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## Comments

# The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency

Geoffrey Sawyer\*

The conviction of Amina Lawal in Nigeria for committing adultery and sentence of death by stoning created an international outcry of support to overturn her sentence.<sup>1</sup> The support she received is a reflection of the outrage many around the world feel toward this particular method of execution, and in a larger context the growing social norm that the death penalty should be abolished. As more of the world looks upon the death penalty as unfair, or cruel and unusual, or as torture, arguably, a jus cogens norm prohibiting the death penalty has developed

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\* J.D., Penn State University Dickinson School of Law, May 2004; B.A. Hamilton College, 1997. I would like to thank my parents for being the inspiration for this comment. Thank you for always challenging me and encouraging me to think outside the box. I would also like to thank CEC for being my number one supporter; I truly could not have done it without you.

1. Merton Amnesty Group, *Amina Lawal Must Not Face Death by Stoning*, available at <http://www.mertonai.org/amina>, (last visited 11/04/02) [hereinafter *Merton Amnesty Website*]. On September 27, 2002, Amnesty International, and Merton Amnesty presented a petition on behalf of the life of Amina Lawal signed by 1.3 million people from around the world. The website claims that this effort was one of the largest "mobilizations in the history of the Internet." In addition, world leaders along with worldwide organizations have protested this sentence.

in international law, and will ultimately be the vehicle by which the death penalty will be abolished worldwide.

Part I of this comment will detail the plight of Amina Lawal, and how her situation is indicative of the globalization of human rights norms. In Part II, this comment will examine the meaning of a *jus cogens* norm and how it can be established in the context of capital punishment. Using human rights treaties, the law and practice of other nations, and international tribunal decisions, Part III will assert, citing other contexts, such as the "right to life," and the already entrenched *jus cogens* norm prohibiting torture, that a *jus cogens* norm abolishing the death penalty has arguably already been established. Finally, Part IV will assess what the effect of the establishment of a *jus cogens* norm prohibiting capital punishment would be in the United States as it relates to the U.S Supreme Court's "evolving standard of decency" test for what constitutes cruel and unusual punishment.

## I. Amina Lawal's Story

Amina Lawal is a Nigerian citizen who was sentenced by a Shari'ah court to die by stoning on March 22, 2002. She allegedly confessed to having a child while divorced, which is *prima facie* evidence to convict a woman of adultery, and the resulting sentence of death by stoning under Shari'a law.<sup>2</sup>

Under the same law, a man cannot be convicted unless there are four witnesses to the act, and therefore, the father of Amina's child had the charges dropped.<sup>3</sup> Amina did not have an attorney during the first trial when the sentence was imposed, and subsequent appeals have failed.<sup>4</sup>

It is widely argued that the sentence violates Nigeria's Constitution, but under Nigerian law, Regional States can enact laws that may be contrary to federal law.<sup>5</sup> The official position of the Nigerian President has been contradictory. On one level, President Obasanjo has condemned the sentence,<sup>6</sup> yet the Nigerian Government as of this writing

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2. Amnesty International, *Nigeria: How Much More Suffering Under Sharia Penal Legislation*, available at [http://www.web.amnesty.org/web/content.nsf/pages/gbr\\_nigeria#action](http://www.web.amnesty.org/web/content.nsf/pages/gbr_nigeria#action) (last visited 1/15/03).

3. *Id.*

4. *Id.*

5. Merton Amnesty Website (last visited 01/15/03), *supra* note 1.

6. Amnesty International Press Release, *Nigeria: Amina Lawal—the Nigerian government's double speech*, November 14, 2002, available at <http://web.amnesty.org/ai.nsf/print/AFR440222002?OpenDocument> (last visited 1/19/03). President Obasanjo stated in a public appearance in October 2002, "... we cannot imagine or envisage a Nigerian being stoned to death (...) it has never happened. And may it never happen."

has refused to intervene, in spite of apparent authority to do so.<sup>7</sup>

#### A. *International reaction*

The international reaction to Amina's case has been nearly universal in its condemnation. Mexico's President Vicente Fox has been one of the loudest voices, personally voicing his concerns to the Nigerian Government.<sup>8</sup> Many nations including France, New Zealand, Sweden and Australia also decried the sentence.<sup>9</sup> The European Union (EU) issued strong statements in support of the sentence being overturned, also revealing the EU's position on the death penalty as a whole: "Our position on the death penalty is clear: We are against it. And we are concerned by this case as we would be by any other countries on a similar issue."<sup>10</sup> In addition, the United States State Department voiced concerns over the case, and urged Nigeria to ensure that Lawal's due process rights are not abrogated.<sup>11</sup>

In the world of public opinion, the reaction has also been very strongly in support of Lawal. Nearly 1.3 million people from over 100 countries signed an Amnesty International internet petition protesting the sentence, making it Amnesty International's most successful Internet campaign ever.<sup>12</sup> Even some participants in the Miss World pageant, which was held in Nigeria in late 2002, boycotted the pageant in support of Lawal.<sup>13</sup> Other human rights groups mobilized their constituencies by

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7. See *id.* On November 4, 2002, Nigerian Foreign Minister Sule Lamido reportedly defended the use of Shari'a law, and its application to Amina.

8. Lekan Awojoodu, THE U.S. AFRICAN VOICE ONLINE, *Shari'a—A Selective or Religious Punishment*, available at <http://www.usafricanvoice.com/sharia.htm> (last visited 1/20/03). President Fox is also noteworthy for his public opposition to the U.S.'s stance on the death penalty, canceling a trip to Texas to protest the execution of a Mexican citizen. *Id.*

9. Tobi Soniyi, Stanley Yakubu, and Francis Famoroti, *Federal Government Takes Over Battle to Save Amina—US, EU react*, ECONDAD Website, available at <http://www.econdad.org/LawalBackground.htm>, (last visited 1/19/03) [hereinafter *ECONDAD website*].

10. *Id.*

11. *Id.* ECONDAD's report on the Global reaction to Lawal's case included this quote: "In its reaction, the US called on authorities in Nigeria to ensure that Amina is given due process in the appeal process. 'To date, we understand that no sentences of stoning have been carried out in Nigeria,' the Deputy State Department spokesman Phillip Recker told reporters in Washington." Independent efforts to get an official United States reaction to Amina's case proved futile.

12. Amnesty International USA, *Monthly Update 10/02*, available at <http://www.amnestyusa.org/artistsforamnesty/oct2002.html> (last visited 01/15/03). According to the Amnesty website, after the Amina Lawal story was profiled on the Oprah Winfrey Show, nearly fifteen E-mails were sent every second to the Nigerian Embassy.

