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The European Tendency Toward Non-Extradition to the United States in Capital Cases: Trends, Assurances, and Breaches of Duty

Robert Gregg*

I. Introduction

In the wake of cases such as *Soering v. United Kingdom*, *In Re Venezia*, and the United States' pending request of France for the extradition of James Kopp, the topic of European nations' treaty obligations to extradite to the U.S. in capital cases has become increasingly contentious and problematic. Further, the United States' recent ouster from the United Nations Human Rights Committee, quite possibly resulting from its staunch refusal to join the ranks of abolitionist European and other nations, justifies some degree of speculation that the European Union and its member states may be employing their judicial power, international influence, and human rights rhetoric in an improper effort to coerce the U.S. to abandon its practice of capital punishment.¹ At the very least, these nations are neglecting their treaty obligations to the U.S., (thereby violating the most fundamental tenets of international law and damaging their international reputations), and may also be unduly interfering with U.S. domestic, criminal justice matters.

This note will look briefly at how and under what circumstances the death penalty is used within the U.S., consider its place in modern criminal justice, its role and status in international law, and the developing trend in Europe to refuse U.S. extradition requests because of this country's continued use of capital punishment.

II. Capital Punishment in the United States

It is worth pointing out that the United States has struggled with the issue of the appropriate use of the death penalty. It has not, as a nation, and as some have suggested, unthinkingly accepted it as part of its cultural heritage.² The United States Constitution clearly provides for the death penalty under the 5th, 8th, and 14th Amendments. The U.S. Supreme Court has so interpreted these Amendments, while imposing substantial limitations on use of the penalty, primarily in the areas of

* (J.D.) *magna cum laude*, University of Miami School of Law, 2002. I would like to thank my wife Andrea and daughter Elise for their love and support. I would also like to thank Professors Abraham and Williamson, as well as all of the members of the UM Leipzig team.

¹ *Editor's Note*: The United States has since been readmitted to the UN Human Rights Committee.

² See Hugo A. Bedau, *International Human Rights Law and the Death Penalty in America*, in *THE DEATH PENALTY IN AMERICA* (Hugo A. Bedau ed., 1997).

proportionality to the crime and systematic fairness of application³. Twelve states have chosen to abolish capital punishment, while a significant majority have either retained or reinstated its use after a prohibitionist period.⁴ (Kansas reinstated the death penalty in 1994, and New York did so in 1995.)⁵ This corresponds to the overall popular support the death penalty has with U.S. citizens generally. According to the most recent Gallup poll, support for the death penalty in the U.S. is at 67%, and has not fallen below 65% since 1980.⁶ Included in this number is the support of a majority of African Americans,⁷ towards whom abolitionists frequently claim the American criminal justice system is most biased and unfair.⁸ While there are many factors to consider in determining whether the death penalty is or is not applied equally without regard to race or any other prohibited basis (e.g., percentage of the overall population, race of victims), on this point it is significant to note that more whites by far are sentenced to and receive the ultimate punishment than minorities.⁹ This does not prove that U.S. capital punishment processes (or the criminal justice or any other system) are foolproof, or even that they are not racist. It does, however, strongly suggest that there do not appear, to most Americans including African Americans, to be significant problems with procedural safeguards for the accused in potentially capital cases.

In 1972, after finding that the death penalty as then implemented was unconstitutional as violative of the 8th and 14th Amendments, the Court effectively struck down all existing state death penalty laws.¹⁰ The Court subsequently (beginning in 1976) upheld the constitutionality of

³See generally *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁴ Amnesty International, *Facts and Figures on the Death Penalty*, at <http://www.web.amnesty.org>.

⁵ Kristi Tumminello Prinzo, Note, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards its Abolition*, 24 BROOKLYN J. INT'L L. 855 (1999).

⁶ Gallup Org., at <http://www.gallup.com>.

⁷ Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 31.

⁸ See, e.g., Amnesty International, *Amnesty International Report Killing with Prejudice: Race and the Death Penalty in the USA*, May 1999, at <http://www.amnesty-usa.org/rightsforall/dp/race/index.html>.

⁹ The U.S. Department of Justice, Bureau of Justice Statistics website at <http://www.ojp.usdoj.gov/bjs/cp.htm> reports that since the reinstatement of the death penalty in 1976 by the Supreme Court, white inmates have made up the majority of those under sentence of death. Of the 98 executions carried out in the U.S. in 1999, 61 were white, 33 were black, 2 were Asian and 2 were American Indian.

