589. NOVAK, *supra* note 83; *see also* Alexandra Lauren Horn, *Recognizing Persecution in U.S. Criminal Justice and Capital Punishment: A Potential Path to Asylum Relief for U.S. Nationals*, 32 FLA. J. INT'L L. 369, 372 (2021) ("The issue of the death

withdrew the death penalty provisions of the Model Penal Code in 2009.[590] Likewise, on December 16, 2015, the Bar of Ireland, the Bar Human Rights Committee of England and Wales, The International Bar Association's Human Rights Institute, and The Paris Bar all joined as *amici curiae* on behalf of Shonda Walter, a Pennsylvania death row inmate,[591] to ask the U.S. Supreme Court to find the death penalty to be a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause.[592] "Coordinating bodies such as Together Against the Death Penalty (founded in France in 2000), World Coalition Against the Death Penalty (founded in Rome in 2002), and International Commission Against the Death Penalty (founded in Spain 2010) host conferences and facilitate meetings with dignitaries," one piece of scholarship emphasizes.[593] Each World Congress against the Death Penalty—organized by *Ensemble Contre la Peine de Mort* (ECPM), the international alliance of abolitionist organizations,[594] and hosted by the likes of the European Union, the Council of Europe, and the European Parliament[595]—draws high-profile political leaders and speakers advocating for the abolition of the death penalty.[596]

In human rights campaigns, whether local, national or international, there is often a turning point[597]—what Malcolm

---

penalty has clearly moved firmly into the human rights arena and is no longer accepted as simply a national criminal justice policy issue.") (quoting INT'L BAR ASS'N, THE DEATH PENALTY UNDER INTERNATIONAL LAW: A BACKGROUND PAPER TO THE IBAHRI RESOLUTION ON THE ABOLITION OF THE DEATH PENALTY 6 (May 2006) (citation omitted).

590. Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010).

591. Commonwealth v. Walter, 119 A.3d 255, 258 (Pa. 2015).

592. Brief for the Bar of Ireland & the Bar Human Rights Committee of England and Wales et al. as Amici Curiae Supporting Petitioner, Commonwealth v. Walter, 119 A.3d 255 (Pa. 2015) (No. 15-650).

593. Novak, *supra* note 83.

594. SAHNI & JUNNARKAR, *supra* note 383, at 44–45 (discussing ECPM's organizing and anti-death penalty advocacy work).

595. John Quigley & S. Adele Shank, *Why Europe Abolished Capital Punishment*, 17 OHIO ST. J. CRIM. L. 95, 123 (2019); Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 172, at 11 n.18; Gibson & Lain, *supra* note 84, at 1239 n.129.

596. *E.g.*, Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1584 (2019) ("As the leaders of several national and international parliaments declared at the first World Congress against the death penalty in 2001, 'the death penalty is a violation of the most fundamental of human rights—the right to life,' and of 'human dignity' more broadly.").

597. *See, e.g.*, David I. Bruck, *Does the Death Penalty Still Matter: Reflections of a Death Row Lawyer*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 169, 177 (2023) (emphasizing on the subject of a "turning" point as regards the public impact of death row exonerations: "It may have begun at an extraordinary meeting at Northwestern

Gladwell terms a "tipping point."[598] With so much international coordination seeking the death penalty's abolition, including among government actors in abolitionist states,[599] and with so many NGOs regularly involved in such anti-death penalty advocacy, the world may finally be opening its eyes, at long last, to what Albert Camus had to say about capital punishment's barbarity. As Camus sagely observed decades ago:

> Capital punishment is the most premeditated of murders, to which no criminal's deed, however calculated, can be compared. For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.[600]

When courts evaluate whether criminal conduct is torturous or not, judges have determined that "causing the victim to anticipate harm or death are sufficient to prove torture."[601] And the anticipation of an unnatural death is what every capital defendant and every death row inmate must face. Capital charges and death sentences cause those subjected to them to anticipate their deaths at the hands of the

---

University in Chicago, in November, 1997, when some 30 former death row inmates, all of them eventually proven innocent and freed, stood together on a lecture hall stage and announced, one by one, that 'if the state of Florida (or Texas, or Illinois) had had its way, I'd be dead today.' More exonerations followed . . . ").

598. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2002).

