

The Abolition of Capital Punishment from an International Law Perspective

by William A. Schabas*

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It is often said that ‘international law does not prohibit capital punishment.’¹ This is an unfortunate and imprecise statement, however, because several international treaties now outlaw the death penalty. These treaties are, to be sure, still somewhat far from universally accepted. Nevertheless, approximately seventy states are now bound, as a question of international law and a result of ratified treaties,² not to impose the death penalty.³ In a recent decision, the European Court of Human Rights ruled that the practice of Member States of the Council of Europe now means the death penalty is prohibited by the *European Convention on Human Rights*, and this despite the explicit recognition of it in article 2(1) of the *Convention*.⁴ As for the

* Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights; Commissioner, Sierra Leone Truth and Reconciliation Commission.

¹ See, for example: ‘Report of the special rapporteur, Ms Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 1999/35,’ U.N. Doc. E/CN.4/2000/3, para. 60.

² *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, ETS 114; *Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty*, GA Res. 44/128, annex; *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OASTS 73; *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, ETS 183. The *American Convention on Human Rights*, (1979) 1144 UNTS 123, OASTS 36, art. 4§4, prohibits the death penalty in States that have previously abolished it.

³ Albania, Andorra, Australia, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, Cyprus, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Mexico, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkmenistan, Ukraine, United Kingdom, Uruguay and Venezuela. These States are abolitionist both *de jure* and *de facto*. The Russian Federation and Sao Tome and Principe have signed one or another of the protocols but instruments of ratification have not yet been deposited.

⁴ *Öcalan v. Turkey* (App. No. 46221/99), Judgment, 12 March 2003, paras. 188-199. According to an interpretation favoured by some members of the Human Rights Committee,

suggestion that customary law prohibits capital punishment, such an affirmation is perhaps premature, although the growing trend towards abolition, and its reflection in international norms, would suggest that this is a probable development at some point in the not-too-distant future.

Few more dramatic examples of the spread and the success of human rights law can be found. This constant progress towards abolition provides us with benchmarks for the more general triumph of what might be called the ‘human rights ideal’, proclaimed in Franklin D. Roosevelt’s ‘four freedoms’ speech, in the *Atlantic Charter*, and in the preamble to the *Universal Declaration of Human Rights*: ‘Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...’⁵ This human rights ideal guided the establishment of the United Nations, and has animated regional organisations like the Council of Europe, the Organisation of American States, the African Union, the Organisation for Security and Cooperation in Europe and, increasingly, the European Union. Limitation and abolition of capital punishment has become a central theme in the standard-setting and monitoring by these key international organisations.

While we can trace abolitionist efforts back to Cesare Beccaria and the Enlightenment, and perhaps even before, the modern movement to abolish the death penalty really begins in the late 1940s. Within Europe, several of the former dictatorships, including Germany, Austria and Italy, abolished capital punishment as part of the ‘transitional justice’ process by which they turned the page on the abuses of the previous decades. At the same time, human rights law emerged as the guiding normative regime for the newly-minted international organisations, the United Nations and the Council of Europe. Discussing the ‘right to life’ provision of the *Universal Declaration of Human Rights* in 1948, the General Assembly of the United Nations contemplated calling for abolition, but then retreated cautiously, essentially because a majority of the world’s states still were not yet ready. In a sense, their

the *International Covenant on Civil and Political Rights* is also an abolitionist instrument for states that have already abolished the death penalty: *Ng v. Canada* (no. 469/1991), UN Doc. A/49/40, Vol. II, p. 189, (1994) 15 *HRLJ* 149 (*per* Francisco José Aguilar Urbina and Fausto Pocar).

minds were ahead of their practice. Indeed, hardly a voice was raised during the debate in the General Assembly to claim that capital punishment was legitimate, appropriate or justified.⁶ The death penalty was treated as an inevitable and necessary exception to the right to life, but also one whose validity was increasingly open to challenge. This was indeed the expectation of the drafters.

Full-fledged and complete respect for the right to life, something which necessarily involves the abolition of the death penalty, stands as the implied ‘common standard of achievement’ in article 3 of the *Universal Declaration*. Half a century later, that ‘achievement’ has made great strides, although it remains very much a work in progress in some parts of the world. But Europe has become, essentially, a death-penalty-free zone. In December 2000, the European Union adopted its *Charter of Fundamental Rights*, article 2 of which declares:

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

The *Universal Declaration of Human Rights* of 10 December 1948 provided the initial framework for the development of what is now a sophisticated and complex system of international human rights law. It has been argued occasionally that the death penalty is not even a human rights issue.⁷ Countries hostile to the progressive development of international law on the subject of the death penalty take the position that it is sheltered by a provision within the *Charter of the United Nations* deeming such matters to be ‘essentially within the domestic jurisdiction of any state’.⁸ The debate during adoption of article 3 of the *Universal Declaration* by the United Nations General Assembly shows that such an argument is unfounded. What specifically the *Declaration* has to say about capital punishment is something that has evolved since 1948 and that will continue to evolve with the development of the law itself, in much the same way as the interpretation of the broad and general provisions in national constitutions adjust to changing times.

⁵ *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810.

⁶ The question of capital punishment in the drafting of the *Universal Declaration of Human Rights* is discussed in detail in: William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge: Cambridge University Press, 2002.

⁷ For a recent example, see the remarks of the Attorney General of Trinidad and Tobago, Lawrence Maharaj, in the Working Group on Penalties at the Rome Conference on the International Criminal Court, 16 July 1998: ‘We want to make it quite clear that we do not consider the death penalty to be a human rights issue.’

Human Rights Treaty Law and Practice

One of the principal international human rights instruments, the *International Covenant on Civil and Political Rights*, adopted by the United Nations General Assembly in 1966, transformed the laconic and in some sense equivocal ‘right to life’ provision found in article 3 of the *Universal Declaration* into a complex text that recognises capital punishment as an exception or limitation on the right to life.⁹ Article 6 of the *Covenant* affirms the ‘inherent right to life’, adding that it cannot be ‘arbitrarily deprived’. But in a subsequent paragraph, the *Covenant* states:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹⁰

The provision goes on to state that anyone sentenced to death be entitled to seek amnesty, pardon or commutation of sentence, and to prohibit the death penalty for persons under eighteen at the time of commission of the crime¹¹ and for pregnant women. A final paragraph, really more programmatic than normative, declares: ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’ The *Covenant* is currently ratified by approximately 150 States, and its principles are therefore approaching near-universal acceptance.