13. CNN.COM, *Miss Denmark joins shari'a boycott*, October 3, 2002, available at <http://www.cnn.com/2002/WORLD/europe/10/03/nigeria.denmark/> (last visited 1/20/03).

urging them to send petitions and letters of support to President Obasanjo.<sup>14</sup>

### B. *Saifiya Husaini*

Almost at the same time as Lawal was sentenced, another Nigerian woman, Safiya Husaini, was acquitted on an apparent technicality after she had been sentenced to die by stoning for committing adultery.<sup>15</sup> Husaini was also a divorced mother who had a child, (the father of her child was her ex-husband), and her case ignited a similar reaction from the international community.<sup>16</sup> The international human rights community attributes the reversal in Husaini's case to the massive international human rights campaign and political pressure put on the Nigerian Federal Government.<sup>17</sup>

### C. *Implications of Amina and Safifiya's cases*

The nearly universal opposition to these two cases is indicative of the globalization of human rights issues,<sup>18</sup> and the countries that have

As of the date of the CNN story, contestants from Spain, France, Belgium, Switzerland, and Denmark had boycotted. The boycotts originally led to the Nigerian government's assurance that Amina would not be stoned, but no official action has occurred as of this writing.

14. ECONDAD website, *supra* note 9. Just a sampling of human rights groups involved include: Human Rights Watch; National Organization for Women; Civil Liberties Organisation (CLO); Committee for the Defence of Human Rights (CDHR); Campaign for Democracy (CD); and the National Coalition on Violence Against Women who described the ruling as "barbaric" and a "cruel and inhuman application of Sharia law."

15. Brian Carnell, EquityFeminism.Com, *Nigerian Woman's Adultery Death Sentence Thrown Out*, March 27, 2002, available at <http://www.equityfeminism.com/articles/2002/000048.html> (last visited 1/20/03).

16. See International Human Rights Campaign, *Shari'ah Law, Adultery and Rape*, available at <http://www.ishr.org/activities/campaigns/stoning/adultery.htm> (last visited 1/19/03). "Safiya Husaini's fate led to world-wide protests, amongst which protest by 77 MPs of the European Parliament and by a parliamentary assembly from 130 countries in the capital of Morocco, Rabat."

17. See *id.* "The protests had the effect that the Nigerian Minister of Justice declared in his letter of 18 March 2002 to the governors of the federal states which had introduced shari'ah law that shari'ah was unconstitutional, because it officially was only applicable to Muslims."

18. See Jerome J. Shestack, *Globalization of Human Rights Law*, 21 *FORDHAM INT'L L.J.* 558 (1997). The author argues that starting from the Universal Declaration of Human Rights through the Covenant on the Rights of the Child, a body of treaties have been introduced and then come into force establishing a globalization of human rights.

Gradually, these treaties came into force as the requisite number of states assented. By now, we have a full, comprehensive and impressive body of substantive international law to protect the rights of the individual. It can, therefore, be said that human rights standards have now been globalized.

*Id.* at 559-560.

condemned the sentences of these two women have cited to human rights entrenched in treaties and other positive law sources as the foundation for their objections.<sup>19</sup> In addition, with the advent of the Internet and global news outlets, no conduct is beyond the concerned eyes of the world. The implication is that the conduct of each state is now being viewed through a much broader lens, and a much larger audience determines the standard for what constitutes “human rights” violations.

Because of increased scrutiny by the world, individual States can no longer unilaterally decide what is humane without incurring intense backlash from the international human rights community, and arguably, without changing their views. The support Lawal has received is a reflection of how human rights is now a global issue, and *jus cogens* norms mark the standard by which “human rights” are defined.

## II. *Jus Cogens*

### A. *Defining the scope of jus cogens*

Simply stated, *jus cogens* norms are principles of law that are deemed the most fundamental and highly valued that the norm actually invalidates past or future agreements between individual states.<sup>20</sup> What gives *jus cogens* norms their force is that states are not free to derogate from these norms.<sup>21</sup> Ultimately, it has been argued that *jus cogens* norms create a basic and fundamental “international constitution,” and state laws that violate this “international constitution” are void as if they were in violation of a state constitution.<sup>22</sup> Thus, international legal scholars often cite to *jus cogens* norms to support substantive claims for policy change.<sup>23</sup>

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19. See, e.g., Amnesty International USA, *Death by Stoning Upheld in the Case of Nigerian Woman Amina Lawal*, August 20, 2002 (Press Release) available at <http://www.amnestyusa.org/news/2002/nigeria08202002.html> (last visited 1/20/03). In its call to mobilize its members in the battle to save Amina Lawal, Amnesty International USA proclaims Lawal's sentence as violative of the ICCPR Article 7 and the Convention Against Torture.

20. Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 587 (1988).

21. Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 362 (1988). The author argues that by its nature and utility, a *jus cogens* norm is so fundamental that it serves as a backbone for the International community's legal system.

22. See Viktor Mayer-Schönberger & Terre E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 92 (1995). The authors cite to international law scholars Marek, Fauchille, Scelle, Menzel, and Quadri to make this conclusion.

23. See Christenson, *supra* note 20, at 615, note 127. Christenson cites various scholars who have attempted to use *jus cogens* to distinguish human rights norms, to invalidate the proliferation of nuclear weapons, to prevent the right of self-defense under

### B. *The foundation of jus cogens*

The fundamental principle behind jus cogens is that there are certain rights and customs that are so ingrained in the international order that they become preemptory norms.<sup>24</sup> Jus cogens are often described as having a higher status in international law than general customary law, and are norms that “set the very foundations of the international legal system.”<sup>25</sup>

Article 53 of the Vienna Convention establishes the principle of jus cogens,<sup>26</sup> and the Restatement of the Foreign Relations Law recognizes that jus cogens “is now widely accepted . . . as a principle of customary law.”<sup>27</sup> The roots of jus cogens are founded in natural law theory and have moral underpinnings requiring their recognition, at least in theory, by the international community.

#### 1. Natural law theory.

Natural law theory is founded upon the supposition that the law is ultimately a reflection of moral tenets that have been shaped by reason and conscience over time.<sup>28</sup> Tangentially, jus cogens is predicated on the theory that certain laws and practices are so fundamental to the human race, that they become the binding law of the international community.<sup>29</sup>

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Article 51 of the United Nations Charter, and to support the progress of the socialist movement.

24. *See id.* at 586. The author states that the concept of jus cogens would prevent several states from, for example, agreeing to “enslave a minority of people, to liquidate a race, to brutalize dissidents, or to use force against another state.” *Id.*

25. Janis, *supra* note 21, at 363.

26. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N.T.S. Regis No. 18, 232, U.N. Doc. A/CONF.39/27 (27) reprinted in 63 AM. J. INT’L L. 875 (1969) [hereinafter *Vienna Convention*]. Article 53 defines jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The United States is not a party to the Convention but has described the Convention as “the authoritative guide to current treaty law and practice.” INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH, (Jeffrey L. Dunoff, Steven R. Ratner, David Wippman eds.), Chapter 1, 39 (Aspen 2002).

27. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (revised) § 102 reporter’s note 6 (Tent. Draft No. 6, 1985). Many scholars cite § 102 as justifying jus cogens norms and their importance in the law of the United States.

