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# The Death Penalty under International

**Law:** A Background Paper to the  
IBAHRI Resolution on the  
Abolition of the Death  
Penalty



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# The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty

## Introduction

This paper aims to outline the status of the death penalty under international law. Part One assesses existing treaty and customary international law, and notes that while the death penalty is not yet prohibited under universally-binding international law, its abolition is strongly encouraged and it may only be imposed within very strict limitations. Part Two examines the increasing international trend amongst states to abolish the death penalty and identifies the likelihood that an international customary standard is developing. Part Three considers the position of other international organisations on the death penalty, noting that according to our research all organisations with a human rights focus promote the abolition of the death penalty to varying degrees.

## Part One: The Death Penalty under International Law

While the death penalty is not prohibited by the International Covenant on Civil and Political Rights (ICCPR) or any other virtually universal international treaty, there are a number of instruments in force with fewer states parties that do abolish capital punishment.<sup>1</sup> Similarly, international customary law does not prohibit the death penalty at the current time, but custom is rapidly changing towards a position in favour of worldwide abolition.

At the international level, the most important treaty provision relating to the death penalty is Article 6 of the ICCPR. At the time the ICCPR was drafted (1947-1966), just ten countries had abolished the death penalty, but extensive debate nonetheless took place as to its status under the covenant.<sup>2</sup>

Article 6 of the ICCPR states:

1. 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.
2. 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 judgement rendered by a competent court.

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1 These include: the Second Optional Protocol to the International Covenant on Civil and Political Rights (60 ratifications, 7 signatures); the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (eight ratifications, one signature); Protocol number 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (45 ratifications, one signature); Protocol no. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (38 ratifications, 6 signatures). Others strictly limit the death penalty, including: the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (12 parties); the American Convention on Human Rights (24 ratifications, 1 signature); and the Arab Charter on Human Rights (22 states).

2 Roger Hood, *The Enigma of the 'Most Serious' Offences* Centre for Human Rights and Global Justice Working Paper Extrajudicial Executions Series (Number 9 2006) NYU School of Law, New York, 2.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. 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.

It is clear from this article that there are a number of strict limitations on the imposition of the death penalty, including (but not limited to) the following:

- Right to a fair trial before the imposition of the death penalty;
- Limitation of the death penalty to only the most serious crimes;
- Prohibition against imposing the death penalty when other ICCPR rights have been violated;
- Prohibition against retroactive imposition of the death penalty;
- Right to seek pardon or commutation of a death penalty sentence;
- Prohibition against the execution of persons who were under the age of eighteen at the time the offence was committed; and
- Prohibition against the execution of pregnant women.

In addition to these limitations, other customary limits are emerging, including (but not limited to) trends towards the abolition of executing the mentally ill and mothers with dependant infants.

The first three limitations remain vague and controversial, so it is helpful to examine some of these issues in greater depth.

### *'Arbitrarily deprived' – the right to a fair trial*

Article 6 demands a fair trial before the imposition of the death penalty under two heads: the protection against being 'arbitrarily deprived' of one's life; and the requirement that the death penalty not be imposed when the Covenant is otherwise breached. This has been interpreted by the Human Rights Committee (the body responsible for monitoring States Parties compliance with the ICCPR<sup>3</sup>), to mean that in all capital trials a fair trial that observes all the provisions of the ICCPR must be held, without which the death penalty may not be imposed.<sup>4</sup> This includes recognised

<sup>3</sup> It should be noted that the findings of the Human Rights Committee are in-principle only, and non-binding. The Human Rights Committee should not be confused with the Human Rights Council, formerly the Commission on Human Rights, which is a subsidiary body of the United Nations General Assembly.

