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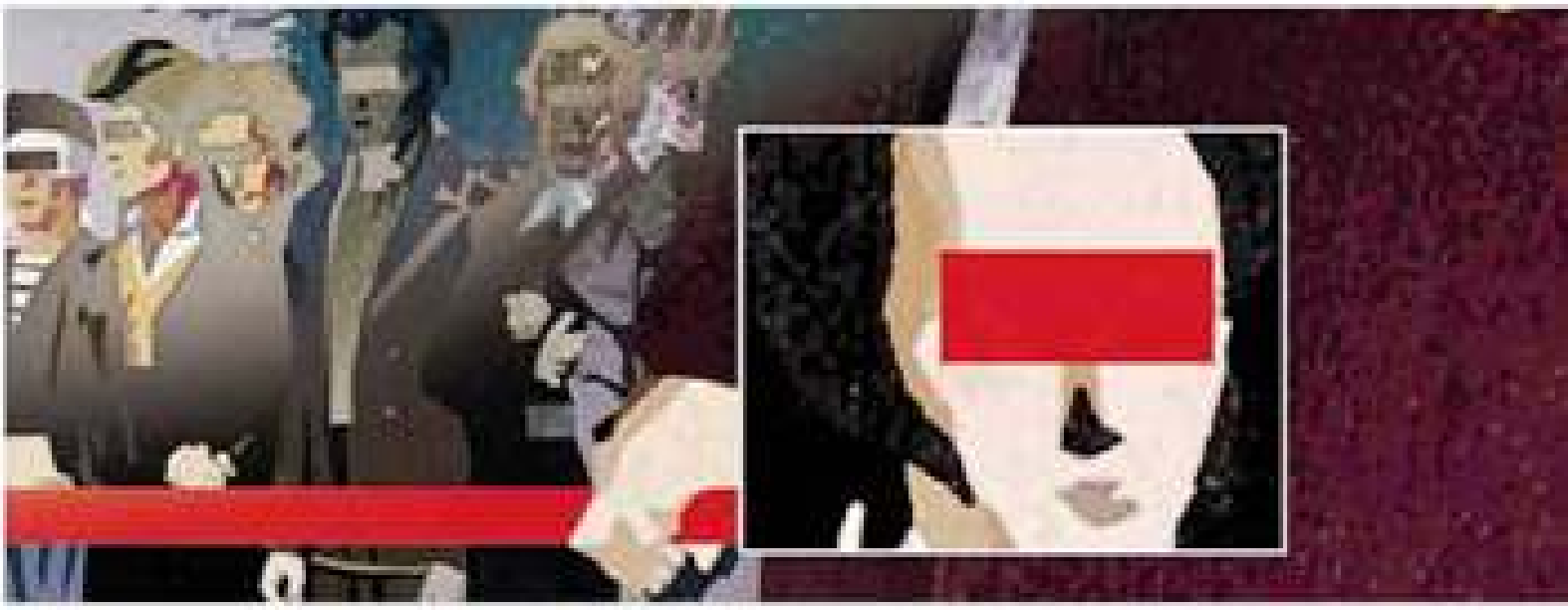
Towards universal abolition of the death penalty



Presentation
José Luis RODRÍGUEZ ZAPATERO

REPECAP
INTERNATIONAL ACADEMIC NETWORK FOR THE ABOLITION OF CAPITAL PUNISHMENT

tirant lo blanch
Abolición de la pena de muerte

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TOWARDS UNIVERSAL ABOLITION OF THE DEATH PENALTY

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Death is Nature's remedy for all things, and why not Legislation's? Accordingly, the forger was put to Death; the utterer of a bad note was put to Death; the unlawful opener of a letter was put to Death; the purloiner of forty shillings and six pence was put to Death; the holder of a horse at Tellson's door who made off with it, was put to Death; the coiner of a bad shilling was put to Death; the sounders of three – fourths of the notes in the whole gamut of Crime, were put to Death. Not that it did the least good in the way of prevention – it might almost have been worth remarking that the fact was exactly the reverse – but it cleared off (as to this world) the trouble of each particular case, and left nothing else connected with it to be looked after.

Charles Dickens *A Tale of Two Cities.*

NOTE FROM THE EDITORS

Luis Arroyo
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The idea of Human Rights is certainly the best invention of humanity. However, it is an idea that is still under development. Following the reaction to the horrors of the Second World War, the first truly Universal Declaration of Human Rights was conceived. There was no agreement at that time on the abolition of the death penalty. The Cold War made it impossible to construct a true international legal order for human rights and a system for their protection. The International Covenants of 1966 represented progress but, at the same time, they divided individual rights into political and social rights. They also failed to achieve the abolition of the death penalty. Relevant changes to the international order since 1989 have brought new opportunities, especially the second optional Protocol of the International Covenant on Civil and Political Rights aimed at abolishing the Death Penalty, which was agreed in 1989. Its preamble proclaims 'that the abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights'. After numerous attempts, on December 18, 2007, for the first time a majority at the General Assembly of the United Nations approved a resolution in favour of a moratorium on the application of the death penalty.

The Spanish President, José Luis Rodríguez Zapatero, at the 2008 General Assembly of the United Nations, expressed a personal commitment throughout the period of the Spanish presidency of the EU to work towards the abolition of the Death Penalty and,

where possible, a moratorium on capital punishment, as well as approval and ratification of the second optional Protocol. In turn, he raised the novel idea of working towards abolition, not only as a specific goal, but within the joint framework of the advancement of Human Rights and the struggle to achieve the goals of the Millennium Declaration. He went on to praise the high degree of international coordination between all of the NGOs that participated in The World Coalition against the Death Penalty and its congresses, the fourth of which launched the Ensemble Contre la Peine de Mort in Geneva towards the end of February, 2010. To do so, he invited us to stimulate the cooperation of specialist academic societies and institutions to raise awareness of the subject and its diffusion at an international level. The idea was expounded on the occasion of the international congress at The Hague, where Cherif Bassiouni presented the final report on the large-scale project: Fighting Impunity and Promoting International Justice. As well as the stimulation and coordination of academic works it was the approach to the question of the Death Penalty in combination with the Millennium Development Goals that appeared of great interest to him and other colleagues. In his introduction, Simone Rozés explains the genesis of the International Academic Network for the Abolition of Capital Punishment (IANACP) that was launched in Madrid in December 2009, at the symposium "For the universal abolition of the Death Penalty", organised for that purpose by the Centre of Political and Constitutional Studies and the European and International Institute of Criminal Law of the University of Castilla La Mancha and with the sponsorship of the following scientific associations: the International Society of Social Defence and Humane Criminal Policy, the International Association of Criminal Law, the International Society of Criminology, and the International Criminal and Penitentiary Foundation.

This book represents the first fruits in English of the commitment to make academic materials of great relevance available to the international community, and others will follow from the works presented at the Madrid symposium. An international open-access website will also be available for documents prepared by international and scientific organisations.

Moreover, the timing of the book launch is opportune as it coincides with the debate at the United Nations General Assembly following the release of the 8th Quinquennial Report of the Secretary General on Capital Punishment that echoes the views of William Schabas.

September 25, 2010

FOR THE UNIVERSAL ABOLITION OF THE DEATH PENALTY

José Luis Rodríguez Zapatero
President of the Government of Spain

The editors have offered me the opportunity to introduce this book that comprises some of the conference addresses presented at the World Congress against the Death Penalty, held in Madrid in December, 2009, which was organized by the Centre for Political and Constitutional Studies and the Institute of European and International Criminal Law of the University of Castilla-La Mancha. I thank them most sincerely, above all, for the opportunity that it gives me to reaffirm one of the most deeply desired commitments in the foreign policy of my Government: the achievement of a universal moratorium on the death penalty, in 2015, as a first step towards its definitive abolition. My thanks also for setting forth the writings of the most qualified and dedicated specialists on this subject of capital punishment and human rights.

I announced the purpose of personally involving myself in the problem of abolition in June 2008, and I had the occasion of publicly announcing as much in the best possible setting: at the General Assembly of the United Nations. It was there, in September of that same year, that I requested those countries, whose legal orders still contemplate capital punishment, to support the moratorium and to agree to participate in a process of reflection on the meaning of this punishment inflicted by the State.

This book will be launched on the 10th of October will coincide with the celebration of the World Day against the Death Penalty, and the commemoration of the anniversary of the Universal Declaration of Human Rights adopted by the United Nations on December, 10, 1948. It is an anniversary that offers us an excellent occasion to revindicate once again the values proclaimed in the Declaration. Since December 10, 1948, international relations have been decisively transformed. In a globalized world, the principles and values of

human rights have gradually extended to all regions of the world, which is, without a doubt, the best way of setting up an international order that is worthy of its name.

Today, nobody now doubts that Human Rights are universal because they intrinsically belong to all human beings considered as individuals and, regardless, therefore, of their appurtenance to the different identities and cultural traits that exist in the world.

They are not, therefore, the result of imposing certain values on others. They are nobody's cultural heritage, neither West against East, nor North versus South; they are nothing less than the consecration of the dignity of the human being as such. They are universal values that all States are obliged to protect in their own territory; an obligation to protect and also to condemn their violation when they are not respected in accordance with International Law.

No country or leader that takes up this cause can fail to ignore the tension created between the fundamental principle of non-interference in the internal affairs of the States, which are internationally recognized in the Charter of the United Nations itself, and the universal demand for respect for Human Rights. And today is a good time here, from Spain, to assert it publicly once again.

Spain is a country at the forefront as regards the guarantees and the protection of Human Rights, in which a public awareness exists of their value, a country that has assumed as a political priority that they become the true, shared patrimony of all people, of all cultures and civilizations.

However, I should recall that the attainment and the perfection of a country's system of rights depends on the day-to-day commitment adopted by its public authorities and its citizens, as it is, in fact, a human experience; whenever support for Human Rights ceases, they are exposed to a real risk of weakening. Today, for the first time, Human Rights have become one of the guiding principles of Spanish foreign policy. It is no easy cause; it requires firmness, coherence and clear ideas, and effective diplomatic action built upon dialogue and, on occasions, discretion.

It was not by chance, therefore, that the speech on international politics that I gave at El Prado Museum of Art, at the start of this

legislature, had as its title "*En interés de España, una política exterior comprometida* [In Spain's interest, a committed foreign policy]". The commitment of our Government towards Human Rights is firm and one of its clearest signs is in the Human Rights Plan adopted by the Council of Ministers on December 12, 2008. With this plan, we have responded to the recommendation of the World Conference of Vienna, in 1993, which proposed that each State consider the possibility of preparing a National Plan that would define, in their field, the measures needed to improve the advancement and the protection of Human Rights.

The Spanish Human Rights Plan has the objective of ensuring effective guarantees for rights in a coordinated and systematic way, to bring our internal order in line with international commitments and to link public and private actors in their defence. The Plan lays out our domestic projects, convinced that safeguarding national interests may be linked to the construction of a fairer global society with greater solidarity. And the Plan contemplates various areas of our international actions in support of these rights, all of which leads to the value that unites them and bestows meaning on them: human dignity.

Within Spain and from Spain we wish to contribute in such a way that liberty and equality become increasingly effective, as our Constitution wisely requires. Within Spain and from Spain we wish Human Rights to become a living reference of our vital experience as a society, and a sign of our identity. Within Spain and from Spain, standing firmly in the present, we wish to unite our views with those of others and set our sights on the future for everybody, showing solidarity to all those in the world that suffer under totalitarianism, violence, discrimination, hunger and poverty.

The year 2015 is an emblematic date for that future and for the struggle for human dignity. In 2015, we will carry out a review of the Millennium Objectives and only five years away from that time the situation is worrying. If we had proposed to reduce hunger in the world by half, very recently we received a new warning from the WFO: in the last three years the number of people that go hungry in the world has risen from 850 to 1,020 million people. Not only are we not approaching the Millennium Objectives, but we are mov-

ing away from them. This reality, which contrasts with modern-day scientific, technological and productive capacities, is the most searing indictment that we live in an inacceptably unjust and unequal world, in which fortunately we are able to organize ourselves to avoid global financial upheaval, but a world which still shows itself to be slothful and docile at mounting a definitive, global response to the challenge of climate change, and even more passive in the battle against hunger and extreme poverty.

If, as I pointed out in my address to the United Nations, in 2008, the Universal Declaration of Human Rights was the living testimony of a determined will to leave us a better world than that of our father's generation, a generation that suffered and overcame totalitarianism, and which condensed its aspirations for liberty and prosperity in that text, the Millennium Objectives have to reflect the will of our generation that is no less determined to confront extreme poverty, at last, in order to leave a world for our children without millions of human beings suffering hunger and misery every day.

Both causes, the affirmation of respect for Human Rights and the achievement of the Millennium Objectives, are perhaps the most noble and the most committed to human dignity that have been proposed in the history of Humanity. Whether we look towards the horizon of the Millennium Objectives, or that of Human Rights, the conclusion is the same: there are, at least, advances in our growing awareness of the need to put them into practice, but progress is far from fulfilling our aspirations.

A lot also remains to be done in the struggle against the death penalty. The right to life is, as defined by the former Commission for Human Rights, today the Human Rights Council, the supreme right, because, without its effective guarantees, all other rights lack meaning and a *raison d'être*. It might seem obvious to everybody, but were it truly so, we would not push ourselves today and tomorrow, and the day after tomorrow, to demand that public authorities throughout the whole world act in complete accordance with the inviolable and sacrosanct nature of human life and with the right not to be subjected to cruel, inhuman and degrading treatment.

The abolition of the death penalty is grounded in Human Rights, in the affirmation of human dignity. Thus, as the International Com-

munity has advanced in the recognition of these rights, the cause for the eradication of capital punishment has been spreading across the world. Over the last decades its progression has been evident, above all, thanks to the development of a powerful international movement in favour of abolition, promoted by international and regional organizations, by representatives in the world of politics and by relevant actors in civil society. Whereas seventy years ago abolition had only found acceptance in a very limited group of countries, it is supported today by almost two thirds of the members of the United Nations.

Progress that has as its fruit an increasingly consolidated international consensus that the death penalty is incompatible with Human Rights, and, with it, the idea that its universal abolition should be achieved. The Spanish people perceived this same incompatibility with clarity when democracy triumphed. A society, a country, that was impelled by a dark history of executions, formalized to a greater or to a lesser degree, but all unnecessary, all iniquitous, was able to understand that the abrogation of that form of penalty should not only be linked to its application by the dictatorship which we had left behind, but that we also had to affirm it for the democratic State that we were starting to shape.

The monopoly over force, which gives meaning to the State and that legitimizes it when it is exercised in accordance with the laws and safeguards of due process, has to have that final moment of temperance, the temperance of not killing, of not killing in cold blood, because then legitimacy is abundant and rises up like a wall against the murderers and, in particular, the terrorists; like a wall and at the same time a mirror that unveils its image for all to see. The refusal of the State to kill is therefore turned into an effective arm to fight those who are willing to do what is so unattainably far beyond the willingness of their morality: to take the life of a fellow human being.

With the Constitution of 1974, the Spanish recovered in this and in so many other things their dignity as a society of free citizens and our Organic Law 11/1995 would complete the task by proscribing capital punishment in wartime as well. We have ratified all the International Treaties that promote the abolition of the death penalty.

We have since completed the task of ratifying Protocol number 13 of the European Convention on Human Rights and Fundamental Freedoms, within the framework of the Council of Europe, which, as you know, establishes the abolition of the death penalty in all circumstances, in line with our legislation.

Today, with the impetus of the Council of Europe, the OSCE and the European Union, virtually all of Europe rejects the death penalty; but the cause for the eradication of the death penalty is universal and progress has taken place in parallel in all regions of the world.

It may also be said that it is sign of Latin American identity. In Latin America, where a majority of countries are *de facto* abolitionists, the Inter-American Convention on Human Rights limits the application of the death penalty and strictly stipulates that it will not be re-established in the States that have abolished it, which constitutes a very significant move forward. A Protocol to this Convention, approved by the OAS in 1990, foresees the total abolition of the death penalty, although it still allows the States parties to apply it in wartime, if they have made a declaration to that effect at the time of ratification.

Positive evolution is occurring in the continent of Africa that would be well to encourage. In this sense, it is important to highlight the recent call from the African Commission on Human and Peoples' Rights for States members to put a moratorium in place with a view to the abolition of capital punishment.

Throughout 2009, new incorporations to the group of countries and abolitionist Governments have taken place; specifically, the State of New Mexico in the United States, which joins the group of abolitionist states, Burundi and Togo. We congratulate them for doing so and, of course, I well recall the honour and the opportunity that the Togolese authorities bestowed on me this year to address the National Assembly of that country on the same day in which it had agreed to abolish the death penalty. I also wish to thank Yaui Boni, President of the Republic of Benin, who personally announced at the inauguration of the International Conference of Madrid the constitutional reform that will abolish the death penalty in his country. I congratulate him and thank him for the firm support of his Government to the initiative for the universal abolition

of capital punishment. In doing so, President Boni gave signs of a clear commitment towards respect for Human Rights. This is one of the themes that has guided the political action of his Government, together with moralization of public life and the eradication of poverty. Thus, his Government has embarked on an ambitious programme of social and economic reform with important achievements in recent years.

I well understand the repercussions that the international economic crisis could have on this policy, which is why I urge President Boni to multiply his work on the programme to reduce poverty and assist economic growth. I wish to convey to him my support for his policy and my willingness to cooperate with Benin, in particular through the Summits in Spain with the Economic Community of West African States.

In fact, in June 2009, in Abuja (Nigeria), the Heads of State and Government of the fifteen countries of the Economic Community of West African States and Spain agreed to reinforce cooperation in all areas. West Africa is today a priority region for our country and, with the initiative that Benin has undertaken, it joins the African States that have decided to enhance their fight for the dignity of all human beings struggling against poverty, exclusion and illiteracy, and through their efforts to extend respect for Human Rights and to abolish the death penalty.

Each new national step forward, such as that given by Togo and Benin, represents an advance and fresh impetus for us all. However, despite these advances, the death penalty is practiced in too many countries of the world. We all have in mind these days an Iranian woman imprisoned under the threat of lapidation, moreover for an offence that should not be seen as such and is in no way a "serious crime" in the context of International Law. This is why efforts should be redoubled within the International Community, which give meaning to books such as the one that we are presenting today.

The World Coalition against the Death Penalty has just launched an international campaign for the ratification of the 2nd Optional Protocol of 1989, of the International Convention on Civil and Political Rights approved in 1966. This Protocol is of particular relevance,

because it is the only legal instrument of universal scope that envisages the total abolition of the death penalty for States members. To date, it has only been ratified by 72 countries, in spite of their being 164 member States in the International Convention. Spain supports this initiative and will work alongside it fully so that the 2nd Protocol becomes the most important binding legal instrument that prohibits the death penalty in International Law.

Also, within the framework of the United Nations, the approval by the General Assembly of two Resolutions, in December 2007 and in December 2008, which urged the countries that still maintain the death penalty to establish a moratorium on its use with a view to its total abolition, represents a new point of departure. Both resolutions were approved by a wide and growing majority of countries and, although by their own nature they are not binding, they have become useful tools to encourage countries that are still retentionist to join the majority of abolitionist countries, whether "*de facto*", because in practice they defer executions, or by law, because their legislations exclude capital punishment.

With its initiative on capital punishment, the Government of Spain aims to assist in the reinforcement of this growing international tendency that seeks to extend abolition. We have already taken the first steps towards the immediate creation of an International Commission against the Death Penalty, which will act as a lobbying body and will coordinate all efforts made to that end by the International Community. This International Commission will consist of leading figures from all regions of the world in matters concerning Human Rights and will follow two basic lines of action: in the first place, the objective is to fight for the universal application of an effective moratorium in the year 2015 as a step leading to its total abolition: once again, 2015, and not by chance. The struggle to affirm human dignity has to be fought on all fronts at the same time and it is as indivisible as dignity itself. If we have fixed a review of the degree of achievement of the Millennium Objectives for that year, what better than to bring to 2015 the universal moratorium that we have proposed.

There are situations, however, that cannot wait for the moratorium to be put in place. The International Commission that we shall

sponsor will have to request as a second line of action the immediate universal and definitive prohibition of the death penalty under the circumstances in which International Law already restricts its application: such as, because of their particular vulnerability, minors at the time their offences were committed, pregnant women and the mentally disabled, or for offences that are not very serious.

During the Spanish Presidency of the European Union, in the first semester of 2010, the universal abolition of the death penalty has been one of our priorities in the field of Human Rights, following and giving impetus to the directives approved by the European Union in 1998, which have recently been updated.

To that end, we have intensified all the initiatives that are underway for the action of earlier Presidencies of the Union and with this purpose in mind I have attended international fora, particularly the World Congress against the Death Penalty at Geneva in April, 2009, where we arranged cooperative projects to stimulate reform in the legal systems of those countries that retain the death penalty in their national legislations, as well as the ratification of international instruments that involve the abolition of the death penalty. We shall do so with all the means within our reach and in coordination with the actors in civil society which are carrying out essential groundwork, such as the International Academic Network responsible for the publication of this book.

I moreover formally proposed the incorporation, in the work of the new European External Action Service, of legal and diplomatic assistance to the diplomatic tasks of the States members, subsidiary and complementary, if necessary, for European citizens who may be convicted to a sentence of capital punishment. I believe that the status of being a European citizen deserves to be enhanced with this additional guarantee: the protection of the Union whenever there is a risk of capital punishment in any country where that risk might arise.

Furthermore, from the European Union, we wish to propel the activity of the States members, along with other countries from all regions of the world, to support the approval of a new Resolution of the General Assembly of the United Nations, at the end of 2010, on the establishment of the moratorium on the use of the death penal-

ty, which will be more ambitious and which will rely on more support than that obtained in 2007 and 2008. In short, we shall make a great effort to curtail the application of the death penalty across the world. We shall do so in all international fora and to facilitate this, in October 2009, we designated an Envoy on a special mission for these tasks, Rafael Valle, who will most certainly help us to reach our goal.

Humanity will not stop moving towards a future that is in our hands to construct and that future can only be in one direction, only one: that which fortunately corresponds with the very ample majority will of the different communities that populate the globe. It is the will that asks us to put an end to the conflicts that threaten peace; the same which is increasingly revolted by the fight Humanity has to wage every day for subsistence and by having the possibility of not going hungry but succumbing to hunger; the same will that compels us to find a definitive response to the consequences of climate change and the same that rejects the violence exercised over human beings, the violation of their rights or the deliberate privation of their life where it happens.

That will, which speaks so many languages in defence of human dignity, is what gives academic initiatives such as this book a well-rounded civic meaning as well as those published by qualified scholars in Spanish and other languages for whom the universal abolition of the death penalty is an inspiring objective.

INTERNATIONAL TRENDS TOWARDS LIMITATION AND ABOLITION IN THE WORLD

William A. Schabas[1]
Director of the Irish Centre for Human Rights at the National University of Ireland, Galway

Thank you Dean. I want to thank our hosts here: The Istanbul University Centre for Research and Practice in Human Rights Law and its distinguished director Prof. Gemalmaz, the Faculty of Law of Istanbul University and the Istanbul Bar Association. I think I last spoke at the University here about two and a half years ago. We were in a much more modest venue. I think it was a more typical University classroom and these are very elegant premises. I am quite thrilled to be able to be here and to speak in this wonderful hall.

My topic is the progress on the abolition of the death penalty and, the growth of the moratorium. My remarks will be largely based on the most recent report issued by the Secretary General of the United Nations on the status of the capital punishment. Since 1975, the United Nations Secretary General has produced the report every five years. It's known as the "Quinquennial Report on Capital Punishment" and, this report takes stock of many features of the death penalty and death penalty practice in the world. It permits us also, by looking at all of the reports beginning with 1975, to get

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1 Abridged Presentation of the Quinquennial Report on Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf at the International Symposium on abolition or moratorium of the death penalty presented at Istanbul University Centre for Research and Practices in Human Rights Law & Istanbul University School of Law & Istanbul Bar Association & University of Castilla La Mancha & International Academics against the Death Penalty (REPECAP) Istanbul 6-7 July, 2010.

a picture of the evolution of the subject, the dynamic nature of this issue of abolition, progress towards abolition and the moratorium on capital punishment.

The first report, in 1975, was really the outgrowth of the initial activities within the United Nations on the subject of capital punishment. The result of a debate that I think is now largely resolved as to where to place capital punishment within the work of the United Nations. Whether it properly fits within the human rights work and mission of the United Nations or whether it is better dealt with as part of the specialized activities at the United Nations engaged with criminal justice. The criminal justice dimension of UN activities continues to address the subject of the death penalty. But I think that it is fairly clear to everyone now that capital punishment is very central to the human rights mission of the United Nations that it gets from its Charter.

The most recent report was produced formally only two months ago at the United Nations Commission on Criminal Justice in Vienna. The report indicates that there are now about 47 countries that retain capital punishment. The remainder have abolished the death penalty either in law, *de jure*, or in practice, *de facto*. There is some debate about the exact number, the method of calculating the number. In his remarks this morning, Ambassador Garagorri I think referred to 57 or 58 and that number may come from the Amnesty International Report where there is a slight difference in terms of the number of abolitionist countries in the calculation of *de facto* states, the states that have abolished the death penalty in practice but not in law. And that's I think principally because some States stop using the death penalty but continue to insist that they have not stopped using it. Some of the Caribbean States are in this category. So in practice while they have not used the death penalty for ten years, which is the period we use to make the calculation, they continue to profess their devotion to the death penalty and their desire to use it. And this we can discuss and we will have a few words to say about it in a minute.