28. *See* Kha G. Nguyen, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEO. WASH. J. INT’L L. & ECON. 401, 417 (Citing Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 780 (1988)).

29. *See* Christenson, *supra* note 20, at 586. The author states that the concept of jus cogens would prevent several states from, for example, agreeing to “enslave a minority of people, to liquidate a race, to brutalize dissidents, or to use force against another state.”

The significance of the correlation between jus cogens and natural law theory is that as the world becomes smaller, in terms of economics, social practices, and politics, it follows that the moral tenets which shape the natural law will be shared by more and more of the world, and thus, more international law will become natural law, and in turn there will be more jus cogens norms.<sup>30</sup>

Another widely held theory of international law is the theory of legal positivism. Legal positivists argue that individual nation states make their laws based on political versus moral underpinnings.<sup>31</sup> Therefore, in order to assert that jus cogens norms are universally recognized in international law, at the very least within certain areas of the law, the theory of jus cogens must be reconciled with the theory of legal positivism.

## 2. Compatibility with legal positivism

Legal positivism is founded upon the principle that individual nation states make their own positive law, or statutory law, constitutions, and treaties, based on solely political considerations and not on global human rights.<sup>32</sup> However, due in large part to the abuses of Nazism during the Second World War,<sup>33</sup> jus cogens norms, grounded in moral principles, have increasingly appeared in positive law sources such as treaties.<sup>34</sup> In turn, the preemptory norms that derive from treaties possess a combination of natural and positive law attributes.<sup>35</sup> The implication of

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*Id.* at 586.

30. See H. Lauterpacht, *First Report on the Law of Treaties*, March 24, 1953, in Documents of the 5th Session, [1953] 2 Y.B. INT'L L. COMM'N 90, 155-56, U.N. Doc. A/CN.4/63. Lauterpacht the special rapporteur in 1953, is considered the driving force behind the inclusion of jus cogens in the Vienna Convention. He stated that preemptory norms should be included in the codification of the Law of Treaties because these norms "may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations. . . ." *Id.* at 155, para. 4. The concept and force of preemptory norms has only grown since Lauterpacht's comments were published in 1953, and today jus cogens norms are not only widely recognized, but also practiced.

31. BLACK'S LAW DICTIONARY 728 (7<sup>th</sup> ed. 2000). Black's defines "legal positivism" as the "[t]heory that legal rules are valid because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law."

32. See E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758) at 55. Vattel stated, "As to the rights introduced by Treaties or by Custom, there is no room to apprehend that any one will confound them with the Natural law of nations."

33. Janis, *supra* note 21, at 361.

34. *Id.* at 361.

35. Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L L. & COMP. L. REV. 411, 423 (1989). One commentator approaches the "complementary" relationship of positivism and jus cogens as follows:



this evolution in international law theory is that *jus cogens* norms can and do co-exist within a state's positive law. Thus, preemptory norms are now an embedded reality of international law, while at the same time, nation-states' self-determination is still retained.

### C. *Jus Cogens Norms Prevent Unilateral State Action*

Traditionally, *jus cogens* norms prevented two or more nations from acting together if their actions violated general international law.<sup>36</sup> Certain commentators have argued that a *jus cogens* goes beyond the law of treaties and indeed restricts unilateral state action.<sup>37</sup> It even appears as if the International Law Commission, a commission established by the United Nations in 1947 to promote the progressive development of international law and its codification,<sup>38</sup> contemplated the use of preemptory norms or *jus cogens* norms outside the context of treaty formation when drafting the articles on state responsibility. For example, Article 33 indicates that a state may not defend a wrongful practice by invoking a state of necessity if the wrongfulness is preempted by a *jus cogens* norm.<sup>39</sup>

In the context of human rights, there is even stronger support for *jus cogens* norms preventing unilateral state action.<sup>40</sup> Because there are certain human rights that are deemed of such import that they may not be

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Legal systems function under a positivist approach until confronted with an unjust law. Then the natural law principle, especially one that is *jus cogens*, overrides the unjust law. The result, even for a positivist, is that the unjust law is not valid law—it has no authority behind it and need not be obeyed.

*Id.* at 423.

36. BLACK'S LAW DICTIONARY 695 (7<sup>th</sup> ed. 2000). Black's defines *jus cogens* as "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." *Id.*

37. See Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 19 (1986). According to Meron:

Even scholars who reserve *jus cogens* to treaty law tend to agree with the elementary proposition that international public order, public order of the international community and international public policy do not allow states to violate severally such norms as they are prohibited from violating jointly with other states.

*Id.* at 19 (citing to H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY, 19-20 (1980), *contra* Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 481 (1985)).

38. UN Website, *International Law Commission*, available at <http://www.un.org/law/ilc/introfra.htm> (last visited 1/20/03).

39. See Meron, *supra* note 37, at 19 (quoting 2 Y.B. INT'L. L. COMM'N. 30, UN Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2) at 33). Article 33(2)(a) states that "a state of necessity may not be invoked by a State as a ground for precluding wrongfulness . . . if the international obligation with which the act of the State is not in conformity arises out of a preemptory norm of general international law."

40. See *id.* at 15.

derogated from,<sup>41</sup> then there is "at least a minimum catalogue of fundamental or elementary human rights."<sup>42</sup> Carrying the proposition one step further, many scholars conclude that because there are certain human rights deemed fundamental, then there also must exist norms deemed fundamental which would supercede unilateral state action.<sup>43</sup>

#### D. Criteria Of A Jus Cogens Norm

Although there is some debate as to the scope of a jus cogens norm, there is a general consensus as to how a jus cogens norm is established. Article 53 of the Vienna Convention states that a norm becomes preemptory or a jus cogens norm when the following criteria are met: (1) it is a norm of general international law; (2) the norm is accepted by the international community of states as a whole; (3) the norm is immune from derogation; and (4) the norm is modifiable only by a new norm having the same status.<sup>44</sup>

In determining whether a law is a norm of general international law, it is critical to examine whether the law is of general applicability. In other words, does the law create "create obligations and/or rights for at least a great majority of states or other subjects of international law."<sup>45</sup> The implication of this assessment is that criteria one and two are essentially the same.<sup>46</sup> Consolidating criteria one and two, the norm must be recognized by a vast majority of nations as essential to the public order.<sup>47</sup>

The third and fourth criterion are what sets a jus cogens norm apart from other recognized norms in international law,<sup>48</sup> and are what give a

41. Such as the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted Dec. 19, 1966, S. EXEC. DOC. E, 95th Cong., 2d Sess. 23 (1978), 999 U.N.T.S. 171; see also AMERICAN CONVENTION ON HUMAN RIGHTS, done Nov. 22, 1969, S. EXEC. DOC. F, 95th Cong., 2d Sess. 41 (1978), 1144 U.N.T.S. 123.

42. Meron, *supra* note 37, at 16 (quoting van Boven, Distinguishing Criteria of Human Rights, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43, 46 (K. Vasak ed., P. Alston Eng. ed. 1982)).