The *Convention on the Rights of the Child*, adopted in 1989, states: ‘Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’. The *Convention on the Rights of the Child* has been ratified by essentially the whole world

⁸ *Charter of the United Nations*, art. 2(7).

⁹ *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171, art. 6.

¹⁰ *Ibid.*, art. 6(2).

¹¹ *Convention on the Rights of the Child*, GA Res. 44/25, annex, art. 37(a), also prohibits execution for crimes committed under the age of eighteen. It has been ratified by 192 countries, and signed but not ratified by the United States of America.

with the exception of the United States, which signed it without reservation in 1995. Even signatories to international treaties are required 'to refrain from acts which would defeat the object and purpose of a treaty'.¹² At the beginning of the 1990s, Amnesty International reported that several countries continued to execute persons for crimes committed while under the age of eighteen. Since then, both Pakistan and Yemen have abandoned the practice, explaining this as an initiative consistent with their obligations under the *Convention on the Rights of the Child*. It is now believed that only the United States and Iran continue to execute juvenile offenders.

In parallel to the United Nations instruments, regional human rights systems have also emerged in Europe, the Americas, Africa and the Arab world. In each, there is a general international treaty similar to the *International Covenant on Civil and Political Rights*. All four instruments recognise the right to life. Three of them resemble the *Covenant* in that they treat the death penalty as a limitation or exception to the right to life, while the fourth is simply silent on the subject. The first of the regional treaties to be adopted, the *European Convention on Human Rights*, actually predates the *International Covenant on Civil and Political Rights* by several years. It was drafted in 1950 by a handful of Western European States, members of the Council of Europe at the time, although its reach has now extended to forty-one parties with the dramatic expansion of the organisation in the 1990s. Like the *International Covenant*, the *European Convention* allows capital punishment as an exception to the right to life.¹³ The 'right to life' provision in the *American Convention on Human Rights*, adopted in 1969, rather closely resembles the text of article 6 of the *International Covenant on Civil and Political Rights*, but with two significant changes, both of them further limiting the scope of capital punishment. In addition to pregnant women and juveniles, capital punishment is also prohibited in the case of persons over seventy years of age. Furthermore, the *Convention* specifies explicitly that '[t]he death penalty shall not be reestablished in states that have abolished it', something that is only implicit in the *Covenant*.¹⁴ The *African Charter of Human and Peoples' Rights*, recognises the right to life but says nothing about capital punishment. Most commentators conclude that capital punishment must be an

¹² *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, art. 18(a).

¹³ *Convention For The Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'), (1955) 213 UNTS 221, art. 2(1).

¹⁴ *American Convention on Human Rights*, (1978) 1144 UNTS 123, art. 4.

implied limitation upon the right to life, given the still-widespread use of the death penalty within Africa.¹⁵ However, under a dynamic interpretation informed by jurisprudential developments like the judgment of the South African Constitutional Court abolishing the death penalty,¹⁶ it is now argued that the *African Charter* also mandates abolition.¹⁷ The *Arab Charter of Human Rights*, adopted in 1994 by the League of Arab States but not yet in force, allows the death penalty in the case of ‘serious violations of general law’, prohibits its use for political crimes, and excludes it for crimes committed under the age of eighteen and for both pregnant women and nursing mothers, for a period of up to two years following childbirth.¹⁸

Analysis of the capital punishment provisions in the *International Covenant* and the European and American conventions shows a definite trend towards limitation of capital punishment. The instrument that is most tolerant of the death penalty, the *European Convention*, was adopted in 1950. The most recent of the three, the *American Convention*, seems to flirt with outright abolition. In any event, by the time it was adopted, in 1969, the idea that these instruments should be amended to take into account abolitionist trends was already making the rounds. At the 1969 San Jose Conference, which adopted the *American Convention*, the United States delegate spoke of ‘the general trend, already apparent, for the gradual abolition of the death penalty’.¹⁹ Fourteen of the nineteen states present at the negotiation of the *Convention* adopted a statement calling for preparation of a protocol abolishing the death penalty.²⁰

¹⁵ *African Charter of Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 Rev. 5. It would be wrong to exaggerate the scope of capital punishment within Africa, however. Leaving aside the Arab States north of the Sahara, nearly half of African States have stopped using the death penalty and many have abolished it *de jure*. On capital punishment in Africa generally, see: William A. Schabas, ‘Abolition of the Death Penalty in Africa’, in William A. Schabas, ed., *Sourcebook on the Abolition of the Death Penalty*, Boston: Northeastern University Press, 1997, pp. 30-65.

¹⁶ *S. v. Makwanyane*, [1995] (3) SA 391, 16 *HRLJ* 154.

¹⁷ Manfred Nowak, ‘Is the Death Penalty an Inhuman Punishment?’, in Theodore S. Orlin, Allan Rosas & Martin Scheinin, *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000, pp. 27-45, at pp. 42-43.

¹⁸ *Arab Charter on Human Rights*, (1997) 4 *IHRR* 850.

¹⁹ OAS Doc. OEA/Ser.K/XVI/1.1 Doc. 10 (Eng.), p. 9.

²⁰ OAS Doc. OEA/Ser.K/XVI/1.2, p. 467: ‘The undersigned Delegations, participants in the Specialised Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering goal of making all possible efforts so that, in a short

European norms on the right to life were the most conservative, although practice on the continent soon began to change. The Council of Europe took the lead in 1983 in adopting a ‘protocol’ to the *European Convention* abolishing capital punishment in peacetime.²¹ Similar instruments for the other two systems, the *Second Optional Protocol* to the *International Covenant* and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, were adopted at the end of the 1980s and came into force shortly afterward.²² Finally, in 2002, the result of efforts by abolitionists like Swedish human rights activist Hans Göran Franck, a second protocol to the *European Convention* dealing with capital punishment, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, was adopted.²³ All four instruments are ‘optional’, and do not amend the original texts as such; rather, they offer States parties to the original texts the possibility of enhancing their obligations. But their success is impressive, and more than fifty ratifications have already been deposited. The number continues to grow rapidly.

Setting aside the protocols, whose effect seems clear enough, international law may also prohibit capital punishment by implication, through the effect of other norms that do not explicitly call for abolition, and more specifically by the prohibition of cruel, inhuman and degrading treatment or punishment, a norm found in all major human rights treaties as well as in most domestic constitutions. The concept of what is cruel, inhuman or degrading ought to change over time to reflect contemporary thinking and values. There is no doctrine of original intent – the bugbear of so much constitutional interpretation within the United States - with respect to international human rights treaties, quite the opposite. It is now well accepted that international human rights norms must receive a dynamic and ‘evolutive’ construction.

time, an additional protocol to the American Convention on Human Rights - Pact of San José, Costa Rica - may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man.’