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

capital punishment as applied in Georgia¹¹ and other states, finding that new state laws providing for capital punishment ensured that the punishment was not imposed “wantonly and freakishly” and that a sentence of death was “always circumscribed by . . . legislative guidelines.”¹² In addition, the Court held mandatory death sentences unconstitutional.¹³ These and other protections ensure that those facing the death penalty will have the kinds of substantive and procedural protections demanded by the U.S. Constitution and the international treaties to which the U.S. is a party. Many supporters of capital punishment claim that those so convicted are actually given too much protection, to the detriment of the efficient functioning of the criminal justice system.¹⁴ Some have even lamented the American system of “super due process.”¹⁵

III. No Prohibition Per Se Under International Law

Neither is the U.S. prohibited from using the death penalty under international law. No ban on the death penalty as such exists under the United Nations Charter (U.N. Charter), the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or any other treaty to which the U.S. is a party. While the ICCPR does not abolish the death penalty, it does provide for certain procedural requirements and limits the types of offenders to which the penalty may be applied by signing parties.¹⁶ The U.S. ratified the ICCPR on September 8, 1992, with a reservation to Article 6 which prohibits use of the death penalty on persons under the age of 18, subject to its own constitutional restraints.¹⁷ While the General Assembly has adopted and proclaimed an Optional Protocol to the ICCPR which looks toward ultimate abolition of the death penalty,¹⁸ the United States has not signed this Protocol. The American Convention on Human Rights contains substantially greater limitations on use of death penalty, and, therefore, the U.S. has not ratified that covenant, either. On the subject of

¹¹ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹² *Id.* at 207.

¹³ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁴ See Peter Bronson, *Death Penalty: Still Guilty*, CINCINNATI ENQUIRER, June 18, 2000.

¹⁵ See, e.g., Press Release, Sen. Eddie Lucio, Jr. (Tex.), Landmark bill adding Life Without Parole as sentencing option in capital cases passes in Senate Committee on Criminal Justice, (April 19, 2001) (on file with author).

¹⁶ International Covenant on Civil and Political Rights, March 23, 1976, 999, art. 6, U.N.T.S. 172.

¹⁷ See United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 653 (1992).

¹⁸ *Second Optional Protocol to the ICCPR*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., No. 98 U.N. Doc. A/RES/44/128 (1990).

death penalty abolition, the U.S. seems to epitomize the persistent objector.

As for the argument that abolition has become customary international law, Professor Hood correctly observes that the case of *Kindler v. Canada*¹⁹ (in which the Supreme Court of Canada allowed extradition of a Canadian citizen to the U.S. without assurances that the death penalty would not be imposed, which ruling was later held not to violate the ICCPR by the United Nations Human Rights Committee) "shows that there is still no international consensus on this issue."²⁰ UN Secretary-General Kofi Annan, an opponent of the death penalty, has also publicly stated that the issue of the death penalty is one on which UN member states are "deeply divided."²¹ Obviously, deep division is nothing like international consensus.

Human Rights, or Simply Justice?

Because the stakes are arguably as high for those convicted and sentenced to death as for their victims, it is necessary to ask why many abolitionists claim that capital punishment is barbaric, or savage, or even cruel to the point of being a per se human rights violation.²² It is doubtful that abolitionists are so fervently opposed to the death penalty because of its mere unpleasantness. Most forms of punishment are unpleasant, intentionally so, and most advocates for abolition do not wish to put an end to the states' rights to impose other forms. Is the critical point of the claim, then, the degradation inherent in the punishment? Perhaps, and perhaps capital punishment is inherently degrading, but again, so is prison life according to most accounts, and the convicted murderer, in a very real sense, chose to subject him or herself to the punishment. Conversely, one could argue that if the condemned has been degraded, it is by his or her own actions, not the state's in exacting punishment for them. On the other hand, philosophers including Immanuel Kant, John Stuart Mill, and George Hegel have argued that a deserved execution actually *affirms* and gives the rightfully condemned person a certain dignity by affirming his "rationality and responsibilities for his actions."²³

¹⁹ See *Kindler v. Canada*, No. 470/1991; 14 HUM. RTS. L.J. 307 (1993).

²⁰ Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 540 (1997).

²¹ Inter Press Service (Dec. 18, 2000).

at http://www.oneworld.org/ips2/dec00/00_22_003.html.

²² See, e.g., Tom Hundley, *Europe Seeks to Convert U.S. on Death Penalty Executions, Erode Role as Moral Leader, Many Activists Say*, CHI. TRIB., June 26, 2000.

²³ Ernest van den Haag, *The Ultimate Punishment: A Defense*, HARV. L. REV. ASS'N, Sec. V para. 4 (1986) at

<http://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.htm>; see also John Stuart Mill, Speech in Favor of Capital Punishment, given before

Wait a minute...which civilization?

Nor has a plausible explanation been offered as to why the death penalty is "uncivilized".²⁴ Most civilizations have provided for capital punishment, as do most of the world's major religions. While subject to interpretation, most adherents accept that the death penalty is provided for in the Islamic scriptures,²⁵ the Jewish Torah,²⁶ and is recognized as a legitimate function of the secular government in the Pauline writings of the Christian faith.²⁷ Those who say their countries have abolished the death penalty because they are enlightened probably -though perhaps not consciously- mean only that they believe their countries enlightened because they are abolitionist. In the end, they merely make the uninformative and uninteresting assertion that they feel somehow more moral because their countries do not allow capital punishment.