599. *E.g.*, Kirchmeier, *supra* note 156, at 69–71 (discussing abolitionist efforts of the Council of Europe and statements of government officials and judges in Europe, Mexico and Canada that have been critical of America's death penalty).

600. ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 153 (Justin O'Brien trans., Modern Library 1963); *accord* EVAN J. MANDERY, CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION 4 (2d ed. 2012) (quoting Albert Camus).

601. State v. Smoot, No. E2017-00367-CCA-R3-CD, 2018 WL 4699046, at *51 (Tenn. Crim. App. Oct. 1, 2018); *see also* Rivers v. State, 298 S.E.2d 1, 8 (Ga. 1982) ("Evidence of psychological abuse before death may amount to torture and will also support a finding of depravity of mind."); Harris v. State, 230 S.E.2d 1, 10–11 (Ga. 1976) (finding torture where a murder victim anticipated death); Briley v. Bass, 584 F. Supp. 807, 819 (E.D. Va. 1984) ("[T]here was evidence of mental and physical torture. The victim was subjected to the agony of anticipating his death for over a quarter of an hour and was assaulted by his killers during the course of the kidnapping, robbery, and murder."); Godfrey v. Georgia, 446 U.S. 420, 441 n.12 (1980) (Marshall, J., concurring) ("The Georgia court has given an extraordinarily broad meaning to the word 'torture.' Under that court's view, 'torture' may be present whenever the victim suffered pain or anticipated the prospect of death.") (citations omitted).

state, and once a death warrant is issued for an execution and the execution date approaches, an official threat of death obviously becomes imminent. Although an exoneration, a commutation, or a reprieve may occur in a specific case, halting or pausing the pending threat of death, so long as capital punishment is authorized by law, executions will continue to take place and official death threats will inflict extreme torment and severe pain and suffering on death row inmates and their families.[602] Judges, jurors, and lawyers in capital cases, as well as prison chaplains and guards, are also adversely affected.[603] "Structured interviews with over one thousand Capital Jury Project ex-jurors," one recent law review article has pointed out, "showed that a great many jurors suffered adverse effects from their trial service, including difficulties with insomnia, nightmares, substance use, flashbacks, interpersonal difficulties, isolation, and strains on their social relationships."[604]

In the non-state actor context, a murder victim need only anticipate death for a relatively short period of time before the law recognizes the presence of psychological torture. For example, in *Mitchell v. State*,[605] the Alabama Court of Criminal Appeals held that

602. *E.g.*, Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 208 (2007) ("[T]here is sufficient research to establish and demonstrate the harm experienced by families with family members on death row."); *see also* Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 289 (2010) (examining the adverse of effects of the death penalty on death row lawyers, family members of the condemned and executed, murder victims family members, and the prison staff who conduct executions); Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 55–56 (citing evidence that capital charges, death sentences, and executions inflict trauma on a host of individuals, including the condemned inmate's family members and friends).

603. *E.g.*, Walter C. Long, *The Constitutionality and Ethics of Execution-Day Prison Chaplaincy*, 21 TEX. J. ON C.L. & C.R. 1, 2, 31 n.190 (2015) (discussing the role of Texas prison chaplains "assigned by the prison system to work with condemned inmates in the immediate days and hours before their execution and to accompany them in the execution chamber when the lethal injection is administered," and describing the death penalty as "torture in fact"); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 459–60, 470 (2005) (emphasizing that many "executioners, and the teams that assist them, suffer from extensive psychological traumas and associated medical difficulties," and noting "how executions predictably, if not uniformly, cause trauma to prison guards").

604. Mark Rabil, Dawn McQuiston & Kimberly D. Wiseman, *Secondary Trauma in Lawyering: Stories, Studies, and Strategies*, 56 WAKE FOREST L. REV. 825, 839–40 (2021); *see also* id. at 826–27, 830–31 (noting that "[c]apital criminal defense" work produces "high levels" of secondary traumatic stress ("STS") and its effects, and that "[t]he effects of STS extend beyond lawyers and their families" to jurors in death penalty cases).