²¹ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, *supra* note 2.

²² *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty*, *supra* note 2; *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, *supra* note 2.

²³ *Supra* note 2.

Many human rights treaties, like many national constitutions, acknowledge the death penalty as an exception to the right to life, but prohibit cruel, inhuman and degrading treatment or punishment. For example, the fifth amendment to the Constitution of the United States grants the right to due process for a person charged with of 'a capital or otherwise infamous crime', yet the eighth amendment prohibits 'cruel and unusual punishment'. Does the reference to capital punishment in constitutions and treaties effectively foreclose any consideration of the death penalty as an intrinsically cruel, inhuman or degrading punishment? Or is it conceivable that present or future interpreters will consider the capital punishment exception to the right to life to be neutralised or trumped by new conceptions of what is cruel, inhuman or degrading? In constitutions where there is no allowance for capital punishment as an exception to the right to life, some courts have concluded it is prohibited by the cruel, inhuman or degrading clause. But the argument by which it is implicitly repealed, despite some more explicit recognition, was rejected by the European Court of Human Rights (with a lone dissenter),²⁴ much as it had been dismissed nearly two decades earlier by the majority of the United States Supreme Court in an eighth amendment case.²⁵

Still, the argument that capital punishment is contrary to the prohibition of cruel, inhuman and degrading (or 'cruel and unusual') punishment is a judicial time bomb, ticking away inexorably as international abolition gains momentum. In 2001, the Supreme Court of Canada, clearly impressed with developments in international human rights law and State practice, reassessed its position on capital punishment, denying extradition to the United States for a capital offence as a violation of the constitution when a decade earlier it had balked at such a conclusion.²⁶

The argument has also returned to the European Court in an application filed by convicted Kurdish terrorist Abdullah Öcalan. Condemned to death by a Turkish court in early 1999, Öcalan's request for provisional measures was granted by the European Court of Human Rights in November of the same year.²⁷ In its judgment of 12 March 2003, the European Court referred to the opinion adopted by the

²⁴ *Soering v. United Kingdom et al.*, 7 July 1989, Series A, Vol. 161, para. 8.

²⁵ *Furman v. Georgia*, 408 US 238, 360-369, 92 SCt 2726, 2788-2792, 33 LEd.2d 346 (1972).

²⁶ *United States v. Burns*, [2001] 1 SCR 183, reversing *Kindler v. Canada*, [1991] 2 SCR 779, 67 CCC (3d) 1, 84 DLR (4th) 438, 6 CRR (2d) 193.

²⁷ *Öcalan v. Turkey*, Provisional Measures, 30 November 1999, Press release 683.

Parliamentary Assembly of the Council of Europe in conjunction with *Protocol No. 13*:

The second sentence of Article 2 of the European Convention on Human Rights still provides for the death penalty. It has long been in the interest of the Assembly to delete this sentence, thus matching theory with reality. This interest is strengthened by the fact that more modern national constitutional documents and international treaties no longer include such provisions (paragraph 5).²⁸

The Court revises the position it took in *Soering*, holding that the practice of Member States of the Council of Europe has had the effect of implied repeal of article 2(1) of the *European Convention*, to the extent that it authorises the death penalty. Necessarily, then, capital punishment is a form of ‘inhuman or degrading treatment or punishment’ incompatible with article 3 of the *Convention*.

195. Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States – most recently in the respondent State – and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

196. Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of

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Öcalan v. Turkey, *supra* note 4, para. 57.

Protocol No 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2.

197. In expressing this view, the Court is aware of the opening for signature of Protocol No. 13 which provides an indication that the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. However this Protocol seeks to extend the prohibition by providing for the abolition of the death penalty in all circumstances – that is to say both in time of peace and in times of war. This final step toward complete abolition of the death penalty can be seen as a confirmation of the abolitionist trend established by the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

198. In the Court's view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

The judgment is cautiously worded and seemingly equivocal. But in the final analysis, the Court clearly rules that the death penalty in peacetime is contrary to article 3, and that it is not sheltered by article 2(1), because that provision has been implicitly amended by State practice. This is confirmed by statements in the partially dissenting opinion of the Turkish judge, who of course disagrees.²⁹

There is now a considerable amount of case law on the interpretation of the human rights treaty provisions dealing with capital punishment. The Human Rights Committee, which is the organ established by the *International Covenant on Civil and Political Rights* to study periodic reports from States parties and to consider petitions

from aggrieved individuals and States, has examined capital punishment issues in many of the States parties to the *Covenant*. Accordingly, it has been held that the exception allowing capital punishment in countries ‘which have not abolished the death penalty’ means that a country that has already eliminated capital punishment cannot reinstate it.³⁰ The restriction on capital punishment to ‘the most serious crimes’ has led to criticism of States that impose it for economic crimes and other offences with non-lethal consequences.³¹ The prohibition on executions for juvenile offenders is a norm so fundamental that even a reservation formulated at the time of ratification is ineffective.³² Methods of execution that inflict superfluous or prolonged suffering on the condemned person – such as the gas chamber - constitute cruel, inhuman and degrading punishment, in breach of article 7 of the *Covenant*.³³ An enormous number of cases before the Human Rights Committee has dealt with capital punishment in Jamaica and elsewhere in the English-speaking Caribbean. Most of these have involved procedural flaws at trial or appeal. The Committee holds to the view that the strictest respect of procedural due process guarantees must be ensured if the death penalty is to be imposed.³⁴ Many death penalty applications are also granted because conditions on death row have been held to breach international standards.³⁵ Practically, this has meant that in approximately 85 per cent of capital punishment cases to be heard by the Committee there is a finding of a violation of the

²⁹ *Öcalan v. Turkey*, *ibid.*, Partially Dissenting Opinion of Judge Türmen.

³⁰ *Piandong et al. v. Philippines* (no. 869/1999), UN Doc. CCPR/C/70/D/869/1999, para. 7.4.

³¹ *e.g.*, UN Doc. CCPR/C/SR.1065-1067, UN Doc. A/46/40, para. 509; UN Doc. CCPR/C/SR.365, paras. 7, 8; UN Doc. CCPR/C/SR.870, 871, 874, 875, UN Doc. A/44/40, para. 259; UN Doc. CCPR/C/SR.928-932, UN Doc. A/45/40, para. 93; UN Doc. CCPR/C/SR.119, §14; UN Doc. CCPR/C/79/Add.50 (1995), para. 16.