<sup>4</sup> Louise Arbour, *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Tribunal: 8 February 2007)

international requirements including (but not limited to): being informed promptly and in detail of the charges; for translation or interpretation into one's own language to be provided; presumption of innocence; counsel of one's choosing; sufficient time to prepare a defence; a trial to be held without undue delay; for the hearing to be heard by an independent and impartial tribunal; and for the right of review by a higher tribunal.<sup>5</sup>

This interpretation was supported and extended by the European Court of Human Rights, which stated in 2005:

In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed... Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.<sup>6</sup>

### *Limitation to 'the most serious crimes'*

Whilst the limitation of the imposition of the death penalty to the most serious crimes is an established principle of international law, it lacks definition and agreement.<sup>7</sup> In 1984, the Economic and Social Council published the *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, which stipulated that the most serious crimes should not go beyond intentional crimes with lethal or other extremely grave consequences. While these Safeguards are not legally binding, they were endorsed by UN General Assembly, indicating strong international support. Similarly, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that the death penalty should be eliminated for economic crimes, drug-related offences, victimless offences, and actions relating to moral values including adultery, prostitution and sexual orientation.<sup>8</sup>

However, this interpretation is contested by a number of countries, and so cannot be regarded as universally accepted. For example, some Islamic states regard adultery and apostasy as some of the most serious crimes, while other states believe the most serious crimes include political offences and economic crimes.<sup>9</sup> States such as Singapore regard drug offences as among the most serious crimes. Many of these views are not supported at the international level, and the Human Rights Committee has stated specifically that the 'imposition...of the death penalty for offences which cannot be characterised 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>10</sup> Other areas remain in contention. While the Committee's findings are non-binding, they are nonetheless highly persuasive in interpreting the ICCPR, particularly when read in conjunction with the Safeguards endorsed by the General Assembly and the UN Special Rapporteur's position.

<sup>5</sup> *Reid v Jamaica* Communication No. 250/1987, Views adopted on 20 July 1990 at para 11.5, U.N. Doc. CCPR/C/51/D/355/1989 (1994).

<sup>6</sup> *Ocalan v Turkey* European Court of Human Rights (First Section) Application 46221/99, Judgement of 12 May 2005 at para 169.

<sup>7</sup> William A Schabas, *The Abolition of the Death Penalty in International Law* (Third Edition: Cambridge UP, 2002), 373.

<sup>8</sup> Eric Prokosch, 'The Death Penalty versus Human Rights' in *Death Penalty: Beyond Abolition* (Council of Europe Publishing: Strasbourg, 2004), 23-35, 27; *Supra Note 7*, 373.

<sup>9</sup> *Supra Note 7*.

<sup>10</sup> CCPR/C/79/Add quoted in *Supra Note 8*, 26

However interpreted, it is clear that this provision restricts the application of the death penalty to a very limited number of crimes. Consequently, under international law, the death penalty must only be used as an exceptional measure, carried out under strict conditions.<sup>11</sup>

### *Breaches of other human rights in the imposition of the death penalty*

The assertion that the death penalty constitutes torture or cruel, inhuman or degrading treatment is gaining ground. These human rights breaches may occur in the period following sentencing and before execution, (which is known commonly in the United States as ‘death row phenomenon’), in the method of execution, or in the loss of life itself.

The European Court of Human Rights found that the death row phenomenon in the United States constituted cruel, inhuman or degrading treatment in *Soering v United Kingdom and Germany*<sup>12</sup>, as did the Judicial Committee of the Privy Council in *Pratt et al v Attorney-General for Jamaica et al*<sup>13</sup>. However, this has caused concern, as the Human Rights Committee and the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions have noted that such criticisms are only likely to result in the limitation of appeals.<sup>14</sup>

Various methods of execution have also been identified as unacceptable at international law. For example, the Human Rights Committee has deemed the use of the gas chamber to constitute cruel, inhuman and degrading treatment.<sup>15</sup> The Human Rights Committee has also found that ‘public executions are... incompatible with human dignity’.<sup>16</sup> The release of the recorded executions of Saddam Hussein and his associates in 2006 was widely criticised, as were the taunts made against him in his last moments. Stonings are heavily criticised as being cruel and inhuman, particularly as the size of the stones is limited in order to prolong the suffering and death of the condemned person.<sup>17</sup> The accidental decapitation of one of Saddam Hussein’s associates (considered further below) also raised objection. In the United States, a number of states have ended use of the electric chair as it is considered to be excessively painful, while debates are ongoing about the use of lethal injections. This is due to concerns that when using lethal injections, the cocktail of drugs may result in an extremely painful and slow death combined with paralysis. However, the use of lethal injection remains legal at international law at this stage.<sup>18</sup>