The numbers have progressed very dramatically of course since 1975 and, in fact, although we did not do these measurements every five years from 1948 we can go back to 1948, which is a useful start-

ing point, because this is the first debate within the United Nations on capital punishment in the context of the adoption of the Universal Declaration of Human Rights. I think that at the time there were 58 member states of the United Nations and I think six of them had actually formally abolished the death penalty. Some of them had ceased using the death penalty for many, many years and had even abolished it in law but returned to it briefly following the Second World War, in order to punish collaborators and war criminals. And of course the post War period was also very fertile because it provided the opportunity for some states to mark a political transition: Germany, Austria and Italy notably within Europe all abolished the death penalty at the end of the 1940s or in the early 1950s. And this was partly about the symbolism of indicating that they had broken with their fascist past. And we have modern examples of this: South Africa abandoning the death penalty in the 1990s, Spain abandoning the death penalty in 1975, and I could give you other examples of that as a feature of the abolition of the death penalty.

We start counting in 1975, when the first United Nations reports come out. At the time, there were I think about twenty-five countries that had abolished the death penalty. So there was slow progress on abolition of the death penalty. The category of *de facto* abolition was not fully measured at the time. They looked at states that had not used the death penalty for thirty or forty years and used that as a measurement, assuming that if they had not used it for thirty or forty years, then they had in fact abandoned it. And it was only later that we took this ten year period without the death penalty as the measurement. There was also significant attention given in 1975 to what we called abolitionist States for ordinary crimes. And this was to take account of the fact that some States abolished the death penalty generally but retained it for special categories, such as treason or for crimes committed during war time. And the fact that there was some significance to this category is reflected also in the fact that when the Council of Europe adopted its first treaty on abolition of the death penalty, the 6th Protocol to the European Convention on Human Rights in 1983, it dealt with the death penalty in peacetime. It is an acknowledgement of the fact that there was something significant about recognizing States that abolished the death penalty in peace time but retained it for special categories. That category of

States that were abolitionist for ordinary crimes was quite meaningful in the 1970s, but it has become insignificant today. It's almost unknown now for a State to abolish the death penalty only for crimes in peace time, or to retain the death penalty for certain crimes. And I think as a general rule for the last 20 years when States abolish the death penalty they abolish it altogether.

The International Covenant on Civil and Political Rights was also completed with a protocol, the 2nd optional Protocol to the International Covenant on Civil and Political Rights. And it allows States to make a declaration withdrawing from the death penalty with respect to crimes committed in war time. But only a few States actually made that declaration. Spain was one of them I think and they have since withdrawn it, retreated from that. So this category of States that partially but not totally abolished the death penalty is no longer of any meaning. I think there are seven States in that category now. There are a few that have remained in the category because they have never gone any further but they have also become abolitionist *de facto*. A good example of that in the region is Israel. As you probably know, it has only used the death penalty once in its history, in the case of Adolf Eichmann. Israel has never abolished the death penalty for the crime of genocide and crimes against humanity. It pronounced it on one occasion in the 1980s for a war criminal but never implemented it, and in fact the death sentence was overturned. But Israel would be one of the handful of States in this category.

The big growth of course has been in States that have abolished the death penalty altogether in law like Turkey, like Spain, like Ireland, and the States that abolished the death penalty in practice, *de facto* abolition. And that category has continued to grow so that today the category of States that have abolished the death penalty in practice is now about fifty. And I believe that it is going to continue to grow. The UN report was issued in May of this year but it actually takes account of the situation up to the end of 2008, to abide by this five year pattern that the UN has followed. There have been I think three States since 2008 that have joined the category of *de facto* abolitionist.

One of the things that the report looked at was the significance of the *de facto* category in terms of representing a permanent shift

in the policy of States. So, what the study does is to examine over the five year periods since 1975 how many States were in the category of *de facto* abolitionist, how many returned to the practice of the death penalty in the next period or in subsequent periods. And until recently there was actually a small percentage of States that would return to the death penalty. They needed no legislative changes because they already had it in practice. They had it in their legislation and they returned to the practice. A small number but not insignificant. Perhaps two or three of 15 or 20 every five year period would return to the death penalty. And that appears to have stopped now. For about the last 10 years there are no examples of States that have become *de facto* abolitionist and that have returned to the death penalty and I think it strengthens the argument not only for the significance of the category of States that have stopped using the death penalty for 10 years as a measure of a political change within the country, that is, a commitment not to impulse the death penalty, but also a hardening of this phenomenon is manifested in the fact that States that have stopped using the death penalty for 10 years now almost certainly do not return to it.

And I should add that of States that have abolished the death penalty in law, it is almost unknown for a State to return to the death penalty. And I always find it a curious feature of discussions about the death penalty that people think that moves towards abolition are very fragile and this is not true. And it often happens in a country that some demagogic politician tries to open the debate about the death penalty again or a newspaper editorialists says "maybe we should think about the death penalty again" or some religious leader calls for the death penalty and people think that this is all going to crumble now because public opinion will insist that we reinstate the death penalty. Dear friends, let me tell you this never happens, it just does not happen and I am not prepared to bet my entire house and my pension fund on the fact that it will not happen, but I would make a significant wager to anybody who would care to, about any specific case, that a state that has abolished the death penalty in law or in fact is very, very, very unlikely to return to it. So this hardening of the position on the death penalty, manifested by the fact that once a state joins the camp of abolitionist states it never leaves it, is of course completed by the fact that every year more and more States

are joining the camp of abolitionist States. And this numbers about two or three every year, a number has been consistent now for about two decades. If it continues, we can reliably predict that the death penalty will be universally abolished within 15 to 20 years. And I see no reason why it would not continue; it is consistent and has been now for, as I say, 20 years in terms of the percentage but even longer in terms of this general trend.

One other feature that the report demonstrates about the trend is that it actually is accelerating. The absolute numbers of States that abolished the death penalty in any five year period and this is looked at over the last 15 to 20 years, the absolute total, is somewhere between 12 and 15 per five year period. And that number is fairly consistent and over the last five year period it was slightly less than what it had been in the previous five year period. And that prompts some people to say "it is slowing", but that was not accurate statistically because the actual number has to be taken as a percentage of the States that have retained the death penalty, and if you calculate over the last 20 years for each five year period the number of States that abolished the death penalty as a percentage of the States that retain it, the numbers are actually accelerating in terms of abolition of the death penalty.

So, these are some of the features of the overall numbers. Let me say a few words about the regions of the world because this has an important regional dimension. It is often said in international human rights circles that this is a European phenomenon, that this was Europe that was in favor of abolition of the death penalty and this is driving the rest of the world. I do not know that, that it is entirely accurate, there are at least two other important regions of the world that are comparable in terms of abolition. Europe today has one State, Belarus, which retains the death penalty and continues to impose one or two executions every year. That is it for Europe. As you know of course abolition of the death penalty is a condition for membership in the Council of Europe. Belarus is one of the few European States that is not a member, I guess we have to also count the Holy See, the Vatican, but of course it has not imposed the death penalty for many years. I do not know when the last time was that they executed somebody in the Vatican.

But if we were to look at the western hemisphere, of course the western hemisphere the entire North and South America and Central America has one notorious practitioner of the death penalty. I do not think I need even to name the country, you all know who I am talking about. But in the last five years, in the five year period that was studied in the United Nations report, aside from the United States of America, there was only one other execution, one single execution in the entire hemisphere in the five year period and that was the island in the Caribbean of Saint Kitts and Nevis. So, I think it is accurate to say that the death penalty is virtually eliminated in the entire western hemisphere with the notorious exception of the United States of America. The Caribbean States continue to impose the death penalty in terms of pronouncing it in their judgments. There is occasional practice of it, I mentioned Saint Kitts, but there has not been an execution for two years now in the Caribbean region. The States other than the English-speaking Commonwealth Caribbean States that continue to impose the death penalty, that also have the possibility, are Cuba and Guatamela, Cuba's last execution was 2003, by the time we get to the next report I would expect Cuba to be *de facto* abolitionist State and Guatemala is the other example. But as I say, in practice, they have all abandoned the death penalty.

The other continent that is extremely interesting in terms of progress towards the death penalty is Africa. And again in Africa I think people who haven't studied the numbers have the impression that the death penalty is still fairly widely practised in Africa and this is not true. There are 4 countries in Africa that continue to impose the death penalty in a significant manner and they are all clustered in the northeastern corner of the continent; Egypt, Libya, Sudan and Somalia. Aside from those 4 states, over the last 2 years in the rest of Africa in its entirety there has been 1 execution, in Botswana. And so, the death penalty has been virtually abandoned throughout Africa, certainly in what we call black Africa. It has essentially disappeared in the Maghreb, in Morocco, Algeria and Tunisia. And I again do not see any reason why that trend would change, why that development would change. Although in some cases these are *de facto* abolitions and we have continuing debates in particularly in the English speaking, the former English colonies. And I should just mention in passing that it is a curious feature of

the death penalty in former colonies that the patterns seem to reflect the colonial ancestry of the country. So that, for example, the former Portuguese colonies - Portugal was the first country in Europe to definitively abolish the death penalty in 1867, and although they did not always bestow wonderful benefits on their colonies the Portuguese did manage to communicate and dislike of capital punishment. So it is totally absent in the former Portuguese colonies. The French and the Belgians used the death penalty but they apparently did not leave their former colonies with a great commitment to it. And it is interesting that the one colonial empire that seems to leave a great enthusiasm for capital punishment behind it was Britain. I went to school in a former British colony, Canada. We used to have a map on the wall of all of the parts of the British Empire, then called the Commonwealth, and they were all in pink on the map and we were all supposed to be very impressed with the fact that we belonged to the this club of countries around the world indicated by these huge pink patches on the map. And that map is actually a map that would indicate where the death penalty has hung on, whether we are looking at countries like Singapore or Malaysia or Kenya, Uganda, Nigeria, Sierra Leone and the Caribbean. But as I mentioned, in most of these countries, certainly in Africa and the Caribbean, the death penalty seems to have stopped.

Where is the death penalty practice today? According to the UN report it's essentially, well, Asia, that's all that is left and it is concentrated in East Asia: China, Vietnam, Thailand and so on, Indonesia, Japan a little bit, Korea we will hear about Korea tomorrow but Korea has essentially stopped executing, Taiwan and the Middle East. And the Middle East is also complex because we have some countries in the region closer to Turkey, like Lebanon and Jordan, that have essentially stopped executing. And than we have others that are the most enthusiastic practitioners in the world: Iran, Iraq, Saudi Arabia. And if we look at the countries, and the UN report also does this, it looks at States that retain the death penalty to measure the relative increase or decline in the death penalty based on their practice over previous years. And there is a decline, a significant decline in the death penalty among most of the States that continue to practice the death penalty, with the exception of Iran, Iraq and Saudi Arabia. Japan had a little what I call a spike, because

two years ago Japan carried out several executions, we are talking about 10 or 11, but that was temporary and Japan has not executed anybody now for about a year, I think, It is back to its normal pattern which was perhaps one execution every year. But the countries where there is a serious increase and enthusiasm for the death penalty are grouped in the Middle Eastern region and are in fact Iran, Iraq and Saudi Arabia. And I wish I knew how we will get to them and how we will influence them. I think, that as has been the case in many countries it is the situation where political change is the only real way forward, if we expect to make progress on the death penalty as well as on may other issues.

A few countries that are of interest, one of them not far from here, and one of them, I'm speaking about Egypt, and the other Singapore, are interesting because they lead the campaigns in the United Nations when we have debates about the death penalty. They are the ones that fight so hard to retain recognition of the death penalty, to fight off the resolutions. They take political leadership on the subject of the death penalty within the United Nations and in other international debates. But they have had sharp declines in practice in the last five years. Egypt shows a dramatic decline in the use of the death penalty in Egypt during the five year period, and the same for Singapore. Some people think that Singapore was actually greatly embarrassed by the previous five year report because it showed that Singapore actually had the highest rate of execution. It's a small country, 4 million people or so, and they were executing 40 or 50 people a year. And so they actually had a rate of execution that was higher even than China or Iran and they were embarrassed by this and it has since declined. So, I think that, and this is shown by the report that this general decline amongst states that have abolished, that have not abolished the death penalty and that retain it is also very significant fact that confirms the general trend towards a moratorium and towards abolition of the death penalty.

Let me conclude now with a few comments about the situation in international law because this is also an important feature of the progress towards abolition of the death penalty. This was my first area of interest as a human rights scholar. It was actually the subject of my doctoral thesis and I am very pleased to point out the man who examined my thesis and who is sitting in the front row here,

Roger Clark of Rutgers University. He was the external examiner on my doctoral thesis some 17-18 years ago. It was on the developments in international law dealing with the death penalty. I thought in 1992 that I had written the last word on this subject of international law and capital punishment, but in fact the thesis has been through three editions now in terms of its published form and at some point we will have to do another one, because there continue to be important developments in law. We had the abolitionist treaties by the time I did my work in 1992. We had this 6th Protocol to the European Convention. We had the additional protocols within the universal system of the United Nations and within the Inter-American system and since than of course we had a new protocol in the European system. I think we can thank Turkey for the 13th protocol because when the Öcalan case was making its way through the courts and some European States turned to Turkey and said that this was a barbaric practice, how can you continue to recognize such a barbaric practice that goes against their fundamental values. Turkey responded by saying, well, why does Protocol 6 only prohibit the barbaric practice in peace time? So the Swedes immediately said "good point and we better adopt the protocol". And so this is the 13th Protocol to the European Convention.

I think a great deal of the interest in terms of international law has been the development in the case law and we have seen very dramatic changes virtually in every forum in international law, in international human rights law that considers capital punishment. We have had dramatic changes in the case law: The Inter-American Commission of Human Rights on the subject of the juvenile death penalty basically reversed itself, the Human Rights Committee reversed itself in terms of its interpretation of Article 6, and finally we have the European Court of Human Rights. It has gone from Soering in 1989 to Öcalan which comes within about a millimeter of declaring that the European Convention on Human Rights itself abolishes the death penalty, but it did not quite do it. And then earlier this year in Al Sadoon we had a judgment by a Chamber of the European Court of Human Rights that in fact declares the death penalty to be contrary to Article 3 of the European Convention. I am told that the British Government has now applied to have it go to

the Grand Chamber. And so we may have a Grand Chamber decision on this subject within the next year or two.

Let me just in conclusion mention one feature of this progress in terms of international law. I think it has had a very significant effect in terms of the national debates. I confine myself to only one example but I am sure that this example is valid in other countries, no doubt including Turkey. We had a case in Ireland last November where a retired judge, he had just left the High Court, he had been the president of the High Court, and he gave an interview to a journalist about his reflections on his life on the bench as a judge for many, many years, and at one point in the interview he said, "you know, I always regretted that we abandoned the death penalty", he said, "I think maybe sometimes the death penalty would be a good thing and we should have a debate on the death penalty in Ireland again, whether to reinstate the death penalty". I immediately got panicked e-mails from students and friends and colleagues in Ireland saying, "this is terrible, we are going to have a debate on the death penalty, the people may want to reinstate the death penalty". I sent immediately a very short letter to the Irish Times which is our national newspaper saying, "well, we can have a debate on the death penalty but if we change our position we will have to withdraw from the European Union". And the Irish Times published this at the top of the letters page the next day and the debate stopped, finished. And this is one of the things that the progress on international norms, I think, has done in a very convincing and important manner, that is, it stops these attempts by the odd demagogic politician or a judge to revive the death penalty. We have an argument, we just say to them well should we leave the Council of Europe, should we withdraw from the European Union, should we denounce the international treaties that we have adopted, and this finishes it off. So, the progress in international law is not just symbolic and it can have great resonance and great impact within national debate as wells.

TOWARDS A UNIVERSAL MORATORIUM ON THE DEATH PENALTY

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"Like a tragic shadow, the death penalty accompanies humanity…" With these words, Marino Barbero began his book on the death penalty that was published in Buenos Aires, in 1985. He gave its first public reading as a lesson in 1968, at the height of the Franco Dictatorship, immediately after the execution of a communist leader; a vain attempt to reaffirm the Dictator's authority in defiance of world opinion and the Pope. The book would have begun in another spirit, had my teacher learnt of the United Nations' resolution in favour of a moratorium, which gained a sufficiently large majority for the first time in 2007. He would certainly have preferred to begin his book with the assertion that "the history of the death sentence is the history of its abolition".

Indeed, the movement driving the progressive abolition of the death penalty that developed after the Second World War has intensified in these first few years of the new Millennium.

In what follows, I wish to approach the question of thought and action directed against the death penalty within the framework of the United Nations; above all, since the adoption of the Millennium Declaration and the presentation of its key objectives in the year 2000.

From the Universal Declaration of Human Rights to the 2007 Resolution on the Moratorium on Executions

The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, is a central part of progress towards a concept of world government that emanates from the Human Rights Charter of San Francisco. Peace, international order, the sovereignty of the people and human rights are fundamental values in the international political landscape. They reflect an overwhelming reaction to

the causes and underlying conditions of the Second World War. The hope that the new World Order would last longer than the League of Nations established in Versailles, in 1919, was more than fulfilled. The United Nations has prevented more than a couple of world wars since then, although it could not avoid the so-called "Cold War", which started after the Universal Declaration of Human Rights in 1948. The limitations of the Declaration may be found in that "tension" generated by the "Cold War": in the content and the scope of some of its rights –such as those that affect the Right to Life- and above all, in the decision not to support the creation of a jurisdictional mechanism to monitor the application of human rights by the respective countries, along the lines of what would later be known as Regional Human Rights Committees and Courts. These were not created at that time. They were only established, albeit with numerous limitations, after the approval of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

It is well known that the question of the abolition of the death penalty was kept off the agenda of the United Nations in its early decades. Article 3 of the Universal Declaration of Human Rights proclaimed the Right to Life and omitted all references to the exception of the death penalty, so as not to obstruct the path of those states committed to abolition. The proposal of the Soviet Union to include full abolition of the death penalty during peacetime did not prosper.

The matter was raised once again in the Covenant on Civil Rights, which was intended as a mechanism to guarantee compliance with Human Rights in the signatory countries: nobody could be arbitrarily deprived of the right to life, but the Covenant acknowledged that the death sentence was an exception to this. Nevertheless, it announced some limitations on capital punishment, which subsequently resulted in a productive debate.

Even before the adoption of the Covenant, in 1957, the Third Committee agreed to undertake a study of all aspects relating to capital punishment in the world, which was entrusted to Marc Ancel, President of the Société Internationale de Défense Sociale and a member of the penal section of the French Institute of Comparative Law. A

further study by Norval Morris emerged some years later from the same Institute, in 1967. These were followed by the all-important reports of Roger Hood and William Schabas, who has just presented his most recent report this year. The Secretary General presented a global report in 1971, which was followed by a draft resolution that referred to the process of restricting the offences for which the death penalty should be imposed and called for its full abolition. This resolution gave way to a stream of reports commissioned by the Secretary General and relevant resolutions that continue to this day. As early as 1973, a firm position appeared in the report from the Secretary General: "the United Nations has gradually shifted from the position of a neutral observer, concerned about, but not committed on, the issue of capital punishment, to a position favouring the eventual abolition of the death penalty".

Since then, the issue of the death penalty and its abolition have been studied and debated from the standpoint of standards in criminal law -in the Social Defence "Branch", today the Commission of Crime Prevention- and, from the perspective of the standards in human rights -in the Human Rights Committee, now the Council on Human Rights. Relevant moments in that debate were the Economic and Social Council in 1975, the 1977 General Assembly, and, especially, the Caracas Congress, in 1980, on Crime Prevention and the General Assembly, where the death penalty was discussed more intensely than any other matter, turning it into a stage upon which its strongest supporters made a stand.

All the same, the debate at the Caracas Congress in 1980 led to the drafting of the "Safeguards" on the application of capital punishment for the subsequent United Nations General Assembly. They were intended to influence those states that still made use of capital punishment. As is well known, these UN "safeguards" barred the legitimate use of the death penalty for anything other than "the most serious crimes"; for offences committed by minors under 18 years old or pregnant woman; and at all times insisted on its non-retrospective nature; a fair and just trial; mandatory appeals procedures; its suspension until all other appeals procedures and possibilities of a pardon were exhausted; and, finally, it stated that the prisoner should be executed in a way that causes the minimum possible suffering. The definitive text was agreed in 1989 (ESC. Res. 1989/64).

In the meantime and closely related to these events came the debate and the drafting of the Second Optional Protocol to the International Covenant on Civil and Political Rights, in 1989, that once again aimed to abolish the death penalty. As pointed out by William Schabas, the vote perhaps reflected the optimistic atmosphere surrounding the demise of the former Eastern bloc countries. In the same year, the Assembly approved the Convention on the Rights of the Child, the wide-scale ratification of which, with the notable exceptions of the USA and Somalia, has universalized the prohibition on the use of the death penalty to punish crimes committed by children under the age of 18.

Also in 1989, the first prominent intervention of a Human Rights NGO took place -Amnesty International- with the publication of a widely read study entitled "When the State Kills". Mass-membership and grass-roots NGOs working in the field of human rights, whose strength and influence would not cease to grow, made their appearance in the sphere of international Human Rights policy, where the protagonists had formerly been governments and NGOs with links to the Crime Committee of the United Nations.

The abolitionist agenda continued to advance, but so did collaboration between the anti-abolitionist states. Thus, a group of Islamic states that called for the retention of capital punishment as a direct consequence of their religious laws threw its weight behind the imposing presence of the United States and China.

In 1944, the Italian Government had launched an initiative at the General Assembly in support of a universal moratorium which was soon accompanied by an international organization: *Hands Off Cain*. Two representatives of retentionism stood out during the debates: Pakistan, which headed the refusal to debate the question; Sudan, which described the death penalty as "a divine right according to some religions, in particular Islam"; and Singapore which led the anti-abolitionist coalition. The arguments they employed deserve some reflection: they affirmed "the sovereign right of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively," and declared that there was no international consensus that considered the death penalty to be contrary to international law.

While this matter was under discussion at the General Assembly, a contentious debate took place in the Security Council over the exclusion of the death penalty from the list of penalties in the Statutes for the International Criminal Tribunal for Rwanda, which had not taken place before the approval of the Statute of the International Criminal Court for the Ex–Yugoslavia, a year earlier, in 1993. Finally, all the statutes of the ad-hoc Tribunals, as well as the International Criminal Court were adopted with the exclusion of the death penalty, despite these Jurisdictions having been conceived for the most serious of crimes.

In 1996, renewed efforts by the abolitionists led to the adoption of favourable resolutions by the Commission on Crime Prevention and Criminal Justice, and, in the following year, by the Commission on Human Rights, which affirmed its belief "that abolition of the death penalty contributes to the enhancement of human dignity and to progressive development of human rights". In 1988, the Commission proposed a resolution for a general moratorium. In response, 51 states formed a group of "hardline retentionists", which expressed their rejection in the same sense as the earlier position held by Singapore concerning the absence of any international consensus on abolition due to differences between religions and judicial systems. The standoff took place at the 1999 General Assembly, at which the European Union presented a resolution to apply the Safeguards and also urged ratification of the Second Optional Protocol on the abolition of the death penalty, the progressive restriction of the death sentence and the establishment of a moratorium with a view to complete abolition. But the proposal of the European Union was defeated by the "hardline retentionist" states led this time by Egypt and Singapore, which reiterated the inexistence of any universal consensus and expressed the view that the death penalty was a matter for criminal justice and was not a human rights issue.

But after this setback, everything started to come together. In the first place, the new specialist NGOs brought old and new actors together in the *World Coalition* and in the *Ensemble*. They have organized a World Congress every four years since 2001; a truly international movement of social actors whose last gathering took place in Geneva, in April 2010, and was inaugurated by the six-monthly President of the European Union, Sr. José Luis Rodríguez Zapatero.

There has been intense activity among regional and local NGOs in the intervals between the 2001 Congress in Strasbourg, the 2004 Congress in Montreal, the Paris Congress in 2007 and the 2010 Congress in Geneva. One of their key supporters is the European Union, which since 1994 has earmarked part of its Human Rights funding programme to the struggle for abolition.

In fact, the "European initiative for Democracy and Human Rights" is an outstanding example of a busy pluridisciplinary instrument, holding meetings and making statements on the broad dialogue between China and the European Union; the situation in the Great Lakes region of Africa; and on Arab countries, such as those which resulted in the Declarations of Alexandria (2008) and Algiers (2009) and Madrid (2009) in which civil society from those states urged their Governments to comply with Resolution 62/149 of the United Nations General Assembly.

New actors have also emerged in force in the international institutional sphere. The actions of the *Special rapporteur for extrajudicial executions*, should be highlighted, a figure that, since its creation in 1982, has to some extent dealt with the question of the death penalty, and the *High Commissioner for Human Rights*, a position that ever since it was occupied by Mary Robinson, has resolutely opposed capital punishment, criticized executions and called for a moratorium and the abolition of the death sentence.

This new climate encouraged an initiative by 85 countries, which delivered a statement to the United Nations in December 2006, declaring that "we firmly believe that the abolition of the death penalty contributes to the enhancement of human dignity, and the progressive development of human rights." The final goal is its abolition and its restriction in those countries that maintain it, with the intermediate objective of a universal moratorium.

For the first time, the ensuing resolution was successful at the General Assembly which approved the Resolution on the moratorium on December 18, 2007, by 104 votes in favour, 54 against and 2+9 abstentions. On November 20, 2008, it was ratified again by 104 votes in favour, 48 against and 31 abstentions. The final report from the Secretary General, presented in Vienna last May, was the work of William Schabas.

