
European human rights law

The European regional system of human rights emerged following the Second World War, and many of its instruments were drafted at the same time as those of the United Nations, indeed, often by the same individuals. One of the European system's exceptional features is its highly developed implementation mechanism built around the European Court of Human Rights. This body interprets and applies the *Convention for the Protection of Human Rights and Fundamental Freedoms*, known as the *European Convention on Human Rights*, and its protocols.¹ Several Western European States – Austria, Germany, the Netherlands, the Scandinavian countries, Spain, Portugal and Italy – have played a pivotal role in advancing the abolition of the death penalty within the United Nations system. The sponsors of numerous resolutions within the General Assembly, they also take credit for proposing and promoting the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*.² Not surprisingly, it is within the regional system of these same States that the death penalty debate has been the most advanced. *Protocol No. 6 to the European Convention*,³ abolishing the death penalty in peacetime, was adopted in April 1983, many years before the corresponding instruments in the United Nations and Inter-American systems.

The *European Convention on Human Rights* was signed at Rome on 4 November 1950, and entered into force on 3 September 1953. The result of a relatively brief drafting period which only began in 1949, the *Convention* provided a model for subsequent instruments in other human rights systems, notably the *International Covenant on Civil and Political Rights*⁴ and the

¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, (1955) 213 UNTS 221, ETS 5 (see Appendix 14, p. 423). Prior to recent amendments, the now abolished European Commission of Human Rights was also involved in implementation of the *Convention*.

² GA Res. 44/128, (1990) 29 ILM 1464.

³ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, ETS no. 114 (see Appendix 15, pp. 424–429).

⁴ (1976) 999 UNTS 171 (See Appendix 2, p. 380).

American Convention on Human Rights,⁵ instruments which adopted many concepts from the European text while at the same time adapting them to the progressive development of international legal thinking on the scope of human rights and freedoms.

Nowhere is this more evident than in the *European Convention's* provisions dealing with capital punishment, which were drafted at a time when many European States still applied the death penalty and when the execution of Nazi war criminals was fresh in the collective memory.⁶ Paradoxically, although the European continent has progressed furthest towards abolition of the death penalty, the provisions of the *European Convention* concerning capital punishment are the most conservative and anachronistic.⁷

The *European Convention* presents the death penalty as an exception to the right to life, but without most of the limitations or safeguards found in other instruments:

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Paragraph 2 of the right to life article enumerates other exceptions to the right to life: defence of any person from unlawful violence, effecting a lawful arrest or preventing an escape from custody, and lawful action taken to suppress a riot or an insurrection. The *European Convention* is the only human rights treaty to set out expressly any exceptions to the right to life, other than capital punishment.

The shortcomings of the *Convention's* provisions on the death penalty have posed no serious problem, because capital punishment has been only rarely employed since 1950 in the States parties to the *Convention*, and never has its actual imposition within a State party resulted in litigation before the European Commission of Human Rights or European Court of Human Rights. In *Soering v. United Kingdom and Germany*, the European Court stated that the

⁵ (1979) 1144 UNTS 123, OASTS 36 (see Appendix 20, p. 436). See also: Thomas Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', (1980) 30 *American University Law Review* 155; J. A. Frowein, 'The European and the American Conventions on Human Rights – A Comparison', (1980) 1 *HRLJ* 44.

⁶ See, for example, *Public Prosecutor v. Klinge*, (1946) 13 *Ann. Dig.* 262 (Supreme Court, Norway), in which Norway's courts declared the death penalty to be actually provided for by customary international law in the case of war crimes.

⁷ See the concurring opinion of Judge De Meyer in *Soering v. United Kingdom and Germany*, 7 July 1989, Series A, Vol. 161, 11 EHRR 439, p. 51: 'The second sentence of Article 2§1 of the Convention [which permits the death penalty as an exception to the right to life] was adopted nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.'

death penalty no longer exists *de facto* in any of the contracting states of the *European Convention*.⁹ Nevertheless, one State party to the *Convention*, Turkey,¹⁰ still continues to pronounce the death penalty, although it has not imposed it for many years. As a condition of admission, all new Member States in the Council of Europe must undertake to abolish the death penalty.

Article 2§1 of the *Convention* soon found itself out of step with social progress in Western Europe, and by the early 1970s initiatives in the Council of Europe were afoot that eventually led, in 1983, to adoption of *Protocol No. 6*. Europe now exports its philosophy, by refusing extradition to States on other continents where capital punishment still exists.¹¹ Although the study of European human rights law represents a modest portion of the present work, the progressive abolition of the death penalty in international human rights law cannot be better demonstrated than with reference to the European system. From a Europe that only fifty years ago recognized the legitimacy of the death penalty with only the most minimal limitations on its use, the entire continent has virtually abolished the death penalty. International law has played a central role in this process of abolition.

7.1 The European Convention on Human Rights

7.1.1 Drafting of the Convention

The drafters of the *European Convention on Human Rights* drew heavily on the early work of the United Nations Commission on Human Rights on the draft *International Covenant on Civil and Political Rights*. At the time, the debate in the Commission on the right to life provisions focused principally on the choice of the terms ‘arbitrarily’ or ‘intentionally’ to qualify the circumstances under which the State may deprive an individual of his or her life and on whether or not the draft article should enumerate exceptions to the right to life or simply leave these to subsequent interpretation. The United States, the Soviet Union and several

⁸ *Ibid.*, §102. ⁹ *Ibid.*, para. 102.

¹⁰ Turkey's last execution dates to 1984. Turkey was strongly criticized earlier in the 1980s by the Freedom of Association Committee of the International Labour Organization for death sentences imposed against trade unionists in the early 1980s: Case Nos. 997, 999 and 1029, *Official Bulletin*, Vol. LXIV, Series B, no. 3, para. 485.

¹¹ *Fidan*, (1987) II *Recueil Dalloz-Sirey* 305 (Conseil d'État); *Gacem*, (1988) I *Semaine juridique* IV–86 (Conseil d'État), 14 December 1987; *Short v. Netherlands*, Supreme Court of the Netherlands, 30 March 1990, (1990) 76 *Rechtspraak van de Week* 358, (1990) 29 *ILM* 1378. For a discussion of *Short*: John E. Parkerson Jr, Steven J. Lepper, ‘Commentary on *Short vs Netherlands*’, (1991) 85 *AJIL* 698; J. E. Parkerson Jr, C. S. Stoehr, ‘The US Military Death Penalty in Europe: Threats From Recent European Human Rights Developments’, (1990) 129 *Military Law Review* 41; S. J. Lepper, ‘*Short v. The Kingdom of the Netherlands: Is It Time to Renegotiate the NATO Status of Forces Agreement?*’, (1991) 24 *Vanderbilt Journalist Transnational Law* 867. The case of *Soering v. United Kingdom and Germany*, is discussed later in this chapter.

Latin American countries generally favoured the term 'arbitrarily', but the United Kingdom and France preferred 'intentionally'. The United Kingdom also led the campaign for an exhaustive enumeration of limitations on the right to life. Although 'arbitrarily' would eventually prevail in the *International Covenant*, the United Kingdom and France found little opposition within the Council of Europe to the term 'intentionally' and to a purportedly exhaustive list of exceptions.

Work on the drafting of the Council of Europe's human rights convention began with a motion tabled in the organization's Consultative Assembly by H. Teitgen and Sir David Maxwell-Fyfe on 19 August 1949.¹² Appended to the resolution was a draft declaration, of which article 1 read as follows:

Every State party . . . shall guarantee to all persons within its territory the following rights:

(a) Security of life and limb . . .¹³

In September, the Consultative Assembly submitted a draft instrument whose article 2 provided that Member States of the Council of Europe would undertake to guarantee 'security of the person' in accordance with articles 3, 5 and 8 of the *Universal Declaration of Human Rights*.¹⁴ Article 3 of the *Universal Declaration* ensures that 'Everyone has the right to life, liberty and security of the person'.

Later that year, a Committee of Government Experts was convened by the Secretary-General. By this time, the United Kingdom had proposed a more thorough instrument, which included an autonomous right to life provision providing for the death penalty 'in those States where capital punishment is lawful' (an implied reference to the possibility of abolition), and 'in accordance with the sentence of a court'.¹⁵ A preparatory document for the meeting of

¹² On the drafting history of the right to life provision of the *European Convention*, see: Bertrand G. Ramcharan, 'The Drafting History of Article 2 of the European Convention on Human Rights', in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Dordrecht/Boston/Lancaster: Martinus Nijhoff 1985, pp. 57–61; Jacques Velu, Rusen Ergec, *La Convention européenne des droits de l'homme*, Brussels: Bruylant, 1990, pp. 37–39, 169–171, Alphonse Spielman, 'La Convention européenne des droits de l'homme et la peine de mort', in *Présence du droit public et les droits de l'homme, Mélanges offerts à Jacques Velu*, Brussels: Bruylant, 1992, pp. 1503–1527.

¹³ *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights, Vol. III*, Dordrecht: Martinus Nijhoff, 1985, p. 28.

¹⁴ *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights, Vol. I*, Dordrecht: Martinus Nijhoff, 1985, pp. 223–227.

¹⁵ *Collected Edition, Vol. III*, p. 296; *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights, Vol. II*, Dordrecht: Martinus Nijhoff, 1985, p. 352:

- 1 No one shall be deprived of his life intentionally.
- 2 There shall be no exception to this rule save where death results, in those States where capital punishment is lawful, from the execution of such a penalty in accordance with the sentence of a court.
- 3 Deprivation of life shall not be regarded as intentional when it results from the use of force which is no more than absolutely necessary:

experts from the Secretary-General compared the European draft with the draft United Nations covenant. In the Committee of Experts, Sir Oscar Dowson of the United Kingdom urged that the convention borrow certain provisions from the United Nations draft, but the right to life provision, which he described as referring 'to punishment of offenders, including deprivation of life', was not one of these. In the United Kingdom draft, life could not be taken 'intentionally', capital punishment was an exception to the right to life, and several other exceptions were also enumerated.¹⁶ The draft article was almost identical to a proposal for the right to life provision of the covenant that had been submitted by the United Kingdom to the United Nations Commission on Human Rights.¹⁷

There was some opposition to the United Kingdom's insistence upon a precise and complete enumeration of exceptions.¹⁸ Two drafts, reflecting the different approaches, were submitted to the Committee of Ministers. The first, 'Alternative A', echoed article 3 of the *Universal Declaration of Human Rights*.¹⁹ The second, 'Alternative B', was the United Kingdom draft.²⁰

A. H. Robertson analysed the debate in an article published that year in the *British Yearbook of International Law*:

Article 3 of the United Nations Declaration reads 'Everyone has the right to life, liberty and security of person'. The civilians were content to incorporate the words textually in the draft Convention. The common lawyers, on the other hand, thought that a statement of the 'right to life' necessitated a statement of the circumstances in which someone may be legally deprived of his life . . . The results of this method of definition are to be found in article 2 of the Convention.

. . . any attempt at exhaustive definition always carries with it the danger of unintentional omissions which may later be constructed as deliberate exclusions. Only the future will show whether the pitfall has been successfully avoided.²¹

- (i) in defence of any person from unlawful violence;
- (ii) in order to effect a lawful arrest or to prevent an escape from custody; or
- (iii) an action lawfully taken for the purpose of quelling a riot or insurrection, or for prohibiting entry to a clearly defined place to which such access is forbidden on grounds of national security.

¹⁶ *Collected Edition, Vol. III*, p. 186:

1. No one shall be deprived of his life intentionally save in the execution of the sentence of a court following his conviction of a crime for which this penalty is defined by law.
2. Deprivation of life shall not be regarded as intentional when it results from the use of force, which is not more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect lawful arrest or to prevent an escape from lawful custody;
 - (c) any action lawfully taken for the purpose of quelling a riot or insurrection or for prohibiting entry to clearly defined places to which access is forbidden on grounds of national security.

¹⁷ UN Doc. E/CN.4/188; UN Doc. E/CN.4/204; UN Doc. E/CN.4/353/Add.2, UN Doc. E/CN.4/365, p. 23.

¹⁸ Ramcharan, 'The Drafting History', p. 60.

¹⁹ GA Res. 217 A (III), UN Doc. A/810 (see Appendix 1, p. 000).

²⁰ *Collected Edition, Vol. III*, p. 58.

²¹ A. H. Robertson, 'The European Convention for the Protection of Human Rights', (1950) 25 *BYIL* 145, pp. 151–152.

The debate about whether the convention should declare rights in a detailed or merely general fashion was renewed at the Conference of Senior Officials, which met in June 1950. An effort was made to reconcile the two approaches by taking 'Alternative B' and including in it some of the general formulations found in 'Alternative A'. The Conference of Senior Officials proposed a draft provision that closely resembled the United Kingdom proposal. Addition of the first sentence, from 'Alternative A', brought the text closer to that of article 3 of the *Universal Declaration of Human Rights*.²² This text became the final version of the right to life provision in the *European Convention*, adopted by the Committee of Ministers on 7 August 1950.²³ A proposal to include a cross-reference to the *Convention for the Prevention and Punishment of the Crime of Genocide*,²⁴ similar to the provision eventually included in article 6§3 of the *International Covenant*, was not pursued.²⁵ No commentary of any kind on article 2 appears in the report, and the *travaux préparatoires* that have been published by the Council of Europe are of little assistance in the interpretation of the provision.²⁶

The *European Convention* came into force on 3 September 1953 and as of 1 May 2001 had been ratified by forty-one States. There have been no reservations to article 2§1.²⁷

7.1.2 *Interpretation of the Convention*

As the European Court of Human Rights stated in a 1995 judgment, *McCann et al. v. United Kingdom*, article 2 of the *Convention* must be interpreted and applied 'so as to make its safeguards practical and effective'.²⁸ The text is to be strictly construed. The Court continued: 'as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life

²² Ramcharan, 'The Drafting History', p. 60

²³ *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights, Vol. V*, Dordrecht: Martinus Nijhoff, 1985, pp. 120–122, 146.

²⁴ (1951) 78 UNTS 277. ²⁵ *Collected Edition, Vol. V*, pp. 258–261.

²⁶ 'There is almost no reported discussion of the drafts,' notes James Fawcett, *The Application of the European Convention on Human Rights*, 2nd edn, Oxford: Clarendon Press, 1987, p. 34. 'Les travaux préparatoires de l'article 2 ne sont pas d'un grand secours pour éclairer la portée due texte', state Velu, Ergéc, *La Convention européenne*, at p. 169. See also: Ramcharan, 'The Drafting History', pp. 57–61; Gilbert Guillaume, 'Article 2', in L. E. Pettiti, E. Decaux and P.-H. Imbert, eds., *La Convention européenne des droits de l'homme, commentaire article par article*, Paris: Economica, 1995, pp. 143–154, at p. 143. Aside from the published volumes of *travaux préparatoires*, all other documentation is sealed.

²⁷ Malta made a reservation to article 2§2 to the effect that the right to self-defence also includes defence of property: 'The Government of Malta, having regard to article 64 of the *Convention*, declares that the principle of lawful defence admitted under subparagraph 2(a) of Art. 2 of the *Convention* shall apply in Malta also to the defence of property to the extent required by the provisions of pars. (a) and (b) of Sect. 238 of the Criminal Code of Malta': (1966) 590 UNTS 301, 10 *YECHR* 24.

²⁸ *McCann et al. v. United Kingdom*, 27 September 1995, Series A, Vol. 324, 16 *HRLJ* 260, para. 146.

may be justified, article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe.²⁹

Article 2§1 of the European *Convention* does not provide the detailed guarantees and limitations that appear in other international instruments concerning the death penalty, for example, prohibition of the execution of minors, pregnant women and the elderly or confinement of the death penalty to the ‘most serious crimes’.³⁰ This may be largely due to the fact that in 1950, when the *European Convention* text was finalized, there had been little consideration in international institutions to the elaboration of such safeguards. Much of the detailed wording used in the *International Covenant on Civil and Political Rights* evolved during the lengthy and complex drafting procedure of that instrument subsequent to 1950, the result of suggestion, reflection and consensus rather than of controversy and conflict. For example, the prohibition of the death penalty for crimes committed while under eighteen years of age was not seriously considered for insertion in the *Covenant* until 1957, at the twelfth session of the Third Committee.³¹ Reference to pregnant women was first suggested in 1952, at the eighth session of the Commission on Human Rights.³² As for the elderly, they were only mentioned in the *American Convention on Human Rights*,³³ not having even been considered at the time of drafting of the *Covenant*.

The failure of the *European Convention* to limit the death penalty to ‘the most serious crimes’ may have been more intentional. By 1949, this limitation already appeared in the draft covenant of the United Nations,³⁴ but the United Kingdom was consistently opposed to such a term, which it qualified as lacking precision.³⁵ Recognition of the right to seek amnesty, pardon or commutation also appeared in the 1949 draft covenant³⁶ but was never added to the *Convention*, an omission that is more difficult to explain because this provision was not particularly controversial.³⁷ Were these intentional omissions

²⁹ *Ibid.*, para. 147.

³⁰ *International Covenant on Civil and Political Rights*, art. 6§2; *American Convention on Human Rights*, art. 4§2.