³² When the United States ratified the *Covenant*, in 1992, it formulated a controversial reservation to article 6: ‘The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.’ The reservation was condemned in objections filed by eleven European States, including Sweden, and declared invalid by the Human Rights Committee: ‘Consideration of reports submitted by states parties under article 40 of the Covenant, Comments of the Human Rights Committee, United States - Initial Report,’ UN Doc. CCPR/C/79/Add.50 (1995), para. 14.

³³ *Ng v. Canada*, *supra* note 4, p. 189.

³⁴ For example, *Yasseen & Thomas v. Guyana* (no. 676/1996), UN Doc. CCPR/C/62/D/676/1996; *LaVende v. Trinidad and Tobago* (no. 554/1993), UN Doc. CCPR/C/61/D/554/1993.

³⁵ For example, *Henry v. Trinidad and Tobago* (no. 752/1997), UN Doc. CCPR/C/64/D/752/1997; *Pinto v. Trinidad and Tobago* (no. 512/1992), UN Doc. CCPR/C/57/D/512/1992; *Lewis v. Jamaica* (no. 527/1993), UN Doc. CCPR/C/57/D/527/1993.

Covenant. Some members of the Committee have never dismissed a death penalty petition, and there is certainly a constituency among its members for total abolition.

Trinidad and Tobago was so incensed by the Committee's findings in death penalty applications that it withdrew from the *Optional Protocol to the International Covenant on Civil and Political Rights*, the treaty that provides for a right of individual petition. Immediately afterward, Trinidad and Tobago ratified the *Protocol* for the second time, but on this occasion it appended a reservation excluding all death penalty applications. But in a subsequent application from Trinidad and Tobago that raised a death penalty issue, the Committee held that the subterfuge of denouncing the *Protocol* and then ratifying it with a reservation was invalid.³⁶

States parties to the *International Covenant* are required to submit periodic reports on their compliance with its provisions. This provides the Human Rights Committee with an opportunity to question States in public session about death penalty issues and to recommend, in its concluding observations, changes to legislation or practice required in order to ensure that there are no violations. The United States ratified the *Covenant* in 1992 and presented its initial report to the Human Rights Committee in March 1995. The Committee made the following comment:

The Committee is concerned about the excessive number of offences punishable by the death penalty in a number of States, the number of death sentences handed down by court, and the long stay on death row which, in specific instances, may amount to a breach of article 7 of the *Covenant*. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain States. It also deplores provisions in the legislation of a number of States which allow the death penalty to be pronounced for crimes committed by persons under eighteen and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.³⁷

The Committee recommended the following:

³⁶ *Kennedy v. Trinidad and Tobago* (no. 845/1999), UN Doc. CCPR/C/67/D/845/1999.
³⁷ UN Doc. CCPR/C/79/Add.47, para. 16.

The Committee urges the State party to revise the federal and State legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were eighteen.³⁸

In June 2002, the Inter-American Court of Human Rights ruled that criminal laws providing for capital punishment as a mandatory sentence for specific crimes were contrary to the *American Convention on Human Rights*.

The Court finds that the *Offences Against the Person Act* of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention.³⁹

Imposition of the death penalty has been challenged somewhat indirectly in cases where foreign nationals are threatened with execution. Under article 36(1)(b) of the *Vienna Convention on Consular Relations*,⁴⁰ foreign nationals have a right to be informed of their right to consular assistance in the event of arrest. It has become clear that many if not most foreign nationals condemned to death within the United States have not benefited from this information, which is essentially a due process guarantee akin to the 'Miranda warning' given by police as a result of a constitutional requirement that suspects be informed of their right to counsel. Two cases against the United States have been taken before the International Court of Justice, by Paraguay and by Germany. Provisional measures requests to suspend at least temporarily the planned executions were issued by the Court, but these were once again defied by

³⁸ *Ibid.*, para. 31.

³⁹ *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment, 21 June 2002, para. 103.

⁴⁰ (1963) 596 UNTS 261.

authorities in the United States.⁴¹ Paraguay dropped its application. But Germany proceeded, and in June 2001 the United States was found liable for a breach of international law because it executed the LaGrand brothers, and also because it did not honour a request from the International Court of Justice that it stay the proceedings until judgment was rendered.⁴²

Similar issues were also debated before the Inter-American Court of Human Rights in the context of a request for an advisory opinion filed by Mexico. The Inter-American Court concluded that in a death penalty case violation of the right to be informed of consular assistance was not only in breach of the *Vienna Convention*, it also violated the due process provisions of the major human rights treaties as well as the right not be deprived of life 'arbitrarily', which is protected by article 4 of the *American Convention on Human Rights* and article 6 of the *International Covenant on Civil and Political Rights*.⁴³

International Political Initiatives

In parallel with the drafting of international legal norms found in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, the political bodies of the United Nations and of other international organisations have been involved in a variety of initiatives aimed at limiting and eventually abolishing the death penalty. Although the issue of the death penalty has been addressed within those specialised bodies of the United Nations that concern criminal law,⁴⁴ the core of the debate has taken place in the Commission on Human Rights. The Commission is a specialised body, made up of fifty-three States elected by the Economic and Social Council. Its membership broadly reflects the geographic

⁴¹ *LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 3 March 1999*, [1999] ICJ Reports 1.

⁴² *LaGrand (Germany v. United States of America)*, 27 June 2001.

⁴³ *The right to information on consular assistance in the context of the guarantees of due process of law*, Advisory Opinion OC-16/99 of 1 October 1999.

⁴⁴ Notably the United Nations committee and commission on crime prevention and control, which has been considering the subject of capital punishment since the 1950s. See: Roger S. Clark, 'Human Rights and the U.N. Committee on Crime Prevention and Control', (1989) 506 *Annals Am. Assoc. Pol. & Soc. Sci.* 68; Roger S. Clark, 'The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990', (1990) 1 *Criminal Law Forum* 513; Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program, Formulation of Standards and Efforts at Their Implementation*, Philadelphia: Penn, 1994, pp. 58-62.

and political orientations of the entire United Nations membership. Although its interventions may be less robust than those of tribunals and similar bodies like the Human Rights Committee, it has the advantage of being able to address itself to violations of fundamental rights in all United Nations member States, even those that have not fully ratified the relevant treaties.