The line between cruel, inhuman and degrading treatment and torture may be blurred. Some commentators have argued that execution is similar to torture, as it constitutes an extreme mental and physical impact on a person already under the control of the government.<sup>19</sup> Under Article 1 of the *Convention Against Torture*, torture is defined as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he ... has committed’, however it specifically excludes ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’, thereby not prohibiting the death penalty

11 *Supra Note 1*, 4.

12 7 July 1989 Series A Vol 161 11 EHRR 439

13 [1993] 4 ALL ER 769

14 *Supra Note 7*, 372.

15 *Supra Note 4*. and *Ng v Canada* (No. 469/1991) and *Supra Note 7*, 375.

16 *Supra Note 7*, 376.

17 *Executions Fall as Pressure Grows for Universal Moratorium* (Amnesty International Press Release: 27 April 2007).

18 *Cox v Canada* (No. 539/1993) UN doc CCPR/C/52/D/539/1993 and *Supra Note 7*, 375.

19 *Supra Note 8*, 24.

where applied in accordance with the law. The comparison of torture with the death penalty raises a number of questions about the logic of current international law, as threatening to kill a prisoner may be illegal, but the sentencing and actual execution of a prisoner may be lawful.<sup>20</sup> Under current international law, progress towards considering the death penalty to constitute torture remains slow. It is more likely that in the near future most methods of carrying out the death penalty will be seen as a breach of the protection against cruel, inhuman or degrading treatment, and eventually, the penalty itself will be regarded as a breach of the right to life.

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<sup>20</sup> *Ibid.*



# Part Two: The international push towards abolition

In addition to the above limitations, the ICCPR encourages states to move towards total abolition of the death penalty. The Human Rights Committee has said that the ICCPR ‘strongly suggest[s] that abolition is desirable’.<sup>21</sup> However, Article 6 does not make abolition mandatory under international law.

Despite the lack of such a mandatory requirement, movement towards abolishing the death penalty worldwide has been increasing rapidly in the last sixty years<sup>22</sup>, particularly since the *United Nations Declaration on Human Rights*. At the beginning of the 20<sup>th</sup> century, only Costa Rica, San Marino and Venezuela had permanently abolished the death penalty.<sup>23</sup> At the current time, 133 countries have abolished the death penalty in law or in practice.

The first international treaty to limit the death penalty was the 1929 Geneva Convention, which restricted it as a penalty on prisoners of war taken in armed conflict.<sup>24</sup> The absence of such a prohibition from the ICCPR is explained by leading death penalty expert Professor William Schabas, who claims that the ICCPR’s goal was abolition, but it was not made mandatory due to ‘the prudence of its drafters, aware of its anomaly but fearful of alienating retentionist States and discouraging them from ratification’.<sup>25</sup>

Public support for abolishing the death penalty gained ground following the huge loss of life in the Second World War, and numerous states began to move towards abolition. In the 1980s, three international instruments completely abolishing the death penalty were drafted.<sup>26</sup> At great speed, the world moved towards ending capital punishment, and abolitionist states outnumbered retentionist states as early as the mid-1990s.<sup>27</sup> Progress continues to this day, with an average of three countries per year abolishing the death penalty throughout the last decade.<sup>28</sup> William Schabas cites an

unmistakeable trend towards abolition, one that [is] constantly growing in momentum... Customary international law does not prohibit capital punishment... but trends in State practice, in the

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21 Laurence E. Rothenberg, ‘International Law, US Sovereignty and the Death Penalty’, *Georgetown Journal of International Law* (Spring 2004).

22 *Supra Note 7*, 363.