³¹ UN Doc. A/C.3/L.647; UN Doc. A/C.3/L.650. Although the prohibition of execution of juveniles was certainly well known at international law, having been included in the *Geneva Convention of August 12, 1949 Relative to the Protection of Civilians*, (1950) 75 UNTS 135, art. 68§4 (see Appendix. 10, p. 416).

³² UN Doc. E/CN.4/SR.309, p. 3. ³³ *American Convention on Human Rights*, art. 4§5.

³⁴ UN Doc. E/1371. As early as 1948, a version of the draft covenant suggested the wording ‘gravest of crimes’ (UN Doc. E/CN.4/AC.1/8).

³⁵ UN Doc. E/CN.4/AC.1/SR.3, p. 12 (on the term ‘gravest of crimes’); UN Doc. E/CN.4/SR.149, para. 35.

³⁶ UN Doc. E/1371, UN Doc. E/CN.4/350; see also UN Doc. E/CN.4/SR.98, p. 121.

³⁷ UN Doc. E/CN.4/SR.98. It was adopted by nine votes to one, with five abstentions (UN Doc. E/CN.4/SR.98, p. 12).

or merely decisions by hurried drafters preoccupied as much by form as by content and anxious not to burden the text with exceptions that were in any case in accordance with State practice of the members of the Council? In the absence of more information from the *travaux préparatoires*, much of which remains confidential to this date, it would be hazardous to attempt an answer to this question.

Unfortunately, the concern of the English experts with precise norms that would leave little room for interpretation meant that the one word which might have given the *European Convention* some flexibility in this respect, 'arbitrarily', was not included in article 2§1. In its stead is the term 'intentionally', whose only purpose appears to be to indicate that article 2§1 refers exclusively to the death penalty.³⁸ As a result, the text of article 2§1 of the *European Convention* seems woefully inadequate in terms of limiting use of the death penalty, at least when set alongside the equivalent provisions in the *Covenant* and the *American Convention*.³⁹

In a comparative study of the *Convention* and the *International Covenant on Civil and Political Rights*, a Committee of Experts on Human Rights appointed by the Council of Europe implied that article 2 of the *Convention* provides essentially the same protections in death penalty cases as article 6 of the *Covenant*,⁴⁰ but a close reading of the study indicates that the only real conclusion was that there was no incompatibility between the instruments. There may be no incompatibility or contradiction, but there is little doubt that the *Covenant* more thoroughly restricts use of the death penalty.⁴¹

The European Court of Human Rights has left open the possibility that the limitations in the other instruments, such as the prohibition of execution for crimes committed while under the age of eighteen, are implicit in the wording of article 2 of the *Convention*.⁴² Such limitations could readily be added to article 2 in a dynamic interpretation of the *Convention*. This approach would find support

³⁸ The exceptions in article 2§2 are not truly 'intentional' cases of deprivation of life. See: Velu, Ergec, *La Convention européenne*, at p. 242; see also P. Van Dijk, G. J. H. VanHoof, *Theory and Practice of the European Convention on Human Rights*. Deventer: Kluwer, 1984, p. 189; C. Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism', (1983) 32 *ICLQ* 82, at p. 104. See also: *Stewart v. United Kingdom* (App. No. 10044/82), (1985) 7 EHRR 453, at p. 458.

³⁹ The inadequacies of the provision were recognized relatively early: K. Vasak, *La Convention européenne des droits de l'homme*, Paris: Librairie générale de droit et de jurisprudence, 1964, p. 17. See also, Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Paris: Economica-PUAM, 1989, p. 279.

⁴⁰ 'Corresponding provisions [to article 6§2 of the *Covenant*] appear in different places of the European Convention (in particular in Articles 3, 6§1, 7 and 13) so that the adoption of the *Covenant* text should not, in this respect, impose any additional obligations on the States bound by the European Convention': C. of E. Doc. H(70)7, para. 91. See also: Marc-André Eissen, 'European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence', (1972) 22 *Buffalo Law Review* 18.

⁴¹ The reasons of Judge De Meyer in *Soering v. United Kingdom and Germany*, confirm this view.

⁴² *Soering v. United Kingdom and Germany*, para. 108.

in the universal acceptance of the more advanced norms found in the *Civil Rights Covenant* by the parties to the *Convention*. The requirement that capital punishment be imposed only for the ‘most serious crimes’ is even recognized in documents of the Organization for Security and Cooperation in Europe.⁴³ Therefore, it may be contended that the limits on use of the death penalty found within article 6 of the *Covenant* and even more recent pronouncements on the death penalty, such as the ‘Safeguards Guaranteeing the Protection of Rights of Those Facing the Death Penalty’,⁴⁴ are implicit within article 2§1 of the *Convention*.

Two explicit limitations to the death penalty are included within article 2 of the *Convention*: sentence of death must be pronounced by a ‘court’ and it must be ‘provided for by law’. ‘Courts’ are often qualified, in international human rights law, with such adjectives as ‘independent’, ‘competent’ and ‘impartial’, but in article 2§1 of the *Convention* the term stands alone. The word ‘court’ appears elsewhere in the *Convention*,⁴⁵ where it has been interpreted as implying a body independent of the executive branch of government and offering the guarantees of a judicial procedure.⁴⁶ The Human Rights Chamber of Bosnia and Herzegovina, applying article 2§1 of the *Convention*,⁴⁷ concluded: ‘[A] death sentence cannot be carried out under Article 2(1) of the Convention unless it was imposed by a “court” which was independent of the executive and the parties to the case and which offered procedural guarantees appropriate to the circumstances. In relation to the latter requirement the Chamber considers that the guarantees required in a case involving the imposition of the death penalty must be of the highest order.’⁴⁸

The term ‘provided by law’ imposes an obligation on any State that wishes to impose the death penalty to ensure that this is in fact authorized by a positive legal provision.⁴⁹ The publicists Velu and Ergec consider that the term is another

⁴³ On the issue of the death penalty within the Organization on Security and Cooperation in Europe, see pp. 299–302 below.

⁴⁴ ESC Res. 1984/50 (see Appendix 8, p. 413). Subsequently endorsed by GA Res. 39/118.

⁴⁵ Art. 5§1(a) (‘competent court’), art. 5§1(b) (‘court’), art. 5§4 (‘court’), art. 6§1 (‘independent and impartial court’).

⁴⁶ *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A, Vol. 12, 1 EHRR 373, 56 ILR 351, 11 *ILM*. 690n, para. 78; *Ringelsen v. Austria*, 16 July 1971, Series A, Vol. 84, 1 EHRR 455, 56 ILR 442, para. 36; *X. v. United Kingdom*, 15 November 1981, Series A, Vol. 46, 4 EHRR 188, 67 ILR 466, para. 39; Francis G. Jacobs, *The European Convention on Human Rights*, Oxford: Clarendon Press, 1975, p. 104.

⁴⁷ The *European Convention on Human Rights* is incorporated in the Constitution of Bosnia and Herzegovina, although the State is not yet a member of the Council of Europe and cannot therefore sign or ratify the instrument.

⁴⁸ *Damjanovic v. Federation of Bosnia and Herzegovina* (Case no. CH/96/30), 5 September 1997, Decisions on Admissibility and Merits 1996–1997, p. 147, para. 38.

⁴⁹ In another context, the European Court was prepared to extend the scope of the word ‘law’ to the unwritten common law of the English system: see *Sunday Times v. United Kingdom*, 26 April 1979, Series A, Vol. 30, 2 EHRR 245, 58 ILR 491.

expression of the principle expressed in article 7 of the *Convention*, which protects against retroactive penalties and assures the least severe sentence.⁵⁰ In any case, these matters are specifically addressed in article 7, which is a non-derogable provision.⁵¹

Some scholars have questioned whether a breach of the procedural safeguards contained in article 6 of the *Convention* is also a breach of article 2 in death penalty cases.⁵² This would imply a restriction on the right of derogation found in article 15 of the *Convention*, because States parties that can otherwise derogate from article 6 would find themselves foreclosed from doing this in capital cases.⁵³ This argument is supported by use of the word ‘court’ in article 2, which may implicitly incorporate the procedural guarantees found in article 6. The question is far from moot because, although the death penalty may now be abolished in peacetime throughout most of Europe, its spectre remains in time of war. At the time of the last world war, even the most enlightened of European countries were occasionally somewhat cavalier, on a procedural level, during the summary trials and executions that followed the German surrender.

There can be no derogation from the rather limited provisions dealing with capital punishment in the *European Convention*, unless of course a State actually denounces the *Convention*. Article 15 of the *Convention* permits derogation ‘in time of war or other public emergency threatening the life of the nation’, but paragraph 2 of the article makes it very clear that no derogation from article 2 is permitted ‘except in respect of deaths resulting from lawful acts of war’.⁵⁴ Use of the death penalty in wartime is already regulated by the *Geneva Conventions* and their additional protocols.⁵⁵ In any case, it seems far-fetched to stretch the meaning of the term ‘act of war’ to include imposition of the death penalty. Consequently, there can be no derogation to article 2§1 of the *Convention* with respect to the death penalty.

In *Kirkwood v. United Kingdom*, the European Commission first considered the possibility that the death penalty, although ostensibly permitted by article 2§1 of the *Convention*, might raise issues under article 3, which is the prohibition of inhuman and degrading treatment. According to the Commission’s report:

⁵⁰ Velu, Ergec, *La Convention européenne*, p. 183. ⁵¹ Art. 15§2.

⁵² Velu, Ergec, *La Convention européenne*, pp. 183–184. Velu and Ergec note that the majority of scholars consider that article 6 does indeed apply to article 2. A similar approach has been taken by the Human Rights Committee to construction of the *International Covenant on Civil and Political Rights*: see our discussion of this point, pp. 112–131 above. For a decision of the European Commission of Human Rights where this matter is addressed with regard to a capital trial held in Belgium following the Second World War, see: *Byttebier v. Belgium* (App. No. 14505/89), (1991) 68 DR 200.

⁵³ Rusen Ergec, *Les droits de l’homme à l’épreuve des circonstances exceptionnelles*, Brussels: Éditions Bruylant, 1987, p. 246.

⁵⁴ For an exhaustive analysis of article 15 of the *Convention*, see: Ergec, *ibid.*

⁵⁵ See Chapter 5.

Whilst it acknowledges that the Convention must be read as one document, its respective provisions must be given appropriate weight where there may be implicit overlap, and the Convention organs must be reluctant to draw inferences from one text which would restrict the express terms of another.

As both the Court and the Commission have recognized, Article 3 is not subject to any qualification. Its terms are bald and absolute. This fundamental aspect of Article 3 reflects its key position in the structure and rights of the Convention, and is further illustrated by the terms of Article 15§2 which permit no derogation from it even in time of war or other public emergency threatening the life of the nation.

In these circumstances the Commission considers that notwithstanding the terms of Article 2§1, it cannot be excluded that the circumstances surrounding the protection of one of the other rights contained in the Convention might give rise to an issue under Article 3.⁵⁶

Kirkwood's application was declared inadmissible, because he had not demonstrated that detention on 'death row' was inhuman and degrading treatment, within the meaning of article 3. After *Kirkwood*, another United Kingdom case came before the Commission, this one involving extradition to Florida. The applicant said that the issues could be distinguished from those in California, the state to which Kirkwood was extradited. Also, he raised the intriguing issue of the compatibility of the electric chair – the method of execution used in Florida – with article 3 of the *European Convention*. At the applicant's request, the case was discontinued.⁵⁷ The same issue returned to the Commission several years later in the case of Jens Soering, who had been arrested in the United Kingdom under an extradition warrant issued at the request of the United States. Soering was a national of the Federal Republic of Germany, although he had lived in the United States since the age of eleven. In 1985, when he was eighteen years old, Soering had murdered his girlfriend's parents in Bedford, Virginia. After the killing, he fled to the United Kingdom, where he was arrested in 1986. The United States government promptly sought his extradition but, a year later, the German government also requested his extradition so that he could stand trial in Germany for the murder. Germany had of course abolished the death penalty, whereas in Virginia the death penalty was still very much in force.

The United Kingdom decided to comply with the extradition request from the United States. It sought an undertaking, pursuant to its extradition treaty, that Virginia not impose the death penalty. The United Kingdom was empowered to refuse Soering's extradition to the United States because of a

⁵⁶ *Kirkwood v. United Kingdom* (App. No. 10308/83), (1985) 37 DR 158, p. 184.

⁵⁷ *N.E. v. United Kingdom* (App. No. 12553/86), 7 July 1987. The records of the Commission reveal yet another United Kingdom case involving capital punishment, *Amekrane v. United Kingdom* (App. No. 5961/72) 44 Coll. 101. Amekrane had fled to Gibraltar following an aborted *coup d'état* in his native Morocco. He was returned to Morocco the following day, tried and executed. In 1974, the United Kingdom and Amekrane's widow reached a friendly settlement involving a payment of £35,000.

provision in the extradition treaty between the two countries entitling either contracting party to insist upon an undertaking from the other that the death penalty would not be imposed.⁵⁸ The provision is drawn from article 11 of the *European Convention on Extradition*, which states that, when the offence is punishable by death under the law of the requesting party but not that of the requested party, or the death penalty is not normally carried out by the latter party, 'extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out'.⁵⁹ The prosecutor in Virginia agreed to make representations before the judge to the effect that the United Kingdom did not want the death penalty to be imposed, but also confirmed that he personally would request the court to impose the ultimate sanction. Soering was unsuccessful in challenging the extradition before the courts in the United Kingdom, but after exhausting his remedies, he applied to Strasbourg and obtained a request by the Commission for provisional measures pending determination of his rights under the *Convention*.⁶⁰

The European Commission of Human Rights followed its case law in *Kirkwood*, declaring the argument based on article 3 of the *Convention* to be inadmissible (by six votes to five), although it found a breach of article 13 (by seven votes to four), which ensures the right to an effective remedy.⁶¹ The case was then taken before the European Court of Human Rights. As a preliminary

⁵⁸ *Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*, (1977) 1049 UNTS 167, art. IV:

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

⁵⁹ *European Convention on Extradition*, (1960) 359 UNTS 273, ETS 24. Similar provisions can be found as early as 1889, in the *South American Convention*, in the 1892 extradition treaty between the United Kingdom and Portugal, in the 1908 extradition treaty between the United States and Portugal, and in the 1912 treaty prepared by the International Commission of Jurists. On these early versions, see: J. S. Reeves, 'Extradition Treaties and the Death Penalty', (1924) 18 *AJIL* 290; 'American Institute of International Law, Project No. 17', (1926) 20 *AJIL Supp.* 331; 'Harvard Law School Draft Extradition Treaty', (1935) 29 *AJIL* 228. The Italian Constitutional Court has ruled that article 11 of the *European Convention on Extradition* does not codify a customary rule of international law: *Re Cuillier, Ciamborrani and Vallon*, (1988) 78 *ILR* 93. A similar provision is found in the *Inter-American Convention on Extradition*, (1981) 20 *ILM* 723, art. 9. The 'Model Treaty on Extradition' proposed by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1990, contains the following: 'Article 4. Extradition may be refused in any of the following circumstances: ... (c) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out' (UN Doc. A/CONF. 14/28/Rev.1, p. 68).

⁶⁰ C. Warbrick, 'Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering Case', (1989–90) 11 *Michigan Journal of International Law* 1073; Vincent Berger, *Jurisprudence de la Cour européenne des droits de l'homme*, 4th edn, Paris: Sirey, 1994, pp. 12–13.

⁶¹ *Soering v. United Kingdom* (App. No. 14038/88), Series A, Vol. 161, p. 53–83.

matter, the European Court unanimously endorsed the established case law of the European Commission⁶² by which extradition to a State where torture or inhuman or degrading treatment might be imposed may involve a breach of article 3 of the *Convention*.⁶³

In a judgment issued on 7 July 1989,⁶⁴ the Court acknowledged the idea that capital punishment as such is accepted under the *European Convention*. It noted that in light of the wording of article 2§1, neither *Soering* nor the two Government parties had taken the position that the death penalty *per se* violated article 3 of the *Convention*. However, the prominent non-governmental organization Amnesty International, which intervened in the litigation,⁶⁵ had argued before the Court that evolving standards of interpretation of the *Convention* meant that the death penalty should now be considered to breach article 3. The Court observed, in this respect, that '[d]e facto the death penalty no longer exists in time of peace in the contracting States of the Convention. In the few contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out.'⁶⁶

But the Court rejected the argument that the interpretation of the *Convention* could be extended in this way, so that article 3, in effect, rendered inoperative a portion of article 2§1. In light of the mention of the death penalty in article 2 of the *Convention*, the European Court of Human Rights was not prepared to consider that the death penalty *per se* constitutes inhuman treatment. As the scholar Francis Jacobs stated presciently, many years before the judgment

⁶² *Kerkoub v. Belgium* (App. No. 5012/71), 40 *Coll.* 62; *Altun v. Federal Republic of Germany* (App. No. 10308/82), (1983) 5 EHRR 651. See also: Cohen-Jonathan, *La Convention européenne*, pp. 304–310.

⁶³ *Soering v. United Kingdom and Germany*, paras. 81–91.