Much of the monitoring and fact finding work of the Commission on Human Rights in specific areas is carried out by its special rapporteurs. The special rapporteur on extrajudicial, summary or arbitrary executions from 1992 to 1999, Bacre Waly Ndiaye took the view that international human rights law seeks the abolition of the death penalty. He has stated that 'given that the loss of life is irreparable... the abolition of capital punishment is most desirable in order fully to respect the right to life.' According to Ndiaye, 'where there is a fundamental right to life, there is no right to capital punishment'. In the course of 1996, he sent urgent appeals to the United States of America concerning death sentences imposed on the mentally retarded, in cases following trial in which the right to an adequate defence had allegedly not been fully ensured, where individuals had been sentenced to death without resorting to their right to lodge any legal or clemency appeal, and where they had been sentenced to death despite strong indications casting doubt on their guilt. He sent a special appeal to the United States in the case of Joseph Roger O'Dell who, according to his report to the Commission on Human Rights, 'has reportedly extraordinary proof of innocence which could not be considered because the law of the State of Virginia does not allow new evidence into court 21 days after conviction'. Despite an international campaign, O'Dell was executed in July 1997. The special rapporteur also noted that in response to his urgent appeals, the Government of the United States provided nothing more than a reply in the form of a description of the legal safeguards provided to defendants in the United States in criminal cases.⁴⁵

In his 1997 report to the Commission on Human Rights, special rapporteur Ndiaye noted that '[a]s in previous years, the Special Rapporteur received numerous reports indicating that in some cases the practice of capital punishment in the United States does not conform to a number of safeguards and guarantees contained

⁴⁵ 'Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur', UN Doc. E/CN.4/1997/60, paras. 544-546. Also: 'Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur', UN Doc. E/CN.4/1996/614, paras. 507-517, paras. 540-557.

in international instruments relating to the rights of those facing the death penalty. The imposition of the death penalty on mentally retarded persons, the lack of adequate defence, the absence of obligatory appeals and racial bias continue to be the main concerns.⁴⁶ He said he

remains deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the appeals procedure after conviction in capital cases in some states.⁴⁷

As a result of repeated initiatives, the government of the United States extended a formal invitation to Ndiaye to visit the country and conduct an investigation.⁴⁸ In October 1997, he undertook a two-week mission to the United States, and attempted to visit death row prisoners in Florida, Texas and California. At California's San Quentin Penitentiary, he was refused permission by authorities to meet with designated prisoners. Ndiaye's visit provoked the ire of Senator Jesse Helms, the arch-conservative chair of the Senate Foreign Relations Committee, who in a letter to William Richardson, United States Permanent Representative to the United Nations, described the mission as an 'an absurd U.N. charade'. 'Bill, is this man confusing the United States with some other country or is this an intentional insult to the United States and to our nation's legal system?', Helms asked. Ndiaye replied: 'I am very surprised that a country that is usually so open and has been helpful to me on other missions, such as my attempts to investigate human rights abuses in the Congo, should consider my visit an insult.'⁴⁹

Ndiaye's successor as special rapporteur, Pakistani lawyer Asma Jahangir, has continued to pursue capital punishment issues. In her 1999 report, she said:

⁴⁶ 'Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur,' UN Doc. E/CN.4/1997/60, para. 543.

⁴⁷ *Ibid.*, para. 551.

⁴⁸ *Ibid.*, para. 549.

⁴⁹ John M. Goshko, 'Helms Calls Death Row Probe 'Absurd U.N. Charade'', *The Washington*

The Special Rapporteur's concerns as they relate to the United States are limited to issues pertaining to the death penalty. The increasing use of the death penalty is a matter of serious concern and particularly worrisome are the continued executions of mentally-ill and mentally-handicapped persons as well as foreigners who were denied their international right to consular assistance. The Special Rapporteur views the persistent application of the death penalty and subsequent executions of persons who committed crimes as minors as a very serious and disturbing practice that inherently conflicts with the prevailing international consensus.⁵⁰

In 1997, the Commission on Human Rights began adopting a series of annual resolutions on the subject of capital punishment. The resolution affirmed the Commission's conviction 'that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.' It requested States to consider suspending executions and imposing a moratorium on the death penalty. The resolution was passed by a roll-call vote, twenty-seven in favour and eleven opposed, with fourteen abstaining.⁵¹ Similar resolutions, with progressively sharper language, were adopted by the Commission on Human Rights in subsequent years. The resolution adopted at the Commission's 2000 session called upon States that still retain the death penalty progressively to restrict the number of offences for which it may be imposed, to establish a moratorium on executions, with a view to completely abolishing the death penalty, and to make available to the public information with regard to capital punishment. All States were required to reserve the right to refuse extradition in the absence of assurances that the death penalty not be imposed.⁵²

The Sub-Commission on the Promotion and Protection of Human Rights, an expert body subordinate to the Commission on Human Rights, debated death penalty issues at its 1999 session. In August 1999 it adopted a resolution condemning the imposition of the death penalty for crimes committed by persons under the age of eighteen. A preamble to the resolution referred to six countries that had applied

Post, 1 October 1997; Page A07.

⁵⁰ 'Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1998/68', UN Doc. E/CN.4/1999/39/Add.1, para. 257.

⁵¹ CHR Res. 1997/12.

capital punishment in such circumstances over the past decade, namely Iran, Nigeria, Pakistan, Saudi Arabia, the United States of America, and Yemen. The resolution also called upon States not to apply the death penalty for refusal to serve in or desertion from the military, and called on States to commute all death sentences to at least life imprisonment on December 31, 1999 to mark the millennium.⁵³

Use of the death penalty throughout the world, including the United States, has also been regularly denounced by the High Commissioner for Human Rights, Mary Robinson. On 4 February 1998 she stated that she was ‘saddened to learn of the death by lethal injection last night of Karla Faye Tucker who was put to death for murders she committed fifteen years ago’. Mrs Robinson also said that the ‘increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international community’s expressed desire for the abolition of the death penalty’.⁵⁴

The death penalty has also been debated within the General Assembly of the United Nations. Initially encouraged by the Commission on Human Rights that had been proposed by Sweden and Austria, it took up the issue of capital punishment for the first time in 1968, with a resolution observing that ‘the major trend among experts and practitioners in the field is towards the abolition of capital punishment’.⁵⁵ The resolution cited a series of safeguards respecting appeal, pardon and reprieve, and mandated delay of execution until the exhaustion of such procedures, inviting governments to provide for a six-month moratorium before implementing the death penalty.⁵⁶ Many Member States favourable to capital punishment actually supported the resolution, noting that it confined itself to the ‘humanitarian’ aspect of the question,⁵⁷ while some abolitionist states criticised its timidity, saying it would not ‘induce Governments to abolish the death penalty’.⁵⁸ The resolution declared that ‘the main objective to be pursued is that of progressively restricting the number of

⁵² ‘The question of the death penalty’, UN Doc. E/CN.4/RES/2000/65.