23 *Supra Note 8*, 32.

24 *Supra Note 7*, 366.

25 *Ibid.*, 367.

26 *Ibid.*, 2.

27 *Ibid.*, 364.

28 Robert Badinter, ‘Preface-Moving towards universal abolition of the death penalty’ in *Death Penalty: Beyond Abolition* (Council of Europe Publishing: Strasbourg, 2004), 7-11, 9; Amnesty International ‘Facts and Figures on the Death Penalty’ Available at <http://web2.amnesty.org/library/Index/engACT500022001?OpenDocument&of=THEMES%5CDEATH> + Accessed on 18 April 2007; Sir Nigel Rodley, ‘The United Nation’s work in the field of the death penalty’ in *Death Penalty: Beyond Abolition* (Council of Europe Publishing: Strasbourg, 2004), 125-157, 125

development of international norms, and in fundamental human values suggest that it will not be true for very long.<sup>29</sup>

The issue of the death penalty has clearly moved firmly into the human rights arena, and is no longer accepted as simply a national criminal justice policy issue.<sup>30</sup> It has been argued that the exclusion of the death penalty by the international courts for the most heinous crimes imaginable suggests that there is now no crime serious enough to warrant the death penalty.<sup>31</sup>

One example of the way in which the movement towards abolition has been growing is evident in the Human Rights Committee's consideration of the responsibilities of abolitionist states in extradition and deportation cases. In a 2003 landmark decision, the Human Rights Committee held that Canada was obliged to ensure that the death penalty would not be carried out on a proposed deportee.<sup>32</sup> In this decision, the Human Rights Committee stated:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out.<sup>33</sup>

This was a departure from the previous position of the Committee, which had allowed such extraditions and deportations to take place. In moving from its earlier position, the Committee stated:

Since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out...The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.<sup>34</sup>

While Human Rights Committee decisions are not binding, this decision supports the assertion that the human rights discourse surrounding the death penalty is expanding. It is highly likely that, eventually, international customary law will view the death penalty as a breach of the right to life, the prohibition against torture, and the right not to be subjected to cruel, inhuman or degrading treatment.

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29 *Supra Note 7*, 364, 377.

30 Roger Hood, 'Capital Punishment: The USA in World Perspective' *Center for Human Rights and Global Justice Working Paper: Extrajudicial Executions Series* (Number 3, 2005), 6.

31 *Supra Note 8*, 28.

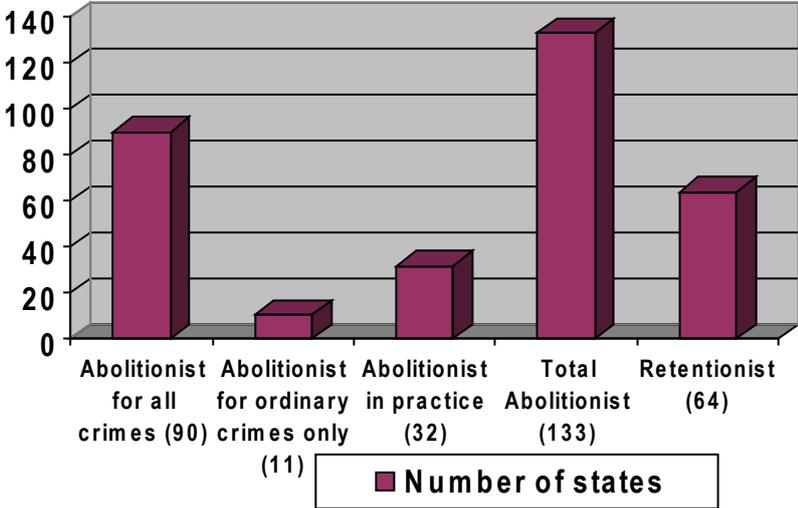
32 UNHCR *Roger Judge v Canada*, Communication No. 829/1998 (13 August 2003) UN Doc CCPR/C/78.D/829/1998.

33 *Ibid.* paragraph 10.4.