⁶⁴ *Ibid.* For scholarly comment on the *Soering* case, see: W. Ganshof van der Meersch, 'Extradition et la Convention européenne des droits de l'homme. L'affaire Soering', (1990) *Revue trimestrielle des droits de l'homme* 5; Frédéric Sudre, 'Extradition et peine de mort – arrêt Soering de la Cour européenne des droits de l'homme du 7 juillet 1989', (1990) *RGDIP* 103; Richard B. Lillich, 'The *Soering* Case', (1991) 85 *AJIL* 128; Michael O'Boyle, 'Extradition and Expulsion under the European Convention on Human Rights, Reflections on the *Soering* Case', in James O'Reilly, ed., *Human Rights and Constitutional Law, Essays in Honour of Brian Walsh*, Dublin: The Round Hall Press, 1992, p. 93; Ann Sherlock, 'Extradition, Death Row and the Convention', (1990) 15 *European Law Review* 87; David L. Gappa, 'European Court of Human Rights – Extradition – Inhuman or Degrading Treatment or Punishment, *Soering* Case, 161 Eur.Ct.H.R. (Ser.A) 1989', (1990) 20 *Georgia Journal of International and Comparative Law* 463; H. Wäntendorff, E. du Perron, 'Human Rights v. Extradition: the *Soering* case', (1990) 11 *Michigan Journal of International Law* 845; John Quigley, J. Shank, 'Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?', (1989) 30 *Virginia International Law Journal* 251; Richard B. Lillich, 'The *Soering* case', (1991) 85 *AJIL* 128; Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', (1990) 39 *JCLQ* 757; Susan Marks, 'Yes, Virginia, Extradition May Breach the European Convention on Human Rights', (1990) 49 *Cambridge Law Journal* 194; Henri Labayle, 'Droits de l'homme, traitement inhumain et peine capitale: Réflexions sur l'édification d'un ordre public européen en matière d'extradition par la Cour européenne des droits de l'homme', (1990) 64 *Semaine juridique* 3452; L. E. Pettiti, 'Arrêt *Soering* c./Grande-Bretagne du 8 juillet 1989', [1989] *Revue de science criminelle et de droit pénal comparé* 786.

⁶⁵ *Soering v. United Kingdom and Germany*, para. 8.

⁶⁶ *Ibid.*, para. 102.

in *Soering*, punishment could be contrary to article 3 of the *Convention* ‘only if it did not involve the ultimate penalty’.⁶⁷ The Court declared:

Whether these marked changes have the effect of bringing the death penalty *per se* within the prohibition of ill-treatment under article 3 must be determined on the principles governing the interpretation of the *Convention*.

The *Convention* is to be read as a whole and article 3 should therefore be construed in harmony with the provisions of article 2. On this basis article 3 evidently cannot have been intended by the drafters of the *Convention* to include a general prohibition of the death penalty since that would nullify the clear working of article 2§1.

Subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under article 2§1 and hence to remove a textual limit on the scope for evolutive interpretation of article 3. However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the *Convention*, article 3 cannot be interpreted as generally prohibiting the death penalty.⁶⁸

In fact, in 1979 when the issue of amending article 2 of the *Convention* arose so as to bring it into step with the more advanced norms of the *American Convention on Human Rights*, the Steering Committee on Human Rights of the Council of Europe felt that any such amendment would imply acceptance of the death penalty at a time when there was a general trend towards abolition.⁶⁹ Amendment of the *Convention* might only legitimize the death penalty and, for this reason, the lawmakers of the Council of Europe chose the route of an optional protocol, updating the *Convention* and abolishing the death penalty. Consequently, the current inadequacies, indeed the obsolescence, of article 2§1 of the *Covenant* can only be properly appreciated in the light of *Protocol No. 6*.

The suggestion that the *Convention's* recognition of the death penalty as an exception to the right to life is now obsolete and incompatible with the legal conscience and practice of contemporary Europe was advanced by a single member of the Court, Judge De Meyer, in a concurring opinion.⁷⁰ Judge De Meyer held

⁶⁷ Francis G. Jacobs, *The European Convention*, at p. 23. The Turkish courts have upheld the constitutionality of that country's death penalty, provided in article 11 of its penal code, with reference to article 2§1 of the *European Convention*: (1963) 4 YECR 821.

⁶⁸ *Soering v. United Kingdom and Germany*, §§102–104 (references omitted).

⁶⁹ ‘Opinion of the Steering Committee on Human Rights’, 12–16 November 1979.

⁷⁰ This view was advanced by Judge De Meyer in his concurring opinion in *Soering v. United Kingdom and Germany*, pp. 51–52. Note that at least one commentator has suggested that ‘there is a general practice amounting to customary international law, in the conditional and presumptive sense indicated, that when a State (like the US) which has not abolished capital punishment seeks extradition from a State which has

that extradition of Soering would breach article 2 of the *Convention*. Because article 2§1 permits imposition of the death penalty only where this 'is provided by law' and because the death penalty is not 'provided by law' in the United Kingdom, the fact that it is allowed in Virginia is irrelevant, he wrote.⁷¹ 'When a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.'⁷² Judge De Meyer added that the unlawfulness of the death penalty in Europe was recognized by the Committee of Ministers when it adopted *Protocol No. 6* in December 1982:

No State party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State. Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe.⁷³

Although it refused to follow such a radical view of article 3, the Court confirmed that circumstances relating to a death sentence could give rise to issues respecting the prohibition of inhuman and degrading treatment or punishment, pursuant to article 3 of the *Convention*. It addressed four of them: length of detention prior to execution; conditions on death row; age and mental state of the applicant; and the competing extradition request from Germany.

The Court noted that a condemned prisoner could expect to spend six to eight years on death row before being executed. The Court agreed that this was 'largely of the prisoner's own making', in that it was the result of systematic appellate review and various collateral attacks by means of *habeas corpus*. 'Nevertheless,' said the Court, 'just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension

(like the U.K.), the requesting State must guarantee that the extraditee would not be executed': Yoram Dinstein, 'General Report', (1991) 62 *International Review of Penal Law* 31, p. 36.

⁷¹ It is clear from the judgment that the argument had been made that the United Kingdom had not rejected capital punishment unequivocally because it had failed to ratify *Protocol No. 6* to the *Convention*. The European Commission, in the same case, held that the *Protocol* had 'no relevance' to the obligations of the United Kingdom under the *Convention* because it had neither signed nor ratified the *Protocol* (at p. 56 in Series A). In his concurring view, Judge De Meyer observed that the failure to ratify *Protocol No. 6* was not in any way decisive, because the 'unlawfulness' of capital punishment had already been recognized by the Committee of Ministers of the Council of Europe in opening the instrument for signature.

⁷² *Soering v. United Kingdom and Germany*, p. 51. ⁷³ *Ibid.*, p. 52.

of living in the ever-present shadow of death.⁷⁴ The Court took note of the exceptionally severe regime in effect on death row, adding that it was ‘compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years’.⁷⁵ What the Court had described is often labelled the ‘death row phenomenon’.⁷⁶

The Court also considered Soering’s age and mental state as ‘particular circumstances’. It noted that the norm prohibiting execution of juveniles, found in ‘other, later international instruments, the former of which [the *International Covenant on Civil and Political Rights*] has been ratified by a large number of States parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with article 3 of measures connected with the death sentence’.⁷⁷ It added that ‘disturbed mental health’ could also be considered an attenuating factor in terms of the assessment of whether treatment was inhuman or degrading, within the meaning of article 3 of the *Convention*.⁷⁸ Finally, the Court also considered that the competing demand by Germany for Soering was a relevant factor in the overall assessment of ‘the requisite fair balance of interests’ and the ‘proportionality of the contested extradition decision’ within the context of article 3.

The European Court of Human Rights cited these factors in finding a breach of article 3 of the *Convention*. ‘[I]n the Court’s view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the appellant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.’⁷⁹ The Court also said that ‘the applicant’s youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3’.⁸⁰

The *Soering* decision was submitted to the Committee of Ministers of the Council of Europe, which oversees implementation of Court rulings, pursuant to the terms of article 54 of the *Convention*. The United Kingdom reported

⁷⁴ *Ibid.*, para. 106. ⁷⁵ *Ibid.*, para. 107.

⁷⁶ The issue of the ‘death row phenomenon’ has been litigated before many domestic courts. See William A. Schabas, *The Death Penalty as Cruel Treatment and Torture*, Boston: Northeastern University Press, 1996, pp. 96–115.

⁷⁷ *Soering v. United Kingdom and Germany*, para. 108.

⁷⁸ *Ibid.* ⁷⁹ *Ibid.*, para. 111. ⁸⁰ *Ibid.*, para. 109.

to the Committee that on 28 July 1989 it had informed the United States authorities that extradition for an offence that might include imposition of the death penalty was refused. Three days later the United States answered that ‘in the light of the applicable provisions of the 1972 extradition treaty, United States law would prohibit the applicant’s prosecution in Virginia for the offence of capital murder’.⁸¹ The Committee said it was satisfied that the United Kingdom had paid Soering the sums provided for in the judgment, and concluded that it had exercised its functions under the *Convention*.⁸² Soering was subsequently extradited to Virginia where he pleaded guilty to two charges of murder, for which he was sentenced to terms of ninety-nine years.

The European Court’s judgment in *Soering* has since been discussed, and interpreted, by both domestic and international courts. Some courts have given the decision a narrow construction, insisting upon the various extenuating factors in asserting that prolonged detention on death row *per se* does not constitute inhuman or degrading treatment or punishment. The majority of the United Nations Human Rights Committee has taken the view that delay must be accompanied by other extenuating circumstances. Moreover, it has expressed the concern that the ‘death row phenomenon’ argument may actually incite States to execute offenders more rapidly.⁸³ Christine Chanet has led the dissenters on the Committee who, relying upon *Soering*, have considered prolonged detention without other factors to breach fundamental rights.⁸⁴ The Zimbabwe Supreme Court endorsed *Soering* in a 1993 ruling, adding that Chanet’s dissenting views in the Human Rights Committee were ‘more plausible and persuasive’ than those of the majority.⁸⁵ Citing *Soering*, the Judicial Committee of the Privy Council also held that inordinate delay is itself sufficient for there to be a breach of the norm prohibiting inhuman or degrading treatment, and that no extenuating circumstance such as age or mental state are necessary.⁸⁶ Justice Gerald La Forest of the Supreme Court of Canada, in *Kindler v. Canada*, dismissed an argument based on the length of detention on death row adding, with reference to *Soering*, that ‘there may be situations where the age or mental capacity of the fugitive may affect the matter, but again that is not this case’.⁸⁷ But some ten

⁸¹ Resolution DH (90) 8, appendix. ⁸² Resolution DH (90) 8.

⁸³ See, for example: *Errol Johnson v. Jamaica* (No. 588/1994), UN Doc. CCPR/C/56/D/588/1994, para. 8.2. The Human Rights Committee’s case law on the ‘death row phenomenon’ is discussed in detail in Chapter 3, at pp. 141–151.

⁸⁴ *Barrett and Sutcliffe v. Jamaica* (Nos 270/1988 and 271/1988), UN Doc. A/47/40, p. 254 (*per Chanet*).

⁸⁵ *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe, et al.*, [1993] 4 SA 239 (ZSC), [1993] 1 ZLR 242 (S), 14 HRLJ 323.

⁸⁶ *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All ER 769, [1993] 2 LRC 349, [1994] 2 AC 1, [1993] 3 WLR 995, 43 WIR 340, 14 HRLJ 338, 33 ILM 364 (JCPC), para. 57. See also: *Fisher v. Minister of Public Safety and Immigration*, [1998] AC 673; [1998] 3 WLR 201 (JCPC), paras. 31–32; *Guerra v. Baptiste and others*, [1996] AC 1997; [1995] 3 WLR 891; [1995] 4 All ER 583 (JCPC).

⁸⁷ *Kindler v. Canada*, [1991] 2 SCR 779, 67 CCC (3d) 1, 84 DLR (4th) 438, 6 CRR (2d) 193.

years later, after noting that the 'death row phenomenon' issue had not been 'definitively settled' in *Kindler*, the Supreme Court of Canada unanimously recognized the relevance of the psychological trauma associated with prolonged detention while awaiting capital punishment.⁸⁸

Since *Soering* in 1989, the European Commission on Human Rights has returned on numerous occasions to death-penalty-related matters. In January 1994, it ruled an application from an individual subject to extradition to the United States for a capital offence to be inadmissible. The Commission considered the guarantees that had been provided by the Dallas County prosecutor to the French Government, to the effect that, if extradition were granted, 'the State of Texas [would] not seek the death penalty', to be sufficient. Texas law stated that the death penalty could only be pronounced if requested by the prosecution. Aylor-Davis had claimed that the undertaking was 'vague and imprecise'. Furthermore, she argued that it had been furnished by the federal authorities through diplomatic channels, and did not bind the executive or judicial authorities of the State of Texas. The Commission compared the facts with those in *Soering*, where the prosecutor had made clear an intention to seek the death penalty.⁸⁹ The Commission found the Texas prosecutor's attitude to be fundamentally different, and concurred with an earlier decision of the French Conseil d'État holding the undertaking to be satisfactory.⁹⁰

In *Çinar v. Turkey*, the applicant was sentenced to death in 1984, and the judgment maintained on appeal in 1987. In 1991, he was released on parole, pursuant to legislation that also declared that all death sentences were to be commuted. The Commission recalled that article 3 of the *Convention* could not be interpreted as prohibiting the death penalty. Moreover, it held that a certain period of time between pronouncement of the sentence and its execution was inevitable. The Commission added that article 3 would only be breached where an individual passed a very long time on death row, under extreme conditions, and with the constant anxiety of execution. Thus, the Commission adopted a large view of *Soering*, in that it did not insist upon the various extenuating factors, such as young age and mental instability, which had been referred to by the Court.⁹¹ Furthermore, the Commission concluded that in Turkey during the period Çinar was on death row there was no serious danger of his death sentence

⁸⁸ The Supreme Court of Canada revisited the matter ten years later in *United States v. Burns*, [2001] 1 SCR 283, paras. 122–123.

⁸⁹ *Aylor-Davis v. France* (App. No. 22742/93), (1994) 76B DR 164. See also *Nivette v. France* (App. No. 44190/98), Interim Measures, November 1999, in which the Court refused interim measures under Rule 39 in a case of extradition to the United States where specific and renewed assurances had been given by United States authorities that the death penalty would not be imposed.

⁹⁰ *Dame Joy Davis-Aylor*, CE, Req. No. 144590, 15/10/93, D. 1993, IR, 238; JCP 1993, Actualités No. 43, [1993] *Revue française de droit administratif* 1166, conclusions C. Vigoreux.

⁹¹ *Çinar v. Turkey* (App. No. 17864/91), (1994) 79A DR 5, pp. 8–9.

actually being carried out. Referring to the Court's judgment in *Soering*, which observed that the death penalty no longer existed in the States parties to the *Convention*, the Commission described the threat of execution as 'illusory'.⁹²

The Commission has made similar findings in several cases where applicants have alleged the possibility of execution in the event of expulsion or extradition. These have all been dismissed because of the sufficiency of assurances that the death penalty would not be imposed, the relatively minor nature of the offence in question,⁹³ or the unlikelihood of capital punishment actually being imposed in the receiving State. In a case involving Turkey, the Commission noted that the death penalty had not been imposed for the crimes in question since 1960, that there had been no death penalties imposed whatsoever since 1984, and that 'in legal writing in Turkey the opinion prevails that the death penalty should be abolished'.⁹⁴ Some applications have been rendered moot when constitutional courts or government authorities intervened to protect the applicants while the case was pending before the Commission.⁹⁵ Others have been resolved with a friendly settlement.⁹⁶

An anomaly resulting from the recent expansion of the Council of Europe is that occasional applications are still filed against States parties to the *Convention* with respect to the death penalty on their own territory. Two pending applications, filed in 1998 against Bulgaria, concern persons sentenced to death in 1989. Bulgaria has since abolished the death penalty, of course. The petitions invoke articles 2 and 3 of the *Convention*, and challenge the death penalty as such as well as the prolonged wait on death row since sentence was pronounced.⁹⁷ Poor conditions on death row in the Ukraine have been invoked in several applications.⁹⁸

The most significant application concerning the threat of imposition of the death penalty by a State party was filed by Kurdish rebel leader Abdullah Öcalan, on 16 February 1999, while his trial was still pending before Turkish courts. The Court issued provisional measures on 4 March 1999, applying Rule 39 of its Rules of Procedure, to ensure that proceedings conducted by the National Security Court complied with article 6 of the *Convention*. On 29 June 1999, Öcalan was sentenced to death by the Second State Security Court, pursuant to article 125 of the Turkish Penal Code. The Court was then

⁹² *Ibid.*, p. 9. ⁹³ *H. v. Sweden* (App. No. 22408/93), (1994) 79A DR 85, p. 96.

⁹⁴ *Z.Y. v. Germany* (App. No. 16846/90), Admissibility Decision, 13 July 1990.

⁹⁵ *Lei Ch'an Wa v. Portugal* (App. No. 25410/94), unreported decision of 27 November 1995. See also: *Yennng Yuk Leung v. Portugal* (App. No. 24464/94), unreported decision of 27 November 1995; *Venezia v. Italy* (App. no. 29966/96), (1996) 87-A DR 140; *Cheong Meng v. Portugal* (App. No. 25862/94), (1995) 83-A DR 88.