Having come this far, it is evident that the Resolution on the Moratorium does not represent the *end of the history* of abolition; not least because 48 countries voted against it and 31 abstained and the majority of them practice the death sentence. For those who consider that abolition is a matter of human dignity and human rights, the right path will be to continue the debate year after year, in order to reduce the group of states that abstain and, above all, the group of states that put up greater resistance by applying capital punishment and keeping it on their statute books. But it will also be necessary to approach the problem of the death sentence from other angles. This is precisely what the Spanish President Rodríguez Zapatero proposed last December in Madrid at the inauguration of the Congress that launched the Academic Network against Capital Punishment, details of which you may find on our website: *www.academicsforabolitión.net*

Allow me to develop this argument here: it is a question of observing the development of what has been called the *power of ideas in the intellectual history of the United Nations.*

I do not have to refer back to Winston Churchill to confront those who attach little or no value to the United Nations and who dismiss it as a *Talking Shop*, suggesting that its work is dissipated in fruitless discussions. Churchill argued that "jaw-jaw is better than war-war". More importantly, I would invite you to reflect on the fundamental role that the UN has played in the development of ideas and concepts. At the outset, they were considered incomplete or the property of certain economic and political orders. Today thanks to the nothing less than the United Nations, they form part of our modern definition of the human being in the Universal Community (S.Tharror). Among the ideas that of the self-determination of peoples stands out, which, although sponsored by the League of Nations in the Treaty of Versailles, was never applied beyond what might be called the civilized world, until the United Nations promoted the large-scale process of decolonization in the second half of the nineteenth century.

Up until some years ago, Human Rights might have appeared to be a privileged intellectual and political asset in developed countries that espoused capitalism; in short, a creation of cultural imperi-

alism. Today, however, when human rights are still trodden underfoot in many parts of the world, it should be made clear that thanks to the ideas and the human rights monitoring work of the United Nations, the UN has become the most effective defender of millions of human beings against abuses of power.

These same ideas of peace, the prevention of war through negotiation, and of peace missions and legitimate intervention by the United Nations have not always been able to prevent conflicts in innumerable parts of the world, but they have prevented wars that might otherwise have rivalled the two World Wars that took place before its creation.

The idea of an end to impunity and the punishment of the most important abuses of power has been consecrated in the creation of *ad hoc* International Tribunals and the International Criminal Court; and by the strength of the principle of Universal Justice. After remaining on ice after Nuremburg on account of the Cold War, this principle has once again become an effective force, especially for the International Convention against Torture, and other such agreements. The United Nations has also been the author of novel economic and developmental ideas, to the point of converting this duality into the *Human Development Programme*; which today lends special attention to the goal of poverty reduction. Nowadays, this same idea of human development also encompasses Human Rights and conflict resolution. Alternative approaches to the division between the fundamental Rights in the two Covenants –on the one hand, Political Rights, and on the other, Social Rights (Delmas Marty)- are today being weighed up behind the scenes, to move towards a wider concept of human Security.

Even so, I would call your attention to the pragmatic ideas that we know as the Millennium Goals launched by the General Assembly and Secretary General Kofi Annan, in the year 2000, through the Millennium Declaration. Far from being rhetorical or purely programmatic and, despite the delays in its implementation, due in large measure to the 9/11 security crisis and the 2007 economic downturn, I believe that the ideas of the Millennium Declaration will be on the daily agenda in the international life of regional and bilateral organizations. The power of these ideas will transform the

world in 2015 and in any case will transform the awareness of its inhabitants with regard to what we can expect from our governments and from ourselves (Kennedy). Furthermore, transport, information, and the organizational capacity to provide more opportunities than ever before are all available to civil society in our nation states in this era of globalization, to overcome the "forces of evil" that everybody has to combat in their countries and their legal orders.

Millennium Goals and New Challenges: Reduction of Criminal Violence and Giving Up the Death Penalty

The Millennium Declaration is structured around eight major sections:

1. Values and principles
2. Peace, security and disarmament
3. Development and poverty eradication
4. Protecting our common environment
5. Human rights, democracy and good governance
6. Protecting the vulnerable
7. Meeting the special needs of Africa
8. Strengthening the United Nations

After reading them carefully and going over the events of the last decade, I add my voice to those who say that the Millennium Declaration and the development goals that arise from it might well constitute the third great United Nations document, after the Charter of San Francisco and the Universal Declaration of Human Rights (Maucisidor, 32).

The Millennium Development Goals are set out in a precise and appropriate way for quantitative measurement from their starting point and throughout the programme. They are as follows:

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality

5. Improve maternal health
6. Combat HIV/AIDS, malaria and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development

The perspicacity of these objectives is manifest. The human spirit rebels against a reality with so much economic violence inflicted on human beings, millions of whom are subjected to hunger by political and economic structures, which is quite unjustifiable in view of the wealth of the modern world; millions suffer from high mortality rates due to illnesses that human development and modern health systems have completely eradicated in a large part of the world, but which should be universally eradicated.

The human spirit also rebels against the brutal, and in other instances, refined discrimination against human beings because of the colour of their skin, or, what is more surprising, against women, whatever the colour of their skin. Male discrimination against females, on a par with hunger and illness, is gratuitous and avoidable: these are the most relevant plagues for humanity at the start of the Millennium. It is not a question, as the Declaration fully explains, of an age of Social Rights set against a past age of Political Rights. It is more a matter of surmounting the division that could not be overcome at the time of the 1966 Conventions, and that continued for three decades before the Millennium Goals were set out.

President José Luis Rodríguez Zapatero came to the meeting of academics, last December in Madrid, to explain and to propose that those who are concerned and take action to abolish the death sentence for traditional reasons should make the effort to situate our goals in the framework of the new discourse and the discussion around the Millennium Development Goals. The fight against hunger is not an alternative to the fight for the Right to Life or for human dignity, but on the contrary, the fight against hunger ensures the groundwork, the basic necessities for the dignity of human beings and their Rights. It is from this viewpoint that we have to reconstruct the content of Human Rights in the contemporary world, and of the Right to Life which is founded on the rejection of capital punishment.

There is no need to revise the Millennium Declaration in order to reconstruct and complement the abolitionist stance. It is all a Declaration against violence, against the intrinsic violence of death by hunger, whether by action or omission; the violence of discrimination against women, which as we know, all too easily turns into criminal violence against women in the relationship between a couple; and the violence of leaving millions of people to die of an illness (i.e. malaria), because of a combination of avarice on the part of pharmaceutical companies and the countries that hold a stake in them.

Two important calls to stop violence are made in the second section of the Declaration. Firstly, the call to promote peace, to end conflicts and to intervene in legitimate defences, avoiding the "let them die" and "let them kill" situations; two concepts that can hardly leave anyone feeling morally indifferent, and secondly, the call to take action against criminal violence, identified above all with international terrorism, arms of mass destruction, antipersonnel mines, cluster bombs, and the illegal traffic in small and light arms, etc.

There is no doubt that a large part of the arguments upheld by abolitionists may be integrated in that context of anti-violence, as for the majority of us it represents the emotion that rejects the death penalty, whether this means *killing in cold blood* or *cold-blooded killing*. Only the heart of the executioner feels no empathy when contemplating the act of capital punishment. It is a feeling that rejects the violence of the death penalty, despite its legality in any one country, or despite it being considered legitimate from a religious standpoint. It is that feeling which should become the objective of consensus between the countries of the world in the construction of the values and principles of the renewed world order. This is the proposal that I submit to you for your consideration. I do so in the hope that the Academic Network may concentrate its efforts with others to construct a value system deserving of the Millennium Declaration. A value system that will accompany progress in the field of human rights and that will enshrine the most important lesson the State may teach those who practice violence: the renouncement of capital punishment because we repudiate killing in cold-blood.

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JUDICIAL COOPERATION IN THE EU AS A MEANS OF COMBATING THE DEATH PENALTY AND THE EXPANSION OF HUMAN RIGHTS

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I. ART. 19.2 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: A DISTINGUISHING MARK OF THE EU

Art. 19.2 of the Charter of Fundamental Rights of the European Union, fully valid since the entry into force of the Treaty of Lisbon, establishes that "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". In this article, the EU expresses one of its distinguishing marks which is abolitionism. It affirms that there is no room for judicial cooperation, with regard to extradition, when the criminal proceedings might lead to the imposition of the death penalty with some probability of it being applied or when extradition is requested to impose that penalty.

The content of art. 19.2 of the Charter is the outcome of a long evolution that should be understood as one of the great collective victories of European abolitionism. Even in 1964, the German Supreme Court (SC) pointed out its frighteningly categorical view that: "the constitutional norm contains no value judgment over other legal orders, for which reason it does not prohibit the German judicial system from refusing extradition, for the mere fact that the offence that has been committed is punishable by the death penalty in the

requesting country"[1]. The German legal order lacks legitimacy, the German SC continued, to impose the absolute nature of the right to life on other systems that is represented by the prohibition on the death penalty in art. 103 of the Fundamental Law[2]. In one of the most well-known German commentaries in the field of judicial cooperation, the arguments advanced in their day by the SC are still considered reasonable. They precisely express the core of the problem we face: in extradition, international courtesy, and good international relations are considered more important than the right to life and the validity of fundamentals rights[3]. Neither was the ECtHR (1950)[4] able to announce the abolition of the death penalty, some years earlier, despite forming part of the same generation as the Italian and German constitutionalists, who were moved to become abolitionists by the horrors of fascism.

Before arriving at Protocol nº 6 in 1983, in the framework of the Council of Europe, the only victory for abolitionism could be found in the European Convention on Extradition of 1957. Its art. 11 pointed out, through the use of an optional "may", that "*If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.*". The majority of European extradition laws and bilateral treaties currently contain similar provisions, in which

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1 BVerfG, 18, 112

2 BVerfG, 18, 117.

3 Cfr. Vogler, § 8, 3 ff, in Grützner/Pötz, Internationaler Rechtshilfeverkeher in Strafsachen, 2 Auf, R. V. Decker; vid. however, Schomburg/Hackner, § 8, 1 ff in Schomburg/ Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 4 Auf. C.H. Beck, 2006, whose opinion is that § 8 of the Law on International Judicial Assistance in Criminal Matters, which prescribes the extra prohibition on the death penalty, unless sufficient guarantees that this penalty will not be applied, has a declaratory value, insofar as it is a constitutional mandate that may be directly taken from the constitutional prohibition of the death penalty.

4 Unless otherwise indicated, all quoted legal texts relating to international and European criminal law may be found in Arroyo/Nieto, Código de Derecho penal Europeo e Internacional, Ministerio de Justicia, 2008.

the facultative "may" has on occasions been substituted by a prohibition on extradition unless sufficient guarantees are given, which should involve an almost absolute certainty that the death penalty will not be implemented[5]. The abolition of the death penalty in the core European countries, which took place in the seventies, has made a notable contribution to the proliferation and the improvement of these clauses.

Despite the normality of not extraditing to a country where the death penalty exists, art. 19.2 of the Charter of fundamental Rights of the European Union (CFREU) has an important practical meaning. On the one hand, it converts the optional "may" into a categorical "will", but on the other, it transforms these types of precepts into a fundamental right which is not available to the ordinary legislator, meaning that Conventions on extradition that such legislators might draw up that contradict this precept are therefore contrary to the EU Treaty. This question, naturally, is not in vain. Even today, it may not be said that the prohibition on the death penalty belongs to the public or *ius cogens* international order[6]; thus, in accordance with treaty law, all conventions that provide for judicial cooperation in cases of the death penalty are perfectly valid from the perspective of international law. If national abolitionist constitutions do not consider that international judicial collaboration is not contrary to the constitutional right to life in cases of the death penalty, the way is open for the ordinary legislator to sign retentionist treaties on judicial cooperation, non-compliance with which would imply a contravention of international law.

Art. 19.2 of the CFREU therefore means that the EU through extradition is ready to export abolitionism, requiring as much from such countries as China, the United States, Japan and India. This position is of great importance, in an age such as this one, in which ex-

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5 In relation to Spain, on all this Cezón González, Derecho Extradicional, Dykinson, 2003, p. 140 ff.

6 Cfr. Vogel, Vor § 1, 99 (not. 3); the only things that may be considered contrary to international *ius cogens* are certain forms of executing the death penalty, which are considered inhuman or degrading, vid. Bassiouni, International Extradition: United States Law and Practice, 4 Ed., Oceana Publications Inc., 2002, p. 735.

tradition and in general all judicial cooperation is necessary in order to effectively sanction serious transnational crime, which precisely in cases such as terrorism is often associated with the death penalty. Art. 19.2 CFREU limits the foreign policy of the EU, given the consequences on international relations, for example, that refusing to extradite *Osama Bin Laden* to the United States might have. What is more, however, art. 19.2 CFREU might be an essential element so that should the case arise, the national SCs following the example of the Italian SC, may consider that non-extradition in the case of the death penalty, unless absolutist guarantees are given, constitute part of the constitutional right to life or part of the constitutional prohibition —until now only internal— on the death penalty[7].

II. SOERING AND ITS PROGENY

The true material authors of art. 19.2 ECFR are non-other than the *Jens Soering*[8] case and its progeny, as is acknowledged in the Explanatory Memorandum to the Charter of Fundamental Rights, which although it lacks legal value, is an authentic instrument of interpretation[9]. The facts that give rise to this case and its contents are widely known[10]: at the age of nineteen years old, Soering, influenced by a mental illness known as split personality syndrome, strangled and savagely stabbed the parents of his girlfriend, who lived in a small town of Virginia. After fleeing to England, where he was arrested one year later for falsifying cheques, the court in Virginia that had to judge him accused him on two counts of homicide, which in the United States, one of the most firmly retentionist countries, is

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7 Only the Italian SC through the *Venezia* case, June 27, 1996, nº 223 has integrated non-extradition in the case of the death penalty into the constitutional prohibition of the death penalty; in Germany, there is still no decision of the SC to date that openly contradicts the doctrine on the decision of 1964 (not. 1 and 2), vid. Vogel, § 73, 99 (not. 3). The SC in Spain has not ruled on the matter.

8 STEDH Soering v. UK nº 14038/88, 7 July, 1989, Series A nº 161.

9 OJ C 303/17, 14.12.2007

10 Among the many commentaries on Soering, vid. Lillich, The American Journal of International Law Vol. 85, 1991, pp. 128-149.

punishable with the death penalty. The United States requested the extradition of *Soering* under the terms of the Convention on Extradition with Great Britain, in 1972, which contain a clause relating to the death penalty that is similar to the Convention on Extradition of the Council of Europe: in cases where the death penalty might be applied: "*extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out*". The guarantees given by the American authorities that the death sentence would not be imposed did not satisfy *Soering*, however, who after various appeals to British authorities, turned to the European Court of Human Rights (ECtHR).

It was no easy matter for the ECtHR to protect *Soering*. Firstly, because the United Kingdom at that time had not signed the second protocol nº 6 of the European Convention on Human Rights relating to the abolition of the death penalty; secondly, because the violation of the right to life would take place within the territory of a country that was not a party to the Convention; thirdly, because there was only a risk that this right would be violated; and fourthly, because the precedents were not favourable. In *Kirkwood*[11], a very similar case, also concerning extradition to the USA, the former European Commission of Human Rights had rejected any violation of the prohibition against inhumane and degrading treatment in confinement on death row; this doctrine was upheld by the Commission in its opinion on *Soering*[12].

Despite all these difficulties, the judges at Strasbourg upheld *Soering*'s application. Instead of underlining the right to life, they pointed out that extradition would affect the right not to suffer inhuman and degrading treatment. Although *Soering* might not finally be condemned to death or the penalty might not be carried out, he would spend many long years, between appeals, on death row, which, above all in his mental state, would in itself suppose a cruel punishment due to *death row syndrome*. The mental state of

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11 Kirkwood v. United Kingdom, 1984, but also Altun v. Frederal Republic of Germany, 1984 and M v. France 1985, the latter case involved deportation.

12 European Commission on Human Rights, Soering v. United Kingdom, nº 14038/88, 7 July, 1989.

Soering was one of the key arguments to distance the case from *Kirkwood* and the opinion of the Commission. The obstacle arising from the extraterritorial application of the Convention was also adroitly handled. It is true, the Court pointed out, that these acts were to take place outside its area of jurisdiction, but human rights and all conventions that protect them should have a universal leaning, for which reason a judge may not cooperate with the probable contravention of a law that is committed in another country that does not subscribe to the Convention[13].

The ECtHR has recently reiterated this last statement, in a set of decisions that represent the progeny of *Soering*. In *Drozd and Janousek*[14], the ECtHR was confronted not with the possible contravention of an imponderable fundamental right belonging to international *ius cogens*, such as the prohibition on torture, but with more complex, ponderable and changing guarantees concerning due process which in this case endangered the acceptance of judicial cooperation. The response of the Court complemented the ruling on *Soering*: "*The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a* **flagrant denial of justice**". With this noun phrase, the ECtHR stated that it did not intend to impose on non-member States a similar level of safeguards. The violation of the Convention only takes place when the violation of the rights enshrined in it is of considerable intensity (flagrant denial of justice). A little later, in *Pellegrini*[15], where the compatibility of the proceedings before an ecclesiastical Tribunal

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13 It is enough to read the words of the European Commission of Human Rights, if we wish to highlight the importance of this doctrine, which as we know considered that the extradition of Soering did not violate the Convention: "if a Convention State deports or extradites a person within its jurisdiction to another country where he is subjected to treatment in violation of the Convention the deporting or extraditing State is not responsible as such for the violation in which is only opposable to the receiving State where the actual treatment (for example, treatment prohibited by Article 3) takes place" (Commission Report (not. 12), pag. 96. The Commission also drew support for its arguments from Swiss and German constitutional jurisprudence that to date has professed a similar doctrine.

14 STEDH Drozd and Janousek v. France and Spain, nº 12747/87, 26, June 1992

15 Pellegrini v. Italy, nº 30882/96, 10 July, 2001

with art. 6 of the Convention was debated, with a view to the nullification of the marriage in an Italian court, the ECtHR once again completed its doctrine. A review of foreign proceedings in the light of demands for a fair trial and due process required by art. 6 are necessary if the decision is in connection with a country that does not apply the Convention, especially if the consequences of the cooperation are of capital importance to the parties[16].

Constitutional jurisprudence in various countries has incorporated the *Soering* doctrine, extending it in accordance with *Drozd* and *Pellegrini* to the violation of fundamental rights that have to do with a fair trial. One of the most emblematic cases is the Spanish SC ruling STC 91/2000 which refused extradition to Italy of a mafia member convicted *in absentia*. The SC, closely following *Drozd*, established that a similar level of protection of fundamental rights can not be demanded when contemplating extradition, as it would also block a constitutionally relevant interest which is that of cooperation[17]. The SC struck a balance between both interests in what it called the absolute content of a fundamental right, which would be applied *ad extra. Soering* and its progeny were also decisive to the decision of the German SC to abandon its 1964 doctrine, and to consider that the fundamental rights that are established in the German constitution are also applied *ad extra*, although reduced to their hard core (*Kernbereich, unabdingbare Grundsätze, Elementargarantien…)*[18]. The Italian Constitutional Court has developed a jurisprudence that surpasses *Soering*, insofar as it does not apply the risk of violation to torture and inhumane treatment but directly to the death penalty in the *Salvatore*[19] case, the content of which we will examine later on.

Soering has even gone beyond the scope of the ECtHR. Its doctrine has been used by the United Nations Human Rights Commit-

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16 For an explanation of the apparently contradictory differences between Pellegrini and Drozd, van Hoek/Luchtman, Transnational cooperation in criminal matters and the safeguarding of human rights, in Utrecht Law Review, Vol I, Issue 2 (December) 2005, p. 13 ff (http://www.utrechtlawreview.org/).

17 Cezón González, Derecho Extradicional (not. 5), p. 112 ff

18 See, for example BVerfG JZ 2004 141, with annotations by Vogel.

19 Salvatore (not. 7)

tee[20]. In *Ng v. Canada,*[21] the Committee decided that Canada had violated art. 7 of the International Covenant on Civil and Political Rights which prohibits cruel, inhuman and degrading treatment, by extraditing *Ng* to California, considering the likelihood of him being sentenced to death and executed by lethal gas, a method of execution that the Committee considered cruel treatment. Unfortunately, Canada extradited *NG* without awaiting the decision of the Committee. Although in two simultaneous judgments -*Kindler*[22] and *Cox*[23]-, referring to extraditions to Pennsylvania, the Committee which considered that there had been no violation of the Covenant, neither because of the execution method, nor because of "*death row phenomenon*", once again applied the logic of *Soering* and refused to vindicate Canada that had rejected any violation of the international covenant through cooperation with a foreign authority: "*If a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant… For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place"*.

III. THE INHERITANCE OF SOERING: JUDICIAL COOPERATION RESPECTFUL OF HUMAN RIGHTS

The inheritance of *Soering* like the judgments that followed it is of great importance for the protection of human rights in a globalized world, as it constitutes the *hardware* of a new model of ju-

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20 Cfr. Quigley, The Rule of Non-Inquiry and Human Rights Treaties, Catholic University Law Review, Vol 45: 1213, 1994, págs. 1219 ss.

21 Ng v. Canada, U. N. Hum. Rts. Comm, Communications Nº469/1991, Dec. of Nov. 5, 1993.

22 Kindler v. Canada, U. N. Hum. Rts. Comm, Communications Nº 470/1991, Dec. of July 30, 1993.

23 Cox v. Canada, U. N. Hum. Rts. Comm, Communications Nº 539/1993, Dec. of Oct. 31, 1994.

dicial cooperation that is respectful towards them. In effect *Soering, Drozd, Kindler* and the doctrine of the absolute core, as we have seen, authorizes the exportation of fundamental rights from one system to another. The term export is not chosen by chance. The German doctrine sustained for a long time that a prohibition existed, in view of sovereignty and of the possibility of establishing international relations, on exporting fundamental rights to other systems enshrined in the Fundamental Law[24].

The *Soering* doctrine applied to the field of judicial cooperation means that cooperation is not possible at any price. In the case of the death penalty, this implies that although abolitionism does not form part of the international public order, *Soering* authorizes it to be exported to retentionist countries, warning them that there can be no judicial cooperation unless, in that specific case, they decide not to impose or execute the death penalty. But *Soering*, through *Drozd,* has a meaning that goes beyond cooperation in cases of the death penalty. In a general way, *Soering* means that assisting with the execution of judgments or in criminal proceedings that violate human rights or in which such a violation is foreseeable constitutes an indirect violation of these rights, even though they are not enshrined in the foreign system.

Implicit in this affirmation is the demise of the conventional, old-fashioned model of judicial cooperation. In effect, cooperation in its most conventional formulation was conceived as an act of assistance (*Rechtshilfe*) to the *ius puniendi* of another state, which is situated within a country's system of international relations. Cooperation serves to maintain good relations between governments and to avoid possible international conflicts. Respect for fundamental rights has not place in this model, where the affected person is moreover a subject without any rights whatsoever. This conception subjugates judicial cooperation to the ups and downs of foreign policy. In fact, real development of cooperation may not be understood without this reference[25]. Cooperation was inexistent in the troubled 16th and

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24 Cfr. Vogel, Vor § 1, 29 ff (not. 3)

25 For a history of extradition from this perspective, see the work of Pyle H. Ch., Extradition, Policies and Human Rights, Temple University Press, 2001.

18th centuries in which the different European monarchies lived in a state of perpetual war between each other. On the other side of the Atlantic, the majority of the old colonies, beginning with the United States, were havens for those persecuted for political and religious motives and fugitive slaves. Still preserving their interest in the values that inspired their independence and preocuppied with their internal affairs, they never developed systems of cooperation. Only as the 19c progressed did cooperation undergo notable development. With the arrival of the industrial revolution and the increase in economic exchanges, states needed more peaceful international relations, the development of communications created greater possibilities moreover for transnationality to appear in criminal proceedings with ever-greater frequency. As from this period, judicial cooperation started to become more positive, above all in laws and treaties on extradition, and it did so in the context of international law.

The principle of *non inquiry*, present in the North American legal order, but also in some European countries such as Holland and the United Kingdom, faithfully enshrines this concept that has dominated without interruption for years. As established by the SC in the USA, at the start of the twentieth century, in *Nely v. Henkel* (1901), in response to the defendant's plea while awaiting extradition to Cuba on charges of fraud, who feared that he would not have a fair trial: "*such citizenship does not…entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled*"[26]. Some years beforehand, the first law from English statutes of 1896 positively affirmed this principle, already expressed some years before by political entities in charge of authorizing extradition. The plea that in the case of extradition to China the defendant might be at risk of torture met with a firm response: "*Her Majesty's Government cannot of strict right refuse to deliver a criminal … on the grounds that there is reason for suspecting that torture will be applied*"[27].

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26 Cfr. Pyle H. Ch., (not. 25), p. 118.

27 Cfr. Pyle H. Ch., (not. 25), p. 122.

In this model of judicial cooperation, the extraditing judge solely exercises formal supervision over whether the requirements arise, as established in the domestic law of each country, to proceed with the extradition. To do anything more would imply interference in the division of powers, interference in foreign policy or international relations which are matters for the executive branch. The violations of fundamental rights that take place in another country as a consequence of their procedural rules, because of police brutality or the poor state of prisons are points which should be given consideration, if necessary, in the political phase of cooperation or at the time the Treaty is signed. The diplomatic protection of fundamental rights is, for the doctrine of *non inquiry* ideal, in order as far as possible to minimize damage to international relations. The opinion of a judge on the system in another country can unnecessarily generate international conflict and diplomatic pressures can turn out to be more effective for the protection of a fundamental law than the courts, which moreover have few instruments to verify what the real situation of the penal system of another country[28].