43. See generally *id.* at 16.

44. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), Article 53. See also Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 760 (1998) (citing Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 775 (1997)).

45. de la Vega & Brown, *supra* note 44, at 760, citing to Kahgan at 775.

46. See generally Kahgan, *supra* note 44, at 775-776.

47. See *id.*

48. See *id.* at 776-777. The author states that, "It is the third criteria enunciated in the Vienna Convention, the non-derogable nature of what might otherwise be a norm of custom, that is the dividing line separating principles of general international law from those of jus cogens. Until a norm has attained widespread recognition that it is not

jus cogens norm its only potential power.<sup>49</sup> It follows that if a norm is deemed fundamental to a public order, then in turn it will be deemed non derogable.<sup>50</sup> The declaration that the norm is non derogable in treaties, or the valid and widespread recognition that the norm is non derogable would satisfy criterion three and four.<sup>51</sup>

### *E. The Four Factors*

To make the argument that the abolition of the death penalty has become a preemptory or jus cogens norm, the four widely recognized factors must be met.<sup>52</sup> Because the roots of jus cogens is natural law, the first question is whether or not a vast majority of nations have, either in law or practice, recognized the death penalty to be contrary to international law and thus have abolished it.<sup>53</sup>

According to Amnesty International, 111 countries have abolished the death penalty in law or practice.<sup>54</sup> Conversely, 84 countries still use and retain the death penalty.<sup>55</sup> At first glance, it is significant that a majority of countries in the world have abolished the death penalty, as it reflects a general custom that capital punishment is wrong. However, the 111 states which have abolished the death penalty only represents about 60 percent of all countries worldwide, and this statistic alone does not appear to meet the "vast majority" standard needed to establish a preemptory or jus cogens norm.

Upon closer inspection, global statistics on the use of capital

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derogable, it remains a matter of jus dispositivum."

49. This comment will later analyze the effect of an established jus cogens norm, what power it really holds, etc., but if the norm is deemed to be derogable, then its potential effect is minimized immensely.

50. See, e.g. Shestack, *supra* note 18, at 559-560.

51. See Kahgan, *supra* note 44, at 777.

52. Vienna Convention, *supra* note 44. Factors to establish a preemptory norm: (1) is a norm of general international law; (2) is accepted by the international community of states as a whole; (3) is immune from derogation; and (4) is modifiable only by a new norm having the same status. See also de la Vega & Brown, *supra* note 44, at 760, citing, Carin Khagan, *supra* note 44, at 775.

53. See generally Shestack, *supra* note 18.

54. Amnesty International, *Website Against the Death Penalty*, available at <http://web.amnesty.org/rmp/dplibrary.nsf/ba4275cdead20d858025677e0059735b/46e4de9db9087e35802568810050f05f?OpenDocument> (last visited 11/30/02) [hereinafter *Amnesty Website*]. Amnesty breaks down the 111 countries who have abolished the death penalty in law and practice as follows: 76 countries and territories have abolished the death penalty for all crimes; 15 countries have abolished the death penalty for all but exceptional crimes such as wartime crimes; and 20 countries can be considered abolitionist in practice: they retain the death penalty in law but have not carried out any executions for the past 10 years or more and are believed to have a policy or established practice of not carrying out executions.

55. *Id.*

punishment paints a slightly different picture. In 2001, executions were carried out in only 31 different countries,<sup>56</sup> which means that 84 percent of the countries worldwide did not execute anyone in 2001. Additionally, of all the known executions in 2001, 90 percent took place in only four countries, China, Iran, Saudi Arabia, and the United States.<sup>57</sup> Finally, on average, more than three countries a year have abolished the death penalty for all crimes over the past decade.<sup>58</sup>

There are multiple conclusions that can be drawn from the statistics. First, there appears to be an emerging international trend to abolish the death penalty. If more than three countries a year on average completely abolish the death penalty, then more than 72 percent of the world will have abolished the death penalty in law or practice by the year 2012. Second, the fact that a vast majority of executions take place in only four countries indicates that at the very minimum, the rest of the world (the other 191 countries surveyed) views the death penalty as something that should be carried out only in the rarest of circumstances, and thus the wide application of the death penalty in China, Iran, Saudi Arabia, and the United States violates international custom and norms. At a minimum there is at least a widely held opposition to the death penalty throughout the world.

Currently there is one treaty adopted by some members of the international community that deals specifically with the abolition of the death penalty. As of this writing there are 65 nations who have become parties or have signed, but not yet ratified, the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>59</sup> The Protocol provides for the total abolition of the death penalty but allows states to retain the death penalty in time of war if they make a reservation to that effect.<sup>60</sup> Considering that only eight countries had abolished the

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56. *Id.*

57. *Id.*

58. *Id.* According to the *Amnesty Website*: "Over 30 countries and territories have abolished the death penalty for all crimes since 1990. They include countries in Africa (examples include Angola, Cote d'Ivoire, Mauritius, Mozambique, South Africa), the Americas (Canada, Paraguay), Asia (Hong Kong, Nepal) and Europe (Azerbaijan, Bulgaria, Estonia, Georgia, Lithuania, Poland, Turkmenistan, Ukraine)."

59. SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991. The Protocol was adopted by the United Nations General Assembly in 1989, and any party to the International Covenant on Civil and Political Rights can become a party to the Protocol (there are 149 parties to the Covenant on Civil and Political rights). Currently the list of countries that have become parties or have signed and not ratified the Protocol includes: Australia, Austria, Belgium, Bosnia-Herzegovina, Colombia, Croatia, Denmark, Finland, Georgia, Germany, Greece, Ireland, Italy, Netherlands, New Zealand, Spain, Sweden, Switzerland, United Kingdom, and Yugoslavia. This list is not exhaustive.

60. *Amnesty Website*, available at <http://www.web.amnesty.org/rmp/>

death penalty for all crimes in 1948,<sup>61</sup> 65 is an astounding number, especially in light of the fact that 30 countries have done so in the past decade.<sup>62</sup>

If the number of countries who were signatories to the Protocol was 165 instead of 65, this analysis would be complete. Abolition of the death penalty would be a norm of general international law that is accepted by a vast majority of the international community. The norm is non-derogable, because the Protocol does not allow for derivation from the norm except in times of war, and the norm could only be modified by a new protocol of equal status.<sup>63</sup> The result would be a *jus cogens* norm and all that would be left for this article is a discussion of the practical effect of the establishment of such a norm.

Although the number of countries signing the Protocol and abolishing the death penalty is rising, any author would be hard pressed to conclude that a *jus cogens* norm has been established based solely on 65 countries signing or ratifying the Second Optional Protocol. Instead the analysis must dig deeper, and pull from other treaties and positive law sources an amalgamation of various non-derogable rights, and from that mixture make the conclusion that a *jus cogens* norm has been established prohibiting the death penalty internationally.