⁹⁶ *Dehwari v. Netherlands* (App. No. 34014/97), 27 April 2000.

⁹⁷ *Iorgov v. Bulgaria* (App. No. 40653/98); *Belchinov v. Bulgaria* (App. No. 42346/98).

⁹⁸ For example: *Poltoratskiy v. Ukraine* (App. No. 38812/97).

asked to issue provisional measures suspending the execution until the case had been adjudicated on the merits, but decided instead to await determination of the appeal. The death sentence was confirmed on 25 November 1999 by the Court of Cassation.⁹⁹ On 30 November 1999, the European Court of Human Rights requested Turkey ‘to take all necessary measures to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant’s complaints under the Convention’.¹⁰⁰

The Court is now faced once again with the death penalty issue that it so adroitly sidestepped in *Soering* in 1989. This time, the threat of the death penalty exists in a Member State and not a third State. The argument that article 2§1 of the *Convention* is implicitly repealed by article 3, advanced by the *amicus curiae* Amnesty International in *Soering*, has been resubmitted by counsel for Öcalan.¹⁰¹ The Court will be reminded that the ‘the Convention is a living instrument which must be interpreted in the light of present day conditions [and] the increasingly high standard being required in the area of the protection of human rights and fundamental liberties’.¹⁰² When *Soering* was issued, *Protocol No. 6* was still quite far from universal ratification among Council of Europe members, many of whom, including the United Kingdom, appeared unlikely to accept the instrument within the near future. That hesitant position seems almost unthinkable in 2001, given the strengthened and unequivocal commitments of the Council of Europe on the subject of capital punishment in the decade since *Soering*. The Council of Europe now boasts that its territory is a death-penalty-free zone, and that capital punishment has no place in a civilized society. The European Court of Human Rights will be challenged to revisit *Soering* and see that these universal European values are now translated into its jurisprudence.

Aside from reconsidering whether article 3 of the Convention ‘trumps’ article 2§1, the Court might also examine whether the exception to the right to life in the latter provision is now contrary to a regional customary norm.¹⁰³ This would involve a determination that a new rule of customary international law can have the effect of repealing a human rights treaty provision that has become manifestly anachronistic.

⁹⁹ An observer mission from the Parliamentary Assembly of the Council of Europe found the procedure to be compatible with norms of the Council of Europe, but condemned the sentence of death that was imposed: ‘Ad Hoc Committee to Ensure the Presence of the Assembly at the Trial of Abdullah Öcalan’, Doc. 8596, 15 December 1999. On 30 November 1998, the Parliamentary Assembly applauded Italy’s refusal to extradite Öcalan to Turkey because he would face capital punishment.

¹⁰⁰ *Öcalan v. Turkey* (No. 46221/99), Interim Measures, 30 November 1999.

¹⁰¹ *Öcalan v. Turkey* (No. 46221/99), Applicant’s Final Submissions.

¹⁰² *Selmouni v. France* (App. No. 25803/94), Judgment, 28 July 1999, para. 101.

¹⁰³ *Asylum Case (Columbia v. Peru)*, [1950] ICJ Reports 266, pp. 276–277; *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, [1951] ICJ Reports 116, pp. 136–139; *Rights of US Nationals in Morocco Case (United States v. France)*, [1952] ICJ Reports 176, p. 200.

Öcalan has also argued that there is a violation of article 2 because he was not sentenced by 'a court', and because the death sentence was imposed following criminal proceedings that breached articles 5 and 6 in several respects. Because he is subject to death by hanging, Öcalan is claiming that the method of execution violates article 3, a question that has yet to be adjudicated by an international human rights body. The United Nations Human Rights Committee has deemed execution in a gas chamber to be cruel, inhuman and degrading treatment or punishment,¹⁰⁴ but rejected a similar claim in a case involving lethal injection.¹⁰⁵ There is considerable case law supporting the inhumanity of execution by hanging.¹⁰⁶ Finally, Öcalan has invoked article 14 of the *Convention*, dealing with non-discrimination, in conjunction with article 2, on the grounds that the death penalty is discriminatory because it is no longer Turkish Government policy to carry out death sentences.

Turkey challenged the admissibility of Öcalan's application, noting that an interpretation holding the death penalty contrary to article 3 of the Convention was untenable. It observed that even article 2 of *Protocol No. 6*, in allowing the death penalty in time of war or of imminent threat of war, indicates that capital punishment is not considered to be inhuman or degrading punishment. After all, the imminence or existence of war cannot make a punishment less inhuman or degrading. On 14 December 2000, after a preliminary assessment of these points, the Court declared that the arguments 'raise complex legal and factual issues which cannot be determined at [the admissibility] stage of the examination of the application but require an examination of the merits'.¹⁰⁷ The case is expected to be heard on the merits in 2002 by a Grand Chamber of the European Court of Human Rights.

7.2 Protocol No. 6 to the European Convention

7.2.1 Drafting of the Protocol

The issue of capital punishment appeared on the first agenda of the newly created European Committee on Crime Problems, an institution of the Council of Europe, in 1957.¹⁰⁸ In 1962, the Committee created a special sub-committee on the death penalty and named French jurist Marc Ancel as *rapporteur*, with the

¹⁰⁴ *Ng v. Canada* (No. 469/1991), UN Doc. A/49/40, Vol. II, p. 189, 15 *HRLJ* 149, paras. 16.3–16.5.

¹⁰⁵ *Cox v. Canada* (No. 539/1993), UN Doc. CCPR/C/52/D/539/1993, (1995) 15 *HRLJ* 410.

¹⁰⁶ *Republic v. Mbushuu et al.*, [1994] 2 LRC 335 (High Court of Tanzania); *Campbell v. Wood*, 18 F.3d 662, 695 (9th Cir. 1994), *cert. denied*, 114 S.Ct. 2125 (1994).

¹⁰⁷ *Öcalan v. Turkey* (No. 46221/99), Admissibility, 14 December 2000.

¹⁰⁸ 'Les activités du Comité européen pour les problèmes criminels du Conseil de l'Europe', (1961) 16 *Revue de science criminelle et de droit pénal comparé* n.s. 646, pp. 646–647.

mandate to prepare a study on capital punishment in Europe.¹⁰⁹ The European Committee also asked the Centre français de droit comparé to conduct an inquiry on the subject, and it created a scientific commission for this purpose. It was understood that the investigation would concern only common law crimes and exclude political and military crimes.

Ancel's report concerned the status of capital punishment in the Member States of the Council of Europe, as well as Finland, Monaco, Portugal, San Marino and Spain. Ancel's study noted that, because of political developments in Europe earlier in the century, some abolitionist countries had revived the death penalty, but that it would be an error to consider this as a renunciation of their commitment to abolition.¹¹⁰

Following publication of Ancel's report, the European Committee on Crime Problems continued to work on a study of crimes for which the death penalty existed but for which it was never imposed, examining the possibility of drafting a resolution demanding the repeal of the death penalty in such cases.¹¹¹ In 1966, the Committee of Ministers decided to discontinue any further study of the consequences of the abolition of the death penalty.¹¹²

Interest in the death penalty revived in 1973, when the Consultative Assembly of the Council of Europe sent a draft resolution¹¹³ on the abolition of capital punishment to the Committee on Legal Affairs.¹¹⁴ The resolution took note of the recent decision of the United Kingdom's House of Commons not to reintroduce capital punishment and affirmed that capital punishment 'must now be seen to be inhuman and degrading within the meaning of article 3 of the European Convention on Human Rights'. It called upon governments of Member States that still retained the death penalty for certain crimes to abolish it as a legal sanction.¹¹⁵

The resolution was referred to the Committee on Legal Affairs for further study.¹¹⁶ Bertil Lidgard, a Swedish Conservative, was appointed *rappporteur* of the Committee on Legal Affairs. Lidgard's report, submitted in the summer of 1974, was staunchly abolitionist, and it met with vigorous opposition within the Committee, inspired largely by Conservative English delegates. Even the

¹⁰⁹ Marc Ancel, *The Death Penalty in European Countries*, Strasbourg: Council of Europe, 1962. At the same time Ancel prepared a study on capital punishment on a world scale at the request of the United Nations: *Capital Punishment*, UN Doc. ST/SOA/SD/9, Sales No. 62.IV.2.

¹¹⁰ Ancel, *The Death Penalty*, p. 1.

¹¹¹ Norman Bishop, 'L'activité du Comité européen pour les problèmes criminels du Conseil de l'Europe', (1966) 21 *Revue de science criminelle et de droit pénal comparé* n.s. 427, at p. 428.

¹¹² Erik Harremoës, 'L'activité du Comité européen pour les problèmes criminels du Conseil de l'Europe 1966–1974', (1975) 30 *Revue de science criminelle et de droit pénal comparé* 327.

¹¹³ Council of Europe, Consultative Assembly, Doc. 3297. Proposed by Bergegren, Wiklund, Aasen, Stewart, Dankert, Radinger, Renschler, Bohman, Sjönell, Wäg and Hansen.

¹¹⁴ Council of Europe, Consultative Assembly, Debates, 18 May 1973, p. 246.

¹¹⁵ C. of E. Doc. 3297. ¹¹⁶ Reference No. 975 (8th sitting, 18 May 1973).

Committee's chairman said that he supported capital punishment in certain circumstances. The retentionist camp invoked growing problems with terrorism and argued that the death penalty was still essential as a deterrent to such 'new crimes'. The Committee was bitterly divided between abolitionist and retentionist camps. At a subsequent meeting, Lidgard suggested that opposition might have been due to his failure to distinguish between capital punishment in wartime or under military law and capital punishment in peacetime, indicating that his report had only contemplated the latter. But even this concession was not enough to appease the proponents of the death penalty. Faced with an impasse, the Committee decided, by nine votes to seven with two abstentions, not to submit Lidgard's report to the Parliamentary Assembly and to propose that the issue be struck from the Assembly's register.¹¹⁷ The Parliamentary Assembly, however, refused to adopt such a course, and by fifty votes to twenty-nine it decided not to remove the question from its register but instead to refer the matter back to the Committee on Legal Affairs for further examination.¹¹⁸

The Committee on Legal Affairs met in July 1975 and instructed Lidgard to present a revised report, which was to be presented to the Assembly in January 1976. That report began:

The abolition of the death penalty is one of those problems that involve the very principles of moral, philosophical, legal and criminological, political and other sciences, and yet the various questions it raises may ultimately be reduced to a single fundamental question, to that direct, crucial, blunt question which Cesare Beccaria asked more than two centuries ago: 'What is this right whereby men presume to slaughter their fellows?'¹¹⁹

Lidgard noted that the position of the United Nations on the death penalty had evolved considerably, from one that was originally neutral to one that now favoured abolition.¹²⁰ The revised report referred to executions in Spain that had taken place in September 1975 and that had provoked a debate in the Parliamentary Assembly and worldwide appeals for clemency.¹²¹ Lidgard also recognized that abolition would not extend to wartime, thereby giving some credence to the argument of the death penalty's deterrent effect, at least in the case of war criminals. He said that the death penalty should be maintained for the most serious war crimes, such as genocide. Lidgard argued that the Parliamentary Assembly should appeal to States that maintain the death penalty in the case of common law crimes, including so-called 'new crimes' such as terrorism, to suppress this in their penal systems. States that maintain the death

¹¹⁷ See the comments of Stoffelen of the Netherlands on this debate: Council of Europe, Parliamentary Assembly, 22 April 1980, p. 60 (Stoffelen was a member of the Legal Affairs Committee at the time).

¹¹⁸ 27th Session, 3rd sitting, 22 April 1975, pp. 77–78. ¹¹⁹ Quoted in C. of E. Doc. 4509, para. 1.

¹²⁰ Note particularly UN Doc. E/2342, para. 16. ¹²¹ They were the last executions in Spain.

penalty in wartime or for military crimes should be encouraged 'to examine the possibility' of the suppression of the death penalty. Lidgard's report noted that capital punishment could also be regarded as 'inhuman' within the meaning of article 3 of the *European Convention*.

The Committee considered Lidgard's revised report at its January 1976 session, but again, intransigent English delegates said it was not an appropriate time to talk of capital punishment. A bitter and frustrated Lidgard announced that he was resigning as *rappporteur*. The Committee then decided that the report should again be deferred. The question of capital punishment remained dormant for a few years, during which there were developments within the Council of Europe that changed the balance within the Committee. Three abolitionist States joined the Council of Europe, Spain, Portugal and Liechtenstein.¹²² An attempt to reintroduce the death penalty in the United Kingdom failed. The prominent non-governmental organization, Amnesty International, held a conference in Stockholm, in December 1977, which resulted in an important declaration calling for abolition of the death penalty.¹²³

In June 1978 at a meeting of the European Ministers of Justice, the issue of capital punishment was addressed in light of a report presented by Christian Broda, the Austrian Minister of Justice and a well-known abolitionist.¹²⁴ The meeting recommended: 'that the Committee of Ministers of the Council of Europe refer questions concerning the death penalty to the appropriate Council of Europe bodies for study as part of the Council's work programme, especially in the light of the Austrian memorandum and the exchange of views at the present conference'.¹²⁵ Pursuant to this resolution, the issue was then taken up by the European Committee on Crime Problems and by the Steering Committee on Human Rights, which sent a questionnaire on the subject to governments of the Member States.

¹²² Portugal abolished the death penalty in 1976. Liechtenstein, which did not abolish the death penalty until 1987, had executed nobody since 1785. Spain abolished the death penalty in 1978. See: M. Barbero Santos, 'La peine de mort en Espagne: histoire de son abolition, in *Mélanges en l'honneur de Doyen Pierre Bouzat*, Paris: Pedone, 1980, p. 103; A. Beristain, 'La sanction capitale en Espagne. Référence spéciale à la dimension religieuse Chrétienne', (1987) 58 *Revue internationale de droit pénal* 613.

¹²³ Nigel Rodley, *The Treatment of Prisoners Under International Law*, Paris: Unesco, Oxford: Clarendon Press, 1987, p. 170. The declaration can be found in UN Doc. E/AC.57/30; C. of E. Doc. 5409, pp. 22–23; (1978) 33 *Revue de science criminelle et de droit pénal comparé* n.s. 469 (French only). The Stockholm declaration described the death penalty as 'the ultimate cruel, inhuman and degrading punishment' that 'violates the right to life'. It called upon non-governmental organizations, both national and international, to work collectively and individually to provide informational materials directed towards the abolition of the death penalty, demanded that all governments bring about the immediate and total abolition of the death penalty, and insisted that the United Nations unambiguously declare that the death penalty is contrary to international law. The Stockholm conference assembled more than 200 delegates and participants from Africa, Asia, Europe, the Middle East, North and South America, and the Caribbean region.

¹²⁴ See a speech by Broda to a meeting of European death penalty coordinators of Amnesty International, Stockholm, 30 March 1985, AI Index: EUR/01/01/85.

¹²⁵ C. of E. Doc. 4509, Appendix III.

The European Committee on Crime Problems prepared an opinion that noted the widespread abolition of the death penalty *de jure* and recommended that new norms be adopted with a view to abolition. It proposed that, while these norms were being prepared, use of the death penalty should be suspended. The Steering Committee on Human Rights also drafted an opinion, stating that the time had come for the Council of Europe to consider either aligning article 2 of the *Convention* with the more recent article 4 of the *American Convention on Human Rights* or simply abolishing the death penalty. A third suggestion was that the Committee of Ministers make a recommendation to governments concerning abolition.

In May 1980, spurred by an announcement the previous year from the Austrian and West German Ministers of Justice, the Conference of European Ministers of Justice took up the question of abolition. The Ministers noted that article 2 of the *European Convention* 'does not adequately reflect the situation actually attained in regard to the death penalty in Europe' and recommended that the Committee of Ministers study the possibility of establishing new norms in Europe that would contemplate abolition of the death penalty. The meeting suggested two solutions: amendment of article 2 of the *European Convention*, along the lines of similar 'amending' protocols, notably numbers 3 and 5,¹²⁶ or alternatively, adoption of an optional protocol requiring a certain number of ratifications before it would come into force. Following an informal meeting in September, the Ministers of Justice expressed great interest in any domestic plans for abolition and at efforts undertaken to that effect on an international scale, notably within the Council of Europe.

Parallel to this activity, the Committee on Legal Affairs, which had quietly abandoned the issue in January 1976 following the resignation of Lidgard, also revived the question in 1979. It assigned another Swede, this time a Social Democrat named Lidbom, to prepare a new report. Lidbom's draft report was confined to the death penalty in peacetime and was discussed at a number of sessions of the Committee during 1979. The Committee's draft recommendation was adopted by twelve votes to six with two abstentions and then submitted, with the Lidbom report, to the Parliamentary Assembly in early 1980.¹²⁷ The report noted that the death penalty was 'inconsistent with the new trends in criminology and criminal law', and that furthermore it was also contrary to human rights law,¹²⁸ notably the right to be protected from inhuman and degrading treatment or punishment, as provided by article 3 of the *European Convention*.¹²⁹ The

¹²⁶ Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention, ETS 45; Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention, ETS 55.

¹²⁷ C. of E. Doc. 4509. ¹²⁸ *Ibid.*, para. 23, p. 12.