As much as the imposition of punishment for any crime can be justified, capital punishment is. It is not -in the U.S., at least- applied arbitrarily or wantonly, and therefore does not belong in the category of those actions, rightfully detested, which are universally acknowledged as violative of human rights, such as genocide. It is imposed on only the worst offenders (almost always for the aggravated murder of innocent victims, and so against society's worst human rights violators), only after the highest degree of due process has been afforded, and in a manner that has been determined by the nation's highest court not to be cruel and unusual.²⁸ As mentioned, however, some hold the taking of life to be unacceptable no matter what the reason or how imposed.²⁹ While this is, for many, a compelling argument, it is not for that reason morally correct or logically sound. The state-sanctioned and imposed killing of a convicted murderer does not demonstrate the barbaric and bloodthirsty impulses of the mob, but rather the orderly and impartial administration of justice on society's most heinous criminal offenders. As such, capital punishment is as unlikely to brutalize or desensitize a nation's citizenry as any other form of collective self-defense. The state, after all, is responsible for the safety and security of its citizens. Those who believe that no crime can ever justify imposition of the death penalty because, as Council of Europe director-general of legal affairs Guy De Vel contends,

Parliament (Apr. 21, 1868); *See also* John O'Sullivan, *Death and Justice*, CHI. SUN-TIMES, May 8, 2001.

²⁴ *See* *Furman v. Georgia*, 408 U.S. 238, 286 (Brennan, J., concurring).

²⁵ Koran 2:178-179.

²⁶ *See, e.g.*, Exodus 21:12.

²⁷ *See* Romans 13:4-5.

²⁸ *See* *Gregg v. Georgia*, 428 U.S. at 178.

²⁹ *See* Hugo A. Bedau, *The Case Against the Death Penalty*, ACLU Freedom Network at

[http:// www.aclu.org/library/case_against_death.html](http://www.aclu.org/library/case_against_death.html).

"taking life is wrong",³⁰ are merely stating a personal conviction. In the words of Professor van den Haag, "Such a belief can be neither corroborated nor refuted; it is an article of faith."³¹ If it was an article of faith shared by all, or nearly all nations, as, for example, the inherent evil of torture, it would be relevant to and maybe controlling of this inquiry. However, it is clearly not a universally held belief among nations, as evidenced by the fact that at least 87 countries retain and employ the death penalty.³²

Professor Hood asserts that the death penalty is used so rarely in the U.S. that its usefulness is limited to political symbolism, and therefore has no "direct utility" as a deterrent to crime.³³ One might ponder, however, why Professor Hood would conclude that the reality that the U.S. carries out the ultimate punishment with caution and temperance necessarily precludes its utility in preventing future crimes, or apparently, anything else. As discussed below, the claim is quite likely impossible to prove. In any case, the death penalty certainly incapacitates the murderer him or herself from committing future crimes.

The Condemned Innocent Argument

Others argue that the death penalty is an inherently dangerous and inappropriate punishment, and therefore always a human rights violation, because of the risk of executing innocent persons.³⁴ The most immediate problem in advancing this argument is, of course, providing any proof that execution of innocent people in fact occurs. One study frequently cited by opponents of the death penalty claims to show that at least 23 innocent people have been executed in the United States since the beginning of the 20th century.³⁵ The study, however, has been slammed by scholars and law enforcement officers as "severely flawed in critical respects," and that its findings actually "confirm . . . the view that the risk [of execution of innocent persons] is too small to be a significant factor in the debate over the death penalty."³⁶

Too small to be a significant factor? Isn't any risk unacceptable when the consequences are so dire and irrevocable? Not if the only evidence of such a thing actually happening is itself unreliable, and the

³⁰ Barry James, *McVeigh Case Adds to European Objections to Executions*, INT'L HERALD TRIB., May 12, 2001.

³¹ See van den Haag, *supra* note 22, at Sec. V para. 2.

³² Amnesty International, *List of Abolitionist and Retentionist Countries* (Updated March 29, 2001), at <http://www.amnesty.org>.

³³ See Hood, *supra* note 19, at 524.

³⁴ See Bedau, *supra* note 28.

³⁵ MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 272 (1992).