The doctrine of *male captus bene detentus* (wrongly captured, properly detained), closely linked to *non inquiry* in American jurisprudence[29], also finds its explanation and rationale within a doctrine in which the judge's eyes are closed to everything that might have happened in the territory of another sovereign jurisdiction. Illegal detention that has substituted the process of extradition under another jurisdiction has no judicial relevance and is purely of political relevance, to be agreed between sovereign powers, in accordance with international law. This doctrine exemplifies like few others the way in which the judge in this model of cooperation is expected to

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28 Cfr. Wilson,Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition, ILSA Journal of Int'l & Comparative Law, Vol. 3: 751, 1997, p. 751 ff.

29 Bassiouni, (not. 6), pp. 249 ff; on its historical context vid. once again Pyle H. Ch. (not. 25), pp. 263 ff (It is a crime for private persons to receive stolen goods, but it is lawful for American courts to receive stolen people. It is unconstitutional for American courts to accept evidence that the government has obtained illegally, but it is not unconstitutional for judges to try alleged criminals who have been brought to them by government or private kidnappers. So is the bizarre state of American law today".

turn a blind eye to everything that might imply a violation of fundamental rights outside his own jurisdiction. The judge moreover closes his eyes in two senses: he is not concerned with whether he cooperates with an unjust criminal system, or whether the proceedings for which he has regard have incurred in some type of behaviour that violates fundamental rights.

Although perhaps less remarkable than the preceding doctrine, it is still possible to find in EU member States, such as Holland[30], important ensnarements of the *non-inquiry* rule that are grounded in the same logic of *male captus*. As a general rule, it is a matter of situations in which one court uses information to initiate criminal proceedings, which were obtained in the territory of another country in violation of fundamental rights. Thus, for example, proceedings were recently opened for tax offences in various countries of the EU, taken from information that had been obtained by tax authorities in another country by means of bribery of bank employees so that they broke banking confidentiality[31]. Equally frequent is the opening of criminal proceedings, on the basis of information from the secret services, without ascertaining whether such information was obtained in accordance with fundamental rights[32]. *Non inquiry* in these cases responds to a line of reasoning that would withhold sources of information or encourage collaboration between the secret services and the courts, which would otherwise face obstacles were they subject to greater controls over the source of their information.

Soering obliges us to give up this type of practice and instigate a radically different system of judicial cooperation, which some authors have accurately described as tridimensional[33]. In effect, the traditional system of cooperation is characterized by its bi-dimen-

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30 Swart, in Eser/Lagodny/Blakesley (ed.), The Individual as Subject of International Cooperation in Criminal Matters. A Comparative Study, Baden-Baden, 2002, p. 520.

31 See, van Hoek/Luchtman, Transnational cooperation in criminal matters and the safeguarding of human rights (not. 16), passim.

32 See, Vervaele, Terrorism and information sharing between the intelligence and law enforcement communities in the US and the Netherlands: Emergency criminal law?, Utrecht Law Review, Vol. 1. Issue 1, Sept. 2005, p. 1 ff.

33 Fundamental Vogel, Vor § 1, (not. 3) 15.

sionality, judicial cooperation simply affects the two States that are involved. In opposition to this model of cooperation, a system arises in which the three principal interests at stake in this field are appropriately weighed up: international relations, effective prosecution of transnational crime, and, of course, fundamental rights. A good model of judicial cooperation is one which allows these three interests to be weighed up. One ideal image of cooperation may be likened to a triangle, each side of which would correspond to the three aforementioned interests, which due to their equal weight and balance would make it an equilateral triangle.

Elements of international law are evident in this model of judicial cooperation, but also from constitutional and criminal law. The position of the subject affected by cooperation and that of the judge undergo radical changes. The former is subject to laws and the latter is the guarantor. The judge in charge of extradition should concentrate on the degree of real respect given to fundamental rights existing in the country with which cooperation is underway. In the governmental phase of cooperation, although authorization continues to be an act of a political nature, the organ in charge should take into account the three interests at stake. Logically, this tri-dimensional model of cooperation is contrary to doctrines such as *non inquiry*, but also to that of *male captus bene detentus* in any of its manifestations.

The most complicated and debated aspect of this model lies in determining what level of fundamental rights will be demanded from the legal system that requests the cooperation. The prohibition on the exportation of fundamental rights upheld by the German doctrine had a nucleus of truth. If we expect the system with which we are cooperating to define fundamental rights in exactly the same way as in the legal order of the country executing the extradition,[34] we will notably hamper cooperation, unaware of the other interests that are at stake. This supposition, furthermore, ignores the fact that regional human rights courts have developed a wide jurisprudence that has been defining the content of a large part of these fundamental rights, and which begins with the need to concede to each system a margin for national appraisal. The ECtHR doctrine in *Drozd*, which speaks

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[34] Cfr. Lagodny, § 73, 1 ff, in (not. 3)

of a *flagrant denial of justice,* of the Spanish SC through the absolute or exportable core of fundamental rights or the German SC, through its *Kernbereich*, are the road to follow. To impose the same level, the same vision of fundamental rights that operates in domestic law is tantamount to chauvinism that is incompatible with good international relations.

It is not, therefore, a question of demanding equal standards from another legal order in the protection of fundamental rights, but rather of respecting contents that are considered essential. In recent years, the laws on judicial cooperation in some EU countries[35] (Switzerland, Germany, Austria) have begun to add weight to this idea through the inclusion of public order clauses or *emergency brakes* which point out that judicial cooperation should not be made available when doing so contradicts "the essential principles of the legal order". The EU in the second generation of Framework Decisions that developed the principle of mutual recognition has included a similar precept by virtue of which the offer of help to the judicial authority of another country "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union[36]."

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35 In Switzerland, Art. 1a, 2 Bundesgesetz über internationale Rechtshilfe in Strafsachen; in Austria, § 2 Auslieferungs- und Rechtshilfegesetz; and in Germany, § 73, Gesetz über die internationale Rechtshilfe in Strafsachen.

36 See, for example art. 1.4 COUNCIL FRAMEWORK DECISION 2008/947/JHA of November 27, 2008, on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008; art. 1.3 FRAMEWORK DECISION 2008/978/JHA of December 18, 2008, on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008; art. 1.1 FRAMEWORK DECISION 2008/977/JHA of November 27, 2008, on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350/72, 30.12.2008; art. 3.4 FRAMEWORK DECISION 2008/909/JHA of November 27, 2008, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 370/30, 5.12.2008; art. 1.2 FRAMEWORK DECISION 2008/675/JHA of 24 July, 2008, on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220/32, 15.8.2008.

Although still sticking to a model of cooperation that takes as its preponderant interest international relations, and which is considered part of international law and foreign policy, North American courts since *Gallina*[37] have also started to accept the possibility of refusing extradition when the offender could be subject to proceedings or a penalty that is contrary to the *sense of decency* of the North American legal order[38]. Although of a more limited extension as regards the rights that might be invoked, and with a much more exceptional application, *decency* fulfils a similar function to *Kernbereich* or the notion of public order in European law[39]. In the United Kingdom, a further bastion of *non inquiry*, the *Extradition Act* of 1989, allows extradition to be refused if it may be "*unjust or oppressive*", which authorizes the courts to investigate the state of justice in the other system.

Logically, to determine what exactly makes up this common standard of unrepealable fundamental rights in mutual cooperation is, as pointed out, a complex tasks, and one that can not be easily approached here in great detail. Probably, the most important approach to do so successfully would be for the appointed courts to ascertain what the unrepealable or absolute nucleus of each fundamental right actually is, in order to adopt a *Rechtsfindung* [law-finding] method based on comparative law, on giving priority to the jurisprudence of regional courts, and to look for solutions that take account of the points of view expressed by other national constitutional courts. It is definitively a method that requires dialogue between the courts of various systems. It is highly probable that only the decisions constructed upon this methodology would have sufficient legitimacy to win acceptance

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37 Gallina v. Fraser, 278 F. 2d 77, 79 (2d Cir. 1960), vid. Sullivan, Abandoning the Rule of Non-Inquiry in International Extradition, Hastings Int'l & Compl. L. Rev, Vol 15, 1991, p. 111 ff.

38 Cfr. Gallina v. Fraser, 278 F. 2d 77, 79 (2d Cir. 1960).

39 More details in Quigley, The rule of non inquiry and human rights treaties, Catholic University Law Review, 1996, Vol. 45: 1213; Sullivan, Abandoning the Rule of Non Inquiry in International Extradition, Hastings Int'l & Comp. L. Rev. Vol. 15, 1991, 111 ff.

on the international scene[40]. For practical purposes, it would be very important to include a generic clause on public order or an *emergency brake* in Conventions on cooperation that the EU might sign with non-EU countries, indicating that judicial cooperation will be refused where there are grave violations of fundamental rights recognized in art. 6 of the TEU.

IV. BEYOND SOERING: THE OPEN-ENDED PROBLEMS

The implantation of a tri-dimensional model, grounded in fundamental rights poses two different types of problems. The first of them is that the struggle to achieve the full potential of fundamental rights should not draw attention from other interests connected to judicial cooperation. International relations and effective prosecution and sanctioning of serious forms of criminality are essential so that judicial cooperation can function and will make sense. *Soering*, just as many of its progeny, were perpetrators of very serious crimes. The second problem is how to arrive at a more profound model. The argument over the application of fundamental rights has taken place almost exclusively in relation to extradition. The role of guarantees in so-called minor cooperation has hardly been discussed, nor has it in other types of cooperation such as the exchange of information between administrative authorities or the intelligence services, and that which takes place in the framework of military operations.

a) Conditional extradition and aut dedere aut judicare

The international community confronts forms of organized transnational crime that requires cooperation that is fully respectful of due process and also effective. To refuse the extradition of someone who has committed serious offences, pleading a possible violation

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40 More widely, Nieto Martín, Cooperación judicial y Derechos fundamentales, in Diez Picazo L.M./Nieto Martín, Derechos fundamentales y Derecho penal europeo, 2010 (in press).

of fundamental rights, and preventing any proceedings or execution of a sanction not constitute a desirable solution. With a view to resolving this problem, two different techniques may be used: "surrender or trial" or the so-called conditional extradition[41].

Using the surrender or trial formula, the country that refuses extradition should commit itself to initiating criminal proceedings or, should it not surrender the person in view of the "situation" of the prison system, it should enforce the penalty itself. In a softer version, this rule has been applied for years through the active personality principle. The legal orders that do not accept the surrender of nationals in extradition proceedings through this principle can judge those same nationals in their own country. In international law, some conventions recognize this principle such as those relating to the hijacking of aircraft[42], attacks against protected persons[43] or the Convention against torture (art. 7).

However, "surrender or trial" has important practical problems, which is why it is not always straightforward to put into practice. In fact, in many cases the bulk of the evidence and most witnesses will be found in the country to which extradition has been refused and judicial cooperation denied. Certainly, this evidence may be requested through a new petition for judicial assistance, but it is frequently the case —logically enough— that the state to which extradition has been refused on account of its criminal system may refuse to cooperate. To begin a trial without sufficient evidence also involves the danger of absolutory judgments or withdrawal of the case on shaky grounds, which subsequently on account of international *ne bis in idem* can block a new trial when sufficient evidence is amassed[44].

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41 Fundamental in what follows is the work of Dugard/Van den Wyngaert, Reconciling Extradition with Human Rights, The American Journal of International Law, Vol 92: 187, 1998.

42 Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (BOE n. 13 de 15/1/1973)

43 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (BOE n. 33 de 7/2/1986)

44 Cfr. Dugard/Van den Wyngaert (not. 41), p. 209 f.

The other possibility is so-called conditional extradition. This form of extradition has principally been developed in the field of the death penalty and trials *in absentia*. As pointed out at the start of this work, the first victory of the abolitionists in judicial cooperation was to concede extradition in exchange for sufficient guarantees that the death penalty would not be imposed or enforced. Equally, in the case of *in absentia* trials, extradition is usually granted on condition that a new trial will take place. A further example is where the principle of non-extradition of nationals has been overcome, as in the case of *ad intra* judicial cooperation in the EU, the surrender of nationals or residents is usually conditional upon them being handed back afterwards to serve out the sentence.

These types of formulas can become generalized. And so, for example, when it is considered that there is a risk of violation of the rights that constitute due process, a trial could be demanded under particular guarantees, or, if there are doubts over the quality of the prison system, the offender could be handed over subject to periodic visits being allowed. Including the content of these types of conditions, and way in which they are to be fulfilled in the Treaties on cooperation would undoubtedly be of great assistance. The development of conditional extradition would be simpler if, for example, by virtue of these agreements, diplomats, national judges that approve cooperation, NGO members or any other type of impartial observer could be present during the development of the criminal proceedings[45]. Equally, it would be necessary to look for effective sanctions against the State that fails to comply with some of the requirements which extradition has to satisfy. To declare that this alone implies the violation of the Convention, would not appear to be effective enough. Conditional extradition, unlike the rule on surrender or trial, also has the advantage, if well understood, of being able to exercise a magisterial function over other legal orders. In countries with more backward judicial systems, the "impartial observer" can become a sort of *amicus curiae* that will help the national court in the development of the proceedings. In other words, unlike the rule on surrender or trial, which can harm international rela-

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45 Cfr. Dugard/Van den Wyngaert (not. 41), p. 206 ff.

tions and diminish the possibilities of a sanction, cooperation/conditional extradition can be understood as a tool for cooperation in a wide sense, to assist the justice administration of certain countries.

The problem of conditional extradition resides, nevertheless, in that this system of control has yet to be developed. In other cases, it may not even be legally possibly for the legal order of the country to comply with the condition. If it indicates for example that a particular safeguard is missing from the criminal proceedings (for example, competency for the facts falls to a military tribunal, the impartiality of which is doubtful), an *ad-hoc* procedural alteration would not always be possible. In the case of the death penalty, where conditional extradition is traditionally found, it is unclear how the principle of the separation of powers may be conciliated with the fact that the executive can pressure a court or tribunal not to impose a particular sanction foreseen in the law. The matter becomes even more complicated when the death penalty is the only punishment. Under these circumstances, the undertaking to seek a pardon, if possible, might be the only available guarantee. Nevertheless, even in this case, it is a complex situation in some constitutional systems for the government to oblige the Head of State to agree to a firm commitment to issue a pardon.

These difficulties explain the *Venezia* case,[46] in which the Italian SC declared the unconstitutionality of the law on Ratification of the Treaty of Extradition between Italy and the United States of America and art. 698.2 of the Code of Criminal Procedure. The Court argued unconstitutionality by pointing out that conditional extradition in cases involving the death penalty was directly contrary to the right to life contemplated in art. 27 of the Constitution, which expressly prohibits the death penalty. It advanced two reasons for this: firstly, because it doubted the capacity of the North American government to give effective guarantees that the citizen who was to be extradited would not be executed, and secondly: because of the facultative powers that the Convention on extradition and Italian law gave to the Minister of Justice when deliberating whether the guarantees

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46 (not. 7)

were insufficient. This margin of discretion was considered incompatible with the right to life[47].

Venezia, despite it being absolutely impeccable, is far from becoming a reality in international conventions that the EU has signed up until now. Art. 13 of the Agreement on Extradition between the EU and the United States (continues to rely on conditional extradition. Criticism may also be made that the formula in use has not advanced substantially in relation to the European Convention on Extradition of 1957. Art. 13 does in fact allow extradition to the United States, even though the requested European State does not consider that sufficient guarantees are in place or the United States does not accept that the guarantees imposed by the requested State. In both cases, art. 13 uses a facultative and regrettable "may be denied extradition"[48]. Conditional extradition in the case of the death penalty should learn from the content of the *Venezia* judgment, which also inspired art. 19.2 of the European Charter of Fundamental Rights. In fact, this conditional clause can hardly be likened to the categorical wording of art. 19.2 that contains an unequivocal mandate of non-extradition in cases of being "subjected to the death penalty"[49]. Conditional extradition in cases of the death penalty is only possible when total or absolute guarantees are given that the death penalty will not be carried out. Any uncertainty, however slight it might be, should lead to a denial of extradition[50]. The *Venezia* doctrine involves a continuation of *Soering*, and also has the virtue of overcoming one of its greatest inconsistencies: the

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47 Cfr. Pisani, Pena di morte ed estradizione nel Trattato Italia-USA: il caso Venezia, Ind. Pen., 1996, p. 671 ff.

48 Cfr. Spatafora, Pena di morte e diritti dell'uomo nell'accordo tra l'Unione europea e gli Stati Uniti d'America sull'estradizione, in Zanghi/Panella, Cooperazione Giudiziaria in Materia Penale e Diritti dell'Uomo, Giapichelli Editore, 2002, p. 51 ff.

49 Art. 17.2 of the Agreement foresees a possible exception in a certain way based on the application of fundamental rights: "Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.".

50 On admissible guarantees vid. Cezón González, Derecho extradicional (not. 5), p. 141 f; Lagodny, § 8, 15 ff (not. 3).

long waiting time on death row is normally because defendants that have been convicted to death use the appeals system available under North American law; when there is not such a refined appeals system and the waiting time is not so prolonged, *a sensu contrario*, there is no inhumane treatment.

b) The scope of application of fundamental rights in judicial cooperation

The discussion around fundamental rights and judicial cooperation has centred almost exclusively on extradition. This has led to important shortcomings in the regulation of other types of cooperation, not only judicial, but also administrative and military. The problems are, however, similar. In accordance with the logic of *Soering*, to cooperate, for example, with the surrender of evidence, in proceedings where the death penalty might be imposed, or where basic principles of due process will be violated, is also an indirect violation of fundamental rights. The literal meaning of art. 19.2 CFREU, nevertheless, theoretically allows the handing over of evidence, for example, banking information, accessing telephone surveillance or even carrying out videoconferences on European territory, with a view to mutual assistance in proceedings where the death penalty may be imposed.

In this respect, it is symptomatic that whereas the Agreement on Extradition between the United States and the EU contains a clause relating to the death penalty, the Convention on Mutual Assistance contains no specific direct reference to fundamental rights. Only under art. 13 does it point out that the States members may invoke motives of "public security" or "legal principles" to refuse mutual assistance, which could leave member States room to invoke respect for fundamental rights. The application of fundamental rights in judicial cooperation is beyond doubt in the countries of the EU, such as Germany or Austria, which have generic public security clauses. The German SC clearly affirms today that cooperating in proceedings where the death penalty may be imposed is unconstitutional. Moreover, the EU itself in its second generation Framework Decision on the principle of mutual recognition has included respect for fundamental rights envisaged in art. 6 of the TEU as a structural re-

quirement for any type of judicial cooperation. Thus, in accordance with what has gone before, the Conventions on mutual assistance of the EU and not only those on extradition should have a generic clause on fundamental rights. This would, in addition, allow the ECJ to determine the hard core of each fundamental right that can be applied to judicial cooperation, and not the judges or SC nationals, as happens if precepts similar to art. 13 of the Agreement on Extradition and Mutual Legal Assistance in criminal matters are used, which refers to the national legal order.

Beyond judicial cooperation, it is necessary to determine the efficiency of fundamental rights in administrative cooperation. Faced with the threat of terrorism, member States share information, for example, from the intelligence services with increasing frequency. Insofar as this information is used for purely preventive or strategic ends, the problems with the fundamental rights are slight, the major problem is when it is judicialized and introduced in the criminal proceedings. A good example might be the opening of criminal proceedings in a matter of terrorism on the basis of information from coactive questioning in Guantanamo or the secret detention centres of the United States in various parts of the world, where people suspected of terrorism are illegally detained. Although the ECtHR has not had the opportunity to give its opinion on a similar question, up until now it has considered as valid the initiation of criminal proceedings on the basis of information arising from a violation of fundamental rights, provided that this information was not then used as evidence[51].

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51 The ECtHR has even gone so far as to describe this hidden manifestation of *non inquiry* by pointing out that it is not necessary to inquire into whether, when obtaining this information, fundamental rights were respected, provided that it is not used as evidence and that it is only taken into account in the ECtHR investigation: Echeverri González v. The Netherlands, First Section, decision as to the admissibility of application nº 43286/92, of June 27, 2000. The facts of the cases were in summary as follows: a Colombian citizen had been convicted in Holland for drug trafficking, in an investigation that began with information supplied by the North American authorities, taken from telephone calls. The accused requested confirmation in the proceedings as to whether the telephone surveillance had been carried out legally, which the Dutch court refused to confirm. The response of the ECHR was that: "the Court consid-

The third area of cooperation in which fundamental rights should be more stringently applied is in the external military missions of European forces. The actions of British forces in Iraq in the search for Saddam Hussein, and the appeal that he presented to the ECtHR, highlighted that in the case of being captured by British forces, his surrender to Iraqi or North American forces would amount to a violation of the European Convention on Human Rights (ECHR), unless assurances were given that the trial would not result in the death penalty[52]. The ECtHR is not only applicable in the territory of the signatory countries, but wherever they may have "jurisdiction". The problem of cooperation in the framework of military operations principally arises when troops from EU countries take part in peace missions under the command of NATO, the UN or even the EU. Given that international organizations are not signatories to the Conventions on Human Rights, the soldiers are neither subject to these standards on fundamental rights, nor to their national standard. Graphically: they have neither the ECtHR nor the national Constitution in the backpacks[53]. After the entry into force of the Treaty

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ers that the Convention does not preclude reliance, at the investigating stage, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected.

52 See, Press release issued by the Registrar. European Court of Human Rights rejects request for interim measures by Saddam Hussein (337 of 30.6.2004). The lawyers for Saddam Hussein requested the court "that a permanent prohibition be imposed on the United Kingdom to facilitate, allow, give its consent or carry out any action that might involve effective participation in placing the accused under the custody of the Iraqi Government while the latter does not establish sufficient measures to guarantee that the accused will not be subjected to the death penalty". In the opinion of the lawyers, it violated art. 2 (right to life), 3 (ban on torture), as well as protocols 1 and 13 of the Convention. Although it rejected the application for provisional measures, the Court pointed out that, "It remains open to Mr. Hussein to pursue his application before the Court".

53 See, with earlier references, Nieto Martín, Human Rights under military criminal law and under war time, in Manacorda/Nieto, Criminal Law Between Law and War, Servicio de Publicaciones de la Universidad de Castilla la Mancha, Cuenca, 2008 (= en RGDP, Iustel, n0 8, 2008; RIDPP, Fasc. 3- 2008).

of Lisbon, EU military missions relating to peace-keeping, conflict resolution and strengthening of peace should also respect the principles of the Charter of the United Nations, the European Charter of Fundamental Rights and the ECHR. This implies, for example, that although the corresponding Status of Forces Agreement (SOFA) makes it clear that certain crimes committed by European soldiers in foreign territories may be judged by national systems, surrender will not be possible if it contravenes the *Soering* doctrine of indirect violation of a fundamental right.

In a similar sense, Dutch judges refused to hand over a United States soldier who was part of a contingent of American troops on Dutch soil and who had murdered a woman. Although the SOFA specified that the crime should be judged in an American court, his surrender was refused because of the possibility that the death penalty might be imposed[54]. Art. 18 of the Agreement between the RFA and NATO troops stationed on German soil, also contains a provision worded in such a way that the North American authorities applying the SOFA may neither execute a death sentence on German soil, nor conduct proceedings on German soil that might lead to the death penalty[55].

V. CONCLUSIONS

The presence of fundamental rights in judicial cooperation has been strengthened thanks to the pressure of abolitionism on extradition, as defined in art. 19.2 of the CFREU that has constitutionalized the *Soering* doctrine. However, it would be wrong to limit the importance of fundamental rights to the death penalty. Abolitionism is not fully understood unless it is placed in a general strategy of respect for all human rights. With this aim in mind, this work construes a tridimensional model, which integrates the three essen-

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54 Cfr. King , The Death Penalty, Extradition, and the War Against Terrorism: U.S Responses to European Opinion About Capital Punishment, Buffalo Human Rights Law Review, Vol. 9, 2003, p. 196 ff.

55 See, Lagodny, (not. 3), VD1, 24 and VD1a.

tial interests of judicial cooperation: the protection of fundamental rights, effective punishment of transnational crimes and international relations. This model of cooperation should be expanded to all forms of cooperation. Its main tools are on the one hand the *emergency brakes* or public order clauses and, on the other, the use of conditional extradition and the principle of surrender or trial.

One of the principal virtues of this model is its role in exporting fundamental rights and abolitionism. The retentionist states and those that do not have a penal system that respects human rights should know that such circumstances may affect the efficacy of their penal systems, insofar as many of their requests for mutual cooperation will be denied. The prohibition of the death penalty or certain aspects of fundamental rights might not belong to *ius cogens* or an international public order, but the States that adopt the tridimensional model have a right to use cooperation as a means of fighting against the death penalty and as a vehicle for the expansion of human rights.

The EU in its Stockholm Programme has included for the first time the external dimension of the Area of Freedom, Security and Justice, fully aware that this dimension "is essential to address the key challenges we face". One of the objectives of this external action is to "pursue the EU's efforts to bring about the abolition of the death penalty, torture and other inhuman and degrading treatment"[56]. In accordance with these objectives, which should form part of a more general plan to extend human rights as stated in art. 21 of the TEU, the EU in the existing agreements on judicial cooperation and in those that may be established in the future should:

– Include public order or *emergency brakes* clauses in such a way that requests for judicial cooperation be rejected whenever they violate or there may be a risk of a serious infraction of the fundamental rights described in art. 6 of the TEU.

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[56] Council of the European Union, The Stockholm programme: an open and safe Europe serving and protecting the citizens, Brussels, December 2, 2009, 17024/09, p. 12.