605. Mitchell v. State, 84 So.3d 968, 987 (Ala. Crim. App. 2010).

"the circuit court did not abuse its discretion in finding that at least one of the victims suffered psychological torture" where individuals were in different areas of an inn's lobby when they were shot and the murders "were not accomplished in a rapid-fire manner; there was sufficient time between the . . . murders for the next victim to be placed in significant fear for his or her life."[606] Likewise, in *Brown v. State*,[607] the Alabama Court of Criminal Appeals held that where the defendant, by his own admission, "was present in the victim's apartment for approximately 30 minutes, and the victim was bound for at least 15 minutes," and where the defendant "admitted that he threatened the victim's life throughout the assault," "[t]he evidence establishes that the victim suffered for an appreciable amount of time following the assault and clearly endured extensive psychological torture."[608] As noted above, death row inmates face threats of death not just for minutes or hours, but for months and years—even decades—at a time.[609]

For too long, capital punishment and torture have been treated separately by the law, with many nations renouncing torture while simultaneously permitting executions.[610] But as the World Coalition Against the Death Penalty and scores of NGOs and legal experts continue to demonstrate that capital punishment should be considered and classified under the rubric of torture and CIDT, that is bound to change over time. The reality of the death penalty's administration is that it has always been inherently cruel and torturous. Ultimately, the death penalty will be classified for what it

606. *Id.* (quoting Taylor v. State, 808 So.2d 1148, 1169 (Ala. Crim. App. 2000)).

607. Brown v. State, 982 So.2d 565, 607 (Ala. Crim. App. 2006).

608. *Id. But cf.* Norris v. State, 793 So.2d 847, 861 (Ala. Crim. App. 1999) (holding that the murder of three individuals was not psychologically torturous because the three victims were shot in rapid succession; the "first three shots were sudden, without any warning or precipitating event" and "[t]here was nothing preceding the first murder that would have evoked in the victims intense apprehension, fear, or anticipation of their deaths").

609. In 2016, Justice Stephen Breyer dissented from a denial of certiorari in the case of Henry Sireci, a man "tried, convicted of murder, and first sentenced to death in 1976." Sireci v. Florida, 580 U.S. 1036 (2016) (Breyer, J., dissenting from denial of certiorari). As Breyer wrote of Sireci: "He has lived in prison under threat of execution for 40 years. When he was first sentenced to death, the Berlin Wall stood firmly in place. Saigon had just fallen." *Id.*

610. Centuries ago, civil law countries made use of judicial torture to extract confessions, utilizing barbaric instruments of torture (e.g., waterboarding, the thumbscrew, and the rack) to secure what, today, would be plainly classed as coerced confessions. "Torture," legal historian John Langbein explains, "was part of the ordinary criminal procedure, regularly employed to investigate and prosecute routine crime before the ordinary courts." JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF 3 (2012).

is—an act of torture—and the practice, like other forms of cruelty and torture, will be prohibited by a *jus cogens* norm of international law.[611] The use of the death penalty plainly violates human dignity and an array of universal human rights, including the right to life, the right to be free from torture and cruelty, and the right to be treated in a nonarbitrary, nondiscriminatory manner.[612] Indeed, because every death penalty regime makes use of credible death threats—the kind of threats that, if used in military[613] or custodial interrogations,[614] or by offenders who torture or kill,[615] are already prohibited by law—

611. Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 172; *accord* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66, at 224–27. As one legal commentator notes: "Peremptory norms prohibit certain highly unethical conduct, including genocide, torture, slavery, and the use of force. International law prohibits any derogation from these norms." Mary Ellen O'Connell, *What Remains of Law Against War*, 113 GEO. L.J. 319, 372 (2024).

612. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66.

613. Al Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 157 n.5 (4th Cir. 2016) (noting the U.S. Army Field Manual's prohibition of physical and mental torture and listing mock executions as a prohibited practice).

614. People v. Jones, 34 Cal. Rptr. 267, 268 (Ca. Dis. Ct. App. 1963) ("Confessions obtained as a result of physical abuse or psychological torture are inadmissible as violative of due process."); In re Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (use of Russian roulette during interrogation constitutes a form of torture); *see also* United States ex rel. Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir. 1995) (decrying the use of "psychological torture" in interrogations, and observing that "the infliction of such psychological punishment is more reprehensible than a physical attack" because "[i]t leaves no discernible marks on the victim"); Tobias v. Arteaga, 996 F.3d 571, 586 (9th Cir. 2021) (observing that an "extended, overbearing interrogation of a minor, who was isolated from family and his requested attorney, comes close to the level of 'psychological torture' that we have held is not tolerated by the Fourteenth Amendment") (citing Crowe v. Cnty. of San Diego, 608 F.3d 406, 432 (9th Cir. 2010) (describing a juror's view of boys' interrogations as "brutal and inhumane" and "psychological torture")).