⁵³ UN Doc. E/CN.4/Sub.2/1999/L.16. See also: ‘The death penalty in relation to juvenile offenders’, UN Doc. E/CN.4/Sub.2/RES/2000/17.

⁵⁴ UN Doc. HR/98/6.

⁵⁵ GA Res. 2393(XXIII). Adopted by ninety-four votes to zero, with three abstentions (UN Doc. A/PV.1727 (1968)).

⁵⁶ UN Doc. E/4475 (1968), UN Doc. E/CN.4/972 (1968), at pp. 134-136, 162-164.

⁵⁷ UN Doc. A/C.3/SR.1557 (1968), para. 17 (China); UN Doc. A/C.3/SR.1558 (1968), para. 10 (France).

⁵⁸ UN Doc. A/C.3/SR.1558 (1968), para. 2 (Austria).

offences for which capital punishment may be imposed with a view to the desirability of abolishing the punishment in all countries'.⁵⁹

More than twenty years later, in 1994, capital punishment returned to the agenda of the General Assembly in the form of a draft resolution inviting states which had not abolished the death penalty to consider the progressive restriction of the number of offences for which the death penalty might be imposed, and to exclude the insane from capital punishment.⁶⁰ The final paragraph 'encourage[d] states which have not yet abolished the death penalty to consider the opportunity of instituting a moratorium on pending executions with a view to ensuring that the principle that no state should dispose of the life of any human being be affirmed in every part of the world by the year 2000'. The proposer, Italy, eventually obtained forty-nine co-sponsors for the resolution. However, a skilful procedural gambit engineered by Singapore succeeded in blocking its adoption.⁶¹

When the European Union again attempted a resolution in the General Assembly in 1999, it was outmanoeuvred by some retentionist states, even though these were very much in the minority. The whole business ended in fiasco, and the resolution was withdrawn before it could be put to a vote. Humiliated, the European Union decided to withdraw the resolution rather than see it transformed beyond recognition. Speaking to the European Parliament, Commissioner Chris Patten said it had been necessary 'to freeze our resolution on the death penalty or risk the passing of a resolution that would have incorporated wholly unacceptable arguments that asserted that human rights are not universally applicable and valid'.⁶² He said that 'following intensive negotiation, we decided at last year's General Assembly in November that no resolution was better than a fatally flawed text, and that therefore the EU should not pursue its initiative in UNGA'. Patten said that 'hardline retentionists' now seem resigned to resolutions in the Commission on Human Rights, but that they will continue to resist strongly any efforts to secure a General Assembly resolution.⁶³

⁵⁹ G.A. Res. 2857(XXVI).

⁶⁰ UN Doc. A/49/234 and Add. 1 and Add.2 (1994), later revised by UN Doc. A/C.3/49/L.32/Rev.1 (1994). See, generally, Ilias Bantekas & Peter Hodgkinson, 'Capital Punishment at the United Nations: Recent Developments', (2000) 11 *Criminal Law Forum* 23.

⁶¹ UN Doc. A/C.3/49/SR.61.

⁶² Excerpts from a Statement Delivered by the Rt. Hon. Christopher Patten, European Union Commissioner for External Relations to the European Parliament, 16 February 2000.

⁶³ Speech to European Parliament, 25 October 2000.

American Exceptionalism?

The United States is very much the great enigma in the death penalty debate, viewed from an international perspective. Its stubborn attachment to capital punishment puzzles Europeans, who see abolition as a logical outgrowth of democratic development and who are mystified about why a country so similar to themselves in so many ways can behave so differently. By the same token, the continued use of the death penalty in the United States only comforts and encourages regimes and societies with rather darker perspectives on human rights. Europe should, perhaps, not so quickly forget the fact that in the late 1960s and early 1970s, when capital punishment had essentially ceased in the United States, executions were very much a part of the punitive landscape in countries like France, Spain, and Greece, and had barely ceased in the United Kingdom. The two societies – Europe and the United States – took different paths, with the United States returning to the death penalty while Europe moved towards permanent and total abolition.

There have been many attempts to understand why the United States headed, so to speak, in the opposite direction. The explanations must necessarily be complex, but one element clearly stands out, and that is the racism that is endemic in the United States justice system. The country continues to live with the sequelae of slavery, the civil war, and the so-called ‘Jim Crow’ regimes that followed emancipation. A vivid example was the 2000 presidential election, which ultimately hinged on the result in Florida, a former slave state. Florida has legislation that deprives convicted felons of the right to vote. It is a form of indirect discrimination, ostensibly neutral in intent but brutal in its effects, which is to deprive a large segment of the African-American population of the franchise. We are not talking about capital punishment here, but the phenomenon is not entirely unrelated. There are major deformations in United States law and society that can only be explained by the legacy of oppression, through slavery and subsequently through segregation. Voting in Florida is one of them, and capital punishment is another. The role racism plays in the administration of the death penalty has been highlighted in litigation before the United States Supreme Court, where it has not yet succeeded,⁶⁴ and the Inter-American Commission on

⁶⁴ *McCleskey v. Kemp*, 481 US 279, 107 SCt 1756, 95 LEd.2d 262 (1987).

Human Rights, where it has.⁶⁵ European justice systems are far from immune to racist influences, but there can really be no comparison with the United States, with its 2-million-strong prison population, comprised essentially of ethnic and racial minorities.

Public opinion polls show that the attachment to capital punishment is not nearly as profound as it once appeared. Perhaps a majority of the American population would prefer an alternative, life imprisonment without parole, although it too is of terrifying and dehumanising brutality, and raises its own human rights questions. And there have been major developments on both the political and judicial front. On a political level, two of the states, Illinois and Maryland, have imposed moratoria on capital punishment. On the judicial front, the Supreme Court of the United States appears to be adjusting its extremely harsh case law on the subject of the death penalty. The two are closely related, because the Court now seems to take much of its lead, in construing the eighth amendment prohibition of cruel and unusual punishment, from the behaviour of state governments.

Can the international context influence the course of abolition within the United States? Certainly, there is a very direct impact when countries refuse to extradite to the United States without assurances that capital punishment will not be imposed. In the long run, its growing status as an international pariah on the subject should contribute to the debate within the United States, with an additive and synergistic effect upon other factors, such as the danger of wrongful conviction. There is a strong constituency within the United States that desires it to play a full role in the international human rights systems. This can be seen in the ratification of certain human rights treaties during the early years of the Clinton administration, and the signature, on 31 December 2000, of the *Rome Statute of the International Criminal Court*. There are also, unfortunately, vocal and influential elements who attack international human rights law as an encroachment upon sovereignty. The changing dialectic of these two currents with respect to international law and practice may well make an important and possibly even decisive contribution to the survival or defeat of capital punishment within the United States in the first decades of the twenty-first century.