¹²⁹ The report said that the death penalty was 'undoubtedly' contrary to article 3 of the *Convention*: C. of E. Doc. 4509, para. 4, p. 14. In support of this rather bold interpretation, it noted that the European

report noted that: ‘Legally speaking, however, the European Convention on Human Rights does not preclude capital punishment. Article 2 even allows it *expressis verbis*.’¹³⁰ The report concluded that article 2 of the *European Convention on Human Rights* should be amended in order to abolish capital punishment.¹³¹

The Committee on Legal Affairs presented draft Resolution 727 to the Council of Europe’s Parliamentary Assembly, appealing to parliaments of European Member States to abolish the death penalty for crimes committed in times of peace.¹³² It also submitted a Recommendation, calling on the Committee of Ministers to amend article 2 of the *European Convention*.¹³³ The proposals were introduced in the Assembly by *rapporteur* Lidbom, who noted that the Committee had dealt only with the death penalty in peacetime, not because of principle but out of a concern to proceed in stages, so as to be certain to reach a positive result.¹³⁴ Lidbom said it was illusory to think that all forms of barbarism could be outlawed, and for that reason, on his suggestion, the Committee had not considered the death penalty in wartime in its resolution. He noted that the draft recommendation sought to focus attention on an ‘inherent contradiction’ in the *European Convention*: article 3 prohibits torture and inhuman or degrading treatment, yet article 2 explicitly permits the death penalty. Abolition of the death penalty would resolve this contradiction, said Lidbom, and the Committee proposed, therefore, that the Committee of Ministers of the Council of Europe proceed with a ‘revision’ of the *Convention*.¹³⁵

Lidbom explained to the Assembly that although the death penalty still existed on the statute books of seven of the twenty-one members of the Council of Europe, in virtually all of those seven countries it had not been applied in practice for many years. France was the only exception, with three executions

Court of Human Rights had decided that even corporal punishment was a violation of the *Convention*: *Tyrer v. United Kingdom*, 25 April 1978, Series A, Vol. 26, 2 EHRR 1, 59 ILR 339. However, the European Court has since ruled out such an interpretation of article 3 of the *Convention*: *Soering v. United Kingdom*.

¹³⁰ C. of E. Doc. 4509, para. 25, p. 13. ¹³¹ *Ibid.*, para. 5, p. 22.

¹³² *Ibid.*, p. 1:

The Assembly

1. Considering that capital punishment is inhuman,
2. Appeals to the parliaments of those member states of the Council of Europe which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems.

¹³³ C. of E. Doc. 4509, pp. 1–2:

The Assembly

1. Referring to its Resolution 727 (1980) on the abolition of capital punishment,
2. Considering that Article 2 of the European Convention on Human Rights recognizes everyone’s right to life, but provides that a person may be deprived of his life intentionally in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
3. Recommends that the Committee of Ministers amend Article 2 of the European Convention on Human Rights to bring it into line with Assembly Resolution 727 (1980).’

¹³⁴ Council of Europe, Parliamentary Assembly, 22 April 1980, pp. 52–53. ¹³⁵ *Ibid.*, p. 53.

since the election of Giscard d'Estaing as President in 1974,¹³⁶ and for that reason Lidbom addressed a special appeal.¹³⁷

Lidbom was supported by a number of speakers, including a French representative, Mercier.¹³⁸ The entire delegations of Switzerland,¹³⁹ Denmark,¹⁴⁰ Germany¹⁴¹ and Spain backed the draft resolution and recommendation.¹⁴² However, Smith of the United Kingdom said the Council had no business addressing an issue which related to political problems of Member States. He said that in most countries that had abolished the death penalty, a majority of the population was opposed to such a measure.¹⁴³ A Turkish member of the Assembly, Aksoy, said that he supported the report and the recommendation 'in principle', but that it did not take sufficient account of the particular situation of certain Member States. He suggested that because of differing economic, social and political structures it was not possible to apply identical sentences in all countries. Were he Swedish, Swiss, Norwegian, Austrian or German, he would most certainly support total abolition of the death penalty, said Aksoy. Yet it would be a grave error to recommend abolition in countries where political assassination and terrorism are organized on a systematic scale.¹⁴⁴ Aksoy submitted an amendment to the recommendation which gave effect to these comments.¹⁴⁵ Aksoy was, however, not present at the time of the voting. As no other member desired to speak in defence of the amendment, the chairman declared it withdrawn.¹⁴⁶

The Parliamentary Assembly adopted Resolution 727¹⁴⁷ and Recommendation 891,¹⁴⁸ decisions which were endorsed shortly afterwards by the Committee of Ministers. Later that year, the Committee asked the Steering Committee

¹³⁶ The last execution in France took place in 1977. See: Robert Badinter, 'France: The Abolition of Capital Punishment: The French Experience', (1984) 11 *United Nations Crime Prevention and Criminal Justice Newsletter* 17; Jean Bloch-Michel, 'La peine de mort en France', in Albert Camus, Arthur Koestler, eds., *Réflexions sur la peine capitale*, Paris: Clamann-Lévy, 1957.

¹³⁷ Council of Europe, Parliamentary Assembly, 22 April 1980, p. 54.

¹³⁸ *Ibid.*, p. 55. ¹³⁹ *Ibid.*, p. 60. ¹⁴⁰ *Ibid.*, p. 66. ¹⁴¹ *Ibid.*, p. 65. ¹⁴² *Ibid.*, p. 60.

¹⁴³ *Ibid.*, pp. 58–59. See also Banks of the United Kingdom at pp. 78–79; Beith of the United Kingdom at pp. 80–81; Grieve of the United Kingdom at pp. 86–87; Michel of Belgium at p. 59.

¹⁴⁴ *Ibid.*, pp. 57–58. Turkish representative Karamollaoglu declared he would vote against the proposition: p. 68.

¹⁴⁵ C. of E. Doc. 4509, Amendment No. 2:

3. Recommends that the Committee of Ministers amend Article 2 of the European Convention on Human Rights to the following effect:

- i. The death penalty shall be abolished in the member states of the Council of Europe.
- ii. The death penalty may, however, be kept during peacetime for organized murder in those member states in which people are frequently assassinated by terrorist acts because of their political opinions and where the right to life of all people is thus seriously threatened.'

¹⁴⁶ Council of Europe, Parliamentary Assembly, 22 April 1980, p. 88. An amendment by Cavaliere of Italy adding the words 'at least for political offences and for all other offences which have not intentionally resulted in the death of one or more persons' to paragraph 2 was also withdrawn: C. of E. Doc. 4509, Amendment No. 1; Council of Europe, Parliamentary Assembly, 22 April 1980, pp. 63–64, 87.

¹⁴⁷ *Ibid.*, p. 87, by show of hands, no roll-call vote being requested. It was identified as Resolution 727.

¹⁴⁸ *Ibid.*, p. 89, by ninety-eight in favour, twenty-five opposed and no abstentions.

on Human Rights and the European Committee on Crime Problems to prepare an opinion on action to be taken with the aim of abolition of the death penalty, referring directly to the idea of an 'additional protocol'. The two Committees drafted a joint opinion, concluding that it would be difficult to adopt an amending protocol, because it seemed very unlikely to rally the support of all parties to the *Convention*, and recommending instead that an additional or optional protocol be considered. The two Committees observed that they had no mandate to draft such an instrument. During these meetings both the United Kingdom and Turkey manifested their opposition to the idea of any protocol, the United Kingdom because this was a matter for the conscience of individual parliamentarians, and Turkey because it simply did not feel it was in a position to abolish the death penalty.

In light of these reports, in September 1981, the Committee of Ministers mandated the Steering Committee on Human Rights to prepare a draft protocol concerning abolition of the death penalty 'in time of peace',¹⁴⁹ fixing a deadline of June 1982. The Steering Committee met in November 1981 and again in April 1982, when it completed its report, together with a draft additional protocol, for submission to the Committee of Ministers.¹⁵⁰

At a meeting of Deputies in September 1982, the Steering Committee's draft additional protocol to the *Convention* was discussed and approved. The Secretariat was asked to prepare a synoptic report for the Committee of Ministers meeting in December 1982. The Committee of Ministers made no changes to the draft that had been accepted by the Deputies in September and formally adopted the text of the protocol at its 354th meeting, held from 6–10 December 1982.¹⁵¹ On 28 April 1983 *Protocol No. 6* was signed by

¹⁴⁹ 'Explanatory Report on Protocol No. 6', C. of E. Doc. H(83) 3, (1982) 25 *YECHR* Part I, Chapter 4, p. 24, 5 *HRLJ* 78.

¹⁵⁰ C. of E. Doc. H/INF (82) 1, p. 20. On 27 April 1982, the Committee of Ministers was asked by a member of the Parliamentary Assembly to provide a progress report on the Protocol, and it replied: 'In its provisional reply to Recommendation 891 (Doc. 4659), to which Mr Flanagan refers, the Committee of Ministers pointed out that it had instructed the European Committee on Crime Problems (CDPC) and the Steering Committee for Human Rights (CDDH) to draw up an opinion on action which would be taken with a view to the abolition of the death penalty in time of peace, including the possibility of elaborating an additional protocol to the European Convention on Human Rights or a recommendation to member states. In their joint opinion, the two steering committees reached the conclusion that 'the adoption of an additional protocol to the European convention on human rights, modelled on protocols 1 and 4, would be a possible solution'. In the light of this opinion, the Committee of Ministers instructed the CDDH to prepare a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime. The Committee of Ministers, which has recently received this draft, will naturally inform the Assembly of the outcome of its examination.'

¹⁵¹ Announced in the Parliamentary Assembly on 26 January 1983. See also Press Release I (83) 5 of 26 January 1983. Several brief articles have been written on the *Protocol*: A. Adinolfi, 'Premier instrument international sur l'abolition de la peine de mort', (1987) 58 *Revue internationale de droit pénal* 321; Peter Leuprecht, 'The First International Instrument for the Abolition of the Death Penalty', (1983) 2 *Forum* 2; Erik Harremoës, 'The Council of Europe and Its Efforts to Promote the Abolition of the Death Penalty',

representatives of Austria, Belgium, Denmark, France,¹⁵² Germany, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden and Switzerland. The *Protocol* entered into force on 1 March 1985.

7.2.2 Interpretation of the Protocol

The instructions from the Committee of Ministers to the Steering Committee on Human Rights had been to draft a protocol providing for abolition of the death penalty 'in peacetime'. However, this term does not appear in the title of the instrument. During the drafting, it was argued that the title should specify this point, but it was decided this was unnecessary. There is no mention of 'peacetime' in article 1 either, despite the instructions from the Committee of Ministers and numerous proposals to this effect during the drafting process. The intention of the drafters was apparently to avoid drawing attention to the wartime exception. Although mention of wartime could not be totally avoided, it was considered important to stress that the goal of the *Protocol* was abolition purely and simply.

The preamble is succinct and makes no reference whatsoever to any substantive law. It does not, for example, refer to articles 2§1 or 3 of the *Convention* or suggest the relationship between that provision and the *Protocol*. During the drafting, there had been suggestions that the preamble be more extensive and that it include reference both to article 2§1 of the *Convention* and to the right to life, similar to the approach followed in the preamble to the *Second Optional Protocol*.¹⁵³ Nor does the preamble refer either to the right to life or to the issue of inhuman treatment, obviously a compromise that avoided irritating those members of the Council of Europe that had not yet abolished the death penalty. Furthermore, a reference to the prohibition of inhuman treatment might be difficult to explain in an instrument that only partially abolished the death penalty.

Article 1 of *Protocol No. 6* establishes three principles: the death penalty shall be abolished, no one may be condemned to death and no one may be

(1986) 12–13 *United Nations Crime Prevention and Criminal Justice Newsletter* 62; Gilbert Guillaume, 'Protocole no 6, article 1–4', in Pettiti, Decaux, Imbert, *La Convention européenne*, pp. 1067–1072.

¹⁵² In France, ratification of *Protocol No. 6* provoked a debate in the National Assembly on the grounds that it would impinge on its sovereignty (*Journal officiel des débats parlementaires, Assemblée nationale*, 4 July 1983, p. 2938; *Journal officiel des débats parlementaires, Assemblée nationale*, 21 June 1985, pp. 1867–1889) and violate article 16 of the *Constitution*. The matter was submitted to the Conseil constitutionnel, which noted that it was constitutionally permissible to ratify the *Protocol*, and which stressed the fact that the *Protocol* could always be denounced, under the terms of article 65 of the *Convention*; see also Louis Favoreu, 'La décision du conseil constitutionnel du 22 mai 1985 relative au protocole no 6 additionnel à la Convention européenne des droits de l'homme', [1985] *AFDI* 868; Cohen-Jonathan, *La Convention européenne*, pp. 279–280.

¹⁵³ The draft second optional protocol which had been proposed by a number of European States in 1980 left room for preambular paragraphs, but did not spell out their content: UN Doc. A/C.3/35/L.75.

executed. The English version declares 'the death penalty shall be abolished', imposing an obligation on States parties to abolish the death penalty.¹⁵⁴ The French version states 'La peine de mort est abolie', a formulation that is more clearly self-executing, in countries whose constitution provides for such immediate effect of ratification of international treaties.¹⁵⁵ No explanation for the discrepancy is provided in the 'Explanatory Report to the Protocol' accompanying the *Protocol*. The 'Explanatory Report' was drafted by the Steering Committee on Human Rights and adopted by the Committee of Ministers, and as such it represents a form of official interpretation or commentary on the *Protocol*.

The second sentence of article 1 prohibits execution, even in the case of an individual condemned to death prior to the entry into force of the *Protocol*. The death penalty may be neither pronounced nor carried out by States parties to the *Protocol*. According to the 'Explanatory Report', '[t]he second sentence of [article 1] aims to underline the fact that the right guaranteed is a subjective right of the individual'.¹⁵⁶ As an individual right, rather than merely an obligation upon States parties, it becomes subject to the petition mechanisms of the *European Convention*.

Article 2 sets out the sole exception to the principle of abolition, that a State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war. The principal effect of article 2 is to confirm that the *Protocol* applies only in time of peace. Consequently, the abolitionist scope of the *Protocol* is not as extensive as the corresponding protocols in the United Nations and Inter-American systems, the latter instruments abolishing the death penalty in wartime as well, although they permit States parties to make reservations on this point.¹⁵⁷ The only condition for the application of article 2 is that the State party must notify the Secretary-General of the Council of Europe as to the relevant provisions of such laws. The language of article 2 suggests that such notification may be made at any time and that it may also be changed.

The drafters had considerable difficulty agreeing upon the text of article 2, and the result is an attempt to satisfy different perspectives. Some would have preferred a general declaration abolishing the death penalty, but allowing reservations in wartime as in the *Second Optional Protocol to the International Covenant on Civil and Political Rights*. Another proposal was a text declaring the death penalty abolished 'in peacetime', an approach which would have necessitated some definition of the term 'peacetime'. The result is a compromise, a principle accompanied by an exception but with no possibility of reservation.¹⁵⁸

¹⁵⁴ Harremoes, 'The Council of Europe', at p. 63.

¹⁵⁵ Guillaume, 'Protocole no 6, article 1-4', at p. 1068. ¹⁵⁶ C. of E. Doc. H(83)3.

¹⁵⁷ The Council of Europe is now attempting to correct the situation with yet another protocol, discussed later in this Chapter.

¹⁵⁸ Guillaume, 'Protocole no 6, article 1-4', at p. 1069.

During the drafting, there were suggestions that the terms ‘time of war or of imminent threat of war’ be replaced by ‘international armed conflict’, which is the expression used in *Protocol Additional I to the 1949 Geneva Conventions*. However, the term ‘time of war’ was retained because the same expression is used in article 15 of the *European Convention*, a provision which permits derogation from the provisions of the *Convention* ‘in time of war or other public emergency threatening the life of the nation’.¹⁵⁹

Would it be possible, in accordance with article 1 of the *Protocol*, for a State party to impose the death penalty in a time of internal armed conflict or civil war? The fact that the drafters of the *Protocol* did not copy the wording of article 15, dropping the phrase ‘other public emergency threatening the life of the nation’, suggests that internal strife is not the same as ‘time of war’. Had the proposal to refer to ‘international armed conflict’ been followed, it would have dispelled any doubt about the scope of article 2, in effect referring to the definition of ‘international armed conflict’ in article 1 of *Protocol Additional I*. Scholars have maintained that the reference to ‘war’ excludes civil war on the premise that, had this been the intention, it would have been mentioned expressly.¹⁶⁰

At international law, a ‘state of war’ may exist in the absence of hostilities.¹⁶¹ Sir Nigel Rodley argues, however, that a ‘state of war’ is a legal status requiring a declaration by at least one of the parties and that armed conflict falling short of this standard is not envisaged by the *Protocol*.¹⁶² Because the *Protocol* uses the phrase ‘or imminent threat of war’, it would seem that the intention of the drafters was to avoid technical debates about when a war was formally declared. The purpose of adding the latter term is to eliminate formalism concerning the beginning of a war and to disallow States parties to extend the death penalty to a variety of crises on the pretext that war is remotely foreseeable. It should be noted that the companion to the *European Convention*, the *European Social Charter*, states that ‘time of war’ also means ‘threat of war’.¹⁶³

According to Rusen Ergec, war as it is contemplated by article 15 of the *European Convention* ‘peut être définie comme un affrontement armé d’une certaine envergure et d’une certaine durée conduite par des armées organisées sous la responsabilité des gouvernements respectifs dont elles relèvent’.¹⁶⁴ However, not

¹⁵⁹ According to Velu and Ergec, the reference is to war in a material sense and not just a formal one: Velu, Ergec, *La Convention européenne*, p. 185.