- Adjusting the Agreements on extradition and judicial cooperation to the requirements of art. 19.2 of the CFREU. Extradition and any type of judicial extradition should be denied where there is a grave risk of capital punishment, torture or inhuman or degrading treatment. Only an absolute guarantee that these violations will not occur justifies extradition or cooperation. Although the above clauses may be considered redundant once public order clauses are in place, their undeniable symbolic value makes it advisable to maintain them.
- The EU Agreements on extradition and judicial cooperation should try to make the greatest possible use of the rule on surrender or trial and of conditional extradition/cooperation. This latter instrument should be understood and should be adapted, as far as possible, as a tool to support less developed judicial systems in their efforts to strengthen the fundamental rights of the person.

INHUMAN PUNISHMENT AND ABOLITION OF THE DEATH PENALTY IN THE COUNCIL OF EUROPE[1]

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I. INTRODUCTION

Article 3 of the European Convention on Human Rights 1950 (hereinafter "Convention") states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"[3]. The *travaux préparatoires* of the 1949-50 drafting debates are unclear on whether during the creation of the Convention, it was considered viable for the prohibition under Article 3 to be used to scrutinise the capital judicial system, and furthermore, there are no published records revealing any discussions on the compatibility of this Article with the provision for allowing the death penalty within Article 2(1)[4]. However, over the proceeding 60 years Article 3 has become an integral component of the various Council of Europe's (hereinafter, "Council") anti-death penalty enactments, and the evolving thresholds of this Article are now established within the death penalty jurisprudence of the European Court of Human Rights. A solidified human rights narrative is now presented around the inhumanity of

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2 Dr. Jon Yorke, School of Law, Birmingham City University. This article has benefited from discussions with William Schabas, Roger Hood, Carolyn Hoyle, Andrew Williams, Anne Oakes and Günter Schirmer, Secretariat of the Committee on Legal Affairs and Human Rights, and Michelle Lafferty and Paul Harvey, Registry of the European Court of Human Rights. All errors remain my own.

3 Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, CETS No. 5 (1953).

4 See *Collected Edition of the 'Travaux Préparatoires of the European Convention on Human Rights, Vols 1-5* (The Hague: Martinus Nijhoff Press, 1976). [hereinafter "TP," followed by the volume number].

the death penalty which has significantly contributed to the creation and maintenance of the region as a "death penalty-free area"[5]. The Council has placed this successful development on its website[6], and most recently, its Facebook page[7], and furthermore, the "European Day Against the Death Penalty" held on October 10 every year[8] provides an additional forum for European popular sovereignty to join the Council and speak out against the punishment. This multifaceted approach is proving hegemonic for the current rejection of the death penalty within member state public law, and to borrow from Roger Hood and Carolyn Hoyle, it is because the punishment has been demonstrated to have failed the "test of humanity"[9].

This article investigates how Article 3 has evolved to contribute to the dismantling of the punishment in the Council. In Part Two, the evolution of the narrative on inhuman punishment within both the Parliamentary Assembly and the Committee of Ministers is explored. A deconstruction of the parameters of Article 3 as a tool for abolitionism is offered, and it is analysed to what extent this narrative is woven within the legislation of Protocol No. 6[10], which provides for abolition of the death penalty in peacetime, and Protocol No. 13[11] which provides for abolition in all circumstances. The current adoption of Article 3 in the dialogue with retentionist ob-

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5 Declaration "For a Death Penalty-Free Area" adopted by the Committee of Ministers, 107th Session, November 9, 2000.

6 See generally the Council of Europe Theme File on the Death Penalty, available at www.coe.int/T/E/Com/Files/Themes/Death-penalty/default.asp.

7 Council of Europe, 'Europe Against the Death Penalty: Death is not Justice,' November 5, 2008, en-gb.facebook.com/pages/council-of-Europe/42276542714 (last accessed April 22, 2010).

8 Joint European Union/Council of Europe Declaration establishing a European Day against the Death Penalty, October 10, 2008, see, www.coe.int/t/dc/files/events/2007_death_penalty/default_EN.asp.

9 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed, (Oxford: Oxford University Press, 2008), p. 8.

10 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, March 28, 1983, Strasbourg, CETS No. 114.

11 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, May 3, 2002, Vilnius, CETS no. 187.

server states is also investigated with a focus upon the reprimand by the Parliamentary Assembly of Japan and the United States for their maintenance of the death penalty after being granted observer status in 1996; the most recent occurred following the executions administered in both countries in 2009[12]. In Part Three, a critique is offered of the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights. The initial restricted opinions of the Commission are considered and placed against the current widening of the jurisprudence by the Court to encompass the various aspects of the capital judicial system. Central to these investigations will be the identification of whether there has been a consistent application of Article 3 to each aspect of the system, or whether variations within the reasoning point to scrutiny under Article 3 being more successful for applicants in certain circumstances but not all. The Chapter then concludes with a recommendation that the Council considers drawing together its various organ's opinions and formulated standards within a clear policy statement on how Article 3 can be applied to the different aspects of the capital judicial system.

II. THE EXPANSION OF THE BOUNDARIES OF ARTICLE 3

1. 1950-1972: From Uncertainty to a Restricted Position

In reviewing the early work of the Council, Frank Dowrick stated that the various organs were "very much alive to the need to revise and extend the basic doctrine of human rights"[13]. From its early stage there were those within the Council who displayed a firm dissatisfaction that the Convention Article 2(1) preserved the death penalty[14], and in 1958 various subordinate committees were created

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12 Press release – 071 (2009) Council of Europe Secretary General Terry Davis condemns executions in Japan and the United States, Strasbourg, January 29, 2009.

13 Frank Dowrick, 'Juristic Activity in the Council of Europe: 25th Year,' 23 ICLQ 3, 610 (1974), p. 616.

14 Convention Article 2(1) states, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of

to investigate the problematical human rights issues of the time[15]. One of these committees was the European Committee on Crime Problems which in turn established sub-committees including the Sub-Committee on the Death Penalty[16]. The Sub-Committee agreed that the death penalty was a "problem,"[17] and so in 1961 Marc Ancel led a study compiling information on member state implementation or rejection of the punishment[18].

Ancel stated that the purpose was to focus on the administration of municipal criminal law and other aspects of the punishment were "outside the scope of the study"[19]. He noted different penological issues which had potential for scrutiny, including examining methods of execution as "capital punishment in Europe as a whole reveals the gradual elimination of certain additional forms of physical and moral torture accompanying execution methods"[20]. The execution methods used in Western Europe at the time, included, hanging, firing squad, the guillotine and the garrotte. Although Ancel used the word "torture" he kept the analysis within a criminological framework and did not enter into the realm of early Convention human rights. His study did not seek to demonstrate whether the various execution methods were inhuman under Article 3, but that is not to say that he completely refrained from the humanism inherent in human rights considerations, as he did concede that within the then retentionist member states there had not been "any official attempt…to do away with cruelty in executions"[21]. Even so, Ancel's displayed discomfort with the punishment did not promote any

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a sentence of a court following his conviction of a crime for which his penalty is provided by law". On the interpretation of Article 2(1) see, Jon Yorke, 'The Right to Life and Abolition of the Death Penalty in the Council of Europe,' E.L.Rev 34, 2, (2009), pp. 205-229.

15 A.H. Robertson, 'The Legal Work of the Council of Europe,' 1 ICLQ 1, 143 (1961), pp. 159-160.

16 Marc Ancel, *The Death Penalty in European Countries,* (European Committee on Crime Problems)(Strasbourg: Council of Europe Publishing, 1962), p. 3.

17 Marc Ancel, 'The Problem of the Death Penalty,' pp. 3-21, in T. Sellin (Ed.) *Capital Punishment* (New York: Harper and Row, 1967).

18 Ancel, *The Death Penalty in European Countries*, *supra* n. 14.

19 *ibid*, p. 3.

20 *ibid*, pp. 27-28.

21 *ibid*, p. 28.

significant political momentum in the Council and so by 1966, only four years after the publication of his report, the Committee decided to cease the investigations.

2. 1973-1980: The Beginnings of change

The problem of the punishment did not go away. In 1973, Astrid Bergegren, a Swedish parliamentarian, presented a Motion within the Consultative Assembly (the political organ's name was changed to Parliamentary Assembly in 1974[22]) for a resolution on the abolition of capital punishment, and paragraph seven stated, "capital punishment must now be seen to be inhuman and degrading within the meaning of Article 3 of the European Convention on Human Rights"[23]. This was the first time that a parliamentarian had attempted to officially extend the discourse on Article 3 to encompass scrutiny of the death penalty. Bergegren had called on the Assembly to adopt a firm position and initiate a new Convention human rights standard. But the motion was sent back to the Committee on Legal Affairs and they shelved it. Then a newly appointed *rapporteur*, Bertil Lidgard, attempted to reignite the debate with a report. Lengthy discussions ensued and in January 1975 the Committee on Legal Affairs again evaded the issue when it decided "not to submit the report to the Parliamentary Assembly"[24] However, the Swedish parliamentarians refused to back-down and in April, 1975, Lidgard presented an unpublished report identifying that the debate on the death penalty ought to be carried on, as attention "should be drawn to various new developments as well as certain familiar arguments

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22 Florence Benoît-Rohmer and Heinrich Klebes, *Council of Europe Law: Towards a pan-European Legal Area*, (Strasbourg: Council of Europe Publishing, 2005), p. 57. Although it was not until 1994 that the Committee of Ministers formally accepted this name alteration and the Statute has not yet been amended to record this change.

23 Motion for a resolution on the abolition of capital punishment, Doc. 3297, Parliamentary Assembly, (8th sitting), May 18, 1973, para. 7.

24 Unpublished Report submitted to the Committee on Legal Affairs in 1975, cited in Report on the abolition of capital punishment, Parliamentary Assembly Doc. 4509 (2nd and 3rd sittings) April 22, 1980, p. 2.

which militate strongly in favour of the abolition cause"[25]. Again this stalwart effort was sidelined by the Committee on Legal Affairs in 1976, who stated that the question of the death penalty should be "deferred"[26]. So Lidgard resigned as *rapporteur*[27].

Then in 1977 Amnesty International held a conference in Stockholm and adopted a Declaration which included the statement that the "death penalty is the ultimate cruel, inhuman and degrading punishment"[28]. Following this Declaration, Christian Broda, the Austrian Minister of Justice, invited the Committee of Ministers to consider whether the death penalty was an inhuman punishment[29]. In 1978 the European Ministers of Justice tabled the issue for their Conference held in Copenhagen[30], and Broda championed Resolution No. 4 which recommended that the Committee of Ministers "refer questions concerning the death penalty to the appropriate Council of Europe bodies for study as part of the Council's work programme"[31] Heeding Broda's call the new *rapporteur*, Carl Lidbom, presented a report to the Committee in 1980 and affirmed that the debate on the death penalty should continue because the punishment "is being called into question…from the human rights standpoint"[32].

In the 1970s Spain and Portugal removed the punishment for peacetime offences, and only France within the Western European

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25 *ibid*, p. 3.

26 *ibid*. See also Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of capital punishment, Debate on the report of the Committee on Legal Affairs, Doc, 4509 and amendments, (2nd and 3rd sittings), April 22, 1980, address during debate by Mr. Stoffelen of the Netherlands, p. 60.

27 *ibid*.

28 See, Amnesty International, 'Report on the Amnesty International Conference on the Death Penalty, Stockholm,' Dec. 10-11 1977, AI Index: CDP 02/01/78.

29 See Christian Broda, 'The Elimination of the Death Penalty in Europe,' paper presented to the meeting of the European death penalty coordinators of Amnesty International, Stockholm, March 30, 1985, AI Index: EUR 01/01/85.

30 European Ministers of Justice, 11th Conference, (Copenhagen, 21-22 June, 1978).

31 Resolution No. 4 of the 11th Conference of European Ministers of Justice on the death penalty, (Copenhagen, 21 to 22 June, 1978).

32 Bertil Lidgard's unpublished report was reprinted in the Report, *supra* n. 22.

region was not considered *de facto* abolitionist. Hence there was now an almost uniform government rejection of the punishment as in this geo-political region, Denmark[33] had removed the death penalty from its statutes for ordinary crimes in peacetime in 1933, and so had (West) Germany (which abolished the punishment for all crimes in 1949, and East Germany had done so in 1978), Italy (1947), the Netherlands (1870), Norway (1905), Portugal (1978), Spain (1976), Sweden (1921), and the United Kingdom (suspended in 1965, and confirmed in 1969)[34]. As Western European states were turning their backs on the punishment, and the anti-death penalty narrative was becoming hegemonic, it was a fertile political circumstance from which the Parliamentary Assembly was able to act. In 1980 the Parliamentary Assembly issued its hitherto strongest human rights platform through a Report, Resolution 727 and Recommendation 891[35]. The Report specifically identified the death penalty as being inhuman[36], and Lidbom argued that capital punishment was "undoubtedly" a violation of Article 3[37]. Lidbom concluded by stating in absolute terms that, "capital punishment should be abolished for the simple reason that it is inhuman and thus incompatible with our system of values"[38] When he presented this report for debate, Lidbom informed his fellow parliamentarians that this was the "crucial argument"[39], and various colleagues supported this

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33 Denmark had administered the death penalty for wartime offences in 1950.

34 Belgium had retained the death penalty but did not impose it during this time and was considered *de facto* abolitionist. The last execution in Belgium was in 1950.

35 Report, *supra* n. 22; Resolution 727 (1980) on the abolition of capital punishment, text adopted by the Parliamentary Assembly, (3rd sitting) April 22, 1980; Recommendation 891 (1980) on the abolition of capital punishment, text adopted by the Parliamentary Assembly, (3rd sitting) April 22, 1980.

36 *ibid*, Report, pp. 2-3.

37 *ibid*, the Report stated that the death penalty was "undoubtedly" contrary to Article 3 of the Convention, p. 14.

38 *ibid*, p. 22.

39 See, Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of Capital Punishment, Debate on the Report of the Committee on Legal Affairs, Doc. 4509 and amendments, (2nd and 3rd Sittings), April 22, 1980. Lidbom stated, "[t]he crucial argument is the one contained in our draft resolution: that capital punishment is inhuman and thus incompatible with human rights," p. 54.

view[40]. So the Parliamentary Assembly adopted Resolution 727 and announced unreservedly, that in its opinion, "capital punishment is inhuman"[41].

The Parliamentary Assembly then approached the Committee of Ministers and in Recommendation 891 requested that its sister organ formulate these principles of abolitionism within new legislation[42]. In 1981 the Committee of Ministers gave direction to the Steering Committee for Human Rights to prepare "a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime"[43]. For the first time a substantial meeting-of-the-minds occurred between the Committee of Ministers and the Parliamentary Assembly on what would become Protocol No. 6 on the abolition of the death penalty in peacetime. This would create the first regional human rights treaty to call for a restriction of the death penalty to wartime application. In 1982 Protocol No. 6 was adopted and Article 1 simply states:

> The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

However, Article 2 allows states to "make provision in its law for the death penalty in respect of acts committed in times of war or of imminent threat of war". In neither the Protocol Preamble nor its Articles was it mandated that the death penalty in peacetime was a violation of the prohibition against inhuman punishment. An omission the Parliamentary Assembly was not satisfied with.

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40 *ibid* Mr. Flanagan of Ireland, p. 56; Mr. Stoffelen of the Netherlands, p. 60; Mr. Meier of Switzerland, p. 61; and Mrs Aasen of Norway, p. 67.

41 Resolution 727, *supra* n. 33, para. 1.

42 Recommendation 891, *supra* n. 33.

43 Council of Europe, 'Introduction,' at p. 5, in, Explanatory Report on Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, (1983).

3. The Expansion of the Council of Europe

Following the Vienna Summit in 1993 and the adoption of the Vienna Declaration[44], the possibility of the Council expanding to include member states from Central and Eastern Europe became a reality. The Vienna Declaration, ninth paragraph, stated in meeting the future challenges which will face the expanding organisation that expression must be given "in the legal field to the values that define our European identity"[45]. The Parliamentary Assembly immediately sought to establish that an intrinsic component of such "European identity" was recognised through its Convention discourse against the death penalty. Indeed, Hans Göran Franck, the next *rapporteur* to the Committee on Legal Affairs, wasted no time. In 1994 he focused upon clearing up the existing capital laws within member states. As at this time although the Western member states had denounced the death penalty for ordinary crimes, Protocol No. 6 had not been signed and ratified by all of them[46], and it was important for this to be achieved in order to successfully spread abolitionism to Central and Eastern Europe. Franck argued for the requirement that future member states need to accept this evolving interpretation of human rights[47], and he proposed that the expanding Council should be unified in the position that the death penalty is "inhuman and degrading punishment within the meaning of Article 3"[48]. Adopting this new discourse the Parliamentary Assembly strengthened the abolitionist agenda through Resolution 1097 which mandated that abolition of the death penalty be made a prerequisite for new membership[49].

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44 Vienna Declaration, Decl-09.10.93E, October 9, 1993.

45 *ibid* ninth paragraph.

46 These countries are listed here and the ratification dates are in brackets: Belgium (1998), Greece (1998), Ireland (1994), and United Kingdom (1999).

47 Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty* (The Hague: Martinus Nijhoff Press, 2003), p. 64.

48 Report on the Abolition of Capital Punishment, Doc. 7154, Parliamentary Assembly, September 15, 1994, para 3.

49 Resolution 1097 (1996) on the abolition of the death penalty in Europe, text adopted by the Parliamentary Assembly on June 28, 1996 (24th sitting).

In order to facilitate the new member state's abolition process the Parliamentary Assembly consulted the European Commission for Democracy through Law (more commonly known as the "Venice Commission")[50]. The Venice Commission identified that the "parallel between the death penalty and the infliction of torture and inhuman or degrading treatment or punishment"[51] was becoming generally accepted within the expansion process. For instance, the Constitution of Romania, Article 22, section 2, states that "no one may be subjected to torture or to any kind of inhuman and degrading punishment or treatment," and in section 3 that the "death penalty is prohibited". Furthermore, Article 25 of the Albanian Constitution replicates Convention Article 3[52]. It was also noted that municipal Constitutional Courts were adopting this position within jurisprudence striking down the death penalty. For instance, the 1999 decision of the Constitutional Court of the Ukraine holding that the death penalty was inhuman in violation of Article 28 of the Ukrainian Constitution. The Venice Commission observed:

> It can therefore be asserted, and with confidence, that the national and international dimensions of European law tend both independently and together towards the abolition of capital punishment. The evolution in this direction is clear and is becoming a cornerstone of European public order[53].

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50 For general information on the Venice Commission, see, www.venice.coe.int/. See Resolution (90) 6 on a partial agreement establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers on May 10, 1990 at its 86th Session. The current mandate for the Venice Commission can be found in Resolution (2002) 3 revised statute of the European Commission for Democracy through Law, adopted by the Committee of Ministers on February 21, 2002 at the 784th meeting of the Ministers' Deputies.

51 Opinion on the Compatibility of the Death Penalty with the Constitution of Albania, adopted by the Commission at its 38th Plenary meeting, (Venice, 22-23 March 1999), on the basis of the report by Mr Giorgio Malinverni (Switzerland) and Mrs Hanna Suchocka (Poland), CDL-INF(1999)004e, Strasbourg, March 24, 1999.

52 *ibid.* The Commission stated that "both Article 25 of the Constitution of Albania and Article 3 of the ECHR to which Albania is party leave no room for the execution of the death penalty," p. 6.

53 European Commission for Democracy through Law, Activities of the Venice Commission relating to the suppression of the death penalty by Mr. J. Klucka presented to the Colloquy on "The Impact of the case-law of the European

The Venice Commission helped steer the new member state's legislation and provide supporting materials for judicial opinions, and it also provided support to, and strengthened, the promotion of a new protocol (Protocol No. 13) which would provide for the abolition of the death penalty in all circumstances.

4. The Success and Failure of Protocol No. 13

Consequently, it may have been expected that within the text of Protocol No. 13 the importance of Article 3 would have been recorded[54]. Indeed, within the Parliamentary Assembly debates on the text of the Protocol, and the report supplied by Renate Wohlwend, Ms. Auken of Denmark stated *inter alia* that the "application of the death penalty constitutes inhuman and degrading punishment"[55]. In 2002 Protocol No. 13 which establishes abolition of the death penalty in all circumstances, was adopted and the Preamble notes that the abolition of the death penalty is essential for the protection of the right to life and "for the full recognition of the inherent dignity of all human beings". But acquiescing with the lacuna in Protocol No. 6, this new Protocol does not mention the Article 3 prohibition nor do any of the Protocol articles. Protocol No. 13, Article 1, simply states "[t] he death penalty shall be abolished. No-one shall be condemned to such penalty or executed".

The Parliamentary Assembly's identification of the inherent inhumanity of the punishment has not yet received legislative endorsement by the Committee of Ministers. As the Council organ ultimately responsible for the text of the Protocols, the Committee of Ministers should be recognised as providing for this omission. Historically the Committee has been somewhat agonistic towards the Parliamentary Assembly pushing the boundaries of human

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Court of Human Rights on the activity of the Constitutional Courts of Central and Eastern Europe," (University of Clermont-Ferrand, November 15-16 2002), CDL-JU (2002) 38, Strasbourg, November 20, 2002, section 2.

54 Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, Parliamentary Assembly Doc. 9316, January 15, 2002. I Draft Opinion, para 2.

55 *ibid*, remarks by Ms. Auken of Denmark, p. 16.

rights in a radical way, and Danny Nicol observes that the Parliamentary Assembly can be viewed as being more "enthusiastic" in its approach to human rights legislation, whilst the Committee of Ministers adopts a more "cautious" approach[56].

The Committee of Ministers comprises the Foreign Ministers of the member states and so the restrictive legislation is perhaps indicative of the sovereign governments wanting to reserve to themselves the mechanisms for interpreting the boundaries of human rights, and specifically the reach of Article 3. Indeed the Committee of Ministers is advised by its Subsidiary Groups, including the Rapporteur Group on Human Rights, which during the drafting of Protocol No. 13 had recommended the omission of provisions which would have directly removed the death penalty from the second sentence of Article 2(1). The Group noted the recommendations made by Renate Wohlwend, for the Committee of Ministers to remove the death penalty from the Convention through Protocol No. 13, but stated, "whilst welcoming its strong political support" for the Assembly's viewpoints, the Group "came to the conclusion that it was not advisable to accede to the Recommendation"[57]. The Group indicated that one of the reasons for this refusal was that an amendment could "give rise to some legal questions, not least with regard to territorial declarations and reservations"[58].

This is interpreted as a primary reason why even though Article 3 has such a voluminous history within the archives of the Council, it has been sidelined within the Protocols. Allowing a *prima facie* right of member state application of the death penalty under Article 2(1) would have made it difficult for the Committee to correctly situate Article 3 within the Protocol. It appears that until Article 2(1) is amended the opportunity is not yet there to make the claim that the death penalty is inhuman in all circumstances. But recalling the

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56 Danny Nicol, 'Original intent and the European Convention on Human Rights' PL 152 (2005), p. 154.

57 Rapporteur Group on Human Rights, Reference documents: European Convention on Human Rights, Draft Protocol No. 13 on the abolition of the death penalty in all circumstances, Ministers' Deputies Meeting, (784th meeting, February 21, 2002), sixth unnumbered paragraph.

58 *ibid*.

history of Article 3 this does not mean that within a Protocol a legislative affirmation of the importance of this prohibition should not be included. There appears to be no good reason why, at least in a Preamble, it should not affirm (or in Preamble syntax, *Recalling…*) the poignant historical discussions. Consistent with this argument, post-2002, the Parliamentary Assembly has not backed down and has continued its Article 3 quest. In 2003, Resolution 1349 repeated the firm advancing of the absolutist position that the punishment has "no legitimate place in the penal systems of modern civilised societies," and consequently it is, "torture and inhuman and degrading punishment, and is thus a severe violation of universally recognised human rights"[59]. Furthermore, Wohlwend stated in 2006 that the Parliamentary Assembly had presented numerous resolutions and recommendations on the abolition of the death penalty, and stated that it would continue to affirm "its absolute opposition to capital punishment, which it regards as an act of torture and an inhuman and degrading punishment, and undeniably the most serious of all human rights violations"[60].

All has not been in vain and progress has been made. In 2007 the Committee of Ministers revealed that its sentiment on Article 3 had evolved. It declared, in seeming assimilation with the Parliamentary Assembly, that it now promotes a "firm opposition to the death penalty which constitutes an inhuman punishment in contradiction with the fundamental right to life which everyone must enjoy"[61]. However, this new language is currently outside the text of the Convention, Protocol No. 6 and Protocol No. 13. Consequently it may be

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59 Resolution 1349 (2003) Abolition of the death penalty in Council of Europe observer states, text adopted by the Parliamentary Assembly on October 1, 2003 (30th sitting), para 2.

60 Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Doc. 10911, Parliamentary Assembly, April 21, 2006; B. Explanatory Memorandum, by Mrs. Renate Wohlwend, para 1.

61 Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Parliamentary Assembly Recommendation 1760 (2006), Reply adopted by the Committee of Ministers on January 13, 2007, at the 985th meeting of the Ministers' Deputies, CM/AS(2007)Rec1760 final, February 2, 2007, para 2.

expected that if Article 2(1) is amended in the future and the second sentence which *prima facie* allows for the death penalty removed, the next protocol to achieve this legislative change will include the specific affirmation that the death penalty is not only a violation of the right to life and human dignity, but also a violation of the prohibition against inhuman punishment within Article 3.