³⁶ Professor Paul G. Cassell, Statements before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, para. 7 (July 23, 1993).

alternative is the deaths of significantly more innocent people at the hands of convicted murderers that are released or escape from prison. The number that accomplish the latter feat may be quite small, but Professor Cassell, in reporting his findings to the House Subcommittee on Civil and Constitutional Rights, stated that of the approximately 52,000 state prison inmates serving time for murder in 1984, an estimated 810 had previously been convicted of murder and had, subsequent to those convictions, killed 821 people.³⁷

IV. European Perceptions of Capital Punishment, and the U.S.

Many abolitionists, including Professor Hood, assert that Western Europe has done away with the death penalty because of a “growing respect for human rights” as well as a “lack of evidence to support” any deterrent effect on crime.³⁸ The latter assertion is simply unprovable. As columnist Don Feder sardonically notes, “How do they know? Survey takers don’t go around asking, “Were you ever deterred from killing someone by the possibility that you might pay the ultimate price?”³⁹ In other words, how *could* one scientifically prove who among us *has been* deterred? And if capital punishment should cease because the deterring effect on crime can’t be satisfactorily demonstrated, how can we justify most other forms of punishment?

As to the former assertion that Europe has done away with the death penalty due to a growing respect for human rights, the argument again makes the increasingly popular but nevertheless misguided assumption that capital punishment is necessarily a human rights issue to begin with. This viewpoint is again summed up in very popular-but-banal abolitionist fashion by Mr. De Vel, who states that “It is quite clear that we [the Council of Europe] consider the death penalty to be contrary to human rights, since these include the right to life.”⁴⁰ That is certainly clear. What is *not* clear (at least to half the world) is that the “right to life” means a right to life free from criminal consequences the Council of Europe finds distasteful or undignified. A more representative expression of the sentiments of most people, certainly inside and perhaps outside the U.S., is that of Judge Kozinski who contends that, “Most of us continue to believe that those who show utter contempt for human life by

³⁷ Cassell, para. 35. A related and perhaps more disturbing statistic, reported by Jeff Jacoby in his June 8, 2000 column for The Boston Globe, “The Abolitionists’ Cop-Out”, comes from the U.S. Department of Justice, which calculated that, in 1995, criminals released “under supervision” committed 13,200 murders and 200,000 other violent crimes.

³⁸ See Hood, *supra* note 19 at 525.

³⁹ *Capital Punishment Foes Dead Wrong*, BOSTON HERALD, Jan. 10, 2001; See also Speech of John Stuart Mill, *supra* note 22.

⁴⁰ See Barry James, *supra* note 29.

committing remorseless, premeditated murder justly forfeit the right to their own life.”⁴¹

A More (or less) Humane Alternative

But even if, for the sake of argument, one were to concede that the death penalty is a human rights violation, isn't the abolitionist alternative of life imprisonment more cruel than a relatively quick death? If one can argue the latter is a human rights violation because it is a cruel, unusual, inhuman, or degrading form of punishment, how much easier to characterize the former as one of the worst kinds of torture: locking a person up (as Mill put it, “immuring him in a living tomb”)⁴² until he should die naturally or perhaps at the hands of another inmate, and therefore even more a violation of basic human rights. It seems that most death penalty opponents are reacting not to the actual suffering or even dignity of the individual, but to their own perceptions and distaste for the *idea* of the death penalty. Writer George Bernard Shaw opined that, “Abolitionists, whenever a capital sentence is passed, write letters to the papers and sign petitions begging for reprieve, yet if the sentence is commuted to one of imprisonment for life forget all about it and leave the guilty wretch to his fate. Their emotions are as thoughtless as those of the savages who shriek for his execution and would crowd round the gallows to witness it”⁴³

Rather, the death penalty as practiced by the United States is rightly characterized as a criminal justice issue; and as between nations, the question is in most cases one of international treaty obligations and comity, not human rights violations. As such, it should properly be examined and debated by United Nations member states according to the principles of the Preamble to and Article 1 of the U.N. Charter, which affirm the member nations' determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,”⁴⁴ and “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”⁴⁵ Abolitionists states would also do well to consider the words of Article 2.1 which provide that “The Organization is based on the principle of the sovereign equality of all its Members.”⁴⁶

Give the People What We Want

⁴¹ ISSUES AND CONTROVERSIES: DEATH PENALTY (Facts On File World News CD-ROM, issue date Dec. 29, 1995).

⁴² Mill, *supra* note 22.

⁴³ George Bernard Shaw, ATLANTIC MONTHLY, June 1948.

⁴⁴ U.N. CHARTER Preamble, para 3.

⁴⁵ U.N. CHARTER art. 1.2.

⁴⁶ U.N. CHARTER art. 2.1.