615. When non-state actors make death threats, that is tortious—indeed, criminal—conduct. Denton v. Silver Stream Nursing and Rehab. Ctr., 739 A.2d 571, 577 (Pa. Super. Ct. 1999) (finding death threats made by a coworker and condoned by the employer reach a level of "outrageous" conduct necessary to claim infliction of emotional distress ("IIED")); Allam v. Meyers, No. 09-CV-10580, 2011 WL 721648, at *10–11 (S.D.N.Y. Feb. 24, 2011) (upholding IIED jury verdict based on a "five month-long, deliberate and malicious campaign of harassment and intimidation" involving "threats of violence," death threats, and "relentless humiliation and emotional abuse"); Nims v. Harrison, 768 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2000) (referencing death threats directed at plaintiffs' children sufficient to support IIED claim); Branden v. F.H. Paschen, S.N. Nielsen, Inc., No. 19-2406, at *3–5, 2019 WL 1760694 (E.D. La. Apr. 22, 2019) (finding that repeated threats of adverse employment action and physical harm, including a death threat of being shot in the head, were sufficient to support an IIED claim); Bustamento v. Tucker, 607 So. 2d 532 (La. 1992) (ruling that allegations of almost daily improper sexual comments and advances, threatened physical violence, and an attempt to run over the plaintiff with a forklift constituted a properly alleged IIED claim); Walters v. Rubicon, Inc., 96–2294 (La. App. 1 Cir. 12/29/97), 706 So.2d

the only way to eliminate those torturous death threats is to abolish capital punishment.[616] With mock executions,[617] threats of torture,[618] and rape[619] already identified as acts of torture,[620] it seems almost

503 (finding allegations of verbal abuse, harassment over the phone, and threats at work, as well as pointing a hand in the form of a gun and saying "pow," were sufficient to state IIED claim); Barrios v. Elmore, 430 F. Supp. 3d 250, 263 (W.D. Ky. 2020) (ruling plaintiff "established a genuine issue of material fact" as to whether defendant's death threats caused his emotional distress in the context of IIED claim); Turley v. ISG Lackawanna, Inc., 774 F. 3d 140, 140, 157–62 (2d Cir. 2014) (finding, in case asserting IIED claim, "insults, slurs, evocations of the Ku Klux Klan, statements comparing black men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile" sufficient at the summary judgment phase); Eves v. Ray, 840 N.Y.S.2d 105, 106 (N.Y. Sup. Ct., App. Div. 2007) (affirming verdict on IIED counterclaim based on evidence that "on several occasions," the plaintiff "threatened the defendant both physically and financially, and stalked him"); Kevin Miller, *Total Surveillance, Big Data, and Predictive Crime Technology: Privacy's Perfect Storm*, 19 J. TECH. L. & POL'Y 105, 130–31 (2014) ("[D]eath threats and conspiracy to commit murder—criminal in nature—are not protected First Amendment behaviors.").

616. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66.

617. *See* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 72.

618. *See* Pierre v. Gonzales, 502 F. 3d 109, 117–18 (2d Cir. 2007) (citing 8 C.F.R. § 208.18(a)(4) (2003)) (discussing "the CAT regulations" that define torture and observing: "[W]hen a credible threat of physical torture causes extreme mental pain or suffering, the specific intent requirement is altogether satisfied by the specific intent to cause the mental pain or suffering; the persecutor's intent (specific or not) to follow through on the threat to inflict physical torture does not matter if the making of the credible threat amounts to the torture in itself.").

619. Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (holding that rape can constitute torture and noting that government officials "do not appear to question that the assaults and rape of Avendano-Hernandez rise to the level of torture" where Avendano-Hernandez "was raped, forced to perform oral sex, beaten severely, and threatened"); *see also* Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143, 156–57 (1994) ("In a key advance, the United Nations Special Rapporteur on Torture in 1992 defined rape in detention as an act of torture. In 1991, the U.S. State Department included rapes in detention as incidents of torture in its annual country-by-country human rights report. Amnesty International has also recently listed rapes committed while the victim is in the custody of the rapist as a form of torture."); Danise Aydelott, *Mass Rape During War: Prosecuting Bosnian Rapists under International Law*, 7 EMORY INT'L L. REV. 585, 612 (1993) ("[S]everal human rights organizations have defined rape as torture."); John Mukum Mbaku, *International Human Rights Law and Violence Against Women and Girls in Africa*, 31 MICH. STATE INT'L L. REV. 525, 568 (2023) (quoting Comm'n on Hum. Rts., Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, UN Doc. E/CN.4/2000/68, (Feb. 29, 2000), at 23, para 67) ("[A]s early as 1992, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 'clearly identified rape as a form of torture.'").

620. *E.g.*, Bessler, *Taking Psychological Torture Seriously*, *supra* note 110, at 34, 34 n.154, 79, 79 n.348 (collecting authorities); Stanley v. Ayers, No. 07-cv-04727, 2017

self-evident that capital punishment should be similarly stigmatized using the torture classification.[621]

As people around the world continue to open their eyes to the horrors of state-sanctioned killing, it is time for abolitionists to redouble their efforts in the international community and push harder at the United Nations General Assembly to have the death penalty classified under the rubric of torture. With death threats ordinarily treated as *tortious* and *criminal* conduct, and with *mock* executions already considered a classic example of psychological torture,[622] it is already clear why, in the immigration context, a person facing and proving imminent threats of death in another country has a basis for obtaining withholding of deportation to that country.[623] In criminal cases, what are often called *torture-murder* cases,[624] jurists already forthrightly define "psychological torture" as occurring when crime victims are made aware of their impending deaths but are helpless to prevent those deaths.[625] For example, the presence of psychological torture has been found in homicide cases where the murder victim "had begged the defendants to cease their behavior," "was aware that her death was imminent," and "feared" for her own life and her grandchild's life.[626]

It is disturbing and totally contrary to rule of law principles that, in the same region where lynchings once occurred so frequently,[627]

WL 2224815, at *24 (N.D. Cal. May 22, 2017) (noting petitioner's argument that, under international law, "'[a]waiting death is a form of psychological torture" as evidenced "by the fact that mock executions . . . are a common torture tactic").

621. *See generally* BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS, *supra* note 66.

622. *See supra* notes 112 and 114 and accompanying text.

623. *E.g.*, Hernandez-Barrera v. Ashcroft, 373 F.3d 9, 14–15, 22 (1st Cir. 2004).

624. Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 822–23 (2012) ("[I]n the last twenty-five years (1985 to present), opinions have been issued in more than two hundred torture-murder cases. Of those, more than half involved some kind of battery on the sexual organs of the victim. Nearly half involved acts committed against children or in the presence of children.").

625. John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 801 (2018) (collecting authorities and cases).

626. Turner v. State, 924 So. 2d 737, 795 (Ala. Crim. App. 2002); Saunders v. State, 10 So. 3d 53, 109–10 (Ala. Crim. App. 2007) (finding that Mr. Clemons, a 77-year-old man, "suffered extreme psychological trauma because he knew that his death was imminent" after he was struck on the head with a crowbar, incapacitating him, that he would have been "in extreme fear for his own life and for that of his elderly wife," that he knew he would be "unable to protect his wife, who was alone in their house," and that "Mr. Clemons would have known that his own death was imminent because he could not overcome the attack by the younger, larger man, and he would have been aware that his wife would likely be the next victim of Saunders's violence").

627. *See* Allen E. Shoenberger, *Freemen and the Constitution: Monstrous Decisions*

southern jurists have defined "psychological torture" one way in coerced confession[628] and torture-murder cases,[629] but then have totally ignored the concept of psychological torture when it comes to the suffering of death row inmates (and, by extension, their families) subjected to continuous and far longer threats of death.[630] Those found guilty of torture-murders have committed heinous crimes and must be punished, but torture is about what is happening to someone

of the United States Supreme Court, 18 S.J. POL'Y & JUST. 214, 226 (2024) ("A six-year study published in 2017 by the Equal Justice Initiative, found that 4,084 black men, women, and children fell victim to 'racial terror lynchings' in twelve Southern states between 1877 and 1950; this number stands apart from the 300 killings that took place in other states. During this period, Mississippi's 654 lynchings led the lynchings which occurred in all of the Southern states.") (citing Bryan Stevenson, *As Study Finds 4,000 Lynchings in Jim Crow South, Will U.S. Address Legacy of Racial Terrorism?* DEMOCRACY NOW!, (Feb. 11, 2015),
https://www.democracynow.org/2015/2/11/as_study_finds_4_000_lynchings).