### III. Positive Law Sources Establishing a *Jus Cogens* Norm Prohibiting the Death Penalty

#### A. *The Universal Declaration of Human Rights*

In 1948, the Universal Declaration of Human Rights<sup>64</sup> was adopted by the United Nations, and is considered the foundation of fundamental human rights enjoyed by every person.<sup>65</sup> Article 3 of the Universal

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dplibrary.nsf/ff6dd728f6268d0480256aab003d14a8/223935dc8bd3e9af8025682c005a3579!OpenDocument (last visited 11/30/02).

61. Eric Prokosch, *Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice* (December 1998), in *THE DEATH PENALTY: ABOLITION IN EUROPE* (Tanja Kleinsorge & Barbara Zatloka eds. 1999), Chapter 1 *available at* <http://web.amnesty.org/ai.nsf/Index/ACT500131998?OpenDocument&of=THEMES\DEATH+PENALTY> (last visited 11/30/02) [hereinafter *Prokosch*], pg. 1.

62. Amnesty Website, *supra* note 54.

63. See Vienna Convention Article 53, *supra* note 44.

64. Universal Declaration of Human Rights (Dec. 10, 1948), *available at* <http://www.amnesty.ie/about/udhr.shtml> (last visited 11/30/02) [hereinafter *Universal Declaration*].

65. See Harold Hongju Koh, *Paying Decent Respect to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1093 (2002). In this reprint of Professor Koh's lecture, Koh argues that the Universal Declaration of Human Rights was a direct result of the atrocities committed by the Nazi's during World War II. In the aftermath of World War II, the human rights movement was born, and the Universal Declaration of Human

Declaration states that “[e]veryone has the right to life, liberty and security of person.”<sup>66</sup> There is much debate as to the extent of this fairly broad provision, but there is evidence that the Human Rights Commission<sup>67</sup> at least considered adding a provision to Article 3 abolishing the death penalty.<sup>68</sup> In spite of many members support, the Commission instead opted for the general language of Article 3 without an explicit prohibition.<sup>69</sup> Commission members ultimately determined that the political infeasibility of a total abolition would undermine the Universal Declaration, and thus determined that further treaties would have to explicitly deal with the abolition of the death penalty.<sup>70</sup>

### B. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR),<sup>71</sup> adopted by the United Nations General Assembly in 1966, was the treaty designed to implement the various provisions of the Universal Declaration.<sup>72</sup> Article 6 explicitly addresses the death penalty, and is an expansion of the Universal Declaration’s general provision guarding the right to life.<sup>73</sup> Article 6(2) of the ICCPR states that “In countries which have not abolished the death penalty, sentence of death may be imposed

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Rights was the articulation of that movement.

66. *Universal Declaration*, art. 3.

67. The Human Rights Commission, who did most of the drafting of the Universal Declaration, was activated in January 1947, and had members from 18 nations, appointed by ECOSOC: Australia, Belgium, Byelorussian Soviet Socialist Republic (BSSR), Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republics, Uruguay, and Yugoslavia. Its first session met in January and February of 1947. Peter Danchin, *The Universal Declaration of Human Rights*, available at [http://www.ccnmtl.columbia.edu/projects/mmt/udhr/udhr\\_general/drafting\\_history\\_4.htm](http://www.ccnmtl.columbia.edu/projects/mmt/udhr/udhr_general/drafting_history_4.htm) 1.

68. Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, 152 (2001).

69. *Id.* at 152.

70. See Koh, *supra* note 65, at 1094. The author notes the Soviets particular objection to the death penalty and their urging to include the abolition of the death penalty in all the commission’s manifestations. The commission as a whole found this to be politically impossible at that time, and instead further treaties, which would implement the Universal Declaration, were to be the vehicle to create a ban on capital punishment.

71. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *opened for signature* Dec. 19, 1966, art. 6(5), 999 U.N.T.S. 171, 175 (entered into force March 23, 1976) [hereinafter ICCPR], available at <http://www1.umn.edu/humanrts/instrree/b3ccpr.htm> (last visited 11/30/02).

72. *Id.* at 1094.

73. ICCPR, art. 6. For example clause 1 reads: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

only for the most serious crimes.”<sup>74</sup> The Human Rights Committee, which was established under the ICCPR,<sup>75</sup> stated in a general comment about Article 6 that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”<sup>76</sup>

Scholars frequently attach *jus cogens* status to the inherent right to life provision of Article 6(1).<sup>77</sup> The “right to life” is widely recognized in many positive law sources, and is also regarded as non-derogable.<sup>78</sup> The official comment to Article 6 embodies the spirit of *jus cogens*: “The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4).”<sup>79</sup>

What is critically important about the “right to life” *jus cogens* is not whether the norm extends, for the purpose of this comment, to the death penalty, but instead simply that the “right to life” is a norm of general international law, fixed in many positive law sources, and for which there is no derogation allowed.<sup>80</sup> In addition, it is clear that the “right to life” provision of Article 6 is not to be construed narrowly,<sup>81</sup> but

74. ICCPR, art. 6(2).

75. Prokosch, *supra* note 61, at 4.

76. REPORT OF THE HUMAN RIGHTS COMMITTEE, U.N. GAOR, 37th Sess., Supp. No. 40 at 94, U.N. Doc. A/37/40 (1982).

77. See W.P. Gormley, *The Right to Life and the Rule of Non-Derogability: Preemptory Norms of Jus Cogens*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (Ramcharan ed., 1985). “The right to life is protected under the Universal Declaration of Human Rights in its Preamble and in article 3. Furthermore, the right to life is protected by customary international law. However, the main source . . . is to be found in article 6 of the International Covenant on Civil and Political Rights . . . in which . . . the right to life is *jus cogens* and may not be derogated by any state party even during periods of emergency. . . . Similar provisions are found in regional conventions.” *Id.* at 111. See also Janis, *supra* note 21, at 359. Janis wrote: “There certainly exists a consensus that certain rights—the right to life, to freedom from slavery or torture—are so fundamental that no derogation may be made.” *Id.* at 359. See also Parker & Neylon, *supra* note 35, at 431. See also, A.V. Ribero, REPORT ON THE IMPLEMENTATION OF THE DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF, U.N. Doc. E/CN.4/1987/35 (1987). Ribero states: “The right to life . . . is one of the rights universally recognized as forming part of *jus cogens* and entailing, on the part of States, obligations *erga omnes* toward the international community as a whole.”

78. See *id.* Scholars justify the inclusion of the “right to life” as a *jus cogens* norm.

79. THE RIGHT TO LIFE (ART 6): 30/07/82—CCPR General Comment 6, [1], [5], UN Doc HRI/GEN/1/Rev.1, 6 (1982) [hereinafter *Article 6*].

80. Vienna Convention, Article 53, *supra*, note 44.

81. See Article 6, *supra* note 71. Further along in the official comment to Article 6: “However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.”

at the same time does not on its face preclude capital punishment.