Interestingly, it is not at all clear that European *citizens* are as widely opposed to the death penalty as their countries' treaty (and in the case of nations such as Italy and the Federal Republic of Germany, constitutional) provisions would seem to indicate. In the United Kingdom, for example, it is reported that support for the reinstatement of capital punishment is at about 65%⁴⁷, very nearly that of the U.S. Quite possibly, the widespread movement to abolition in Europe was fueled not so much by public sentiment, but by the agendas of those nations' political elites, which abandoned the practice in spite of the will of the majority of its citizens.⁴⁸ One might reasonably wonder how, in democratic countries, leaders can ignore the wishes of their constituents on such an important topic. According to one writer and editor -who asserts that, far from being morally superior to America's political culture, Europe's is simply less democratic- a number of causes can explain the phenomenon. First, "cornerstone" states in the European Union pressure newer members to adopt the "European norm" of abolition.⁴⁹ Second, and related to the first, the EU does not have a governmental structure that approximates the United States' federal system, and cannot therefore disregard the opinions of leaders in other regions of the Union.⁵⁰ Additionally, the EU's parliamentary government is "more resistant to . . . single-issue politics on which the death penalty thrives."⁵¹ Finally, in these government structures people vote for parties rather than individuals, therefore, they have little or no say in the decisions of party committees in choosing their candidates.⁵²

V. A Few Words on Trends

Opponents of the death penalty argue that the "trend" in international law generally is away from the death penalty and toward abolition.⁵³ While this may be an accurate statement about present tendencies in individual nations' criminal justice policies, it does not follow that newly-abolitionist nations (or long-established ones, for that matter) view or should view the death penalty as a human rights violation. An important thing to remember about trends is that they are

⁴⁷ See Joshua Micah Marshall, *Death in Venice (Europe's Death Penalty Elitism)*, NEW REPUBLIC ONLINE, (Post date July 20, 2000) at <http://www.tnr.com/073100/marshall073100.html>; See also *Europe's View of the Death Penalty*, N.Y. TIMES, May 13, 2001, available at <http://www.nytimes.com/2001/05/13/opinion/13SUN1.html>.

⁴⁸ See O'Sullivan, *supra* note 22.

⁴⁹ See Marshall, *supra* note 46.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, e.g., Prinzo, *supra* note 4, at 876; Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 CAP. DEF. J. 243 (1999).

not necessarily determinative of norms. By their nature they are subject to change, and sometimes even whim. But it will be instructive to take a look at some other aspects of this specific "trend."

It must be acknowledged that capital punishment has been banned in times of peace throughout the 43 countries in the Council of Europe.⁵⁴ In some nations, it is even constitutionally prohibited.⁵⁵ However, for many European countries, this is likely the response to long experiences with oppressive regimes, which the U.S. as a nation simply has not had.⁵⁶ According to Ruprecht Polenz, Muenster's representative on the foreign policy committee of the Bundestag in the Federal Parliament in Berlin, "[Germany's] views have been shaped by the experience of the Third Reich, when the potential for abuse was so horribly apparent in the state's right to decide matters of life and death."⁵⁷

Abolition of the death penalty is a precondition of European Union membership,⁵⁸ therefore, it is not surprising that retentionist countries applying for EU membership would change their positions (or become "enlightened") on the subject, in order to gain the economic and other perceived benefits of EU membership. This does not, of course, account for abolition in many other countries. But neither does focusing only on the switch to abolition in these countries provide a very accurate look at the larger picture. For instance, some countries that tried the abolition experiment have reinstated the death penalty in recent years, including the Philippines, Papua New Guinea, and Gambia.⁵⁹ A number of countries (11 by 1996) that were presumed to be abolitionist at least in practice, have resumed executions.⁶⁰ At least 87 countries throughout the world maintain and use the death penalty, including the Bahamas, Jamaica, Japan and Thailand.⁶¹ While a 1979 survey of penalties for drug trafficking in 125 countries revealed that the death penalty could be imposed in 10 of them, by 1995 the number rose to at least twenty-six.⁶² As Professor Hood writes in his Article "The Death Penalty: The USA in World Perspective", "[T]here has been a marked resistance to appeals for abolition in the United States *and various other parts of the world . . .*"⁶³

⁵⁴ See James, *supra* note 29.

⁵⁵ Constitution of The Federal Republic of Germany, Article 102 states: "The death penalty is abolished." Title I, Article 27 of Italy's Constitution reads in part: "The death penalty is not admitted except in cases specified by military laws in time of war."

⁵⁶ See van den Haag, *supra* note 22.

⁵⁷ Carol J. Williams, *Europeans Baffled by U.S. Support of Death Penalty*, L.A. TIMES, Apr. 6, 2000.

⁵⁸ See Hundley, *supra* note 21.

⁵⁹ See Hood, *supra* note 19, at 520.

⁶⁰ ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE, 49-52 (2d ed. 1996).

⁶¹ Amnesty International, *supra* note 31.

⁶² See Hood, *supra* note 59, at 60-62.

⁶³ See Hood, *supra* note 19, at 524.