628. United States v. Broussard, 80 F.3d 1025, 1036 (5th Cir. 1996) (observing that *Miller v. Fenton*, 474 U.S. 104, 190 (1985) stands for the proposition that "confessions procured by beatings or other forms of physical or psychological torture cannot be used to obtain a conviction"). In *Miller v. Fenton*, the U.S. Supreme Court emphasized that it "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller*, 475 U.S. at 109; *see also id.* (referring to *Brown v. Mississippi,* 297 U.S. 278, 286 (1936) as "the wellspring of this notion, now deeply embedded in our criminal law," and noting that, in *Brown*, "[f]aced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means 'revolting to the sense of justice' could not be used to secure a conviction.").

629. *E.g.*, *Ex parte* Key, 891 So. 2d 384, 390 (Ala. 2004) (quoting Norris v. State, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)) ("Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death. Such torture 'must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.'"); Smith v. Hamm, 13-cv-437, 2023 WL 171772, at *21 (Ala. 2023) (finding no direct evidence that the murder victim overhead Smith and his co-defendants "discuss among themselves how they were going to dispose of her body," but finding that "[t]he facts . . . demonstrate the victim was present when the co-defendant directed Smith to 'finish her off,'" that "there are numerous other facts demonstrating psychological torture," and that "there are several facts which support a finding of the HAC [heinous, atrocious, or cruel] aggravating circumstance, including those demonstrating psychological torture").

630. Faulder v. Johnson, 99 F. Supp. 2d 774, 775, 777 (S.D. Tex. 1999) (discussing circumstances where a Texas inmate, Joseph Faulder, alleged he was "subjected to psychological torture in violation of 42 U.S.C. § 1983 and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment . . . because of his nine execution dates and repeated stays of his execution during his twenty-two years on death row" and holding that "Faulder cannot now argue that his repeatedly rescheduled executions, while no doubt a gruesome and disturbing ordeal, constituted deliberately inflicted torture when the stays were the result of his numerous appeals"); *see also id.* at 777 ("[I]t is unlikely that Faulder could successfully show that the delay and reschedulings resulted in cruel and unusual punishment.").

in the moment at the hands of a state official, and under existing law nothing can justify torture—not war, public emergency, or superior orders,[631] and certainly not the fact that someone, *in the past*, has been found guilty of a crime, no matter how heinous. As the Alabama Supreme Court, in America's Deep South where most American executions now occur,[632] has held: "Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death."[633] That legal description of psychological torture—from a court in a death penalty state, as it happens—describes the very circumstances faced by death row inmates in America and across the globe who now live under continuous threats of death before execution, commutation or reprieve, or exoneration.[634]

Because of the death penalty's continued use, international law is, in substance, quite unprincipled in application.[635] While the U.N. Convention Against Torture *absolutely* bars torture, including in wartime,[636] the ICCPR—at least as originally conceived in Article 6—

631. *E.g.*, People v. Martinez, 23 Cal. Rptr. 3d 508, 516 (Cal. Ct. App. 2005) (discussing the U.N. Convention Against Torture and noting that article 2 of that convention "requires each state party to the Convention on Torture to take effective measures to prevent torture within its jurisdiction and bars the use of 'exceptional circumstances' or superior orders as justifications for torture").

632. Historically, many executions occurred in the southern part of the United States. Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. CHI. L. REV. 243, 247–53 (2015); *see also* Diann Rust-Tierney, *Dismantling Structural Racism to End Capital Punishment*, 67 HOW. L.J. 275, 281 (2024) ("[M]ost death penalty statutes targeting enslaved and free Black people were enacted in the South, where enslaved and free Black people outnumbered the white population."). Since 1976, the majority of American executions have also taken place in the South. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf (identifying 1,299 executions in the South, 200 executions in the Midwest, 89 executions in the West, and 4 executions in the Northeast).

633. *Ex parte* Key, 891 So. 2d 384, 390 (Ala. 2004).