5. Council of Europe Observer States and the Application of the death penalty in Japan and the United States of America

The Council currently has five observer states which are Canada, Japan, Mexico, the Vatican City State, and the United States of America[62]. Statutory Resolution No. (93) 26 on Observer States, paragraph one, identifies that observer states must accept the principles of human rights and "co-operate with the Council of Europe"[63]. This provision has been interpreted by the Parliamentary Assembly as prohibiting the application of the death penalty by observer states[64], and hence the administration of the punishment outside of the Council boarders still amounts to inhuman and degrading punishment[65]. Since their membership in 1996, Japan and the United States have maintained the death penalty and both have imposed executions in 2009[66]. Having observer states which apply the death penalty is a political and legal conundrum for the Council. It was created by the fact that observer status was granted to these retentionist countries in 1996 before the prerequisite requirement for member states to ratify Protocol No. 6 gathered sufficient momen-

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62 Statutory Resolution No. (93) 26, on Observer States, adopted, May 14, 1993.

63 *ibid* para. 1.

64 Abolition of the death penalty in Council of Europe observer states, Doc. 9115, Parliamentary Assembly, June 7, 2001; Recommendation 1627 (2003) Abolition of the death penalty in Council of Europe observer states, text adopted by the Parliamentary Assembly on October 1, 2003 (30th sitting); and Resolution 1349 (2003) Abolition of the death penalty in Council of Europe observer states, text adopted by the Parliamentary Assembly on October 1, 2003 (30th sitting).

65 The death penalty in Council of Europe member and observer countries – an unacceptable violation of human rights, Doc. 11675, Parliamentary Assembly, July 1, 2008, Motion for a resolution presented by Mrs Wohlwend and others, para. 1.

66 Press release – 071 (2009) *supra* n. 10.

tum. The Parliamentary Assembly have noted this anomaly and are of the opinion that no retentionist country should be given observer status in the future. For the status to be granted, a minimum *de facto* abolition must be secured and *de jure* will be preferred[67].

In a 2001 Report the Assembly "deeply deplore[d]" the capital judicial systems of Japan and the United States[68]. It called into question their continued observer status should there have been no "significant progress in the implementation of this Resolution [being] made by January 1, 2003"[69]. But no significant progress has been forthcoming and following the application of the death penalty as expressions of "American exceptionalism"[70] and "Japanese exceptionalism,"[71] the dialogue continues. Central to the Parliamentary Assembly's conversations with Japan and the United States is that the death penalty is an unacceptable violation of human rights[72], and it reiterated to the two observer states that the death penalty "constitutes torture and inhuman and degrading punishment"[73]. The Parliamentary Assembly has "required" Japan and the United States to institute a moratorium and take steps to abolish the death penalty[74], and it informed the two countries that it would assist "in their endeavours, in particular by promoting par-

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67 Recommendation 1760 (2006) Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, text adopted by the Parliamentary Assembly on June 28, 2006 (20th sitting); Position of the Parliamentary Assembly as regards the Council of Europe member and observer countries which have not abolished the death penalty, Doc. 10152, Parliamentary Assembly, April 28, 2004.

68 Resolution 1253 (2001) abolition of the death penalty in Council of Europe observer states, text adopted by the Parliamentary Assembly on June 25, 2001 (17th sitting).

69 *ibid,* Part I, para 10.

70 See Carol Steiker, "Capital Punishment and American Exceptionalism," pp. 57-89, in Michael Ignatieff (Ed.) *American Exceptionalism and Human Rights*, (Princeton: Princeton University Press, 2005).

71 See David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, (Oxford: Oxford University Press, 2009), pp. 82-3.

72 *supra* n. 63, para 1.

73 Abolition of the death penalty in Council of Europe observer states, text adopted by the Parliamentary Assembly on October 1, 2003, *supra* n. 62.

74 *ibid,* para 4.

liamentary dialogue in all forms"[75]. The Parliamentary Assembly noted that they had been "successful in initiating a dialogue with the Japanese parliamentarians,"[76] in what it termed a "transpacific parliamentary dialogue"[77]. But in contrast it has largely failed in the efforts to promote "transatlantic parliamentary dialogue" with the United States[78]. Consequently, the Parliamentary Assembly:

> Asks the United States Congress and Government, at federal and state level to enter into a more constructive dialogue with the Council of Europe on this issue. It encourages American politicians to create abolitionist "caucuses" in their respective parliamentary assemblies, and to continue to engage opponents in informed debate[79].

These Recommendations were not followed, and so the Parliamentary Assembly stated in 2004 that the dialogue with Japan and the United States "must be resumed as a matter of urgency,"[80] and most recently in 2008 the Parliamentary Assembly asked the Committee of Ministers to "reiterate the position of principle that states enjoying observer status shall…not apply the death penalty,"[81] which the Committee of Ministers did in January 2009[82]. This demonstrates that although three of the observer states have accepted, and joined, the Council in the abolitionist discourse, Japan and the United States provide examples of resistance against the current ex-

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75 *ibid.*

76 *ibid,* para 5.

77 *ibid,* para 4.

78 *ibid,* para 6.

79 *ibid,* para 10.

80 Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Doc. 10152, Parliamentary Assembly, April 26, 2004, final unnumbered paragraph.

81 Recommendation 1827 (2008) the Council of Europe and its observer states: the current situation and the way forward, Parliamentary Assembly debate on January 23, 2008 (6th Sitting), affirming the provisions under Resolution 1600 (2008) the Council of Europe and its observer states – the current situation and the way forward, text adopted by the Parliamentary Assembly on January 23, 2008 (6th sitting).

82 The Council of Europe and its observer states – the current situation and a way forward, Reply from the Committee of Ministers, adopted at the 1045th meeting of the Ministers' Deputies (January 14, 2009), Doc. 11791, January 16, 2009.

ternal project. Even so, Article 3 is being consistently used by the Parliamentary Assembly to express to these countries that their use of the death penalty is an infliction of inhuman punishment. This will not change until the capital sanction is denounced by these two observer states.

III. THE JUDICIAL INTERPRETATION OF ARTICLE 3

1. The Disharmony of Article 3 and Article 2(1)

The judicial organs of the (former) European Commission of Human Rights and the European Court of Human Rights have engaged with the difficult issue of how to reconcile Article 3 with the possibility of the death penalty included within the second sentence of Article 2(1). The initial issue was to consider whether Article 3 *per se* renders the death penalty a violation of the Convention, or to hold that the prohibition is restricted to scrutinising the various aspects of the capital judicial system. The former would be in line with the opinions of the Parliamentary Assembly and the Committee of Ministers, but the latter would curtail the promoted standards. In *Kirkwood v. the United Kingdom*[83], the European Commission of Human Rights first considered this intricate question and held that:

> One may see a certain disharmony between Articles 2 and 3 of the Convention. Whereas Article 3 prohibits all forms of inhuman and degrading treatment and punishment without qualification of any kind, the right to life is not protected in an absolute manner. Article 2(1) expressly envisages the possibility of imposing the death penalty[84].

This Commission opinion in 1984 conflicted with the Parliamentary Assembly's position from 1980, and it may be interpreted as reflecting an ambivalent element, or at least a point of disagreement, within the Council organs. The Commission established a cardinal rule that the right to life is qualified and what this seems to mean in a practical sense is that there were interpreted to be some (unspeci-

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83 *Kirkwood v .the United Kingdom*, (1984) 6 E.H.R.R CD373, p. 184.

84 *ibid*, p. 190.

fied) circumstances where the death penalty was not considered to be an Article 3 violation. Then in the 1989 case of *Soering v. the United Kingdom*, the Court considered the extradition of Jens Soering, a German national, to face a capital trial in Virginia for the murder of his girlfriend's parents. In the course of the proceedings, Amnesty International submitted an *amicus curiae* brief and argued that the evolving standards of interpretation meant that the death penalty should now be considered a breach of Article 3, and so to extradite the defendant would cause him to suffer an inhuman punishment[85]. At this time Protocol No. 6 had been ratified by thirteen member states and the Court considered it appropriate to assess the significance of this for the interpretation of Articles 2(1) and 3[86]. It held:

> [s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3…However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an agreement. In these conditions, notwithstanding the special character of the Convention…Article 3 cannot be interpreted as generally prohibiting the death penalty[87].

The *Soering* Court followed the Commission's reasoning in *Kirkwood* and rejected the possibility that Article 3 provided a *per se* prohibition against the death penalty. This line of interpretation will not change unless the text of Article 2(1) is amended. The *Soering* decision can be seen as a judicial acceptance of the traditional role of amending the Convention through the legislation of protocols, the

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85 *Soering v. the United Kingdom*, (1989) 11 E.H.R.R. 439, para. 8.

86 The thirteen member states who had ratified Protocol No. 6 by 1989 were: Austria, Denmark, France, Germany, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, (San Marino), Spain, Sweden and Switzerland.

87 *ibid*.

member states posting their ratifications, and then the Court adjudicating on the acceptance or otherwise of the protocol[88].

Then by 2003, all member states except Russia[89] had signed and ratified Protocol No. 6 and Protocol No. 13 had opened for signature and ratification. The member states began to sign and ratify this new Protocol and form a consensus that the death penalty is abolished in all circumstances. The collective shift in penal policy was considered by the Chamber of the European Court of Human Rights in *Öcalan v. Turkey*[90]. This case concerned the death sentence of Abdullah Öcalan, the leader of the PKK (Kurdistan Worker's Party), for the Kurdish uprisings aimed at destroying the "integrity of the Turkish state"[91]. This was the first case to come before the Court which involved a member state's application of the punishment within its territory. The Chamber first outlined the general interpretive principles on Article 3 consistent with the *Soering* decision[92], and held that the textual limit provided by the harmonising of Articles 2(1) and 3 prevented it from adopting an "evolutive interpretation"[93]. However, the Chamber did concede some ground as it explained that "[s]tates have agreed to modify the second sentence of Article 2(1) in so far as it permits capital punishment in peacetime"[94]. Hence it can be argued that in peacetime "implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3,"[95] and the Partially Dissenting Opinion of Judge Türmen explained further:

> Article 2 still permits [the] death penalty in wartime. The logical conclusion would then be that the death penalty constitutes a breach of

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88 See, Statute of the Council of Europe, Article 15 (a).

89 Russia is still the only Council member state who has not ratified Protocol No. 6.

90 *Öcalan v. Turkey* (2003) 37 E.H.R.R.10.

91 Mirja Trilsh and Alexandra Rüth, 'Case Comment: *Öcalan v. Turkey*' 100 AJIL 180 (2006), p. 180.

92 *Öcalan v. Turkey*, *supra*, n. 88, para. 189, citing *Soering*, para 103.

93 *ibid*, para. 191.

94 *ibid*, para 198.

95 *ibid*.

> Article 3 in peacetime but not in wartime (because it is permitted in Article 2)[96].

Öcalan challenged the Chamber's restricted position[97]. On appeal to the Grand Chamber it was submitted that a penological evolution had taken place beyond what was recognised by the Chamber[98], and this change in policy meant that Article 3 should now be interpreted as explicitly denouncing the death penalty in all circumstances and not confined to peacetime[99]. Öcalan also argued there had been *de facto* abolition throughout the Council's member states, and so fundamentally no interpretation of Article 2(1) should allow a member state to inflict inhuman and degrading treatment, and that the death penalty *per se* constituted such treatment[100]. However, the Grand Chamber held strong to its previous decisions. The Court in *Soering* had given prominence to the member state signatures and ratifications of Protocol No. 6, and refused to initiate judicial amendment until there were unanimous ratifications. Following the adoption of Protocol No. 13, the Grand Chamber applied the same interpretive principle in *Öcalan* when the Court identified:

> For the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war[101].

The Grand Chamber was of the opinion that its hands are tied unless unanimous ratification of Protocol No. 13 occurs. However, Judge Garlicki was not satisfied with this restriction as it seemed to the Judge to "stop short of addressing the real problem"[102]. He stated in absolute terms that the Court should have decided that "Article 3 had been violated because any imposition of the death

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96 *ibid*, Partly Dissenting Opinion of Judge Türmen, at 71.
97 *Öcalan v. Turkey*, (2005) 41 E.H.R.R. 45, para 157.
98 *ibid*.
99 *ibid*.
100 *ibid*, paras 157-158.
101 *ibid*, para 165.
102 *ibid*, Partly Concurring, Partly Dissenting opinion of Judge Garlicki.

penalty represents *per se* inhuman and degrading treatment prohibited by the Convention"[103]. But not all of the Judges affirmed this view, as in contrast the Joint Partly Dissenting Opinion of Judges Costa, Caflisch, Türmen and Borrego Borrego, held that Article 3 does *not* provide a *per se* prohibition[104]. In Öcalan's case, they argued, "there is no violation of Article 3 on account of the death sentence"[105]. These polarised viewpoints reveal the inherent conflict on the Court, and four years after the Grand Chamber judgment there is now a majority of member states who have signed and ratified Protocol No. 13, with only Armenia, Latvia, Poland and Spain, left to ratify, and Azerbaijan and Russia, yet to sign. However, the subsequent cases of the European Court of Human Rights, which are analysed below, have not yet explicitly determined that Article 3 provides a *per se* prohibition in all circumstances.

The European Commission of Human Rights and the European Court of Human Rights have applied Article 3 to various aspects of the capital judicial system, including: (a) the capital charge and sentence, (b) moratorium and the consequences of the suspension of executions, (c) extradition and deportation cases, (d) the physiological and psychological impact of incarceration conditions on death row, (e) different methods of execution, and (f) the death row phenomenon as a jurisprudential consideration of the factors collectively. These aspects are considered in turn below.

2. The Capital Charge and Sentence

The Court has not yet specifically analysed in a majority opinion the isolated issue of the capital charge. However, the judges in the Joint Partly dissenting opinion in *Öcalan* (see above) maintained that the capital charge itself is not a violation of Article 3, and the denial of admissibility decision in *Tarlan v. Turkey* may be seen to

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103 *ibid*, paras 1-2.

104 *ibid,* Joint Partly Dissenting Opinion of Judges Costa, Caflisch, Türmen and Borrego Borrego.

105 *ibid*.

affirm this position[106]. Tarlan had argued that the criminal proceedings before sentence in his capital trial amounted to a violation of Article 3, because he "lived with the fear of the death penalty,"[107] but the Court stated that it:

> Considers that the mere fact that the applicant could have been sentenced to the death penalty and that he lived with this fear is in itself not enough to amount to a violation within the meaning of Article 3 of the Convention. Therefore, the Court considers [the application] be declared inadmissible as being manifestly-ill founded[108].

Furthermore, in *Güveç v. Turkey*, the Court considered the criminal proceedings against a 15 year old boy who had subsequently been granted a release from prison, but who had endured a capital trial and harsh treatment in prison[109]. He had been charged under the former Turkish Criminal Code, and the Court held, along with the inhuman treatment he received in prison "that for a period of eighteen months he was tried for an offence carrying the death penalty, [which] must have created complete uncertainty for the applicant as to his fate"[110]. Again the Court restricted its finding to the trial but not the charge. It would appear that if the Court held that the capital charge itself was a violation of Article 3, then the analysis of all the other aspects of the capital judicial system would be a moot issue. However, the Court has not yet isolated the capital charge in this way and so it is still necessary to review the different aspects of the capital judicial system.

From the capital charge, the next issue is the capital trial and sentence. In *Öcalan* the Court stated, that to impose a death sentence on a person after an "unfair trial must give rise to a significant degree of human anguish,"[111] and that the "anguish cannot be dissociated from the unfairness of the proceedings"[112]. In coming to this conclu-

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106 *Tarlan v. Turkey*, Application no. 31096/02, (Partial Decision) March 30, 2006; (Decision) March 22, 2007.
107 *ibid*, para 3.
108 *ibid.*
109 *Güveç v. Turkey*, Application no. 70337/01, January 20, 2009.
110 *ibid*, para 91.
111 *ibid*. para. 207.
112 *ibid*. para. 169.

sion the Chamber joined the Convention Article 6 fair trial standards[113] with the imposition of inhuman treatment or punishment under Article 3[114]. This judgment correctly observes the anguish which must surely be present within the defendant during an unfair capital trial, and subsequent sentence, and it used an objective test to establish this. Öcalan had not presented any written or oral argument that he specifically experienced anguish, but the Court imputed the presence of an adverse cognitive effect, which lead to Judge Türman providing a Partly Dissenting Opinion in which he stated:

> Inhuman treatment within the meaning of Article 3 is based on a subjective concept, that is to say fear and anguish felt by the applicant that reaches the threshold level required by Article 3. In the absence of such a complaint, it is not possible for the Court to stand in the applicant's shoes and decide *ex officio* that there has been a violation of Article 3 in reliance on the assumption that the applicant must have felt such fear and anguish[115].

However, the objective mechanism for a finding of fact was adopted in *Bader and others v. Sweden*[116]. This case concerned the deportation of the applicants from Sweden to possibly face a capital trial in Syria after they had previously been convicted and sentenced to death *in absentia*[117]. The Court reiterated the objective analysis when it declared that the evidence of the denial of fair trials in Syria, "must give rise to a significant degree of added uncertainty and distress for the applicants" and that it would "inevitably cause the applicants fear and anguish as to their future if they were forced to return to Syria" to face a capital trial[118].

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113 *ibid.* paras. 111 and 169. Convention, Article 6(1) states "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law…"

114 Stephano Manacorda, 'Restraints on Death Penalty in Europe: A Circular Process,' JICJ, 1 263 (2003), p. 281.

115 Partly Dissenting Opinion of Judge Türmen, *Öcalan v. Turkey*, *supra* n. 94.

116 *Bader and others v. Sweden*, (2008) 46 E.H.R.R. 13.

117 *ibid*, para. 17.

118 *ibid*, para. 47.

It is appropriate to question this objective analysis and hypothesise what would be the Chamber's opinion if it found that the applicant had received a *fair trial*, as appeared to be the case in *Tarlan*. If a person faces a capital charge the "uncertainty as to the future" may be present following either a fair or unfair trial. In *Soering* it was held that the imposition of a fair trial did not alleviate the effects of a possible death sentence, as it was accepted that the provisions in the Virginia Code "undoubtedly serve…to prevent the arbitrary or capricious imposition of the death penalty…[t]hey do not however remove the…death row phenomenon for a given individual once condemned to death"[119]. But the *Tarlan* and *Öcalan* judgments failed to consider the nuance of the *Soering* position, in that the fairness of a capital trial does not neutralise the inhumanity of the punishment. Furthermore, it is argued that it would appear more logical to state that the perceived unfairness of a capital trial makes a death sentence *more* certain, not *less*. The knowledge of a denial of due process would more likely lead to a death sentence and not an uncertainty of one. If the state circumvents due process within the capital judicial system, it would most likely be to achieve a capital conviction. As such for a consistent Convention jurisprudence it would appear more appropriate for the Court to hold that the very initiation of a capital trial constitutes inhuman treatment and this, it is argued, would be consistent with the *Soering* observation above. If a capital charge and trial is presented in peacetime, the adjudication of the fairness or otherwise of this specific criminal process should now be seen as unnecessary. It should always be an automatic violation.

3. Execution Moratorium

The Court has considered the complex political vicissitudes and the legal parameters of member state moratoriums on executions. When the Ukraine joined the Council in 1995 a moratorium on executions was initiated. However between November 9, 1995

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119 *Soering v. United Kingdom*, *supra* n. 83, para 109.

and March 11, 1997, 212 people were executed[120]. In *Poltoratskiy v. Ukraine*[121], and other Ukrainian cases decided on the same day[122], the European Court of Human Rights noted that the applicants were under a sentence of death before the moratorium came into force and it cited the Parliamentary Assembly Reports and Resolutions 1097, 1112, and 1179, and Recommendation 1395, recording the Ukrainian government's violation of the moratorium[123]. The applicant was sentenced in December 1995, some fifteen months before the moratorium came into effect. But the Court observed the risk the sentence would be carried out and the:

> Accompanying feelings of fear and anxiety on the part of those sentenced to death, must have diminished as time went on and as the *de facto* moratorium continued in force[124].

It is difficult to understand how breaching a moratorium can diminish the psychological effect of the applicant's death sentence and incarceration on death row. Although moratoriums should be analysed on a case-by-case basis, it would still appear to be more reasonable to find that the knowledge of the reintroduction of executions would lead to a heightened awareness that "*you*" may be next. But the Court applied an objective test to the case and did not specifically consider the subjective adverse cognitive impact, and so the decision that the moratorium "must have" diminished the applicant's fear and anguish, was applied to all of the Ukrainian appli-

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120 Resolution 1112 (1997) on the honouring of the commitment entered into by Ukraine upon accession to the Council of Europe to put into place a moratorium on executions, text adopted by the Parliamentary Assembly on January 29, 1997 (5th sitting).

121 *Poltoratskiy v. Ukraine*, (2004) 39 E.H.R.R. 43.

122 *See Kuznetsov v. Ukraine*, Application no. 39042/97, April 29, 2003, para 115; *Nazarenko v. Ukraine*, Application no. 39483/98, April 29, 2003, para 129; *Dankevich v. Ukraine*, (2004) 38 E.H.R.R. 25, para 126; *Aliev v. Ukraine*, Application no. 41220/98, April 29, 2003, para 134; *Khokhlich v. Ukraine*, Application no. 41707/98, April 29, 2003, para 167.

123 See, Resolution 1097 (1996) on the abolition of the death penalty in Europe, text adopted by the Parliamentary Assembly on June 28, 1996 (24th sitting); Recommendation 1395 (1999) on the honouring of obligations and commitments by Ukraine, text adopted by the Parliamentary Assembly on January 27, 1999 (5th sitting).

124 *Poltoratskiy v. Ukraine*, *supra* n. 119, para 135.

cations[125]. This reasoning did not alter the fact that the accumulative impact of death row in the Ukraine amounted to a violation of Article 3, but it does display that the Ukrainian government was given a form of leniency when it attempted to remove the death penalty from its statute books through the political process of moratorium, and then official constitutional amendment. It is acknowledged that room for political manoeuvre contributed to the wider promotion of abolition in the Ukraine in 1999 and it has now ratified Protocol No. 6 and Protocol No. 13.

Such judicial leniency was also applied in *G.B. v. Bulgaria*[126]. Medical reports concluded that the applicant feared for his life during the Bulgarian moratorium, which would appear to satisfy a subjective psychological diagnosis enabling the judicial determination that the applicant was treated in an inhuman way[127]. Furthermore, the Parliamentary Assembly argued that there were high crime rates and political instability which could challenge the Bulgarian moratorium[128]. However the Court held that in the presence of the moratorium the inmate's fear must have diminished over time[129]. Even considering the medical reports and the Parliamentary Assembly's observations, the Court did not give any reasons as to why the applicant's fear and anxiety would diminish. On this point Judge Tulkens provided a Concurring Opinion and disagreed with the Court, in its Article 3 analysis, as it did not include the "fact that for many years he suffered uncertainty as to whether the death penalty to which he had been sentenced would be carried out"[130]. Judge Tulkens found fault with the general acceptance of the solidity of the political suspension of the punishment, and identified that

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125 See *Kusnetsov v. Ukraine*, *supra* n. 120, para 115; *Nazarenko v. Ukraine*, *supra* n. 120, para 129; *Dankevich v. Ukraine*, *supra* n. 120, para 126; *Aliev v. Ukraine*, *supra* n. 120 para. 134; *Khokhlich v. Ukraine*, *supra* n. 120, para 167.

126 *G.B. v. Bulgaria*, Application no. 42346/98, 11 Marc 2004; see also *Iorgov v. Bulgaria*, (2005) 40 E.H.R.R. 7.

127 *ibid*, *G.B.v. Bulgaria*, paras. 45-48.

128 Honouring of Obligations and Commitments by Bulgaria, Doc. 8180, Parliamentary Assembly, September 2, 1998.

129 *G.B. v. Bulgaria*, *supra* n. 124, para. 76.

130 *Iorgov v. Bulgaria*, and *G.B. v. Bulgaria*, *supra,* n. 124, Concurring Opinion of Judge Tulkens.

moratoriums can only be determined "with hindsight"[131] and are never to be substituted for constitutional amendment. As moratoriums extend in time there may be underlying political vicissitudes which could lead to the reinstating of the death penalty.

Judge Tulkens was clearly not comfortable with a sentence of death suspended for eight years, but the majority have not identified what moratorium duration, if any, would exceed the threshold of Article 3. There is currently no specific guidance as to what length of time would attract an Article 3 violation or whether an indefinite period would be a violation at all. Perhaps this is because of the continuing sensitive situation with Russia, as even though it has not ratified Protocol No. 6, it has implemented a moratorium since 1996. The Council does not want to alienate the state by forcing its hand but continue pressing for ratification and abolition though dialogue. It worked with the Ukraine and it is the hope of the Council that Russia will follow. Although the Parliamentary Assembly and the Committee of Ministers have repeatedly requested that Russia post its ratification[132], its moratorium was demonstrated as being strong enough to prevent the execution of Nur-Pashi Kuylev for his part in the Belsan school massacre in 2004[133].

The Turkish government had not executed anyone since 1984, and in 1995 it stated that its policy was restricted to only reducing the offences carrying the death penalty, not to abolishing the punishment[134]. Between 1994 and 2000 there were at least 100 people

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131 *ibid*.

132 For example see Resolution 1065 (1995) on procedure for an opinion on Russia's request for membership of the Council of Europe, text adopted by the Parliamentary Assembly on September 26, 1995 (27th sitting); Resolution 1455 (2005) honouring of obligations and commitments by the Russian Federation, text adopted by the Parliamentary Assembly on June 22, 2005 (21st sitting); The Death Penalty in Council of Europe member and observer countries – an unacceptable violation of human rights, Doc. 11675, Parliamentary Assembly, July 1, 2008; Abolition of the death penalty in all member states of the Council of Europe, CM/Del/Dec(2007)1025/4.4, 1039th meeting, October 22, 2008.