(emphasis added) Even those in favor of the growing “trend” toward abolition find it noteworthy that in most abolitionist countries, opinion polls show that the majority of those nations’ citizens would prefer to have it than not.⁶⁴ Perhaps of greater import, the number of abolitionist countries that death penalty opponents put forward to prove the trend looks rather doubtful upon examination. At the very least, it seems disingenuous to label nations “abolitionist” that *retain* the death penalty in law but haven’t used it in the last ten years, or which provide for it only in times of war or other emergency (a limitation on, but not necessarily a condemnation of, the practice), as Amnesty International does.⁶⁵ So, while recognizing a trend toward abolition in some countries, it is not at all certain that this trend is what death penalty opponents claim, or that it will continue, or even that it is reflective of the will of most nations’ citizens.

Finally, even if nothing above casts doubt on the ultimate outcome of the trend toward abolition, in any event the U.S. Supreme Court has made it clear that it will not be guided by trends that do not yet embody customary international law, at least in deciding questions of 8th Amendment jurisprudence.⁶⁶

Everyone Wants Assurances

The more specific problem, from the perspective of U.S.-European extradition duties, is the refusal of some European nations to send or return fugitives to the United States in potentially capital cases, even when these countries have agreed by treaty to extradite in such situations. These refusals have been justified and even celebrated by European and American abolitionists as the “subordinat[ion of] extradition law to human rights norms.”⁶⁷ Ennobling as that sounds to the abolitionist ear, the statement turns out to be nothing more than a euphemism for the increasing tendency of continental courts to circumvent treaty obligations in the name of Europe’s rather pietistic and parochial conception of human rights. It is *not* an accurate statement about customary international extradition law.

A few clarifications with respect to this problem should be made. First, the refusal by a nation to extradite in capital murder cases is not -in the absence of a treaty duty to do so- improper under international law, and certainly not where a treaty between the party States so provides. Nor is there any difficulty where treaty parties stipulate that extradition in such cases will only be granted when sufficient assurances from the requesting state that the death penalty will not be sought are secured by

⁶⁴ FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA at 12 (1986).

⁶⁵ Amnesty International, *supra* note 31.

⁶⁶ See *Stanford v. Kentucky*, 492 U.S. 361, n.1 at 370.

⁶⁷ Mark E. DeWitt, Comment, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATH. U.L. REV. 535, 542 (1998).

the requested State.⁶⁸ These are prerogatives that sovereign nations enjoy when negotiating whether and in what circumstances they will honor a request to extradite. However, a troubling trend of another sort is developing in Europe, where the European Court of Human Rights seems intent on limiting more and more the sovereignty of member states in determining their own treaty obligations, as well as deciding when the Court's "totality of the circumstances" interpretation of human rights violations would supercede them, as it did in the case of accused (and later convicted) double-murderer Jens Soering. Mr. Soering, a German national, was wanted in Virginia for the murders of his girlfriend's parents, and a request for extradition was made of England, where he had been arrested for check fraud.⁶⁹ While the Court recognized the "undoubted" legitimacy of the reason for Soering's extradition to the U.S., "in accordance with the Extradition Treaty between the United Kingdom and the United States,"⁷⁰ it nevertheless found that the U.K. would be in violation of the European Convention on Human Rights without "greater assurances" that Soering would not face the death penalty, or the "inhuman or degrading" (per Article 3 of the European Convention) conditions of the "death row phenomenon."⁷¹

This fairly transparent attempt to coerce the U.S. to a) recognize the death penalty as an inherent human rights issue, and b) to abolish its practice, has been noted and commented upon especially by those most enthusiastic about the Court's holding. One commentator writes that the Court seems to be "leaning towards not allowing the extradition of prisoners from Convention States to States where the death penalty still exists,"⁷² while another notes that "implicit in [the Court's] holding that Soering's extradition by Great Britain would violate Article 3 is the finding that the conditions surrounding the use of the death penalty by the United States run against that article and, indeed, the customary international law of human rights."⁷³

In reality, use of the death penalty by the United States does not, by itself, violate customary international law, nor any human rights treaty to which the U.S. is a party. As Professor Nanda writes:
The trend toward abolition of the death penalty notwithstanding, there is not sufficient state practice and *opinio juris* for the abolition of the death penalty that has developed as customary international law. Thus, a

⁶⁸ See, e.g., Article 12 of the U.S.-Germany Treaty Concerning Extradition, 32 U.S.T. 1485 (Aug. 29, 1980 Date-In-Force).

⁶⁹ See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 4 (1989).

⁷⁰ *Id.* at para. 110.

⁷¹ *Id.* at para. 111.

⁷² Robertson, *Extradition, Inhuman Treatment and the Death Penalty*, 154 JUST. PEACE 231, 231 (1990).