34 *Ibid.*

*Statistics on the death penalty by Country*

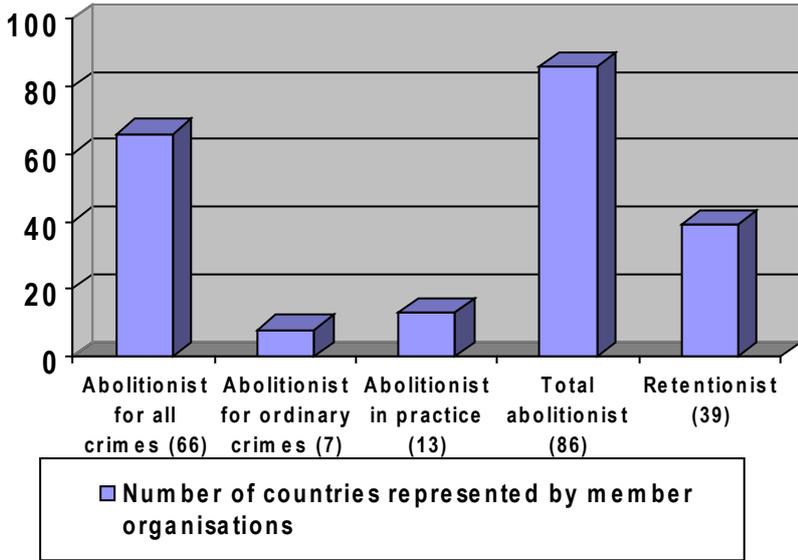
Examining the trend towards abolition from a statistical viewpoint also supports the claim that the death penalty is becoming increasingly unacceptable for the majority of states. When considering these statistics, it is important to remember that only 60 years ago, just three states in the world had abolished the death penalty.



**Source: Amnesty International**

The abolitionist trend is clear world-wide, particularly when states that are abolitionist for ordinary crimes<sup>35</sup> or are abolitionist in practice<sup>36</sup> are included. Viewing these numbers, 67.5% of countries are abolitionist (45% are abolitionist for all crimes, 5.5% are abolitionist for ordinary crimes, and 16% are abolitionist in practice), while 32.5% of countries are retentionist.

*Statistics on the death penalty by IBA member organisation nationality*



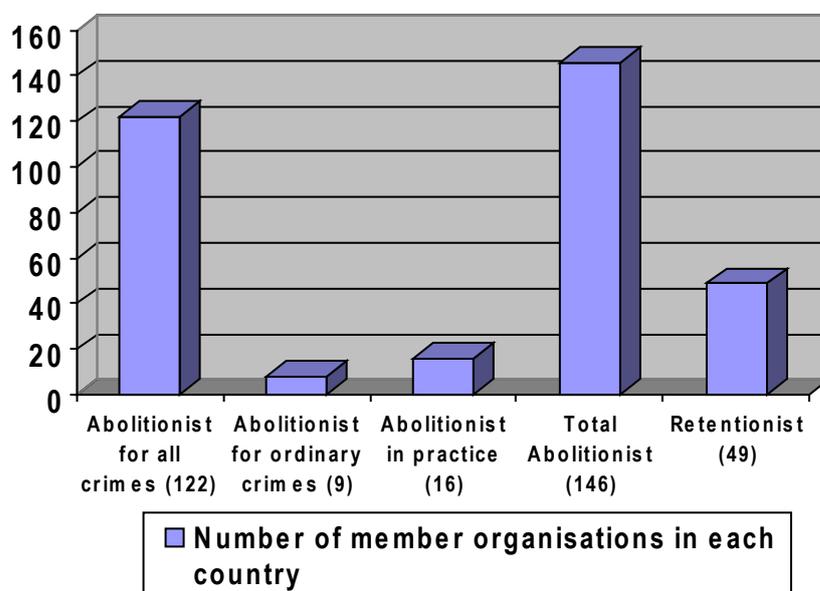
**Source: Amnesty International**

<sup>35</sup> This refers to those countries which only provide for the death penalty for exceptional circumstances, such as crimes under military law.