⁶⁵ *Andrews v. United States* (Case No. 11.139), Report No. 57/96, 6 December 1996.

In one of the leading cases on the Eighth Amendment not dealing with capital punishment, the United States Supreme Court considered comparative law sources and noted the fact that the punishment - deprivation of citizenship for desertion - was not authorised in other countries.⁶⁶ In a late 1960s death penalty case, Chief Justice Wright of the Supreme Court of California wrote that 'the repudiation of the death penalty in this country is reflected in a world-wide trend towards abolition'.⁶⁷ But in recent years, the references to international sources in judgments of the United States Supreme Court have not been frequent. Then suddenly, in a footnote in *Atkins v. Virginia*, decided in June 2002, the majority took favourable note of the views of 'the world community'. The reference in question was to an *amicus curiae* brief filed by the European Union, which had obtained permission to make submissions in the case. Outraged, but also threatened, by this modestly renewed openness to international authorities, conservative justice Antonin Scalia ridiculed the references of the majority to the international authorities, describing them as 'irrelevant' and declaring that its 'notions of justice are (thankfully) not always those of our people'.

Scalia's views are thankfully in decline. All around the world, courts and lawmakers increasingly look to other courts and other legislatures for guidance. The synergy between them has driven the debate. When Canada's Supreme Court reversed itself on the death penalty in February 2001, the evolving international debate weighed heavily and perhaps decisively on the minds of the judges. The wrote:

.....

The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental

⁶⁶ *Trop v. Dulles*, 356 US 86, 102, 78 SCt 590, 599, 2 LEd.2d 630 (1958).

⁶⁷ *People v. Anderson*, 6 Cal.3d 628, 654, 493 P.2d 880, 898 (1972), *cert. denied*, 406 US 958, 92 SCt 2060, 32 LEd.2d 344 (1972) (Wright CJ).

justice that led to the rejection of the death penalty in
Canada.⁶⁸

.....

The Supreme Court was particularly impressed with evidence of the danger of executing the innocent. This issue was not addressed in *Kindler* and, to be fair, it has emerged as a central theme in the death penalty debate only within the past decade. Technological advances, principally the possibility of DNA testing, have facilitated revelations about miscarriages of justice. Within the United States, there is now a substantial literature on the subject.⁶⁹ Several erstwhile enthusiasts for capital punishment in the political sphere have ‘blinked’ on this issue. Perhaps the most celebrated development is the moratorium ordered by governor Ryan of Illinois in late-1999, a move that was followed in January 2003 by his systematic commutation of death row prisoners.

Only a few months after the *Burns* ruling by the Supreme Court of Canada, the Constitutional Court of South Africa tackled much the same issue. In 1995, the South African Court had issued a landmark ruling holding capital punishment to be inconsistent with the post-*apartheid* interim constitution’s protection of the right to life and prohibition of cruel, inhuman and degrading treatment or punishment.⁷⁰ In June 2001, the same Court granted a petition from Khalfan Khamis Mohamed, who was a participant in the Al Qaeda bombing of the United States embassy in Dar es Salaam. After being arrested in South Africa, Mohamed had been summarily turned over to the FBI in what the State called a deportation, although the Court saw no reason to view it as anything but a disguised extradition.⁷¹ According to the Court: ‘In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and

⁶⁸ *United States v. Burns*, *supra* note 26, para. 92.

⁶⁹ Michael L. Radelet, Hugo Adam Bedau & Constance E. Putnam, *In Spite of Innocence*, Boston: Northeastern University Press, 1992; James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, ‘Capital Attrition: Error Rates in Capital Cases, 1973-1995’, (2000) 78 *Tex. L. Rev.* 1839; Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*, New York: Random House, 2000..

⁷⁰ *S. v. Makwanyane*, *supra* note 16. The Court reaffirmed the validity of *Makwanyane* in light of the new *Constitution*, in *Mohamed v. President of the Republic of South Africa*, (2001) (3) SA 893 (CC), para. 39.

⁷¹ See, for example, *Mohamed v. President of the Republic of South Africa*, *ibid.*, paras. 40, 60.

protected and his right not to be subjected to cruel, inhuman or degrading punishment.’⁷²

But Mohamed was already on trial in New York when the Constitutional Court issued its ruling. He was being tried jointly with an accomplice, Mahmoud Mahmud Salim, who had been extradited to the United States from Germany subsequent to a commitment that capital punishment would not be imposed. The South African Court noted the unfairness of the situation, which also refuted any suggestion that the United States might not have provided the assurance has it been sought.⁷³ As a remedy for the constitutional violation, the South African Constitutional Court ordered ‘the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency’.⁷⁴ It noted in addition

Not only is the learned judge presiding aware of these proceedings, but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding. On the papers there is a conflict of opinion as between one of the defense lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal proceedings of any finding we might make. It is for the presiding judge to determine such issues. For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial judge is enabled to exercise his judicial powers in relation to the proceedings in this Court...⁷⁵

Apparently Judge Sand, who was presiding over the trial, had specially authorized the use of funds for the court-appointed defense team to pursue Mohamed’s interests in South Africa, as the South African Constitutional Court observed.⁷⁶

Within days of the Constitutional Court ruling, the New York jury found Mohamed guilty of murder. Under federal law, the jury had then to deliberate again

⁷² *Ibid.*, para. 49.

⁷³ *Ibid.*, paras. 44, 55.

⁷⁴ *Ibid.*, para. 74.