⁷³ Richard B. Lillich, *Notes and Comments: The Soering Case*, 85 AM. J. INT'L L. 128, 147 (1991).

general proposition prohibiting extradition to a country still retaining capital punishment cannot be maintained.⁷⁴

The "death row phenomenon" likewise is not anywhere near a settled matter in international human rights jurisprudence, and is also a risky proposition for abolitionists, as it will almost certainly be taken by U.S. supporters of capital punishment as further evidence of the ill effects of the "super due process" afforded death row inmates. Nor does the European Court's somewhat scattered holding serve by itself to elevate abolition to the level of customary international law. What the holding actually does is further subject EU member states to the Court's tentative and confusing extradition jurisprudence, and perhaps engender greater dissatisfaction with its competence and even jurisdiction. This attempt to substitute the Court's norms for international ones could backfire. The German Federal Constitutional Court has itself recognized the conflicts with state sovereignty inherent in the European Union, and has complained of the "ambiguous nature of the EU legal system."⁷⁵ While this is, in a sense, a risk that the states of the European Union "contracted" into, the Court should be careful not to view it as an opportunity to attempt to mold U.S. domestic policy, or to interfere with any European nation's treaty obligations.

More troubling, though, is the ruling of the Italian Constitutional Court in *In Re Venezia*, in which the U.S. had sought the return to Dade County, Florida of Pietro Venezia, who in 1994 confessed to murdering a Florida state government collection agent in front of the agent's home.⁷⁶ After being arrested in Italy, the U.S. requested his extradition under its treaty with Italy.⁷⁷ The Court ultimately refused extradition, essentially holding that its Constitution's prohibitions against the death penalty and guarantee of the "right to life" were superior to any treaty agreements.⁷⁸ The U.S.-Italian treaty provided that:

[W]hen the offense for which extradition is requested is punishable by death under laws of the requesting Party, extradition shall be refused, unless the requesting Party provides such assurances as the requested Party considers

⁷⁴ Ved P. Nanda, Essay, *Bases for Refusing International Extradition Requests—Capital Punishment and Torture*, 23 FORDHAM INT'L L.J. 1369, 1379 (2000).

⁷⁵ Sean C. Monaghan, *European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitutional Court's Maastricht Decision*, 12 EMORY INT'L L. REV. 1443, 1445 (1998).

⁷⁶ DeWitt, *supra* note 66, at 567; *see also* Arnold Markowitz, *Pasta to Die For?*, MIAMI HERALD, May 29, 1994.

⁷⁷ Extradition Treaty, Oct. 13, 1983, U.S.-Italy, TIAS No. 10,837, 24 ILM 1525 (1985) (entered into force Sept. 24, 1984) [hereinafter U.S.-Italy Extradition Treaty].

⁷⁸ *In Re Venezia*, pt. I, para 2.2 (June 25, 1996); *See also* DeWitt, *supra* note 66, at 569-573.

sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.⁷⁹

Although the U.S. Department of Justice followed an oral assurance not to seek the death penalty with a written promise, the Court questioned the assurance because Venezia would be tried in a state court. The Court seemed to resolve that issue for itself, though, writing that it was confident the U.S. Constitution's Supremacy Clause would require Florida to abide by the federal government's promise to Italy.⁸⁰ In the end, the Italian Court decided that there was, essentially, no such thing as a sufficient assurance in light of Italy's absolute constitutional protections against the death penalty and of the "right to life". One commentator suggested that the Court's reasoning was based on Italian sentiment against the death penalty and a desire to show the U.S. that it did not support its practice.⁸¹ If true, that is, if the Italian Court's purportedly constitutional holding was merely a pretense, and its true purpose was to engender anti-death penalty sentiment in order to coerce the U.S. into abandoning the practice of capital punishment, then one should not hesitate to view Italy's conduct as not only an inexcusable violation of its treaty duties to the U.S., but also interference in U.S. internal affairs. Recognizing that utilization of the death penalty is not a violation of The Universal Declaration on Human Rights (as even most abolitionists do), that there is not international consensus that waiting on "death row" necessarily amounts to inhuman and degrading treatment, and that capital punishment is not in itself a violation of customary international law, such an action is inherently violative of the principle of state sovereignty, and abolitionist nations would do well to consider the ramifications of attempting to force even their most laudable beliefs on states that have arrived at different conclusions on as-yet unresolved international issues.

Currently, four years after the U.S. first requested extradition from France of fugitive Ira Einhorn for the murder of his former girlfriend, the French government has still not made a final decision to extradite.⁸² Additionally, a new episode of political maneuvering has begun with the United States' recent request of that country to extradite accused abortion-doctor killer James Kopp.⁸³ Seemingly emboldened (or

⁷⁹ U.S.-Italy Extradition Treaty art. IX.

⁸⁰ See DeWitt, *supra* note 66, at 574-575.

⁸¹ *Id.* at 569.

⁸² See *A Step Ahead of the Law*, U.S. NEWS, Aug. 7, 2000, available at <http://www.usnews.com>.

⁸³ See Beverly Lumpkin, *Copping Kopp*, ABC NEWS, available at <http://www.abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice74.html#A>.