### C. *Prohibition Against Torture*

Another commonly recognized *jus cogens* norm is the prohibition against torture, cruel, inhuman or degrading treatment or punishment. It is widely recognized as being a general norm of international law that appears in every aforementioned positive law source or treaty.<sup>82</sup> Additionally, there is no derogation permitted from this norm,<sup>83</sup> and therefore the prohibition against torture, cruel, inhuman or degrading treatment or punishment, meets the four factor test articulated in Article 53 of the Vienna Convention and is a *jus cogens* norm.

There are two recognized positive law treaties that articulate the preemptory norm against torture, Article 7 of the ICCPR, and the Convention Against Torture, other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>84</sup> The Convention Against Torture prohibits the intentional infliction of "severe pain or suffering, whether physical or mental."<sup>85</sup> It could be argued that capital punishment would fall within a strict reading of Article I, but the official comments, exceptions, and tribunal interpretations, demonstrate that the drafters of the Convention Against Torture did not initially intend this instrument to be the vehicle that would completely abolish every method of capital punishment.<sup>86</sup> In fact, the last sentence of Article I reads: "It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."<sup>87</sup>

### D. *Other treaties/U.N. reports*

Further treaties, mainly regional treaties, and reports from the UN have expanded the plain meaning of Article 6. For example, Article 4(4)

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82. See, e.g., Universal Declaration of Human Rights, *supra* note 67, art. 5; *International Covenant on Civil and Political Rights*, *supra* note 41, art. 7; *American Convention on Human Rights*, *supra* note 41, art. 5; EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, in force Sept. 3, 1953, Europ. T.S. No. 5, art. 3; *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1960), principle 9.

83. Article 4(2) of the ICCPR explicitly states no derogation is permitted from Article 7.

84. Article 7 of the ICCPR and, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

85. See *id.*, Article I.

86. See William A. Schabas, *International law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 808 (1998).

87. See *Convention Against Torture*, *supra* note 84.



of the American Convention on Human Rights (ACHR)<sup>88</sup> states that the death penalty shall not be inflicted "for political offences or related common crimes."<sup>89</sup> Also, the Human Rights Committee commented that "the imposition . . . of the death penalty for offenses which cannot be characterized as the most serious, including apostasy, committing a homosexual act, illicit sex, embezzlement by officials, and theft by force, is incompatible with article 6 of the Covenant."<sup>90</sup> The UN Special Rapporteur stated that the death penalty "should be eliminated for crimes such as economic crimes and drug related offenses."<sup>91</sup>

The United Nations has also spoken quite loudly through various resolutions about their opposition to the death penalty. In 1971, the United Nation's General Assembly adopted a resolution that stated, "in order to fully guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which the capital punishment may be imposed; with a view to the desirability of abolishing this punishment in all countries."<sup>92</sup> This resolution has been reaffirmed by the UN General Assembly once, by the UN Commission on Human Rights twice (the latest in 1998), and was reaffirmed by the European Union in 1998.<sup>93</sup>

#### *E. Jus Cogens Norms as Applied by International Tribunals and U.S. Courts*

These various treaties and United Nation's resolutions at least in theory establish a norm against capital punishment, but the true test is how they are put to practice. Considering that 90 percent of all executions take place in only four countries, it would seem as if the rest of the world is following the mandate of the ICCPR, and restricting their use of capital punishment only to the rarest of cases.<sup>94</sup> The European Union and Council on Europe actually requires potential new members to prohibit capital punishment, with the result being that countries like

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88. AMERICAN CONVENTION ON HUMAN RIGHTS, Nov. 22, 1969, 1144 U.N.T.S. 123, 145 O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970) [hereinafter *American Convention*].

89. *Id.* art 4(4).

90. Prokosch, *supra* note 61, at 4 (citing UN Document No. CCPR/C/79/Add.85 (November 19, 1997), ¶ 8).

91. *Id.* at 4 (citing UN Document No. E/CN.4/1997/60 (December 24, 1996), ¶ 91).

92. Resolution 2857 (XXVI) (December 20, 1971).

93. By the UN General Assembly through Resolution 32/61 (December 8, 1977), by the UN Commission on Human Rights in resolutions 1997/12 (April 3, 1997) and Resolution 1998/8 (April 3, 1998), and by the European Union in the Guidelines to EU Policy towards Third Countries on the Death Penalty ("EU Guidelines"), adopted in 1998. Prokosch, *supra* note 61, at 3.

94. ICCPR Article 6, *supra* note 71.

Poland and Turkey, with sometimes suspect human rights practices, are taking real steps to abolish the death penalty.<sup>95</sup>

In 1993 and 1994, when international criminal tribunals were established in Rwanda and the former Yugoslavia, the UN Security Council excluded the death penalty as a possible penalty for the genocide and war crimes committed.<sup>96</sup> Additionally, the adoption in July 1998 of the Statute of the International Criminal Court does not include the death penalty as a possible punishment for the crimes of genocide, other crimes against humanity, and war crimes.<sup>97</sup> The implication is that if the international community is assessing the appropriate penalties for some of the most heinous crimes imaginable, such as genocide, and yet still exclude execution as even a possible form of punishment, then it is hard to imagine what crimes would fit within Article 6's language of the "most serious crimes."

In spite of the debate regarding what "the most serious crimes" confers, what is clearly precluded is the "arbitrary deprivation of life," and the drafters of Article 6 mandated that states parties to the ICCPR proscribe some limits to a state taking a human life.<sup>98</sup> These restrictions are manifested in Constitutional provisions drafted prior to Article 6 and drafted post Article 6. Many states use their constitutional limits on the deprivation of life to justify capital punishment, the United States being exemplary of such practice. In the United States reservations to Article 6 and Article 7 (dealing with "torture"), the United States justifies the retention of capital punishment on grounds that the Fifth, Eighth, and/or Fourteenth Amendments to the United States Constitution restrict the death penalty.<sup>99</sup>

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95. Koh, *supra* note 65, at 1122. The author states that because of the EU and Council on Europe Policy: "steps have been taken to abolish or impose a moratorium on the death penalty in such countries as Taiwan, Lebanon, the former Yugoslavia, Turkey, Chile, the Philippines, Russia, Bermuda, and Poland."

96. Prokosch, *supra* note 61, at 4.

97. *Id.* at 4.

98. Article 6, *supra* note 71. "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."

99. SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. (1992), *reprinted in* 31 I.L.M. 645 (1992). "The United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." *Id.* at 654.