133 See BBC News 'Beslan Attacker's Sentence Stands,' October 26, 2007, http://news.bbc.co.uk/1/hi/world/europe/7064234.stm.

134 Roger Hood, *The Death Penalty: A Worldwide Perspective* 3rd ed. (Oxford: Oxford University Press, 2002) at p. 27.

sentenced to death[135]. Analysing this period, Mehmet Gemalmaz argued that the Turkish legislative activity primarily concerned defunct capital statutes, and that "the true political will of the legislation organ in Turkey aims at retention of the death penalty and its regular and intensive application"[136]. Then in 1994 the European Commission of Human Rights considered Turkey's moratorium in *Çinar v. Turkey* and observed that the moratorium had been applied consistently and that the threat of the execution of the applicant was "illusory"[137]. By the time of the *Çinar* decision the Turkish moratorium had been in place for ten years and the European Commission of Human Rights considered that to be "long-standing"[138].

However, an exception to this reasoning was found in *Öcalan v. Turkey*[139] when the moratorium had been in place for 19 years. The Chamber considered that Abdullah Öcalan's case was distinguished from *Çinar* because of the specific political circumstances. Öcalan was the founder and political leader of the Kurdistan Worker's Party and his Kurdish militia had "sustained violence causing many thousands of casualties, [which] had made him Turkey's most wanted person"[140]. As a result, even with a moratorium which had lasted through to 2003, the Chamber held, "surrounding the question of whether he should be executed, it cannot be open to doubt that the risk that the sentence would be implemented was a real one"[141]. This was until the moratorium was concluded with an amendment of the Constitution of Turkey in October 2001, and affirmation of the abolition of the death penalty by the Constitutional Court of Turkey

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135 *ibid*.

136 Mehmet Gemalmaz, 'The Death Penalty in Turkey (1920-2001): Facts, Truths and Illusions' (2002) 13 *Criminal Law Forum* 91, p. 100.

137 *Çinar v. Turkey*, Application no. 17864/91, September 5, 1994, at p. 9, para 5. The illusion of the death penalty being applied was also observed *in Fedai Şahin v. Turkey*, Application no. 21773/02, (Final) January 21, 2009, where the Court held, "the risk of enforcement of the death penalty against the applicant was illusory," para 29.

138 *ibid*. para 5.

139 *Öcalan v. Turkey*, *supra* n. 95.

140 *Öcalan v. Turkey*, *supra* n. 90, para. 210.

141 *ibid*.

on December 27, 2002[142]. On appeal the Grand Chamber confirmed the Chamber's decision and stated that Öcalan's case was a "special circumstance"[143].

4. Extradition and Deportation

The Convention, the multilateral European Convention on Extradition and its Protocols[144], and bilateral treaties[145], govern extradition proceedings transferring individuals from Council member states to receiving states. Within the transfer proceedings of suspects facing capital charges there has been an evolution in the judicial scrutiny. An early case in 1963 demonstrated that extraditions may have occurred even though there was the possibility of inhuman punishment being imposed by the receiving state[146]. However, in the 1970s the Commission began to accept that extradition circumstances may lead to a violation of the Convention[147]. Ivan Shearer had noted in 1971 that extradition treaty provisions including under certain circumstances a prohibition against the death penalty, were becoming more common[148]. Then in 1983 the transfer of a suspect to face a capital trial outside the Council member state's boarders was considered in *Kirkwood v. the United Kingdom*[149]. Kirkwood was extradited to California to face a capital trial and the Commission

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142 *ibid.* para. 47.

143 *Öcalan v. Turkey, supra* n. 95, para. 172.

144 European Convention on Extradition, CETS No. 024, December 13, 1957; Additional Protocol to the European Convention on Extradition, CETS No. 086, Strasbourg, October 15, 1975; Second Additional Protocol to the European Convention on Extradition, CETS No. 098, Strasbourg, March 17, 1978.

145 See Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, (1977) 1049 UNTS 167.

146 See, *X. v. the Federal Republic of Germany*, Application no. 1802/62, March 26, 1963, at 462.

147 See, *Kerkoub v. Belgium*, Application no. 5012/71 40 Collected Decisions 55 (1972).

148 Ivan Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971), at p. 149. See also, William A. Schabas, 'Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice,' 25 Loyola L. A. Int'l and Comp L. Rev. 581 (2003).

149 *Kirkwood v. United Kingdom*, supra n. 81.

was of the opinion that this was not a violation of Article 3[150]. Then in *Soering v. the United Kingdom*[151], the Court considered the possible extradition of Jens Soering from the United Kingdom to face a capital trial in Virginia. The Court adopted a different reasoning to the Commission, as it was of the opinion that extradition may result in the applicant being sentenced to death, awaiting execution on death row for six to eight years, and that this along with the mental anguish he would subsequently suffer, amounted to a violation of Article 3[152].

Several factors contributed to the Court's decision that extradition would cause Soering inhuman and degrading treatment. The Court considered it significant that he was only eighteen at the time of the crime[153], that he suffered from the mental condition "*folie á deux*,"[154] that the conditions on death row enhanced by the prolonged detention would contribute to his suffering[155], and finally, that Germany had requested that as a German citizen, Soering should be extradited to its jurisdiction to stand trial[156]. There was a bilateral extradition treaty between the governments of the United Kingdom and the United States[157], which allowed for either government to refuse extradition of a suspect unless there were "assurances satisfactory" that the death penalty would not be imposed[158]. During the extradition negotiations Virginia modified the assurance and the state prosecutor indicated that he would seek the death penalty, but would submit to the jury the United Kingdom government's wishes against the administration of the punishment. Under such circumstances the Court held that there were substantial grounds for believing that the applicant would be sentenced to death[159]. The assurance did not meet the treaty requirement and juxtaposed with

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150 *ibid*, p. 181.
151 *Soering v. United Kingdom*, *supra*, n. 83.
152 *ibid*, para 106.
153 *ibid*.
154 *ibid*.
155 *ibid*.
156 *ibid*, para 111.
157 *ibid*, para 36.
158 *ibid*.
159 *ibid*, para 98.

the accumulative effects of the capital judicial system in Virginia, it was held to violate Convention Article 3. Judge De Meyer stated in his Concurring Opinion that extradition would only be lawful, "if the United States were to give absolute assurances that he would not be put to death"[160]. The assurance was only an undertaking of representation to the Virginian capital jury, and not an absolute assurance against a capital trial.

As a consequence member states[161] could utilise extradition proceedings to restrict and prohibit the death penalty in receiving states outside of the Council sphere[162]. Richard Lillich noted that the *Soering* decision was the "pebble thrown in the pond" and the ripples would be felt internationally[163]. In *Shamayev and others v. Georgia and Russia*[164], the Court adopted the *Soering* principle when it considered the transfer of suspects from one member state to another to possibly face the death penalty. The Court held that there was a violation of Article 3 when a group of Chechens were extradited by Georgia to Russia. The Chechen applicants claimed that the extradition (and other applicants were awaiting extradition) violated Articles 2(1) and 3 because of the risk of the death penalty in Russia. The Court noted that the Russian government had implemented "gradual elimination of the death penalty"[165], through the moratorium in the country, but it held that there was still a "real and per-

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160 See *Soering v. United Kingdom*, *supra* n. 83, Concurring Opinion of Judge De Meyer.

161 There are recorded cases of member state courts applying the Convention to prevent the extradition of suspects to face capital trials in receiving states. For instance, see *Short v. the Kingdom of the Netherlands* (1990) translated in 29 I.L.M. 1378; *Venezia v. Ministero di Grazia e Guistizia*, (1996) 79 *Rivista Di Diritto Internazionale* 815.

162 See, *Soering v. the United Kingdom*, Committee of Ministers, Resolution DH (90) 8.

163 Richard Lillich, 'Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study' 40 St. Louis. U. L. J. 699 (1996), p. 704.

164 *Shamayev and others v. Georgia and Russia*, Application no. 36378/02, April 12, 2005. Georgia acceded to the European Convention on Extradition on Sept. 13, 2001, and Russia on March 9, 2000, and so the death penalty provision under Article 11 applied.

165 *ibid*, para 330.

sonal risk of inhuman or degrading treatment within the meaning of Article 3"[166].

Extradition issues have also arisen in terrorism cases where further acts of violence are a possibility within member states. In *Chahal v. the United Kingdom*, the United Kingdom government argued that threats to national security could be taken into consideration when it decided whether or not to extradite the applicant. The Court held that there was no room for "balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged"[167]. It further stated that "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration," and so national security:

> Could not be invoked to override the interests of the individual where substantive grounds had been shown for believing that he would be subject to ill-treatment if expelled[168].

Consequently when a receiving state demonstrates that the death penalty will not be imposed extradition can then be permitted. In *Aylor-Davis v. France*, the European Commission on Human Rights considered the extradition proceedings of Joy Aylor-Davis who was charged with a capital offence in Texas[169]. The Dallas County prosecutor guaranteed that he would not pursue the death penalty and the Commission held that the Convention would not be violated under the circumstances[170]. Furthermore, in *Mamatkulov and Askarov v. Turkey*, the Uzbekistan authorities gave assurances that it would not impose the death penalty if the suspect was extradited and this was held to not violate Article 3[171], and in *Ismaili v. Germany*, the

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166 *ibid*, para 353; See also paras 368 and 386. This decision may be interpreted as an attempt to encourage Russia to ratify Protocol No. 6.

167 *Chahal v. the United Kingdom*, (1997) 23 E.H.R.R. 413, para. 81.

168 *ibid*, paras. 80 and 78. This judgment was confirmed in *Ahmed v. Austria*, Application no. 25964/94, December 17, 1996, para 41; see also, *Saadi v. Italy*, Application no. 37201/06, February 28, 2008; *NA v. United Kingdom*, 25904/07, July 17, 2008; *Ismoilov and Others v. Russia*, 2947/06, April 24, 2008.

169 *Aylor-Davis v. France*, Application no. 22742/93, January 20, 1994.

170 *ibid*.

171 *Mamatkulov and Askarov v. Turkey*, (2005) 41 E.H.R.R. 25, para 62.

Moroccan government had declared to Germany that the offence the suspect was charged with did not carry a death sentence. So the specific claim that a possible death penalty would be imposed in violation of Article 3 was nullified[172]. This line of case law is significantly contributing to the creation of a norm that in extradition circumstances involving a harbouring member state, the receiving state cannot now have the option to impose the death penalty[173]. Susan Marks observes that this is because, "states parties are now responsible for breaches of Article 3 that are the foreseeable consequence of extradition"[174].

5. The European Committee for the Prevention of Torture and the Evaluation of Death Row Conditions

To evaluate the conditions, structure, and incarceration regimes, on various death row prisons the European Court of Human Rights has considered reports and investigations carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter, the "CPT")[175]. Under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Article 1, the task of the CPT is to examine the "treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of

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172 *Ismaili v. Germany*, Application no. 58128/00, March 15, 2001. In *F.H. v. Sweden*, Application no. 32621/06, January 20, 2009 it was held that no real risk of death penalty for the applicant following the fall of Saddam Hussein's regime. However, see the dissenting opinion of Judge Power joined by Judge Zupančič, who strongly disagreed with the majority finding of fact that there was no real risk of a violation of Articles 2(1) and 3.

173 For 'norm creation' concerning the death penalty and international law, see Sonia Rosen and Stephen Journey, 'Abolition of the Death Penalty: An Emerging Norm of International Law,' (1993) Hamline J. Pub. L. & Pol'y 163; Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of the Death Penalty* (Albany: State University of New York Press, 2007) at pp. 1-12.

174 Susan Marks, 'Yes, Virginia, Extradition May Breach the European Convention on Human Rights, 49 Cam. L.J. 194 (1990), p. 196.

175 See generally, European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, at www.cpt.coe.int.

such persons from torture and from inhuman or degrading treatment or punishment"[176]. Jim Murdoch, an expert on the CPT, has described the Committee as a "central player" and that the CPT is advancing human rights through an "on-going dialogue" with the governments of member states[177]. The CPT has also developed its own "corpus of standards"[178] articulated within the reports which are of:

> Potential relevance in applications to Strasbourg both in helping establish the factual circumstances of detention and also in encouraging revision of existing Article 3 case law[179].

The Directorate General of Human Rights has noted that the role of the CPT is to "visit any place where persons are being deprived of their liberty to ensure that all such persons are kept in human conditions"[180]. Murdoch's opinion concerning the impact of the CPT is demonstrated as the European Court of Human Rights relied upon the CPT's reports in the 2003 Ukrainian death row cases. The CPT's Report to the Ukrainian government in 1998 observed that prisoners sentenced to death were incarcerated for up to 24 hours a day in cells which "offered only a very restricted amount of living space and had no access to natural light and sometimes very meagre artificial lighting," and it further found that there was an unsatisfactory high degree of isolation with minimal human contact for periods ranging between ten months and two years, and that:

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176 European Convention for the Prevention of Torture or Degrading Treatment or Punishment, ETS, No. 126, Article 1. Text amended according to the provisions of the Protocol No. 1 to the European Convention for the Prevention of Torture or Degrading Treatment or Punishment, CETS No. 151 Strasbourg, November 4, 1993; and Protocol No. 2 European Convention for the Prevention of Torture or Degrading Treatment or Punishment, CETS No. 152, Strasbourg, November 4, 1993 which entered into force on March 1, 2002.

177 Jim Murdoch, 'The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: activities in 1996 and 1997' E.L. Rev. 23 Supp (Human rights survey), 199 (1998), pp. 199-200.

178 Jim Murdoch, 'The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Activities in 2001' E.L. Rev. 27 Supp (Human rights survey 2002), 47 (2002), p. 55.

179 *ibid*, p. 59.

180 Council of Europe, *Death is Not Justice: The Council of Europe and the Death Penalty*, (Strasbourg: Council of Europe Publishing, 2007), pp. 23-24.

> Such a situation may be fully consistent with the legal provisions currently in force in Ukraine concerning the treatment of prisoners sentenced to death. *However, this does not alter the fact that, in the CPT's opinion, it amounts to inhuman and degrading treatment*[181]. (emphasis added)

It is significant that although the CPT identified the death row conditions may have complied with the then existent Ukrainian law, this did not prevent it from declaring that it constituted inhuman and degrading treatment. This finding of fact was then translated into Convention jurisprudence by the Court to hold that the death row prison conditions in the Ukraine were a specific violation of Article 3[182]. Since *Soering*, the jurisprudence concerning death row conditions has evolved, and this is seen to a large extent to have benefitted from the CPT reports. What the Court now considers are the personal circumstances of the applicant including the age, sex, mental and physical health both before and during incarceration on death row[183]. The material conditions of the prison are scrutinised with emphasis placed on access to natural light, fresh air and adequate living conditions[184]. The prison regime is evaluated with an expectation of access to medical care, sufficient outdoor exercise and a reasonable quality of food[185], and the length of detention on death row is assessed but no decisions have been made as to what length of detention reaches the threshold of Article 3. In addition, the Court has held that poor economic circumstances are not *prima facie* an excuse for allowing the above conditions to remain[186].

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181 Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 24 February, 1998.

182 See *Poltoratskiy v. Ukraine*, *supra* n. 119, para. 109-117; *Kuznetsov v. Ukraine*, *supra* n. 120, para. 89-96; *Nazarenko v. Ukraine*, *supra* n. 120, paras. 94-102; *Dankievich v. Ukraine*, *supra* n. 120, paras. 94-102; *Aliev v. Ukraine*, *supra* n. 120, paras. 92-100; *Khokhlich v. Ukraine*, supra n. 120, paras. 133-141.

183 For example see, *Soering v. United Kingdom*, *supra* n. 83, para. 64.

184 See cases *supra* n. 180.

185 See *Soering v. United Kingdom*, *supra* n. 83.

186 *Poltoratskiy v. Ukraine*, *supra* n. 119, para 148; *Kuznetsov v. Ukraine*, *supra* n. 120, para 128; *Nazarenko v. Ukraine*, *supra* n. 120, para 144; *Dankievich v. Ukraine*, *supra* n. 120, para 144; *Aliev v. Ukraine*, *supra* n. 120, para 151; *Khokhlich v. Ukraine*, *supra* n. 120, para 181.

Following these principles in *Iorgov v. Bulgaria* and *G.B. v. Bulgaria*, the Court stated that a violation of Article 3 had occurred because of the detention conditions in Sofia Prison including isolation in cells for 23 hours per day and minimal contact with other inmates and family[187]. The Court relied on the CPT report in 1995 which recorded the results of a visit to Stara Zagora Prison, and it used the CPT's findings for comparative analysis[188]. Furthermore, in *Ilaşcu and others v. Russia and Moldova*[189] the Court held that strict isolation on death row for eight years and the anxiety of the death sentence, in the Moldovian Republic of Transdniestria, were acts of torture within the meaning of Article 3[190]. The Court used the CPT's report on Moldova which included a visit to the region of Transdniestria. The CPT doctors examined Ilaşcu and the other applicants who were detained for eight years and stated that "solitary confinement could, in certain circumstances, amount to inhuman and degrading treatment"[191].

6. Methods of Execution

Methods of execution have received minimal judicial scrutiny. Hanging adopted in the United Kingdom was not challenged in the Commission between 1950 and 1964[192] as it was not until 1966 that the United Kingdom accepted individual petition to the Commission and Court. Likewise Caroline Ravaud and Stephan Trechsel note that the guillotine in France was not called into question at the regional level when executions were implemented in the 1970s,

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187 *Iorgov v. Bulgaria*, *supra* n. 124, paras. 48-50; *G.B v. Bulgaria*, *supra* n. 124, paras. 49-50.

188 The Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from March 26 to April 7, 1995, CPT /Inf (97) 1.

189 *Ilaşcu and others v. Russia and Moldova*, Application no. 48787/99, 8 July, 2004.

190 *ibid*, paras. 429, 430 and 440.

191 The Report on the visit to the Transnistian region of the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from November 27 to 30, 2000, CPT/Inf (2002) 35, para. 289.

192 Peter Anthony Allen and Gwynne Owen Evans were the last people to be executed in Britain in 1964.

and this was due to France not accepting individual petition until the year of the abolition of the punishment in 1981[193]. The European Commission of Human Rights' decision in *Soering* considered the application of the electric chair[194] but the decision in the appeal to the Court did not specifically rule on the method of execution. It confined its holding to state that the accumulative effects of death row manifested inhuman treatment, and a separate consideration of electrocution was not provided. In *N.E. v. the United Kingdom*, the applicant faced extradition proceedings for transfer to Florida to face a capital trial and if convicted he would face the electric chair, but before the Commission could adjudicate on the case the applicant withdrew his petition[195].

However, it would appear quixotic for the Court to find that any execution method could satisfy the Convention, Protocol No. 6, Protocol No. 13, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In order to render an execution technique not at variance with Article 3, the Court would need to rebut the wealth of Parliamentary Assembly arguments, which to borrow from Jonathan Glover, indicates that, "there is something so cruel about the kind of death in capital punishment that this rules out the possibility of it being justified"[196]. For instance Lidbom stated in his 1980 Report that:

> None of the execution methods employed today succeeds in completely eliminating the physical suffering which necessarily accompanies violent death, since death cannot be instantaneous. To this must be added the mental and moral suffering caused by long periods of waiting and by uncertainty…[c]apital punishment certainly constitutes "inhuman and degrading treatment or punishment,"

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193 Caroline Ravaud and Stephan Trechsel, 'The death penalty and case-law of the institutions of the European Convention of Human Rights,' in Council of Europe, *The Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004), p. 85.

194 *Soering v. the United Kingdom*, Application no. 14038/88, January 19, 1989, paras. 141-143, where the Commission held that electrocution did not "attain a level of severity contrary to Article 3".

195 *N.E. v. the United Kingdom*, Application no. 10308/83, (1985) 37 DR 158, p. 184.

196 Jonathan Glover, *Causing Death and Saving Lives*, (London: Penguin Press, 1990), p. 231.

> both by its very nature and by the awesome, even revolting character of an execution, whatever the procedure chosen[197].

In 1994 Hans Göran Franck extended the argument on the deficiencies within the techniques and technologies of the different execution methods. He stated:

> Errors in the judgment of the executioner can lead to torturous strangulation when hanging is the method of execution, and extreme pain and suffering when it is shooting, electrocution, lethal injection or gassing, beheading or stoning[198].

Essentially it is the abolitionist mantra within the Parliamentary Assembly that no method of execution can be humane and the punishment therefore cannot be justified.

7. The Death Row Phenomenon

The above aspects of the capital judicial system have been viewed collectively under the jurisprudential label of the "death row phenomenon". This was first recognised in *Kirkwood* as being the circumstances which lead to an inmates' prolonged detention on death row leading to his execution[199]. Kirkwood argued that the Article 3 prohibition against inhuman punishment was violated by the "inordinate delay in carrying out the death penalty in California," and that "after he has completed all possible appeals…in the interval he will be exposed to the rigours of the death row phenomenon"[200]. The *Soering* Court confirmed that the phenomenon "may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death"[201]. William Schabas has observed that "[w]ith the European Court's judgment in *Soering*, the term 'death row phenomenon' entered the

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197 Report, *supra* n. 22, paras 2 and 13.
198 Report, *supra* n. 46, para. 9.
199 *Kirkwood v. United Kingdom*, *supra*, n. 81, p. 165.
200 *ibid* p. 166.
201 *Soering v. United Kingdom*, *supra* n. 83 para. 81.

mainstream of human rights vocabulary,"[202] and consequently, the Parliamentary Assembly has utilised the ideology of the phenomenon to challenge the death penalty both within the region, and externally within Japan and the United States[203].

What is significant is that the material circumstances of this phenomenon are now intricately connected with Article 3, and they are fluid concepts and change from case to case. In effect, the factors which become material can be all or a selection of the issues discussed throughout this article. It is now clear that Article 3 has been used to open a plethora of judicial doors for the denunciation of the death penalty. Indeed the above analysis reveals that the Court has adopted intricate and in many instances, landmark judicial reasoning, for the denunciation of the death penalty. However, while the judgments concerning unfair trials, extradition, and conditions on death row, have provided clear guidance on Article 3, it has been argued that there still appears to be scope for greater clarity on the status of the capital charge, moratoriums, and execution methods. But this is not to detract from the observation that the Court is advancing a human rights jurisprudence, which at its heart, is aimed at the restriction and eradication of the death penalty.

IV. CONCLUSION

Manfred Nowak, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has argued that the original acceptance that the death penalty is not a violation of inhuman treatment has, "been superseded by a dynamic interpretation of these legal terms in light of modern criminological experiences and socio-political developments"[204].

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202 William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment in the World's Courts*, (Boston: Northeastern University Press, 1996), p. 115.

203 Resolution 1253, *supra* n. 66, para. 8(ii).

204 Manfred Nowak, 'Is the Death Penalty an Inhuman Punishment?' p. 42, in T. Orlin, A. Rosas and M. Scheinin (Eds) *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Åbo: Åbo Akademi University Press, 2000).

This article has engaged with how the Council has significantly contributed to this dynamic human rights evolution, and which as Mowbray has observed now demonstrates a "contemporary European disapproval of the death penalty"[205]. Following the stalwart efforts of the Parliamentary Assembly, Article 3 is now a primary Convention Article for achieving and maintaining complete abolition in the Council, and for promoting the denunciation of the punishment in its observer states. However there is still a way to go before the Council's discourse unreservedly reflects that the death penalty is inhuman in all circumstances. Even though Protocol No. 13 provides for complete abolition, it did not textually remove the possibility of the death penalty from the second sentence of Article 2(1), and therefore Article 3 has been interpreted by the Court to not provide a complete prohibition. This judicial obstacle should not be viewed as being formulated by unreasonable human rights judges, but perhaps more correctly, as the product of the history of the legislative lacuna. It is the Committee of Ministers, as advised by the Rapporteur Group on Human Rights, who are seen as refusing to specifically provide for the amendment of Article 2(1), and thus were unable to record the importance of Article 3 within either Protocol No. 6 or Protocol No. 13. But this is not to forget that without the hegemony of Article 3, it is doubtful whether Protocol No. 13 would have been envisioned, and Protocol No. 6, although does not refer to Article 3, certainly benefitted from the human rights discourse created by the Parliamentary Assembly between 1980 and 1982.

However, the recent change in the Committee of Minister's narrative may have provided new opportunities. Following the seeming acquiescence of the Committee with the Parliamentary Assembly's advancing of Article 3, it now appears to be an opportune moment in the history of the abolition of the death penalty in the Council for the Parliamentary Assembly to draw together the fragments of the arguments from its previous Recommendations and Resolutions, and formulate a specific Resolution on Convention Article 3. It can

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205 Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights*, 2nd ed, (Oxford: Oxford University Press, 2007), p. 128.

now delineate how each aspect of the capital judicial system manifests inhuman punishment through (although not limited to); (a) the capital charge, (b) the capital trial (whether fair or unfair), (c) extradition and deportation of a suspect to a third country to face a capital trial, (d) moratoriums, as although they are a positive step in the removal of the death penalty, they do not neutralise the inhumanity of the lingering, and possible, execution, (e) the structure of death row will always be inhuman because it cannot be dissociated from the psychological impact of *knowing you are on death row*, (f) all methods of execution are inhuman as they apply physical torture, and no method can neutralise the adverse cognitive impact of knowing *you are about to be executed*, and (g) one or more of the above aspects of the capital judicial system constitute inhuman punishment and is thus also a manifestation of the death row phenomenon. A specific Resolution setting out how each aspect of the capital judicial system is a violation of Article 3 would appear to provide the required impetus for a Recommendation to the Committee of Ministers to endorse this hegemonic position in legislation. This may occur most appropriately through a further protocol which the member states can then sign and ratify. Once this is achieved, the door will then be opened for the Council to express uniformly that the death penalty is, and in every circumstance, inhuman and degrading.