Editor's Note: Both Ira Einhorn and James Kopp have been extradited to the U.S. from France with the assurance that the death penalty will not be sought.

perhaps just pressured) by the European Court's holding in *Soering*, it appears that more countries are willing to ignore their extradition treaties with the U.S., or at least give them less than the consideration they warrant. While neither French law nor its Constitution (nor, for that matter, its current extradition treaty with the U.S.) require France to refuse extradition *even in death penalty cases*⁸⁴ and even though Einhorn's first trial *in absentia* in Pennsylvania resulted in a conviction and a sentence of life imprisonment, France will likely give in to pressure from the EU and the European Court of Human Rights and not extradite either Einhorn or Kopp without a promise by the U.S. not to seek the death penalty—though its treaty with the U.S. does not require such assurances—simply because both Pennsylvania state law (in Einhorn's case) and New York's (in Kopp's) provide for the death penalty.⁸⁵ While progress seems to have been made in the Einhorn case during the past months, he is presently living free in France while his appeal is pending review by France's highest legal administrative body, the Council of State.⁸⁶

Recent events at the United Nations further suggest a European ploy to pressure the U.S. into the abolitionist fold. On April 25, U.S. Ambassador George E. Moose voted on behalf of the United States against resolution E/CN.4/2001/L.93 as drafted, which called on all States parties to the ICCPR to accede to or ratify the Second Protocol to the International Covenant, aiming at the abolition of the death penalty.⁸⁷ A week later, the U.S. lost its seat on the Human Rights Commission for the first time since its formation. It is not difficult or even unreasonable to view this unprecedented action as part of a scheme by some European nations to coerce the U.S. to abandon its use of the death penalty. Initially offering reasons such as the U.S. arrearage in U.N. dues and its opposition to the creation of an International Criminal Court as possible explanations for the vote,⁸⁸ many nations and commentators are beginning to consider and suggest the far more likely explanation that the EU and some other countries wanted to punish the United States for its stand on capital punishment.⁸⁹ Joanna Weschler, the U.N. Human Rights

⁸⁴ See U.S.-France Treaty on Extradition, T.I.A.S. No. 7075, 22 U.S.T. 407.

⁸⁵ See Lumpkin, *supra* note 82.

⁸⁶ Julie Stoiber, *French Leader Decides Not to Reconsider Extraditing Einhorn*, PHILA. INQUIRER, Oct. 7, 2000.

⁸⁷ Press Release, United Nations, Commission on Human Rights Adopts Ten Resolutions, Measures on the Death Penalty, Impunity, and Other Issues Concerning the Promotion and Protection of Human Rights (Apr. 25, 2001).

⁸⁸ BBC News Online (May 3, 2001) at

<http://www.news.bbc.co.uk/hi/english/world/americas/newsid%5F1311000/1311468.stm>.

⁸⁹ See N.Y. TIMES, *Europe's View of the Death Penalty*, May 13, 2001 (Editorial).

Watch representative, commented immediately after the vote that the U.S. had voted "on the wrong side of several human rights issues."⁹⁰

VI. Conclusion

What should be remembered perhaps above all is the indisputable fact that, when promised, the U.S. has never failed to honor its word to either not seek the death penalty or to not impose it. Quite likely, even if a prosecutor attempted to avoid honoring such an assurance, he or she would be compelled to do so by American courts in much the same way our courts enforce plea agreements against our own state and federal governments. The Italian Constitutional Court's seeming distrust of U.S. assurances is therefore unwarranted and its constitutional claim unjustifiable, in light of Italy's extradition treaty with the U.S. Some suggest that, due to trends in the development of European human rights jurisprudence, the U.S. will more frequently find itself either unable to secure extradition, having to resort to alternative methods of bringing fugitives back to its soil, such as forcible abduction,⁹¹ agreeing to sentence extraditees according to punishments employed for the same crime by the requested state,⁹² or else finally joining the ranks of the abolitionist nations. All this assumes that the U.S. is to blame for the position it finds itself in, apparently because it continues to practice a method of punishment that is lawful under its own domestic as well as international law.

The reality is that European and other states that would refuse to extradite to the United States, in spite of U.S. assurances not to execute, and contrary to their voluntarily assumed treaty obligations, are the true offenders. There are solutions to the dilemma other than for the U.S. to become international kidnapers or to give in to the ersatz humanitarianism of some self-proclaimed enlightened nations. The onus, however, lies with those states that would dishonor their treaty commitments for the sake of expediting other political ends to rethink the matter, and consider these other solutions. They may amend their constitutions (not always as difficult a proposition in civil law countries as in the U.S.), or renounce their extradition treaties with the U.S. and—hopefully—negotiate new ones. Whatever they decide, they should be sensitive to the values of and prudential in their behavior towards close allies, and steadfastly mindful of the value of their reputations in the international community.

⁹⁰ BBC News Online, *supra* note 87.

⁹¹ See Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 CAP. DEF. J. 243, 259-260.

⁹² *Id.* at 261.