¹⁶⁰ Rodley, *The Treatment of Prisoners*, p. 173. Also: Velu, Ergec, *La Convention européenne*, p. 185. See our comments on this subject in Chapter 4, with respect to the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty*, above at pp. 183–186.

¹⁶¹ O. Wright, ‘When Does War Exist?’, (1932) 26 *AJIL* 363; L. Delbaz, ‘La notion juridique de guerre’, (1953) 62 *RGDIP* 193.

¹⁶² Rodley, *The Treatment of Prisoners*, at p. 172.

¹⁶³ (1965) 529 UNTS 89, ETS 35, Appendix, Part V (my italics).

¹⁶⁴ Ergec, *Les droits de l’homme*, p. 125. See also K. J. Parsch, ‘Experiences Regarding the War and Emergency Clause (art. 15) of the European Convention on Human Rights’, (1971) 1 *Israel Yearbook on Human Rights* 327.

any 'war' will be sufficient to allow exceptions to the *Protocol*. Again, by way of analogy with the scope of the term 'war' in article 15 of the *Convention*, it is very significant that the provision refers to 'time of war or *other* emergency threatening the life of the nation', indicating that a war must at the same time constitute an 'emergency threatening the life of the nation'.¹⁶⁵ Recent wars in which European States were involved, such as the Malvinas/Falklands war between the United Kingdom and Argentina, and the Gulf War of 1991, probably do not meet this standard.

'Time of war' should not be confused with the military death penalty. Many States provide for capital punishment in their military code but not in their general criminal law.¹⁶⁶ The military death penalty is proscribed by *Protocol No. 6*, except of course in time of war. Unlike the *Second Optional Protocol*, which only permits the death penalty for military crimes of a serious nature, *Protocol No. 6* establishes no limit *ratione materiae* on use of the death penalty during wartime. During the drafting of the *Protocol*, suggestions were made that the instrument restrict the death penalty in wartime to the 'most serious crimes', but these were rejected.¹⁶⁷ In any case, the *European Convention* continues to apply, and an execution imposed in wartime for a crime that was not very serious could violate articles 2 and 3 of the *Convention*. Furthermore, in time of war, the provisions of international humanitarian law take effect, although they are not applicable in time of 'imminent threat of war'.

Declarations have been made pursuant to article 2, by Switzerland, the Netherlands, Cyprus and Ukraine.¹⁶⁸ These States have legislation allowing for the death penalty in time of war, but none of them confines this to cases of 'an emergency threatening the life of the nation'. The Human Rights Chamber for Bosnia and Herzegovina, interpreting article 2 of *Protocol No. 6*,¹⁶⁹ has considered it insufficient that existing legislation providing for the death penalty be applied in time of war or imminent threat thereof. It is essential that the legislator actually contemplate the possibility of imposing capital punishment under such circumstances.

the Chamber considers that before Article 2 of Protocol No. 6 can apply there must be specific provision in domestic law authorising the use of the death penalty in respect of defined acts committed in time of war or of imminent threat of war. The law must define with adequate precision the acts in respect of which the death penalty may be

¹⁶⁵ The European Court of Human Rights has amplified the term, explaining that it refers to an 'exceptional and imminent situation of crisis and emergency which affects the whole population and constitutes a threat to the organized life of the community of which a state is composed': *Lawless v. United Kingdom*, 1 July 1961, Series A, Vol. 2, para. 28.

¹⁶⁶ Christine van den Wyngaert, 'Military Offences, International Crimes and the Death Penalty', (1987) 58 *Revue internationale de droit pénal* 737.

¹⁶⁷ Guillaume, 'Protocole no 6, article 1-4', at p. 1069.

¹⁶⁸ See Appendix 15, at pp. 424-429, for the texts of the declarations.

¹⁶⁹ *Protocol No. 6* is incorporated in the Constitution of Bosnia and Herzegovina, although the State is not yet a member of the Council of Europe and cannot therefore sign or ratify the instrument.

applied, the circumstances in which it may be applied, and the concepts of ‘time of war or of imminent threat of war’. Article 2 requires that before it can apply the legislature should have considered and defined the circumstances in which, exceptionally in the context of a legal system where the death penalty has been abolished, such penalty may nevertheless be applied in respect of acts committed in time of war or imminent threat thereof.¹⁷⁰

There is no provision for renewal or withdrawal of the declaration envisaged in article 2, and no indication either of the consequence of the failure to make such a declaration. Some States whose legislation has allowed for the death penalty in wartime – Spain,¹⁷¹ Italy¹⁷² and Malta¹⁷³ – have ratified the *Protocol* without making any declaration under article 2. The text is looser and more permissive than typical ‘derogation’ clauses, which imply that in the absence of formal notice of derogation there is clear violation of the substantive clauses of the instrument. Failure to notify the Council of legislation concerning the death penalty in wartime is a breach article 2 of the *Protocol* but may not foreclose a State from actually employing the death penalty in time of war or imminent danger of war. A suggestion that the wartime exception be formulated as a possibility of reservation, an approach subsequently adopted in the United Nations and Inter-American protocols, was rejected by the drafters.

Article 3 of the *Protocol* prohibits any derogation by virtue of article 15 of the *European Convention*. Ordinarily article 15 would apply to an additional protocol to the *Convention*, permitting States parties to derogate in time of war or public emergency threatening the life of the nation. The *Protocol* does not apply in time of war, where there is a clear overlap between its article 2 and article 15 of the *Convention*. However, without such a provision, it would have been possible for States to avoid the provisions of the *Protocol* in time of ‘other public emergency threatening the life of the nation’, by making a formal derogation.

Although reservations to the *Protocol* are excluded by article 4, it would seem possible to make interpretative declarations.¹⁷⁴ Germany made an interpretative declaration to the effect that its non-criminal legislation is not affected

¹⁷⁰ *Damjanovic v. Federation of Bosnia and Herzegovina*, para. 32.

¹⁷¹ The death penalty in wartime in Spain was also discussed in the Human Rights Committee: ‘Third Periodic Report of Spain’, UN Doc. CCPR/C/58/Add. 1 and 3, UN Doc. CCPR/C/SR.1018–1021, UN Doc. A/46/40, pp. 35–45. Note that Spain made a reservation to this effect when it ratified the *Second Optional Protocol* (for the text of Spain’s reservation, see Appendix 4, p. 399). The reservation was withdrawn on 13 January 1998.

¹⁷² Italy was challenged about its maintenance of the death penalty in wartime by Sir Vincent Evans in the Human Rights Committee: UN Doc. CCPR/C/SR.257, §37. In 1994, Italy abolished the death penalty in wartime as well as in peacetime.

¹⁷³ Malta ratified the *Protocol* on 26 March 1991 and it came into force on 1 April 1991. Note that Malta made a reservation to this effect when it ratified the *Second Optional Protocol* (for the text of Malta’s reservation, see Appendix 4, p. 400). Malta’s reservation was withdrawn on 15 June 2000.

¹⁷⁴ *Ibid.* For the distinction between reservations and interpretative declarations, see: *Belilos v. Switzerland*, 29 April 1988, Series A, Vol. 132, 10 EHRR 466, 88 ILR 635. The same rule has been accepted by the Human Rights Committee: ‘General Comment No. 24 (52)’, UN Doc. CCPR/C/21/Rev.1/Add.6 at §3; *T.K. v. France* (No. 220/1987), UN Doc. A/45/40, Vol. II, p. 118,

by the *Protocol*. Furthermore, according to article 5, a State may specify the territory or territories to which the *Protocol* shall apply.¹⁷⁵ The German declaration states that its government considers the *Protocol* to contain no other obligation than to abolish the death penalty in its domestic legislation, something it points out Germany has already done. Unlike the declaration under article 2, an ‘interpretative declaration’ must be made at the time of ratification, acceptance or approval.

A State may extend the protection of the *Protocol* to territories excluded in the initial declaration but may not do the opposite, that is, withdraw the protection of the *Protocol* from specified territories. The declaration by the Netherlands extended the protection of the *Protocol* to its Caribbean territories. The declaration by Germany extended the protection of the *Protocol* to Berlin, something which became quickly obsolete with the reunification of Germany and the extension of the *Protocol’s* scope to the entire German territory. In a *Protocol No. 6* application against Portugal by a Chinese national threatened with deportation from Macao, the European Court of Human Rights found it was without jurisdiction *ratione loci* because of the absence of such a declaration.¹⁷⁶

Article 6 of the *Protocol* explains that its provisions shall be considered to be additional articles to the *Convention*, with the consequence that the protection mechanisms established by the *Convention* applies. It also ensures that article 2§1 of the *Convention* continues to apply in cases where the death penalty is imposed in time of war or imminent threat of war. According to Pierre-Henri Imbert, the fact that States parties to *Protocol No. 6* are automatically subject to the jurisdiction of the Commission of the Court is further evidence of the absolute character of abolition of the death penalty, which was the objective of the drafters of the *Protocol*.¹⁷⁷

The *Protocol* provides that it comes into force with five ratifications. There were suggestions that this be increased to seven and even ten, but the drafters eventually returned to the original proposal of the Steering Committee on Human Rights back in 1979. The *Protocol* can only be denounced pursuant to the conditions set out in the *European Convention*, which states that such action may not be taken until five years have elapsed since ratification. Moreover, notice of six months must be provided before denunciation is legally effective. During the drafting of the *Protocol*, it was proposed that the terms of

para. 8.6. See: Donald McRae, ‘The Legal Effect of Interpretative Declarations’, (1978) 49 *BYIL* 160; Gérald Cohen-Jonathan, ‘Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt Belilos du 29 avril 1988)’, (1989) 93 *RGDIP* 273.

¹⁷⁵ Michael Wood, ‘Protocole no 6, article 5’, in Pettiti, Decaux, Imbert, *La Convention européenne*, p. 1073.

¹⁷⁶ *Yonghong v. Portugal* (No. 50887/99), Decision, 15 November 1999.

¹⁷⁷ Pierre-Henri Imbert, ‘Protocole no 6, article 6’, in Pettiti, Decaux, Imbert, *La Convention européenne*, p. 1075.

denunciation be made less onerous, for example, by providing for a notice period of six months but no minimum period of application of the *Protocol*. The drafters opted for a mechanism that mirrored that of the other additional protocols to the *Convention*.¹⁷⁸

Protocol No. 6 has been invoked in cases before the Court and, prior to its abolition, the European Commission. Several applications have been lodged against the Netherlands by drug traffickers threatened with deportation to Malaysia, where they might be exposed to the mandatory death sentence. The applicants maintained that this was contrary to both article 3 of the *Convention* and article 1 of *Protocol No. 6*. The Commission recalled authorities under the *Convention*, notably *Soering v. United Kingdom*, by which the decision to deport a person may give rise to an issue under article 3 and engage the responsibility of the State:

The question arises whether analogous considerations apply to Article 1 of Protocol No. 6 to the Convention, in particular whether this provision equally engages the responsibility of a Contracting State where, upon deportation, the person concerned faces a real risk of being subjected to the death penalty in the receiving state. The question also arises whether if Article 1 of Protocol No. 6 cannot engage the responsibility of a Contracting State in such circumstances, Article 3 of the Convention may serve to prohibit deportation to a country where the person concerned may be subjected to the treatment complained of.¹⁷⁹

The Commission concluded that the evidence submitted by the applicant that he would be subject to prosecution for drug trafficking was insufficiently substantiated. As a result, the applications were declared inadmissible. In another case, involving extradition from Austria to the Russian Federation to stand trial for murder, the Commission noted a maximum sentence of ten years in the Penal Code of the Russian Federation and the fact that two accomplices had been sentenced to nine years, concluding that ‘there are no substantial grounds for believing that the applicant faces a real risk of being subjected to the death penalty in the Russian Federation’.

Protocol No. 6 has also been cited in domestic law in cases concerning extradition of fugitives to States imposing the death penalty. On two occasions, the French Conseil d’État has refused to extradite, expressing the view that *Protocol No. 6* establishes a European *ordre public* that prohibits extradition in capital cases.¹⁸⁰ The Supreme Court of the Netherlands took a similar

¹⁷⁸ Guillaume, ‘Protocole no 6, article 1–4’.

¹⁷⁹ *App. No. 15216/89 v. Netherlands*, unreported decision on admissibility of 16 January 1991; *Y. v. Netherlands* (App. No. 16531/90), (1991) 68 DR 299.

¹⁸⁰ *Fidan; Gacem. Fidan* was cited by Judge De Meyer in his concurring opinion in *Soering v. United Kingdom*, at p. 51.

view, invoking the *Protocol* in refusing to return a United States serviceman,¹⁸¹ although required to do so by the *NATO Status of Forces Agreement*.¹⁸² The Court considered that the *European Convention* and its *Protocol No. 6* took precedence over the other treaty.

Protocol No. 6 has even been cited before domestic courts of non-European states as a demonstration of the breadth of international sentiment in favour of the abolition of the death penalty.¹⁸³ In *United States v. Burns*, decided on 15 February 2001, the Supreme Court of Canada noted that ‘a significant number of countries’ had either signed or ratified *Protocol No. 6* since the Court had last examined the issue of capital punishment, a decade earlier. This was taken as evidence of the international trend towards the abolition of capital punishment.¹⁸⁴ Its influence has even been felt deep within the United States, in the death-penalty state of Ohio. In the Dayton Peace Agreement, signed at Paris on 14 December 1995, the new state of Bosnia and Herzegovina was held to the highest standard of compliance with contemporary human rights norms. The country’s Constitution, which is also Annex IV of the Dayton Agreement, declares: ‘The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.’¹⁸⁵ Accordingly, capital punishment is abolished because *Protocol No. 6* is directly incorporated into the laws of Bosnia and Herzegovina.¹⁸⁶

In 1994, the Parliamentary Assembly of the Council of Europe adopted a resolution calling upon Member States that had not yet done so to ratify *Protocol No. 6*. The resolution praised Greece, which in 1993 had abolished the death penalty for crimes committed in wartime as well as in peacetime. It stated: ‘In view of the irrefutable arguments against the imposition of capital punishment, it calls on the parliaments of all Member States of the Council of Europe, and of all states whose legislative assemblies enjoy special guest status at the Assembly,

¹⁸¹ *Short v. The Netherlands*.

¹⁸² *Agreement Between the Parties to the 1949 North Atlantic Treaty Regarding the Status of Their Forces*, (1951) 199 UNTS 67. Note that on 19 June 1995, the States parties to the NATO treaty finalized the *Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces* together with an *Additional Protocol*. Article 1 of the *Additional Protocol* states: ‘Insofar as it has jurisdiction according to the provisions of the agreement, each State party to the present additional protocol shall not carry out a death sentence with regard to any member of a force and its civilian component, and their dependents from any other State party to the present additional protocol.’

¹⁸³ *Kindler v. Canada*; *S. v. Makwanyane*, 1995 (3) SA 391, (1995) 16 HRLJ 154; *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General et al.*

¹⁸⁴ *United States v. Burns*, para. 87.

¹⁸⁵ *General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 4: Constitution of Bosnia and Herzegovina, art. II§2. Also: *Ibid.*, Annex I, para. 7; *General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 6: Agreement on Human Rights, art. 1.

¹⁸⁶ *Damjanovic v. Federation of Bosnia and Herzegovina*.

which retain capital punishment for crimes committed in peacetime and/or in wartime, to strike it from their statute books completely.’ It also affirmed that willingness to ratify *Protocol No. 6* be made a prerequisite for membership of the Council of Europe. It concluded by urging all heads of state and all parliaments in whose countries death sentences are passed to grant clemency to the convicted.¹⁸⁷

On the same date, the Parliamentary Assembly also adopted a Recommendation that deplored the fact that the death penalty was still provided by law in eleven Council of Europe Member States and seven States whose legislative assemblies had special status with respect to the organization.¹⁸⁸ The Assembly expressed shock that fifty-nine people were legally put to death in Europe in 1993, and that at least 575 prisoners were known to be awaiting their execution. The Assembly said that application of the death penalty ‘may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the *European Convention on Human Rights*’. The Recommendation urged the Committee of Ministers to draft an additional protocol to the *European Convention on Human Rights*, abolishing the death penalty both in peace- and wartime, and obliging the parties not to reintroduce it under any circumstances. The recommendation also proposed establishing a control mechanism that would oblige States where the death penalty was still provided by law to set up a commission with a view to abolishing capital punishment. A moratorium would be declared on all executions while the commissions fulfilled their tasks. The commissions would be required to notify the Secretary General of the Council of Europe of any death sentences passed and any executions scheduled without delay. Any country that had scheduled an execution would be required to halt it for a period of six months from the time of notification of the Secretary General. During this time the Secretary General would be empowered to send a delegation to conduct an investigation and make a recommendation to the country concerned. Finally, all States would be bound not to allow the extradition of any person to a country in which he or she risked being sentenced to death and subjected to the extreme conditions on ‘death row’.