## 1. International practice

International tribunals, as recently as thirteen years ago, have refused to hold the death penalty as per se violative of the prohibition against torture or cruel and unusual punishment articulated in both the ICCPR and Covenant Against Torture.<sup>100</sup> The United States Supreme Court decisions of the past 25 years are in accord with the decisions of international tribunals,<sup>101</sup> and even the U.N. Human Rights Committee has refused to hold all forms of capital punishment in violation of the prohibition against torture and other cruel and unusual punishment.<sup>102</sup>

The Human Rights Committee did conclude that California's gas chamber violated Article 7 of the ICCPR.<sup>103</sup> The Committee reasoned that even though Article 6 allows capital punishment for the "most serious" crimes, the penalty "must be carried out in such a way as to cause the least possible physical and mental suffering."<sup>104</sup> Because the gas chamber resulted in prolonged pain and suffering, it sometimes took at least 10 minutes for a prisoner to die, the gas chamber violated Article 7, and was deemed "cruel and unusual."<sup>105</sup>

Similarly, in *Fierro v. Gomez*, the Ninth Circuit held that the gas chamber was in violation of the Eight Amendment's prohibition against "cruel and unusual punishment."<sup>106</sup> The *Fierro* court used the same reasoning as the Human Rights Committee did in *Ng v. Canada*,<sup>107</sup> in finding, based mainly on factual evidence, that the gas chamber inflicts, "extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes."<sup>108</sup>

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100. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

101. *See Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (plurality opinion). The Court in *Gregg* was explaining the holding in *Furman v. Georgia*, 408 U.S. 238 (1972) where the *Furman* Court held that certain applications of the death penalty did violate the Eight Amendment.

102. GENERAL COMMENT 20(44), U.N. GAOR, Hum. Rts. Comm., 44th Sess., 1138th mtg. at 1-4, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

103. REPORT OF THE HUMAN RIGHTS COMMITTEE, *Ng v. Canada*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Vol. 2, at 205, U.N. Doc. A/49/40 (1994) [hereinafter *Ng v. Canada*]. The Committee found California's gas chamber to be cruel and inhuman.

104. *Id.* at § 16.2 (quoting General Comment 20[44] on article 7 of the Covenant (CCPR/C/21/Add.3, paragraph 6)).

105. *Id.* at § 16.3.

106. *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

107. *See Ng v. Canada*, *supra* note 103.

108. *Fierro*, 77 F.3d at 309.

## 2. Lethal injection

Interestingly, the Human Rights Committee found that lethal injection did *not* violate the prohibition against “cruel and unusual punishment,”<sup>109</sup> in spite of empirical data detailing the suffering of those put to death using that method.<sup>110</sup> The reasoning for this position was that lethal injection was the same method used for euthanasia and is “on the end of the spectrum of methods designed to cause the least pain.”<sup>111</sup> The Committee’s position is clear, that putting an individual to death would not constitute torture or cruel and unusual punishment as long as it is “humane.”

What the Committee does not state is that lethal injection does not inflict any pain. Because the AMA prohibits any physician from participating in the execution of any individual,<sup>112</sup> mishaps do occur, and pain and suffering is the logical consequence of mishap.<sup>113</sup>

In addition, because the first drug administered to a prisoner renders the individual paralyzed, it is not apparent what the individual is experiencing, because the individual literally cannot exhibit physical signs of pain and suffering.<sup>114</sup> Without physical manifestations of pain,

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109. See REPORT OF THE HUMAN RIGHTS COMMITTEE, *Kindler v. Canada* (No. 470/1991), U.N. GAOR, Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/470/1991, at § 9.6 (1993) [hereinafter, *Kindler v. Canada*]. This position was reaffirmed only 12 months after *Ng v. Canada*, in, UN Human Rights Committee, Geneva/New York, *Extradition to the United States to Face the Possible Imposition of the Death Penalty Not Considered to Violate the CCPR/Cox v. Canada*, 15 HUM. RTS. L.J. 410, 417 (1994) [hereinafter *Cox v. Canada*].

110. Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 380-381 (1997). The author lists, fairly comprehensively, the myriad of problems that can arise during the execution of a human being via lethal injection.

111. *Kindler v. Canada*, *supra* note 109, at § 9.7.

112. AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS (CEJA), *Ethical Opinion 2.06*, available at [http://www.amaassn.org/apps/pf\\_online/pf\\_online?f\\_n=browse&doc=policyfiles/CEJA/E-2.06.HTM](http://www.amaassn.org/apps/pf_online/pf_online?f_n=browse&doc=policyfiles/CEJA/E-2.06.HTM). Ethical Opinion 2.06 states in pertinent part that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.” Later in the Opinion, the CEJA specifically addresses what would constitute physician participation in an execution by lethal injection:

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

*Id.*

113. Denno, *supra* note 110, at 380-381. The author lists the problems that can arise during the execution of a human being via lethal injection, exacerbated by the fact that trained physicians cannot participate.

114. *Id.* at 380-381.

at least the spectrum that the punishment is humane remains somewhat in tact, and the State can justify the execution of an individual using this method. Perhaps that is why in the United States 70 of 71 executions in 2002<sup>115</sup> were by lethal injection.

The preemptory norm prohibiting the use of torture or cruel and unusual punishment does not reach far enough to establish a jus cogens norm completely abolishing the death penalty, but it does create a preemptory norm that, at the least, establishes a threshold that the punishment be humane. Similarly, the "right to life" jus cogens norm does not extend to prevent states such as the United States from continuing to execute its prisoners, but again, at least there is a threshold that the taking of life cannot be arbitrary, and must only be for the most serious crimes.<sup>116</sup> Taking these norms together and applying them to the state sponsored execution of a prisoner would only be permissible in the rarest occasions, if at all. The question then becomes, have U.S. courts interpreted these norms as being preemptory, and what role do they play in adjudicating death penalty cases?

#### IV. The Evolving Standard of Decency

The death penalty has a long and sometimes controversial history in the United States. Most often litigated in United States death penalty challenges is the issue of whether the practice violates the Eighth Amendment's prohibition against "cruel and unusual punishment."

##### A. *Cruel and Unusual Punishment*

Internationally, the Human Rights Committee has found that the death penalty does not per se violate the ICCPR's Article VII prohibition against "cruel and unusual punishment," but the practice must be carried out humanely.<sup>117</sup> Similarly courts in the United States have found various methods of executions to violate the Eight Amendment, based mainly on whether the practice was humane.<sup>118</sup>

William Schabas and other scholars have argued that "cruel" punishment is an evolving standard that may, in the 21<sup>st</sup> Century, now include capital punishment.<sup>119</sup> The argument would be that the "evolving

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115. United States Department of Justice Statistics, Bureau of Justice Statistics, *Capital Punishment Statistics*, available at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited 1/15/03) [hereinafter Bureau of Justice Statistics].

116. See ICCPR, art. 6(2), *supra*, note 71.

117. ICCPR, *supra* note 41, art. 7.

118. See, e.g., *Fierro*, *supra* note 106.

119. Schabas, *supra* note 86, at 808-809. The author quotes the United States Supreme Court from *Trop v. Dulles*, 356 U.S. 86, 101 (1958), where the Court stated that the definition of "cruel and unusual punishment" is determined by "evolving standards of

standard of decency” used to determine what is “cruel and unusual punishment” in the 21<sup>st</sup> Century is much different than in 1789, and that indeed new standards of “cruel and unusual” prohibits the application of the death penalty in most if not all situations.