<sup>36</sup> This refers to countries which retain the death penalty for ordinary crimes, but have not executed anyone for the past ten years and appear to have adopted a practice or policy against executions.

When the statistical trend of the countries from which member organisations of the IBA are based is considered, the tendency towards abolition is even stronger. Over half of all member countries represented in the IBA are abolitionist for all crimes, with 70% of all member countries total abolitionist (including 53% abolitionist for all crimes, 6% abolitionist for ordinary crimes, and 11% abolitionist in practice). Only 30% of member countries are retentionist.

### Statistics by IBA member organisations



Source: Amnesty International

The strongest trend towards abolition is evident when the individual bar associations and law societies are each counted towards their country. In this case, an overwhelming 75% of member organisations hail from countries that are abolitionist (including 62% abolitionist for all crimes, 5% abolitionist for ordinary crimes and 8% abolitionist in practice) and only 25% are retentionist.

### The Abolitionist Argument

States abolish the death penalty for a variety of reasons. However, human rights discourse regularly plays a role. When Spain adopted abolition in 1995, it stated that ‘the death penalty has no place in the general penal system of advanced, civilised societies...what more degrading or afflictive punishment can be imagined than to deprive a person of his life?’<sup>37</sup> When the Constitutional Court of South Africa held the death penalty to be unconstitutional, Justice Chaskalson said that ‘The rights to life and dignity are the most important of all human rights...and this must be demonstrated by the State in everything that it does, including the way it punishes criminals.’<sup>38</sup> Many of the states entering the European Union have abolished the death penalty as a requirement of membership, rather than directly due to their own human rights concerns. However, the EU’s strong human rights stance in this area cannot be ignored as the primary reason behind the prohibition against the death penalty amongst members states. Following abolition, most states increasingly move towards

37 Richard C. Dieter, *The Death Penalty and Human Rights: US Death Penalty and International Law* (Death Penalty Information Centre: Located at <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf> Accessed May 2007).

38 *Ibid.* 4.

viewing the death penalty as a breach of human rights, even if this was not the original reason behind its abolition and where public opinion preferred retention at the time of abolition. This tendency is evident both at the national leadership level and amongst members of the public.

Other states identify concerns not with the death penalty itself, but with the discriminatory way that it tends to be imposed.<sup>39</sup> In abolishing the death penalty, some states undertake a trial moratorium on capital punishment, to see whether it results in any increase in crime. The ensuing abolition in such cases is therefore partially due to the failure of the death penalty to have a deterrent effect.<sup>40</sup> In the US, much of the debate promoting the abolition of the death penalty focuses on the risk of executing the innocent, as over 100 prisoners have been released from US death rows since 1973.<sup>41</sup>

### *The Retentionist Argument*

Before considering the retentionist argument, it should be noted that the number of retentionist countries imply a greater resistance to abolition than may actually be the case. In 2007, 91% of all known executions took place in just 3% of the world's countries: China, Iran, Pakistan, Iraq, Sudan and the US, leaving 58 countries to account for the remaining 9% of all executions.<sup>42</sup> The total number of executions worldwide has also been falling, from 2,148 in 2005 to 1,591 in 2006.<sup>43</sup>

The arguments in favour of retaining the death penalty tend to fall into three camps: those who claim that it is a matter of national sovereignty and is not related in any way to human rights law; those who claim that it has a deterrent effect and is necessary for controlling crime; and those who claim that it is required under their religion, and particularly in accordance with Islamic principles.

China, Singapore and some of the Caribbean states fall into the first category. China has stated that 'each country should decide whether to retain or abolish the death sentence on the basis of its own actual circumstances and the aspirations of its people'.<sup>44</sup> When Trinidad and Tobago withdrew from the *American Convention on Human Rights*, it stated 'the death penalty is not a human rights issue'.<sup>45</sup> Singapore made a similar statement during the negotiation of the Rome Statute for the International Criminal Court. These claims, while in line with similar views throughout the world held in the early to mid 20<sup>th</sup> century, do not fit with the widespread attitudes throughout states, international organisations and leading thinkers that regard the death penalty as very much a human rights issue.