634. In the non-state actor context, psychological torture—it is said—"'must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.'" *Key*, 891 So. 2d at 390 (quoting Norris v. State, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)); *Norris*, 793 So. 2d at 860–61 ("[W]e find that the factor of psychological torture must have been present for an appreciable lapse of time, sufficient enough to have caused prolonged or appreciable suffering, i.e., the period of suffering must be prolonged enough to separate the crime from 'ordinary' murders . . . .").

635. The same thing can be said of the U.S. Supreme Court's Eighth Amendment jurisprudence. *See generally* Bessler, *The Anomaly of Executions*, *supra* note 19.

636. United States v. Belfast, 611 F.3d 783, 809 (11th Cir. 2010) ("The CAT itself says that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'") (citing CAT, *supra* note 167, art. 2(2)); *id.*

allowed death sentences for the most serious crimes.[637] However, in Europe and in many other locales, and thanks, in part, to the work of NGOs like Amnesty International and ECPM[638] and the ratifications of the ICCPR's Second Optional Protocol, Protocols 6 and 13 to the European Convention on Human Rights, and the Inter-American Protocol to Abolish the Death Penalty, the inherent and irreconcilable conflict between capital punishment and the absolute prohibition of torture is being resolved through the death penalty's abandonment or abolition.[639]

As more international advocacy occurs, it now seems very clear that, in time, death sentences and executions will be found to be totally incompatible with the law's strict prohibition of torture because an immutable characteristic of the death penalty is that it utilizes official and torturous death threats. If the world is to achieve truly *universal* human rights, then *everyone*—the innocent and the guilty alike—must be protected from acts of torture and cruelty.[640] The Rule of Law, which requires that governmental officials be subject to the same laws

("Referring to that provision, the Senate Executive Report explained that '[t]he use of torture in wartime is already prohibited with the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law.'").

637. ICCPR, *supra* note 43, art. 6.

638. *See, e.g.*, Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 L. & INEQ. 467, 482–83 (2007).

639. KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 146–47 (2017).

640. Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 83–84 (2005) ("Prisoner rights have been increasingly defined in the latter half of the twentieth century, beginning with the International Covenant on Civil and Political Rights ('ICCPR') in 1966. Article 7 of the ICCPR applies to prisoners and prohibits any use of 'cruel, inhuman, or degrading treatment or punishment.' Article 10 further provides that '[a]ll persons deprived of their liberties shall be treated with humanity and with respect for the inherent dignity of the human person.' In 1984, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ('Convention Against Torture') expanded the protection of prisoners.").

as everyone else,[641] demands no less.[642] As Benjamin Cardozo once observed: "Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life."[643]

641. Kevin Salazar, *Independent Counsel: The Interest of Justice Demands Neutral Prosecution in Local Affairs*, 32 KAN. J.L.& PUB. POL'Y 123, 152 (2023) ("The United States Supreme Court once remarked that the American system of government is 'a government of laws, not of men.' Indeed, the rule of law, the idea that the law is binding and the actions of government officials are subject to the law and constrained by it, is an invaluable principle to the American way of life."); *see also* Walker v. Bain, 257 F.3d 660, 677 (6th Cir. 2001) (Daughtrey, J., concurring in part, dissenting in part) ("Because most prisons are still arms of state government, the officials in charge of those institutions remain subject to the rule of law as defined by the constitution and as interpreted by the courts. To the extent that litigants are able to establish constitutional violations by prison officials, the courts are duty-bound to rectify those transgressions."); Olmstead v. United States, 277 U.S. 483, 485 (1928) (Brandeis, J., dissenting) ("Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.").

642. The Rule of Law has ancient origins. *See generally* Bessler, *The Rule of Law*, *supra* note 177; *see also* Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RES. L. REV. 669, 725–26 (2022) (discussing the writ of *habeas corpus* and emphasizing: "The writ . . . enforced Chapter 39 of Magna Carta, which prohibited the Crown from detaining or punishing subjects except pursuant to the 'law of the land'—'the Common Law, Statute Law, or Custome of England.' Chapter 39 formally endorsed in England's fundamental legal document what we would today call 'the rule of law'—viz., the principle that, because we are 'a government of laws, and not of men,' every government official, both low and high, is subject to the law.").

643. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 93–94 (1931).