The Parliamentary Assembly’s 1994 recommendation that a new protocol be adopted, abolishing the death penalty in wartime, was greeted favourably by the Council of Europe’s Steering Committee for Human Rights. However, the Committee of Ministers, in its decision of 16 January 1996, considered that the political priority was moratoria on executions, to be consolidated by complete abolition of the death penalty.¹⁸⁹ The idea of a new protocol lingered until the

¹⁸⁷ Resolution 1044 (1994) on the abolition of capital punishment, 4 October 1994, para. 6.i.

¹⁸⁸ Recommendation 1246 (1994) on the abolition of capital punishment, 4 October 1994.

¹⁸⁹ This point was soon taken up by the Parliamentary Assembly in Recommendation 1302 (1996) on the abolition of the death penalty in Europe, 28 June 1996.

Ministerial Conference, held in Rome on 3–4 November 2000, to commemorate the fiftieth anniversary of the adoption of the *European Convention on Human Rights*. A resolution adopted at that meeting invited the Committee of Ministers ‘to consider the feasibility of a new additional protocol to the Convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of imminent threat of war’.¹⁹⁰ A week later, the Committee of Ministers adopted a ‘Declaration for a European Death Penalty-Free Area’ that declared the achievement of the abolition of the death penalty in all Member States to be ‘our common goal’. Sweden then took the initiative to prepare the text of a draft ‘Protocol No. 13’ whose legal effect would be to neutralize article 2 of *Protocol No. 6*, somewhat in the same way as *Protocol No. 6* neutralizes article 2§1 of the *Convention*. Sweden’s proposal was presented to the 7 December 2000 meeting of Ministers’ Deputies and, a month later, that body instructed the Steering Committee for Human Rights ‘to study the Swedish proposal for a new protocol to the Convention . . . and submit its views on the feasibility of a new protocol on this matter’. Using the Swedish proposal as a basis, the Committee asked its Committee of Experts for the Development of Human Rights to finalize a draft protocol and an explanatory report.

The Committee of Experts for the Development of Human Rights addressed this mandate at its June 2001 meeting. There was little disagreement about the substantive and procedural provisions of the Swedish proposal, which essentially replicate *Protocol No. 6* except that article 2, which allows for capital punishment in time of war and imminent threat of war, has been eliminated. Most of the attention at the expert meeting was directed to the terms of the preamble. The proposed draft has a short preamble that refers to the *European Convention* and *Protocol No. 6*, noting that ‘the abolition of the death penalty is essential for the full recognition of the inherent dignity of all human beings’ and stressing that protection of the right to life ‘is a basic value in a democratic society’. The draft explanatory report traces post-*Protocol No. 6* developments within the Council of Europe, such as the October 1997 Final Declaration at the Second Summit of Heads of State and Government of Member States of the Council of Europe, calling for ‘universal abolition of the death penalty’ and insisting upon ‘the maintenance, in the meantime, of existing moratoria on executions in Europe’. The draft report also takes note of parallel developments within the European Union, and of the exclusion of the death penalty from the *Rome Statute of the International Criminal Court*.

Aside from the development of new normative instruments like *Protocol No. 6* and the new draft protocol, since the mid-1990s the political institutions

¹⁹⁰ Paragraph 14(ii) of Resolution IIB.

of the Council of Europe have aggressively pursued an abolitionist agenda, both within and without Member States. The Council was in a phase of rapid expansion, and several new members in Central and Eastern Europe that still had legislation allowing for the death penalty and, in some cases, still imposed it, had been admitted by the Committee of Ministers. What only a few years earlier had seemed an emerging abolitionist consensus within the organization was in danger of being dramatically diluted. Accordingly, on 18 June 1996, the Parliamentary Assembly requested that three new members of the Council of Europe, Russia, Ukraine and Latvia, abolish capital punishment, threatening them with exclusion if they did not. The Assembly rebuked the Committee of Ministers, urging it to pay more attention to the issue of the death penalty in admitting members to the Council.¹⁹¹

Capital punishment is one of six themes comprising the monitoring procedure of the Committee of Ministers, set up as a consequence of the first Summit of Heads of State and Government held in Vienna in 1993.¹⁹² States have been requested to submit information on capital punishment.¹⁹³ This has led to exchanges in meetings of Ministers' Deputies, some of which have been made public.¹⁹⁴

The relationship between the Council of Europe and Ukraine has been particularly difficult. On joining the Council in November 1995, Ukraine pledged a moratorium on the use of capital punishment. The Parliamentary Assembly had only pronounced itself in favour of admission after Ukraine committed itself to 'put into place, with immediate effect from the day of accession, a moratorium on executions'.¹⁹⁵ But in its 1996 resolution on capital punishment, the Assembly condemned Ukraine for not honouring this commitment, and spoke of consequences if there were further breaches.¹⁹⁶ On 29 January 1997, the Assembly warned the Ukrainian authorities 'that it will take all necessary steps to ensure compliance with commitments entered into', including, if necessary, the non-ratification of the credentials of the Ukrainian parliamentary delegation, at its next session in January 1998.¹⁹⁷ Following reports that thirteen executions had taken place in Ukraine in 1997, and a report by *rapporteur* Renate Wohlwend

¹⁹¹ Resolution 1097 (1996).

¹⁹² The procedure is outlined in detail in a memorandum prepared by the Secretary General's Monitoring Unit: 'Monitoring Procedure of the Committee of Ministers on the Theme Capital Punishment: Collection of Materials Declassified in February 2000', CM/Monitor (2000)3, AS/Inf (2000) 2.

¹⁹³ 'Capital Punishment: Information Submitted by Member States', AS/Inf (1999) 2 and CM/Monitor (99)2 rev., Addendum, AS/Inf (1999) 2 Addendum.

¹⁹⁴ Summary Records, 673rd Meeting of the Ministers' Deputies, 1 June 1999, CM/Del/Act(99)673, paras. 28–56; Summary Records, 683rd Meeting of the Ministers' Deputies, 13 and 17 November 1999, CM/Del/Act(99)683, paras. 11–12.

¹⁹⁵ Opinion No. 190 on the Application by Ukraine for Membership of the Council of Europe.

¹⁹⁶ Resolution 1097 (1996), para. 2. ¹⁹⁷ Resolution 1112 (1997).

who said she could no longer trust the promises of the Ukrainian authorities,¹⁹⁸ the Parliamentary Assembly declared that '[w]hen the credentials of the delegation are examined at one of the next sittings of the Assembly or the Standing Committee, it should be taken into account whether the Ukrainian authorities have lifted the secrecy surrounding executions and have furnished documentary and undeniable proof that a moratorium on executions has been established in Ukraine'.¹⁹⁹ In January 1999, the Assembly adopted a resolution threatening to annul the credentials of the Ukrainian parliamentary delegation if substantial progress towards abolition was not made promptly.²⁰⁰ In May 1999, the Council's Committee on the Honouring of Obligations and Commitments of Member States recommended that Ukraine be suspended from the Council. In June 1999, the Parliamentary Assembly granted that, although certain progress had been made, the process of suspending the Ukrainian delegation's rights should be initiated. The issue was finally resolved on 29 December 1999, when Ukraine's Constitutional Court ruled the death penalty to be contrary to the Constitution and ordered the Parliament to enact legislation abolishing capital punishment. The Constitutional Court invoked the right to life provision of the Constitution, noting that there was no exception allowed for using the death penalty. On 22 February 2000, Ukraine's Criminal Code was amended, replacing the death penalty with life imprisonment.

Belarus, the Russian Federation and Albania have also been challenged by the Parliamentary Assembly. In January 1997, the Parliamentary Assembly of the Council of Europe suspended the Belarus Parliament's special guest status following the constitutional changes introduced by President Lukashenko. At the same time, the Assembly also adopted Resolution 1111 (1997) addressing reports of continuing executions in Russia. The Parliamentary Assembly took action in 1999 against Albania, in a resolution expressing concern at statements by local politicians suggesting its moratorium on capital punishment might be terminated. The Assembly reminded Albania that any retreat on its commitment to introduce an immediate moratorium and to ratify *Protocol No. 6* within three years would have serious consequences for its membership of the Council of Europe. Albania's Constitutional Court, in a judgment of 10 December 1999, declared capital punishment in peacetime to be contrary to the country's new constitution. The abolitionist agenda of the Parliamentary Assembly was also reaffirmed in Resolution 1187 (1999), entitled 'Europe: A Death Penalty-Free Continent', adopted on 26 May 1999.

¹⁹⁸ Honouring of the Commitments by Ukraine to Introduce a Moratorium on Executions and Abolish the Death Penalty, Doc. 7974, 23 December 1997.

¹⁹⁹ Resolution 1145 (1998) Executions in Ukraine, para. 13. See also: Order No. 538 (1998) Executions in Ukraine.

²⁰⁰ Resolution 1194 (1999).

By then, the death penalty had been essentially eradicated within the forty-three Member States of the Council of Europe, comprising a population of 800 million, with the exception of rebel-held parts of Chechnya in the Russian Federation, described by the Parliamentary Assembly as ‘a consequence of a fundamentalist interpretation of the Sharia’.²⁰¹ The Parliamentary Assembly has now set its sights on States with observer status. Two of them, Japan and the United States, continue to impose capital punishment. In the two others, Canada and Mexico, the death penalty has been abolished. In June 2001, *rapporteur* Renate Wohlwend submitted a report to the Parliamentary Assembly recalling that observer States have to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, pursuant to Statutory Resolution (93) 26 on observer status.²⁰² On 25 June 2001, the Parliamentary Assembly adopted a resolution requiring Japan and the United States to put a moratorium on executions without delay, and to take steps towards abolition. The Parliamentary Assembly has set a deadline of January 2003.

7.3 Organization for Security and Cooperation in Europe

European States have brought the death penalty debate to the Organization (formerly the Conference) for Security and Cooperation in Europe (OSCE), but with only rather modest results. Historically, this was explained by the presence of a large number of retentionist States within the organization, including the United States and, until recently, the former republics of the Soviet Union and the States of Central and Eastern Europe. The OSCE is almost certainly the international organization in which the trend towards abolition of the death penalty is the most apparent. In 1998 and 1999 alone, seven participating States abolished the death penalty completely. Now, only the United States and a handful of Asian members of the organization actually impose the death penalty.²⁰³ Capital punishment also remains in force in some separatist, internationally unrecognized entities within the OSCE region: Abkhazia and South-Ossetia (both within Georgia), Chechnya (within the Russian Federation), Nagorno-Karabakh (within Azerbaijan), and Transdniestria (within Moldova).

The question of capital punishment had not been addressed in the documents of the OSCE prior to 1989. That year, in the concluding document of the Vienna Follow-Up Meeting, the participating States simply ‘note[d]’ that capital punishment had been abolished ‘in a number of them’. Participating States that

²⁰¹ See: Doc. 8340, para. 44.

²⁰² Abolition of the Death Penalty in Council of Europe Observer States, Doc. 9115, 7 June 2001.

²⁰³ Belarus, Kazakhstan, Kyrgyzstan, Turkmenistan, United States and Uzbekistan.

had not abolished the death penalty committed themselves to imposing it '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 their international commitments', a provision that echoes article 6§1 of the *International Covenant on Civil and Political Rights*. Furthermore, participating States agreed to keep the question of capital punishment under consideration, and to co-operate on the issue within relevant international organizations.²⁰⁴

The issue returned almost immediately within the context of OSCE initiatives on the human dimension, as abolitionist States attempted to build on the cautious statement in the Vienna Document. A proposal from Portugal, Austria, Cyprus, France, the Federal Republic of Germany, Greece, Italy, Liechtenstein, Luxemburg, the Netherlands, San Marino, Spain and Switzerland noted that the death penalty was being abolished in 'most of the legal systems of the participating States within the context of an international human rights movement' and called for 'progressive abolition in peacetime' of the death penalty where it still exists.²⁰⁵ However, the text was never adopted. In 1990, at the Copenhagen meeting of the Conference on the Human Dimension, there was a similar initiative. Reflecting recent political changes within Europe, the resolution was supported not only by its traditional Western European sponsors, but also by Czechoslovakia, the German Democratic Republic and Romania.²⁰⁶ It took note of the adoption by the United Nations General Assembly, in December 1989, of the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, called upon participating States to exchange information on national measures taken towards the abolition of the death penalty, and affirmed the principle of progressive abolition of the death penalty in peacetime where it still existed. A competing proposal, from Austria and the Scandinavian States, also called for an exchange of information, but eliminated reference to the desirability of progressive abolition.²⁰⁷ This second text appears to have been the basis of the tame provisions that were finally incorporated into the *Document of the Copenhagen Meeting*.²⁰⁸ Similar pronouncements have appeared in the document of the 1991

²⁰⁴ *A Frame Work for Europe's Future, Concluding Document of the Vienna Follow-Up Meeting, 1989*, para. 24 (see Appendix 18, p. 433).

²⁰⁵ 'Abolition of the Death Penalty, Proposal Submitted by Portugal, Austria, Cyprus, France, the FRG, Greece, Italy, Liechtenstein, Luxemburg, the Netherlands, San Marino, Spain and Switzerland', OSCE Doc. CSCE/CDHP.28, 19 June 1989.

²⁰⁶ 'Abolition of the Death Penalty, Proposal Submitted by the Delegation of Portugal, and Those of Belgium, Cyprus, Czechoslovakia, France, the GDR, the FRG, Greece, Ireland, Italy, Liechtenstein, Luxemburg, the Netherlands, Romania, San Marino, Spain and Switzerland', OSCE Doc. CSCE/CHDC.18, 6 June 1990.

²⁰⁷ 'Abolition of the Death Penalty, Proposal Submitted by the Delegations of Austria, Denmark, Finland, Iceland, Norway and Sweden', OSCE Doc. CSCE/CHDC.13, 8 June 1990.

²⁰⁸ *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, art. 17 (see Appendix 18, p. 433).

Moscow Meeting on the Human Dimension,²⁰⁹ and they were reaffirmed at the 1992 Helsinki Summit and the 1994 Budapest Summit.²¹⁰

Paragraph 17.7 of the *Copenhagen Document* declares that the participating States 'will exchange information within the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration'. Under paragraph 17.8, they are to make information on the death penalty available to the public. In this context, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) has been asked to act as a clearing house. However, some of the participating States have refused to disclose information regarding capital punishment, in violation of their commitments. A recent publication of the OSCE noted that '[s]everal governments, including the governments of Belarus, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan, regard information related to capital punishment as a state secret and refuse to disclose relevant material – a practice that is in clear contradiction to paragraph 17.8 of the Copenhagen Document'.²¹¹

Abolition of the death penalty has been regularly addressed at the Supplementary Human Dimension Meetings, which are organized jointly by the OSCE Chairman-in-Office and ODIHR. It was considered at the Implementation Meeting on the Human Dimension, held in Warsaw in late 1993, under the agenda item 'Exchange of information on the question of the abolition of the death penalty'. The question returned at the 1995 Implementation Meeting on the Human Dimension, but again there was no significant evolution in the Organization's position. However, at the November 1997 Implementation Meeting on Human Dimension Issues, held in Warsaw, a recommendation on abolition of the death penalty was adopted. It states: 'The OSCE participating States should consider introducing measures aimed at facilitating the exchange of information on the question of the abolition of capital punishment to which they are already committed under existing OSCE provisions.' The recommendation slightly strengthened the effort of the OSCE's Office for Democratic Institutions and Human Rights as a clearing-house of information on the abolition of capital punishment in participating States. At the 1998 Implementation Meeting, the fact that some of the participating States did not disclose details about their use of capital punishment and had not made basic information public, in violation of OSCE commitments, was also noted. Recommendations from the discussion included: urging all OSCE countries to abolish the death penalty as soon as possible (specific concerns were raised regarding the execution

²⁰⁹ *Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE*, para. 36 (see Appendix 18, p. 434).

²¹⁰ *Budapest Document 1994, Towards a Genuine Partnership in a New Era, Budapest Decisions*, VIII, §19 (see Appendix 18, p. 434).

²¹¹ 'The Death Penalty in the OSCE Area', ODIHR background paper prepared for the seminar on 27 March 2000, 'Human Rights and Inhuman Treatment or Punishment'.

of juvenile or mentally impaired offenders), asking the OSCE to consider introducing concrete measures designed to facilitate the exchange of information on the question of the abolition of the capital punishment, and having participating States 'encourage ODIHR and OSCE Missions, in cooperation with the Council of Europe, to develop activities aimed at raising awareness against recourse to the death penalty, particularly with media circles, law enforcement officials, policy-makers, and the general public'.

During the 1999 Review Conference, held in Vienna and Istanbul, steps towards the abolition of the death penalty taken by several OSCE participating States were mentioned. Many at the Conference called for the abolition of the death penalty, or at least for the establishment of a moratorium. The conference called upon the OSCE participating States that still retain the death penalty 'to provide information at each human dimension implementation meeting on its use, comprising the scope of capital crimes, the respect for due process, possibilities for appeal, the number of persons executed in the previous year, and other relevant data'.²¹²

The OSCE held a Supplementary Human Dimension Meeting on Human Rights and Inhuman Treatment or Punishment, in March 2000 in Vienna, that included a session entitled 'Exchange of Information on Capital Punishment in the OSCE Region'. A number of recommendations emerged along the lines of previous OSCE commitments, with retentionist States being urged to ratify the abolitionist protocols, to consider imposing a moratorium, and to publish detailed information on a regular basis. There was a particular focus on the need to raise public awareness on the subject, for example by encouraging respected public figures to take positions in favour of abolition. The OSCE itself was urged to 'consider stability and security aspects of the use of the death penalty especially in political cases, for example in Central Asia'. These points were reaffirmed at the Implementation Meeting on Human Dimension Issues held in October 2000, in Warsaw.