⁷⁵ *Ibid.*, para. 71 (reference omitted).

as to whether or not the convicted man should be sentenced to death. Judge Sand took the extraordinary step of informing the jury of the South African Constitutional Court's views. The jury also knew that Salim, who had also been found guilty, could not be sentenced to death because this had been a condition of his extradition from Germany. On 10 June 2001, eleven of the twelve jurors concluded that 'others of equal or greater culpability in the murders [would] not be sentenced to death', which is a mitigating factor under the applicable federal statute. Mohamed was given a sentence of life imprisonment.⁷⁷

The refusal of abolitionist States to cooperate in the imposition of capital punishment is increasingly manifesting itself in another, related, manner, namely the denial of other forms of mutual legal assistance. For example, on 27 November 2002, French and German authorities agreed to provide evidence requested by the United States in the prosecution of French national Zacarias Moussaoui for his involvement in the 11 September attacks, after receiving an assurance that the information would not be used to seek or impose the death penalty.⁷⁸ German documents apparently provide information about transfer of money from a man alleged to have belonged to al Qaeda in Germany, Ramzi Binalshibh, to Moussaoui. French documents depict the childhood and early adulthood of Moussaoui in France, and apparently assist in establishing his connections with Muslim radicals. The Germany Embassy in Washington issued a statement on its website:

The German government will meet the request for legal assistance by the U.S. government in the case of French citizen Zaccharias Moussaoui. The United States of America has assured, that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty... The German constitution (Art.2, par.1; Art.102), which prohibits the imposition of the death penalty or any submittance [*sic*] of material that might lead to the capital punishment. The

⁷⁶ *Ibid.*

⁷⁷ *United States v. Bin Laden*, 156 F.Supp.2d. 359 (S.D.N.Y. 2001).

⁷⁸ Dan Eggen, 'U.S. to Get Moussaoui Data From Europe', *Washington Post*, 28 November 2002, p. A19, col. 1; Christopher Marquis, 'Germany Agrees to Share Evidence Against 9/11 Defendant', *New York Times*, 28 November 2002, p. A18.; Bruce Zagaris, 'Germans and French Agree to Give Evidence in Moussaoui Case', (2003) 19 *Int'l Enforcement L. Reporter* 21.

U.S. government has acknowledged this legal position with the aforementioned assurance.⁷⁹

In December 2002, the European Union reached a deal allowing the United States to get personal data from Europol law enforcement agency on suspects. It was described by journalists as a 'breakthrough' that resulted when the United States accepted that European Union members would not be expected to surrender suspects if they could face the death penalty.⁸⁰

* * * * *

Human rights law – the *Universal Declaration of Human Rights* and the treaties that followed - has become the touchstone for new constitutions and for the case law of constitutional courts. The phenomenon is one of legal globalisation, and it is promoting moves to limit and eliminate the death penalty in those countries where it still exists. There are many paths to abolition. In Ireland, it was by referendum when, on 31 May 2001, some 63 per cent of voters supported a constitutional amendment prohibiting capital punishment.⁸¹ In South Africa, Albania and Ukraine it has been by judgment of the Constitutional Court. In Russia, it was by executive fiat. In Turkey, it was by legislation. There appears to be no formula to follow as each country finds its own path to a civilised and humane system of criminal law. But in all of these recent cases of abolition of the death penalty, probably the most significant single impetus has been the dynamism of international human rights law.

⁷⁹ Germany gives legal assistance in the Moussaoui case, <http://www.germany-info.org/relaunch/politics/new/pol_terror_trial3.html>.

⁸⁰ Ian Black, 'EU agrees to pass on intelligence to FBI', *The Guardian*, 20 December 2002, p. 12; USA and Europol sign a full co-operation agreement, 20 December 2002, <<http://www.europol.eu.int/index.asp?page=news&news=pr021220.htm>>.

⁸¹ *Twenty-first Amendment of the Constitution (No. 2) Bill, 2001 (Death Penalty)*. The death penalty was abolished in Ireland in 1990: *Criminal Justice Act, 1990*.

Biographical notes - William A. Schabas

Current as of 1 August 2003



Professor William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law. Professor Schabas holds B.A. and M.A. degrees from the University of Toronto and LL.B., LL.M. and LL.D. degrees from the University of Montreal.

Professor Schabas is the author of twelve books dealing in whole or in part with international human rights law, including *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001; a second edition will appear in late 2003), *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), *The Abolition of the Death Penalty in International Law* (Cambridge, Cambridge University Press, 2002 (3rd ed.)), *International Human Rights Law and the Canadian Charter* (Toronto, Carswell, 1996), *The Death Penalty as Cruel Treatment and Torture* (Boston, Northeastern University Press, 1996) and *Précis du droit international des droits de la personne* (Montréal, Éditions Yvon Blais, 1997). He has also published more than 125 articles in academic journals, principally in the field of international human rights law. Professor Schabas is editor-in-chief of *Criminal Law Forum*, the quarterly journal of the International Society for the Reform of Criminal Law.

In May 2002, the President of Sierra Leone appointed Professor Schabas to the country's Truth and Reconciliation Commission, upon the recommendation of Mary Robinson, the United Nations High Commission for Human Rights.

Professor Schabas has often been invited to participate in international human rights missions on behalf of non-governmental organizations such as Amnesty International (International Secretariat), the International Federation of Human Rights, and the International Centre for Human Rights and Democratic Development to Rwanda, Burundi, South Africa, Kenya, Uganda, Sudan, Cambodia and Guyana. He

has worked as a consultant to the Ministry of Justice of Rwanda, the United States Agency for International Development and the Organization for Security and Cooperation in Europe. He was a delegate of the International Centre for Criminal Law Reform and Criminal Justice Policy to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15-July 17 1998. He is a member of the board of several international human rights organisations and institutions, including the International Institute for Criminal Investigation, of which he is chair, and the International Institute for Human Rights (Strasbourg), of which he is treasurer.

From 1991 to 2000, William Schabas was professor of human rights law and criminal law at the Département des sciences juridiques of the Université du Québec à Montréal, a Department he chaired from 1994-1998; he now holds the honorary position of *professeur associé* at that institution. He has also taught as a visiting or adjunct professor at McGill University, Université de Montréal, Université de Montpellier, Université de Paris X-Nanterre, Université de Paris XI, Université de Paris II Pantheon-Assas, Dalhousie University, University of Rwanda and Université de Genève, and he has lectured at the International Institute for Human Rights (Strasbourg), the Canadian Foreign Service Institute, the United Nations Institute for Training and Research and the Pearson Peacekeeping Centre.

Professor Schabas is a member of the Quebec Bar, and was a member of the Quebec Human Rights Tribunal from 1996 to 2000. He has participated in death penalty litigation before such bodies as the United Nations Human Rights Committee, the Inter-American Commission of Human Rights, and the Supreme Courts of Canada and the United States. Professor Schabas was a senior fellow at the United States Institute of Peace in Washington during the academic year 1998-99. In 1998, Professor Schabas was awarded the Bora Laskin Research Fellowship in Human Rights by the Social Sciences and Humanities Research Council of Canada.

Professor William A. Schabas
Director, Irish Centre for Human Rights
National University of Ireland, Galway
Galway, Ireland

Tel.: 353.91.512103
Fax: 353.91.750575
william.schabas@nuigalway.ie

Selected publications by William A. Schabas dealing with capital punishment

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