Retentionist states often argue that the death penalty deters crime and prevents re-offences. However, these claims are not supported by any recognised studies, and many countries that adopt a moratorium prior to the final abolition of the death penalty find that the death penalty does not have a deterrent effect in practice.

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39 *Ibid.* 7, 19; Roger Hood, 'Introduction – the importance of abolishing the death penalty' in *Death Penalty: Beyond Abolition* (Council of Europe Publishing: Strasbourg, 2004), 13-22, 13; *United Nations Norms and Guidelines in Criminal Justice: From Standard-Setting to Implementation, and Capital Punishment – Capital Punishment* (Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders A/CONF.87/9 23 June 1980, 27.

40 *Supra Note 397*, 19; Hood, *Supra Note 41*, 13; United Nations *Supra Note 41*, 27.

41 *Supra Note 8*, 24.

42 *Supra Note 19*; *Supra Note 8*, 32.

43 *Supra Note 19*.

44 Philip Alston, 'Transparency and the Imposition of the Death Penalty' *Civil and Political Rights, including the Questions of Disappearances and Summary Executions*, (Economic and Social Council, E/CN.4/2006/53/Add.3 24 March 2006)

45 *Supra Note 29*, 4; *Supra Note 32*, 10.

Islamic states also argue that the death penalty is required under Islamic law. However, this position is not supported by a number of Islamic international lawyers<sup>46</sup>, and apparently also by some Islamic states that have abolished the death penalty. While apostasy requires the death penalty (unlike other offences, where it is recommended only), some Islamic scholars consider that this mandatory status was only where the person had waged war against Allah and where their actions had resulted in a homicide.<sup>47</sup> In addition, of the fifty countries in the world with a Muslim majority, only 32 (64%) retain and impose capital punishment. In practice, it tends to be the least democratic and most repressive states that retain and use the death penalty. Islamic law is also tempered by the *darura*, the doctrine of necessity, which allows the Shari'a to be ignored when necessary under the circumstances.<sup>48</sup> It is arguable that the international environment is increasingly creating such a necessity as the death penalty becomes unacceptable.

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46 Including M Cherif Bassiouni.

47 M Cherif Bassiouni, 'Death as a Penalty in the Shari'a' *The Death Penalty: Condemned* (International Commission of Jurists: Chatelaine, 2000), 65-84, 73-77.

48 *Ibid.*

# Part Three: the positions of other international organisations on the death penalty

A brief consideration of the positions of other human rights-related international organisations on the death penalty also reflects a strong trend towards promoting abolition.

Both the Office of the High Commissioner for Human Rights and the High Commissioner for Human Rights herself are strongly opposed to the death penalty and promote its abolition. An annual resolution of the Commission on Human Rights between 1997 to 2005 entitled 'The Question of the Death Penalty' called for abolition by all states. While neither the Commission on Human Rights nor the Human Rights Committee has asserted that the death penalty is a violation of the right to life, recent resolutions have moved towards this, and notably the 2005 Resolution stated that the Committee 'convinced that the abolition of the death penalty is essential for the protection of this right [to life]'.<sup>49</sup> Louise Arbour has stated that 'I sense that this year [2006] there is an opportunity to move towards abolition in some countries, moratorium in others and transparency in some which still surround the application of the death penalty with secrecy.'<sup>50</sup>

The UN General Assembly has also reached a majority in opposition to the death penalty. On 18 December 2007, the UN General Assembly adopted a resolution supporting a moratorium on capital punishment. 104 countries voted in favour of the resolution, with 54 against and 29 abstaining. It was the first resolution of its kind since attempts to pass similar versions were rejected in 1994 and 1999. The resolution calls upon all states to establish a moratorium on executions with a view to abolishing the death penalty, to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed, and to refrain from reintroducing the death penalty where it has been abolished.<sup>51</sup>

Both current UN Secretary-General Ban Ki-Moon and his predecessor Kofi Annan promote the abolition of the death penalty. The UN Secretary-General is responsible for producing UN Quinquennial Reports on Capital Punishment which detail the imposition of the death penalty around the world and view the abolition of the death penalty as positive progress. Upon the passage of the December 2007 Resolution, Ban Ki-Moon stated: 'This is further evidence of a trend towards ultimately abolishing the death penalty'.