7.4 European Union

The European Union is currently composed of fifteen Member States essentially from Western and Southern Europe, although expansion into Eastern Europe is to be expected within the early years of the twenty-first century. It is the direct descendant of efforts that date to the 1950s to promote greater economic and, later, political integration among its members. Although this was not always the case, the death penalty has been abolished by all members of the European

²¹² 'The Death Penalty in the OSCE Area'.

Union, and is a condition of admission for any new members.²¹³ For many years, the European Union did not particularly concern itself with human rights issues such as the death penalty, leaving these to the Council of Europe whose composition was similar though far from identical. More recently, though, the European Union, through its three main component parts, the European Parliament, the European Commission and the European Council, has taken an increasingly dynamic role in efforts to abolish capital punishment internationally. The question has become a pillar in its foreign policy.

Death penalty issues were first raised in the early 1980s in the European Parliament, when a resolution called for abolition of the death penalty in the European Community.²¹⁴ In 1986, the European Parliament called upon its Member States to ratify *Protocol No. 6 to the European Convention on Human Rights*.²¹⁵ In 1989, the European Parliament adopted the 'Declaration of Fundamental Rights and Freedoms', which proclaimed the abolition of the death penalty.²¹⁶ In 1990, the President of the European Parliament announced that he had forwarded a motion for a resolution on abolition of the death penalty in the United States.²¹⁷ Subsequently, the Political Affairs Committee appointed a rapporteur on the subject, Maria Adelaide Aglietta. A 1992 resolution of the European Parliament called upon those Member States whose legislation still provided for the death penalty, namely Greece, Belgium, Italy, Spain and the United Kingdom, to abolish it altogether. It also urged all Member States that had not yet done so to ratify *Protocol No. 6* as well as the *Second Optional Protocol to the International Covenant on Civil and Political Rights*. Member States were to refuse extradition to States where capital punishment still exists, unless sufficient guarantees that it will not be provided were obtained. The resolution also stated that the European Parliament '[h]opes that those countries which are members of the Council of Europe, and have not done so, will undertake to abolish the death penalty (in the case of exceptional crimes, this applies to Cyprus, Malta and

²¹³ 'Communication from the Commission to the Council and the European Parliament, the European Union's Role in Promoting Human Rights and Democratisation in Third Countries', COM (2001) 252 final (8 May 2001), p. 16. In a speech to the European Parliament on 24 October 2000, the European Commissioner for External Relations, Chris Patten, stated that all candidate members for the European Union have abolished the death penalty.

²¹⁴ E.C. Doc. 1-20/80, 13 March 1980; E.C. Doc. 1-65/81; *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 116–129. The Irish extremist Ian Paisley spoke against the proposal, as did some Greek members. The Report was adopted on 18 June 1981: *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 225–228; E.C. Doc. A 2-167/85, Doc. B 2-220/85; *Official Journal of the European Communities, Debates of the European Parliament*, No. 2-334, Annex, pp. 300–303.

²¹⁵ E.C. Doc. A2-0187/85; *Official Journal of the European Communities, Debates of the European Parliament*, C 36, 17 February 1986, p. 214.

²¹⁶ *Official Journal of the European Communities, Debates of the European Parliament*, Annex, No. 2-377, pp. 56–58, 74–79, 151–155; E.C. Doc. A 2-3/89.

²¹⁷ E.C. Doc. B3-0605/89. See also: E.C. Doc. B3-0682/90; E.C. Doc. B3-1915/90.

Switzerland, and in the case of both ordinary and exceptional crimes, to Turkey and Poland), together with those countries which are members of the CSCE, in which the death penalty still exists (Bulgaria, United States of America, Commonwealth of Independent States, Yugoslavia, Lithuania, Estonia, Latvia, and Albania)'. It urged the United Nations to adopt a 'binding decision imposing a general moratorium on the death penalty'.

The *Amsterdam Treaty*, which was adopted on 2 October 1997 and came into force on 1 May 1999, was the first of the legal instruments that underpin the European Union to speak of the death penalty. It provides the organization as a whole with a mandate to promote abolition. In addition to a general affirmation that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States',²¹⁸ the Final Act includes a number of declarations, of which the first is a 'Declaration on the Abolition of the Death Penalty':

With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty.

In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them.

The *Charter of Fundamental Rights* of the European Union was adopted at Nice in December 2000, following a decision to prepare such an instrument taken at the European Council of Cologne, in June 1999. The *Charter* was intended to reflect the fundamental rights guaranteed by the *European Convention on Human Rights*, as well as those derived from constitutional traditions common to Member States and general principles of community law. The *Charter* is not a treaty and is without binding effect, although there would be little quarrel among Member States with a claim that it codifies European human rights norms dealing with capital punishment. Article 2, entitled 'Right to Life', states;

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Additionally, article 19§2 declares: 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected

²¹⁸ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, OJ C 340, 10 November 1997, art. F(a)(1).

to the death penalty, torture or other inhuman or degrading treatment or punishment.²¹⁹

The *Amsterdam Treaty* and its declaration on capital punishment was the impetus for the General Affairs Council of the European Union to adopt, on 29 June 1998, the 'Guidelines to EU Policy Towards Third Countries on the Death Penalty'.²²⁰ The EU's objectives, according to the Guidelines, are 'to work towards universal abolition of the death penalty as a strongly held policy view agreed by all EU Member States' and 'where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards'. The 1998 Guidelines include a list of 'minimum standards' to be used in auditing third States that still maintain capital punishment. In a general sense, these follow the classic statements of limitations on capital punishment that are found in article 6 of the *International Covenant on Civil and Political Rights* as well as in the 1984 resolution of the Economic and Social Council entitled 'Safeguards Guaranteeing Protection of those Facing the Death Penalty'.²²¹ In some respects, they attempt to push the law somewhat further, although they do not attempt to expand the categories of persons upon whom the death penalty may be imposed. Thus, they determine that the death penalty may not be imposed for juvenile offences, upon pregnant women and young mothers, and upon the insane, but they do not extend the list to cover the mentally disabled,²²² a category recognized by the Economic and Social Council in its 1988 resolution,²²³ and the elderly, a prohibited category according to article 4 of the *American Convention on Human Rights*.²²⁴

The European Union Guidelines declare that '[t]he death penalty should not be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience'. They also affirm that anyone sentenced to death shall be entitled to submit an individual complaint under international procedures; the death sentence is not to be carried out while the complaint remains under consideration. It is not to be imposed in violation of a State's international commitments. The Guidelines state that '[t]he length of time spent

²¹⁹ *Charter of Fundamental Rights*, OJ C 364/1, 18 December 2000.

²²⁰ 'Guidelines for EU Policy Towards Third Countries on the Death Penalty', in European Union Annual Report on Human Rights, 11317/00, p. 87.

²²¹ ESC Res. 1984/50. These are discussed in Chapter 4, at pp. 168–173.

²²² The 1998 document refers to the 'insane', which is the same language employed in the 1984 Safeguards. But in a 2000 publication of the Commission, this is changed to the 'mentally ill', which is clearly a broader term than 'insane' although a narrower one than 'mentally disabled' (European Union Annual Report on Human Rights, 11317/00, p. 29). The EU Memorandum on the Death Penalty, in European Union Annual Report on Human Rights, 11317/00, p. 84, says it is concerned about the execution of 'persons suffering from any form of mental disorder'. In 2001, the European Union intervened in a case before the United States Supreme Court as *amicus curiae* in support of a defendant arguing that it was illegal to execute the mentally disabled.

²²³ ESC Res. 1989/64.

²²⁴ *American Convention on Human Rights*, (1979) 1144 UNTS 123, OASTS 3, art. 4§5.

after having been sentenced to death may also be a factor' in determining whether or not to impose capital punishment. With respect to manner of execution, the Guidelines declare that the death penalty should be carried out 'so as to inflict the minimum possible suffering', and that it may not be carried out in public or in any other degrading manner. Finally, '[t]he death penalty shall not be imposed as an act of political revenge in contravention of the minimum standards, e.g. against coup plotters'.

Pursuant to the Guidelines, the EU has adopted a practice of communicating with third governments (*démarches*) with the goal of achieving formal or *de facto* moratoriums on executions and the eventual abolition of the death penalty. For example, on 10 May 2001, the EU sent a *démarche* to the United States reiterating its opposition to the use of the death penalty under any circumstances and expressing concern about the relatively high number of executions.²²⁵ In December 1999, the European Union embassies in Washington drew up a document entitled 'Common EU Embassy Actions on Death Penalty in the US'. In addition to the United States, the EU has addressed the use of the death penalty with numerous other countries in recent years.²²⁶ China, in particular, has been the focus of several initiatives, including the organization of seminars with Chinese academics and officials on the subject.²²⁷ The European Union says it is 'particularly concerned about those countries which execute large numbers of prisoners (e.g., China, Democratic Republic of Congo, Iran, Iraq and United States of America), as well as cases where countries have resumed executions or which have withdrawn from international safeguards aimed at preventing miscarriages of justice, such as Trinidad and Tobago and Peru'.²²⁸

In addition to these general *démarches*, the EU has protested the death sentences of individual prisoners where execution violates the minimum standards set forth in its Guidelines. In the case of the United States alone, it has taken such initiatives by writing to governors and other officials in Arizona, Illinois, Georgia, Nevada, New Hampshire, Missouri, Ohio, Oklahoma, Tennessee, Texas and Virginia. The European Union has also intervened in proceedings

²²⁵ See 'EU Policy on the Death Penalty', Press Release, Embassy of Sweden, Washington, 10 May 2001. A similar *démarche* was issued in February 2000 (European Union Annual Report on Human Rights, 11317/00, p. 30).

²²⁶ The European Union has raised the issue of capital punishment with the governments of Antigua and Barbuda, Benin, Burundi, the Bahamas, China, Cuba, Guyana, India, Iran, Kyrgyzstan, the Palestinian Authority, Jamaica, Pakistan, the Philippines, Uganda, Tajikistan, Thailand, Trinidad and Tobago, Turkey, the United Arab Emirates, the United States, Uganda, Uzbekistan, Vietnam, Yemen and Zimbabwe.

²²⁷ See, for example: Communiqué on China at 2000 Commission on Human Rights, adopted at 2249th Meeting of Council (General Affairs), Brussels, 20 March 2000, which noted 'with distress the frequent use of the death penalty in China', and the 'use of death penalty for non-violent crimes, including those of an economic nature' (p. 126, para. 5).

²²⁸ European Union Annual Report on Human Rights, 11317/00, p. 49.

in the Supreme Court of the United States as an *amicus curiae*, supporting the appeal of Ernest Paul McCarver in arguing that execution of the mentally disabled is contrary to international law.²²⁹

European Council directives concerning development cooperation support initiatives to abolish the death penalty.²³⁰ The European Commission has provided substantial funding to non-governmental organizations in their efforts to promote abolition of capital punishment throughout the world. As part of the €100 million budget of the European Initiative for Democracy and Human Rights (EIDHR), the European Commission has backed projects aimed at reducing the use of the death penalty, such as publicizing the ineffectiveness of capital punishment as a mechanism to reduce crime.²³¹ For example, in 2000 the Free Legal Assistance Group (FLAG) Human Rights Foundation, based in the Philippines, was awarded a grant of €200,205 to provide legal services for capital prisoners. The London-based NGO Penal Reform International has received €512,952 to provide legal assistance for death row prisoners in the Caribbean. The Centre for Studies of Capital Punishment at the University of Westminster, in London, has received €675,859 for a range of projects focused on the death penalty in the United States.²³²

The European Parliament, which initiated European Union interest in the subject of capital punishment, has accelerated its activities in recent years. In February 1999, the European Parliament criticized the failure of the United States to abide by its commitments under the *Vienna Convention on Consular Relations*.²³³ On 6 May 1999, the Parliament welcomed the adoption of a resolution by the Commission on Human Rights and requested that the issue of a moratorium on capital punishment be introduced on the agenda of the United Nations General Assembly later in 1999.²³⁴ The European Union's Council subsequently decided to submit a resolution. The decision was again endorsed by the European Parliament, which added the suggestion that a *rapporteur* be

²²⁹ *McCarver v. North Carolina*, Brief of *amicus curiae*, the European Union in Support of the Petitioner, 10 June 2001.

²³⁰ Council Regulation (EC) no. 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms', art. 2(2), Council Regulation (EC) No. 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries', art. 3(2)(a).

²³¹ See Communication from the Commission to the Council and the European Parliament: The European Union's Role in Promoting Human Rights and Democratization in Third Countries, 8 May 2001, p. 13.

²³² Commission Staff Working Document: Report on the Implementation of the European Initiative for Democracy and Human Rights in 2000, pp. 14–15.

²³³ Resolution B4-0188/99. ²³⁴ Resolution B4-0461, 0473, 0475, 0480, 0496, 0502/99.

appointed to ensure implementation of the draft resolution.²³⁵ When the resolution floundered, the Parliament deplored this development.²³⁶

In July 1999, the European Parliament called upon Turkey to commute the death sentence imposed upon Abdullah Öcalan, noting that the execution could impede Turkey's admission into the European Union. It also called upon the Turkish Government to change its *de facto* moratorium on capital punishment into formal, legal abolition.²³⁷ An *ad hoc* committee of the Parliament attended proceedings in the Öcalan case, concluding that he was given a fair hearing by the Court of Cassation but that 'the death penalty was unacceptable as contrary to the norms and standards of the Council of Europe'.²³⁸ The European Parliament also condemned use of the death penalty for persons convicted of espionage by Iran.²³⁹ It urged Jamaica to reverse its decision to withdraw from the *Optional Protocol to the International Covenant on Civil and Political Rights*, and appealed to Trinidad and Tobago and Barbados not to follow Jamaica's example.²⁴⁰ It urged El Salvador not to extend the scope of capital punishment to rape and violent killings, something that would violate the country's obligations under the *American Convention on Human Rights*.²⁴¹ The European Parliament has denounced the death sentences imposed in the United States upon Joaquin José Martínez, Mumia Abu Jamal, Larry Robinson,²⁴² Derek Rocco Barnabei²⁴³ and Juan Raul Garza.²⁴⁴ In a resolution of October 2000, the European Parliament reiterated its belief that the abolition of capital punishment constitutes part of the *acquis éthique* of the European Union. It called on the Commission to report on the initiatives it supports aimed at the abolition of the death penalty and the promotion of a universal moratorium on capital punishment.²⁴⁵

7.5 Conclusion

The day appears not far off when capital punishment will be eradicated from the European continent. Abolition of the death penalty has become indispensable for full participation in such organizations as the Council of Europe and the European Union. In this way, Europe signals that prohibition of capital

²³⁵ Approved by Resolution B5-0144, 0155, 0159, 0169, 0171/1999, 7 October 1999.

²³⁶ Resolution B5-0272, 0274, 0282, 0283, 0284, 0287, 0297, 0306/1999. For the discouraging results of this initiative in the United Nations General Assembly, see pp. 000–000.

²³⁷ 'Resolution on the Death Sentence of A. Öcalan and the Future of the Kurdish Question in Turkey', B5-0006, 0012, 0018, 0023, 0026/99, 22 July 1999.

²³⁸ 'Ad Hoc Committee to Ensure the Presence of the Assembly at the Trial of Abdullah Öcalan', Doc. 8596, 15 December 1999, para. 14.

²³⁹ Resolution B5-0079, 0093, 0098, 0107/1999, 16 September 1999.

²⁴⁰ Resolution B4-0340/98, 12 March 1998. ²⁴¹ Resolution B4-0821/98, 17 September 1998.

²⁴² Resolution B5-0272, 0274, 0282, 0283, 0284, 0287, 0297, 0306/1999, 18 November 1999.

²⁴³ Resolution B5-0613, 0624, 0631, 0638/2000, 6 July 2000.

²⁴⁴ Resolution B5-0341, 0359, 0370, 0376/2000, 13 April 2000.

²⁴⁵ Resolution B5-0804/2000, 26 October 2000.

punishment forms part of the central core of human rights. It now seems appropriate to consider abolition of the death penalty to be such a customary norm, at least within Europe. The rapid emergence of this customary norm prohibiting the death penalty within Europe itself, where capital punishment was still being practised in France, Spain and Portugal as late as the 1970s, also indicates how quickly the principle may progress elsewhere in the world. Nobel prize-winning French philosopher Albert Camus, an outspoken abolitionist, was indeed prophetic when he wrote: 'Dans l'Europe unie de demain . . . l'abolition solennelle de la peine de mort devrait être le premier article du Code européen que nous espérons tous.'²⁴⁶

²⁴⁶ Albert Camus, 'Réflexions sur la guillotine', in Arthur Koestler and, Albert Camus, *Réflexions sur la peine capitale*, Paris: Pluriel, 1979, p. 176.