### 1. Evolving “standard of decency”

Supreme Court cases are mixed as to what standard is to be applied and the role that international norms play in assessing the standard of cruel and unusual punishment. In *Trop v. Dulles*, the Court stated that the definition of “cruel and unusual punishment” is determined by “evolving standards of decency that mark the progress of a maturing society.”<sup>120</sup>

Thirty-one years later, the Court in *Stanford v. Kentucky* (1989), a juvenile death penalty case, Justice Scalia’s majority opinion argued that the audience to judge what is “cruel and unusual” is the citizens of the United States, and the court should not “embark rudderless upon a wide-open sea.”<sup>121</sup> In other words, US Courts should look to evolving standards of decency as marked by United States citizens, not international norms.

### 2. Atkins

And then along comes *Atkins v. Virginia*,<sup>122</sup> where the Court cites the *Trop* “evolving standard of decency” test for what constitutes “cruel,” and states that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>123</sup> In assessing what the “evolving standard” has become the Court cites as persuasive evidence a “consensus” against executions and “overwhelming disapprov[al]” of “the world community” in its reasoning to hold that executing the mentally retarded is unconstitutional.<sup>124</sup>

Just this year, the Supreme Court decided to hear the case of *Roper v. Simmons*.<sup>125</sup> The case involves Christopher Simmons, who was 17 when he was arrested for the murder of Shirley Crook. Simmons appealed his case on a Writ of Habeas Corpus to the Missouri Supreme Court. In late 2003, the Missouri Supreme Court held that juvenile

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decency that mark the progress of a maturing society.”

120. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

121. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

122. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty for the mentally retarded is unconstitutional).

123. *Id.* at 311 (quoting *Trop*, 356 U.S. at 101-102 (1958)).

124. *Id.* at 325.

125. *State ex rel. Simmons v. Roper*, 112 S.W.3d. 397 (Mo. 2003).

executions violated the Eighth Amendment's provision against cruel and unusual punishment under the "evolving standards of decency" test.<sup>126</sup> Consequentially, Simmons' death sentence was vacated, and the State of Missouri appealed to the United States Supreme Court.

The Missouri Supreme Court's reasoning was based on a reading of *Atkins* that overturned Scalia's reasoning in *Stanford*.<sup>127</sup> Therefore, according to the Missouri high court, it is appropriate to consider both a national and international "consensus" in determining the evolving standard of decency.<sup>128</sup> It is hard to predict how the Supreme Court will rule, but if their reasoning is based on the Court's most recent precedent in *Atkins*, it is likely that the Court will find the death penalty as applied to juveniles is cruel and unusual.

### B. Arbitrary Deprivation of Life

Although the focus has been on "cruel and unusual," there is at least an argument to be made that the U.S. death penalty violates the jus cogens norm prohibiting the arbitrary taking of life.<sup>129</sup> The Supreme Court seems to indirectly recognize and uphold this norm,<sup>130</sup> stating in *Furman v. Georgia*: "In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not *arbitrarily* inflict a severe punishment."<sup>131</sup> This reasoning is in direct accord with Article 6 of the ICCPR.<sup>132</sup>

Thus far, the Court has yet to find that the death penalty, except in specific circumstances, is the "arbitrary" deprivation of life. However, on January 11, 2003, Governor George Ryan of Illinois granted clemency to more than 150 death row inmates.<sup>133</sup> The main reasoning behind Governor Ryan's 11<sup>th</sup> hour decision was that there was too much evidence that the death penalty in Illinois was being applied arbitrarily.<sup>134</sup>

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126. *Id.* at 413.

127. *Id.* at 411.

128. *Id.* at 410-411.

129. See ICCPR Article 6, *supra* note 98.

130. See *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (plurality opinion) (describing the holding in, *Furman v. Georgia*, 408 U.S. 238 (1972)).

131. *Furman*, 408 U.S. at 273 (1972).

132. ICCPR Article 6, *supra* note 71.

133. Emily Kaiser, *Illinois Gov. Commutes All Death Sentences*, Reuters, available at <http://www.washingtonpost.com/wp-dyn/articles/A43011-2003Jan11.html> (last visited 1/19/03).

134. *Id.* "A commission Ryan created to review the Illinois system found the poor were at a disadvantage, too many crimes drew the death penalty and police abuse and jailhouse informants too often resulted in capital convictions. The commission looked at 160 cases of people then on death row, but not all inmates asked for a clemency review."

For many of these same reasons, the ABA has called for a national moratorium on executions,<sup>135</sup> and general support for the practice nationally has been eroding.<sup>136</sup>

## V. Conclusion

The Court's reasoning in *Atkins*, evokes at the very least natural law theory, and at the most, the very essence of jus cogens.<sup>137</sup> The result is that jus cogens norms are creeping into the reasoning of the Supreme Court as they adjudicate death penalty cases, and into the consciousness of the regular American.

Nothing embodies this shift in the evolving standard of decency then the story of Amina Lawal. Her story was on the Oprah Winfrey Show,<sup>138</sup> and as mentioned above, support for her release was widespread. Twenty years ago, no one would have ever heard her story, and it is unlikely then that any intervention would have been as swift and as uniform in its condemnation as it was today.

What her story most embodies is that the values espoused in our own Constitution and the values embodied in Americans seem to be more closely aligning with an international standard. The evolving standard of decency, shaped invariably by jus cogens norms, has shifted towards the conclusion that the death penalty is cruel and unusual punishment, and can often mean the arbitrary deprivation of life. The Supreme Court and American public are finally recognizing these norms, and the U.S.'s violation of them, meaning that jus cogens norms have become a more viable means to establish the ultimate end, abolition.

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135. RECOMMENDATION NO. 107, American Bar Association 1997 Midyear Meeting, February 3, 1997, *available at* <http://www.abanet.org/irr/rec107.html> (last visited 1/20/03). The moratorium called for every state that imposes capital punishment to not do so until procedures were implemented to prevent the arbitrary imposition of the sentence of death: including ensuring competent counsel, eliminating the racial discrepancies in the imposition of the death penalty, and streamlining the appeals process.

136. *See* Polling Report on Crime, *available at* <http://www.pollingreport.com/crime.htm>. In a January 2003 NBC News/*Wall Street Journal* Poll conducted by the polling organizations of Peter Hart (D) and Robert Teeter (R), 34% of Americans felt there should be a moratorium on the death penalty until death penalty procedures are examined. In a May 2002 Gallup poll, 69% of Americans opposed the death penalty for Juveniles, 75% opposed the death penalty for the mentally ill, and 82% opposed the death penalty for the mentally retarded.

137. *Infra* text p.6; *see also, supra* notes 20-23.

138. Amina Lawal's story aired in 2002 on the Oprah Winfrey Show. Oprah called for 1 million e-mails in support of Amina, and 1.23 million viewers obliged. Oprah Winfrey Show Website, *available at* [http://www.oprah.com/tows/pastshows/tows\\_2002/tows\\_past\\_20021004\\_b.jhtml](http://www.oprah.com/tows/pastshows/tows_2002/tows_past_20021004_b.jhtml) (last visited 1/20/03).