International human rights groups are similarly united in their criticism of the death penalty. Amnesty International, the International Commission of Jurists and Human Rights Watch have labelled the death penalty a violation of the right to life and the protection against cruel, inhuman and degrading treatment.<sup>52</sup> The American Civil Liberties Union believes it to be applied arbitrarily

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<sup>49</sup> Human Rights Resolution 2005/59

<sup>50</sup> *Ibid.*

<sup>51</sup> UN Document A/C.3/62/L.29 (1 November 2007)

<sup>52</sup> Amnesty International The Death Penalty (located at <http://web.amnesty.org/pages/deathpenalty-index-eng> accessed on 21 February 2007). The Death Penalty: Condemned (International Commission of Jurists: Chatelaine, 2000), 8; 'The Death Penalty in the United States of America' <http://hrw.org/campaigns/deathpenalty>;

and discriminatorily, and to constitute cruel and inhuman punishment.<sup>53</sup> The Fédération Internationale des ligues des Droits de l'Homme considers that all executions are a failure of justice.<sup>54</sup>

Throughout Europe, progress towards the abolition of the death penalty is particularly advanced. The Council of Europe and the European Union are strongly opposed to the death penalty, regarding it as a form of cruel and inhuman punishment and torture and 'which has no legitimate place in the penal systems of modern civilised societies'.<sup>55</sup> The EU and the Council of Europe consider the abolition of the death penalty to 'contribute to the enhancement of human dignity and the progressive development of human rights'.<sup>56</sup> Membership of the Council of Europe (since 1994) and the European Union (since 1998) is conditional upon the abolition of the death penalty.<sup>57</sup>

The American Bar Association does not maintain a formal position on the death penalty, but is strongly in favour of a moratorium in order to review evidence that suggests that that race, geography, wealth and personal politics can influence every stage of capital cases.<sup>58</sup>

## Conclusion

International law is clearly moving towards disallowing the death penalty and this is continuing apace. The primary human rights treaty, the ICCPR, encourages states to abolish the death penalty, and the Human Rights Committee has supported this encouragement with strong statements promoting abolition. International custom is also becoming increasingly abolitionist, with more states regarding the death penalty as being inconsistent with human rights standards. While the death penalty remains legal at international law at the current time, it is highly likely that progress towards abolition will continue. Arguments in favour of retaining the death penalty often appear to rely on unproven allegations, such as its deterrent effect, or focus solely on the argument that the decision to abolish or retain capital punishment remains within national sovereignty. Additional arguments relying on religious or cultural grounds appear to be criticised when investigated in-depth, and have not prevented other nations from abolition.

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53 'The Death Penalty: Questions and Answers', American Civil Liberties Union (9 April 2007) Available at <http://www.aclu.org/capital/facts/10534res20070409.html> Accessed on 18 April 2007.

54 [http://www.fidh.org/article.php3?id\\_article=3701](http://www.fidh.org/article.php3?id_article=3701) (Accessed 2 April 2007).

55 *Supra* Note 32, 8.

56 Declaration by the Presidency on behalf of the EU on the Occasion of the Third World Congress against the Death Penalty Brussels, Third World Congress Against the Death Penalty 5863/07 (Presse 14) (Paris, 1 - 3 February 2007), Available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/cfsp/92602.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/92602.pdf) accessed 18 April 2007; *Supra* Note 32, 8.

57 *Supra* Note 32, 6.

58 American Bar Association, *Death Penalty Moratorium Implementation Project*, <http://www.abanet.org/moratorium/faq.html>.