THE EUROPEAN UNION RESPONDS TO THE DEATH PENALTY WITH NEW COMPETENCIES

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The purpose of these few lines[1] is to present, in a succinct manner, recent forms of international judicial cooperation that arise from the new architecture of the international organization committed to integration: the European Union. This recently unveiled structure is not only present in conventional instruments but will also be reflected in the enlargement of institutional competences. The guiding principle of European action since the 1980s has been international protection of human rights and, in consequence, protection of the right to life.

Firstly, with the entry into force of the Treaty of Lisbon[2], the European Union has clarified its foreign relations and reaffirmed its political weight. One of the various scenarios that springs to mind is transatlantic dialogue in which the European Union, the United States and other international bodies share values, respect for the rule of Law, and functional concepts of liberty, justice and security, which commit them to working together for their proactive defence in the international sphere. These are fields, moreover, in which the application of the 14th Declaration of the Treaty on European Union[3]

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1 The author wishes to thank the Autonomous University of Tamaulipas, Mexico and, especially, Carlos Hinojosa Cantú, for the assistance offered in drafting these lines.

2 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community OJEC 2007/C 306/01. In force since December 1, 2009

3 Declaration relating to the common foreign and security policy: "In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and

will not be applicable *per se*, thereby preventing the Treaty from becoming a mere game in a hall of mirrors. In this sub-system of regulations which allow us to speak of a *European public order*, the death penalty is considered contrary to International Human Rights Law.

Both the Permanent President of the Union and the recently appointed High Representative of Foreign and Political Affairs and Security Policy institutionalize the presence of the European Union as an international actor subject to the principles set down in article 3, point 5 of the Treaty of Lisbon, which updates the *acquis* of the Union[4]. One controversial element in the protection of human rights will undoubtedly be the relations with countries where the death penalty is applied, principally when it is applied or an attempt is made to apply it to nationals of some of the 27 member States that hold European citizenship, which is additional to national citizenship (art. 9 para. 2 TEU)[5]. A forerunner to this *reinforced diplomatic assistance* may be found in the community competencies for the protection of fishing crews when they are arrested for alleged violations of Fishing Law in international waters.

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the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.
The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions or increase the role of the European Parliament.
The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States."

4 "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

5 "Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it..."

European Union policy since 1993[6], performed in an increasingly functional and flexible way through the creation of an External Action Service of the Union, has provided international protection to defendants, who in the case of a flawed defence might have grounds for bringing a case before the Court of Justice for failure to comply with the provisions of the Treaty[7]. It is acknowledged in this text, through the inclusion of the Charter of Fundamental Rights, and the future adhesion of the Union to the European Convention on Human Rights[8] with its extended protective jurisprudence, that there no limitations may be placed on the right to life[9]. Thus, the values of the Union mean that this model of diplomatic protection, under circumstances where the death penalty may be applied, which is held as inhumane in the European context, are in the vanguard, coming close to fulfilling the express desire of the Special Rapporteur of the International Law Commission[10], 2006, on Diplomatic Pro-

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6 Vid., Decision of the Representatives of the Governments of the Member States meeting within the Council of December 19, 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (OJEC L 314, December 28, 1996); More recently, the Green Paper presented by the Commission on Diplomatic and consular protection of Union citizens in third countries 28.11.2006 COM (2006) 712 final.

7 Vid., the *Odigitria* case Court of the First Instance, Judgment July, 6, 1995 (Case T.572 - 1993.)

8 In an initiative that dates back to 1979, firstly from the Commission, and then upheld by the European Parliament, which was the subject of a negative opinion from the European Court of Justice on March 28, 1996, Opinion 2/94. Vid., Chueca Sancho, A.G.; "Por una Europa de los Derechos Humanos (La Adhesión de la Unión Europea a la Convención de Roma). In http://www.unizar.es/derecho/doctorado_humanos/CHUECA.doc. More recently, see, Fernández Tomás, A. F.; ¨ El Tratado de Lisboa: la salida de la crisis constitucional ¨ In Jornadas de la Asociación Española de Profesores de Derecho Internacional Madrid 2008

9 The fact of having recourse to diplomatic protection, in the words of Special Rapporteur Dugard, is because "Most States will treat a claim of diplomatic protection from another State more seriously than a complaint against their conduct to a human rights monitoring body", First Report on Diplomatic Protection March 7, 2000 A/CN. 4/ 506 p. 11.

10 The International Law Commission, established by the Assembly General in 1947 to promote the progressive development and codification of international law, has a wide programme of work that encompasses the codification of diplomatic law.

tection —in essence an a—temporal state-to-state relationship—, who wished to arrive at a situation in which diplomatic protection is considered a new mechanism for the protection of human rights, forming part of International Human Rights Law[11].

From a strictly criminal policy point of view, I agree with the Italian jurist Manacorda, who considers that refusal to extradite in application of the agreements of police and judicial cooperation is an added safeguard for the authorities of the Member States of the European Union: I understand that this interpretation, grounded in the Treaty of the Union and its annexes, may be extended to all individuals, regardless of their legal condition in European territory, under the scope of application of the European system of norms. It establishes the fundamental right of citizens not to be handed over to a country in which their life may be in danger[12].

To solidify this safeguard, *lege ferenda*, in a subsidiary way and faced with the inaction of community institutions, it would be possible to use the popular initiative foreseen in article 11.4 of the Treaty[13], to develop legislation that defends the right of everybody under threat of a capital punishment within the jurisdiction of the European Union not to be extradited. If already under the jurisdiction of a *retentionist* state, then the European Union will use all

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11 See, Torroja Mateu, H.; El Derecho del Estado a ejercer la protección diplomática Ed. Bosch Barcelona 2007. Along the same lines, Professor Benounna, in1996, upheld the existence of inherent subjective rights for individuals. In constitutional jurisprudence, we may infer traces of this subjectivity, for example, in the sentences of the German Constitutional Court," which has acknowledge the obligation of the State to provide diplomatic protection on behalf of its nationals…" Cit. in Fernández Tomás, A.; Sánchez Legido, A.; Ortega Terol, J.M.; *Manual de Derecho Internacional Público* Tirant lo Blanch 2004 p. 385.

12 "Il mandato di arresto europeo nella prospettiva sostanzial penalistica: implicazioni teoriche e ricadute politico criminali", in *Riv. it. dir. proc. pen.*, 2004, p. 789;

13 "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with Article 24 of the Treaty on the Functioning of the Union."

available mechanisms in the Treaty of Lisbon to offer diplomatic protection, and in the last instance commercial measures to prevent execution of the sentence, more effective today with the clarification of the pillars and the existence of its own legal base[14].

In second place, the European Union has the opportunity of using this new competency (art.34 TUE) to encourage ratification or to reject termination of the *Optional Protocol concerning the Compulsory Settlement of Disputes* concerning the interpretation and application of the Vienna Convention on Consular Relation[15].

The very fact that this Protocol contains no article regarding its termination or withdrawal is a sign of the will of the parties that this instrument should, in practice, effectively regulate any controversies that might arise in its functioning. Withdrawal from the protocol would emphasize an immunity of sovereignty, equating the decisions of the International Court of Justice, a specifically international order, with interference in the internal affairs of a State, in this case, its criminal system.

It also implies a *perverse domino effect* running in both directions, because at an internal level the States might use arguments that limit the access of their citizens to international justice, as happened on occasions with the rejection of the Optional Protocols of the International Convention on Civil and Political Rights[16]; at an international level, if certain States no longer report non-compliance with the Convention, this might lead to other countries no longer defending their consular rights and interests, the side-effect of which would be to create greater danger of individual human-rights violations that

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14 On the origins of the existing *acquis*, see, Pérez Prats Durban. L.; *Cooperación política europea y Comunidades Europeas en la aplicación de sanciones económicas internacionales* Ed. UAM Madrid 1991

15 In greater detail see, Martín Arribas, J.J.; *Derecho Internacional. Bases y Tendencias Actuales.* Entinema 2007

16 More specifically, the situation of various Caribbean countries such as Jamaica, Trinidad and Tobago and Guyana, on which matter, see, Amnesty International http://asiapacific.amnesty.org/library/index/engamr050011999

transcend nationalities. The Convention is therefore a cornerstone of the United Nations system[17].

In addition to being an ineffective measure, once a dispute is put before the court, the countries are not without legal protection as it comes under the compulsory competence of the International Court of Justice, and according to article 60 of the Statute "In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." and the decision implies a valid appraisal of the current interpretation under International Law, with similar effects to those of a Consultative Opinion and with the media impact associated with all pronouncements of the International Court of Justice.

Finally, verification through organs with democratic representation, or by an independent figure[18], Parliamentary representatives, Committees of Experts and mixed EU, Council of Europe[19], and OSCE representatives that the Agreements signed by the European Union that imply limitations on the exercise of human rights should be duly respected by all of its members; for example, the recent Agreement on Extradition and Legal Assistance between the EU and the United States of America[20].

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17 The European Union contributes actively in the signing of commercial agreements with third countries through the so-called "human rights and democracy clauses", with which they have to comply in its judgment. The knock-on effect of a greater violation of human rights would only accentuate the pressure brought to bear through these Agreements, which might not endure and fall victim to an undesired end. Satisfactory compliance with these same agreements is dependent on the periodic opinions drawn up by the Commission's missions in those countries, as well as the delegations of the Member States of the Union, and subsequently, the representatives of the External Action Service. See, on this point, Maria Mercedes Candela Soriano.; *Los derechos humanos, la democracia y el estado de derecho en la acción exterior de la Unión Europea*. Madrid Dykinson 2006

18 The election of an "eminent European personality", who verifies that the United States complies with the commitments it has acquired, as was done in the Terrorist Finance Tracking Programme.

19 In this Organization, the United States, Mexico, Canada, Japan and the Holy See have observer status.

20 Council Decision 2009/820/CFSP of October 23, 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the

In particular, these agreements envisage that the Member States of the Union establish or improve their bilateral agreements on extradition and mutual cooperation and that the provisions, which are a framework of minimum standards, in the US/EU agreements be applied in relation to these bilateral agreements, with which they have all complied[21], and which, in turn, could serve as a legal framework for the negotiation of those bilateral agreements dating back to a much earlier time[22].

For example, in relation to extradition, the first of them outlines the extent of its application in relation to existing bilateral agreements, clarifies the category of offence to which extradition may be applied, and describes the procedure for the transmission and certification of documents as well as the rules for temporary surrender, simplified extradition and prisoner transit.

Finally, protection is noticeably improved with regard to the death penalty in the sense that non-application of the death penalty

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European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America. L. 291 /40. 7.11.2009, which will enter into force on February 1, 2010. See, text on http://www.statewatch.org/news/2009/nov/eu-usa-extradition-mutual-cooperation-agreements-2.pdf

21 Without anything preventing an increase in the guarantees at a bilateral level, provided that the principle of sincere cooperation is respected as envisaged in article 4-3 TEU that reads: ¨ Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives..'' as a norm originating from European Community Law, known in German Federal law as *Bundestreue.*

22 See, on Extradition Agreements by countries, UNITED NATIONS CRIME AND JUSTICE INFORMATION NETWORK BILATERAL AGREEMENTS ON EXTRADITION, JUDICIAL/LEGAL ASSISTANCE, CONTROL OF NARCOTIC DRUGS, AND PRISONER TRANSFER BY COUNTRY http://www.uncjin.org/Laws/extradit/extindx.htm. Evidently, for the most recent, new developments in an Agreement such as this one, negotiated over a lengthy period, were scarce, or had already been put into effect in the signing of the Agreement in question.

will no longer depend on safeguards promised by the US government based on each individual case; instead, extradition will only take place on condition that the death penalty will not be imposed, or if for procedural reasons, that condition may not be fulfilled, absolute certainty that the penalty will not be carried out[23]. As a result, legal guarantees that go beyond weak diplomatic guarantees that

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[23] In concrete, in article 13 of the Treaty that is developed under article VII of the integrated texts of the Instrument on Mutual Legal Assistance in Criminal Matters and the Agreement on Extradition between the United States and the European Union, which will be applied when this Instrument enters into force.
"When the offence for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed, or, if imposed, will not be carried out." However, NGOs have been very critical of the content of this article and have asked for the creation of a uniform framework for its interpretation, such as the one proposed (*supra)*. The position was made clear in the Recommendations that were made to the Justice and Home Affairs Council for its meeting on June 5 and 6, 2003. See, http://www.amnesty.org/en/library/info/IOR61/013/2005/en where it was recommended that the entry into force of these agreements should be subject to suitable parliamentary supervision in all Member States. See, also http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/153/153.pdf. The content of this article quotes article 11 of the European Convention on Extradition, done in Paris, in 1957, which reads: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out." The term "may" should be interpreted as "must", in order to guarantee the full effect of the article. See, Rengeling/Szczekalla.; *Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze.* Carl Heymanns Verlag 2004 p. 374. There is likewise, a Model Treaty on Extradition, which was proposed at the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1990, that declares under article 4: "Extradition may be refused in any of the following circumstances: (d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.." (U. N Doc. A/ CONF.14/28/Rev. 1 (1990), 68).

have been harshly criticized by NGOs, and which find no support in the *iusinternacionalista* doctrine, due to their excessive proximity to the field of international Relations and the lack of rigour as a *hard law* regulation, necessary to be considered under International Law. Added to which is the fact that the negotiation of diplomatic guarantees has a markedly secretive character to it[24].

[24] In greater detail, see Catherine R. Hawkins ¨ The Promises of Torturers: Diplomatic Assurances and the legality of Rendition ¨ 20 Georgetown Immigration Law Journal, 213 (2006); Sánchez Legido, A.; "Garantías diplomáticas, no devolución y prohibición de la tortura." http://www.aepdiri.org/publicaciones/descarga/redi/2008-1.pdf; Larsaeus, N.; "The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment"; RSC Working Paper No. 32 October, 2006, University of Oxford.

RESTRAINTS ON THE DEATH PENALTY IN EUROPE: A CIRCULAR PROCESS

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I. THE STARTING POINT FOR THE CURRENT DEBATE ON DEATH PENALTY IN EUROPE

At the moment when "the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment"[2], dealing with the topic outlined in the title of this paper might appear to be a mere academic exercise, especially if such an effort is made in the area of criminal law. Historical studies have highlighted the objectives and outcomes of the long-lasting abolitionist movement, which started several centuries ago and still produces effects, either *de iure* or *de facto*, on the whole continent. Legal analysis in national legal systems, at the Europeanlevel, or even on a larger scale, is now widely developed[3]. The death penalty is finally outside the area of legal punishments in Europe. One

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2 European Court of Human Rights, First Section, Judgment, Ocalanv. Turkey, Application no. 46221/99, March 12, 2003, para. 195. See A. Clapham, "Symbiosis in International Human Rights Law. TheOcalan Case and the Death Sentence", infra, 475-489.

3 For a general overview on the issue from the international and European legal perspective, see M. Ancel, The Death Penalty in European Countries (Strasbourg: Council of Europe, European Committee on Crime Problems, 1962); W.A. Schabas, The Abolition of the Death Penalty in International Law (3rd ed., Cambridge: Cambridge University Press, 2002); W.R.G. Hood, The Death Penalty: A Worldwide Perspective (3rd ed., Oxford: Oxford University Press, 2002), 9-34.

Journal of International Criminal Justice 1 (2003), 263-283

could therefore conclude that criminal law analysis cannot add any further value to the debate from a positivist viewpoint.

Such a possible conclusion is worth discussing and, to a certain extent, challenging. Restating the present abolitionist trend in Europe has numerous positive effects, not only in terms of its symbolic impact on the dozens of countries still upholding capital punishment[4], but also, and probably more importantly, in terms of legal analysis. The theory of complexity, towards which comparative studies, legal theory, and some criminal law doctrines have recently converged, is a useful and innovative tool for a better understanding of the European world of criminal law[5]. The systemic method has been primarily used to interpret the process of penalization[6]; however, it can also be applied to the movements towards depenalization/decriminalization[7]. The analysis of the combination of a certain number of issues related to a plurality of legal "spaces" and

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4 An updated presentation of the abolitionist and retentionist countries all over the world is published by Amnesty International and can be found at the address http://web.amnesty.org/rmp/dplibrary.nsf/ ff6dd728f6268d0480256aab-003d14a8/daa2b602299dded0802568810050f6b1!OpenDocument (las accessed April 5, 2010). This site reports that 76 countries are abolitionist for all crimes, 15 are abolitionist for ordinary crimes, 21 are abolitionist in practice, and 83 are still retentionists.

5 From very different perspectives see M. Delmas-Marty, Modeles et mouvements de politique criminelle (Paris: Economica, 1983); Le flou du droit, du code penal aux droits de l'homme (Paris: Presses universitaires de France, 1986); Pour un droit commun (Paris: Seuil, 1994), also in English, Toward a Truly Common Law (Cambridge: Cambridge University Press, 2002); Trots defis pour un droit mondial (Paris: Seuil, 1998); F. Ost and M. van de Kerchove, Legal System between Order and Disorder (Oxford: Oxford University Press, 1994); De lapyramide au reseau: pour une theorie dialectique du droit (Bruxelles: Facultes universitaires Sant-Louis, 2002); M.R. Damaska, The Faces of Justice and State Authority: a Comparative Approach to the Legal Process (New Haven: Yale University, 1986); E. Grande, Imitazione e diritto: ipotesi sulla circolazione dei modelli (Torino: Giappichelli, 2000).

6 See recently M. Delmas-Marty (ed.), Vers des principes directeurs internationaux de droit penal. Vol. VII. Les processus d'internationalisation (Paris: Maison des Sciences de l'Homme, 2001).

7 M. Delmas-Marty, Les grands systemes de politique criminelle (Paris: Presses universitaires de France, 1992). For in-depth scholarship on depenalization, see M. Van de Kerchove, Le droit sans peines: aspects de la depenalisation en Belgique et aux Etats-Unis (Bruxelles: Facultes universitaires Saint-Louis,

normative levels helps us appreciate the different phases and steps along the path to abolition of the death penalty in Europe. Here the specificities of European law, in its multidimensional structure, clearly stand out, marking its differences from other regional legal contexts.

This method leads to some interesting and partially unexpected results. First, it shows that abolition is the result of a thick interweaving of mutual relationships among the several normative levels coexisting in Europe, and that case law (both at national and international level) is one of the main vectors of exchange (*infra* Part 2).

More surprisingly, it seems doubtful that this process works perfectly and that Europe is completely free from (at least, the risks of) capital punishment. Nobody is "legally executed" in democratic Europe at the beginning of the third millennium; nonetheless, some "fissures" in the dynamic process leading to abolition are still present, war crimes being the most relevant exception (*infra* Part 3). Some dangers also arise from the mechanisms that allow individuals to be transferred to a retentionist country as a result of a judicial or administrative order (*infra* Part 4). Only recently have new abolitionist perspectives emerged from the "right of interference" in foreign death penalty cases that some countries try to exercise (*infra* Part 5).

In the next pages I shall analyse these points, deliberately leaving aside all those considerations that underlie Europe's position with respect to the death penalty. Abolition of the death penalty is, rather than a criminal policy option, a categorical imperative, which does not need to be justified. Critics of the death penalty have used similar arguments to support their view. Rather than affirming the fundamental idea that human life cannot be violated, they have developed utilitarian arguments, such as that there is no profit in capital punishment, that general deterrence is low and cannot be proved, or that the "message" expressed by such a sanction is contrary to the sense of

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1987); C. E. Paliero, Minima non curat praetor: ipertrofia del diritto penale e decriminalizzazione dei reati bagatellari (Padova: Cedam, 1985).

humanity. This attitude is one of the reasons why the death penalty is only very slowly disappearing from our legal systems[8].

II. THE ABOLITIONIST MOVEMENT: A CIRCULAR LEGAL PROCESS

The approach taken by the European countries to the death penalty is nearly homogenous and shows clearly the path regional institutions follow to achieve a common understanding on human rights. In due course we will also mention torture and inhumane and degrading treatment, as well as life imprisonment, insofar as these severe punishments are alternatives to, or consequences of, sentencing to capital punishment.

In looking for the origins of the abolitionist movement, the temptation to adopt either of two extreme interpretations must be avoided. One the one side is the idea that the European legal world is a monolithic block: this reductionist perspective denies the specificities and plurality of components within, flattening the history of abolition in Europe into a taken-for-granted result. On the other side is the idea that the European legal world is simply *fragmentary and chaotic*; this instead encourages the dismissal of any "structured" analysis in favour of analyses of each national legal order as such. We refuse here both the idea of Europe as a whole area where the death penalty is banned, and the idea of a European legal "patchwork" where no rationality can be found at a legal level.

The common European criminal "legal space" (*espace juridique*) against the death penalty is the result of a complex normative structure. Indeed, the multilevel dimension of European law generates a very sophisticated network of relations, bringing about the most important laboratory of regionalization of law in the world[9]. Kelsen's hierarchy does not seem to apply anymore, and linear explanations do not represent adequately such a complex issue. Some

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8 L. Ferrajoli, Diritto e ragione. Teoria del garantismo penale (Roma-Bari: Laterza, 1990), 383-384.

9 M. Delmas-Marty, Pour un droit commun, supra note 4, at 223-253.

scholars go so far as to suggest that the European legal structure can only be explained by fuzzy or chaos theories. Without necessarily sharing this position, the complexity cannot be denied: despite its geographical unity, from the legal point of view Europe represents a pluralistic world. National and regional normative levels have to be distinguished; within each of these levels a wealth of additional components may be discerned. This is especially true with reference to criminal law, where the original monopoly by national legislators has been only partially eroded by the new regional powers, giving rise —for that reason -to a complex interrelation of sources.

At the national level, different traditions coexist in Europe. Aside from the classical division between the main traditions of civil law (followed by a majority of states) and common law (in the UK and Ireland), there is an increasing tendency towards mixed systems[10]. France, for instance, has a civil law tradition but a strong pragmatic approach to criminal law, which probably places it in an intermediate position between the classical families from the point of view of criminal law[11]. Nordic countries are traditionally inspired by the Anglo-American system but are also highly influenced by the theo-

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10 For the classical opposition between civil law and common law systems, with a third category for socialist countries, see R. David, Les grands systemes de droit contemporain (Paris: Dalloz, 1964) and, in a criminal law perspective, M. Ancel, Utilites et methodes du droit compare (Neuchatel: Editions Idees et Calendes, 1971). For more recent work on some features of comparative criminal law in Europe, see Les systemes compares de justice penale: de la diversite au rapprochement (Toulouse: Eres,1998), especially F. Tulkens, "Rapport de synthese", at 63. Specifically on the structure of the offence, see E. Grande, "Reato in diritto penale comparato", Digesto delle Discipline Penalistiche (Torino: Utet, 1996) at 279, including systems which do not fit in the traditional categories. For an attempt to systematize comparative criminal law through a "common grammar" see G. Fletcher, Basic Concepts of Criminal Law (Oxford: Oxford University Press, 1998). We can also add S. Manacorda, "Ius commune criminalis ? Enjeux et perspectives de la comparaison penale dans la transition des systemes", in M. Delmas-Marty, H. Muir Watt and H. Ruiz-Fabri (Eds.), Variations autour d'un droit commun (Paris: Societe de Legislation Comparee, 2002), 323-355.

11 H.H. Jescheck, "Dogmatica penale e politica criminale nuove in prospettiva comparata", Indice Penale (1985) 507-533, at 510; S. Manacorda, "La theorie generale de l'infraction penale en France: lacunes ou specificites de la science penale.?" Revue belge de droit penal et criminologie (1998) 35-53.

retical German approach[12], even if they are probably less repression-oriented than what the general trend in and outside of Europe has been[13]. Eastern countries, which used to belong to the socialist family, have quickly embraced —after 1989— the western legal thinking[14]. At the same time, deep evolutions are taking place inside the classical families, as a result of harmonized rules for criminal law and procedure; the distance between them is thus, in the view of many scholars, much smaller than in the past.

Despite this heterogeneity, an abolitionist position with respect to the death penalty has slowly emerged almost everywhere. As will be quite apparent when we present in greater detail the positions taken on this topic by some prominent countries in Europe, the abolitionist attitude is frequently the result of political and social changes that had a strong impact on criminal law systems. Even where, as in France or Italy, old criminal codes have maintained their legal force for a very long time and resisted the fundamental changes of the system, the death penalty has been progressively abolished as a result of the emergence of common values of humanity and dignity.

The inter-and supra-national legal context has played a prominent role here and —at this level— the complexity of the European legal order shows up even more clearly: the death penalty has been firmly opposed by the Council of Europe, while the abolitionist po-

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12 A. Eser and K. Cornils (Eds.), Neuere Tendenzen der Kriminalpolitik. Beitrage zu einem deutsch-skandinavischen Strafrechtskolloquium (Freiburg i. Br.: Edition Iuscrim, 1987); N. Bishop (Ed.), Scandinavian Criminal Policy & Criminology (Stockholm: Scandinavian Research Council for Criminology, 1990).

13 T. Lappi-Seppala, "Sentencing and Punishment in Finland: The Decline of the Repressive Ideal", in M. Tonry and R. Frase (Eds.), Punishment and Penal Systems in Western Countries (New York: Oxford University Press, 2001) at 92.

14 A. Eser and J. Arnold (Eds.), Strafrecht in Reaktion auf Systemunrech. Vergleichende Einblicke in Transitionsprozesse (Polen, Ungarn) (Freiburg i. Br.: Edition Iuscrim, 2002); A. Eser and J. Arnold (Eds.), Strafrecht in Reaktion auf Systemunrecht. Vergleichende Einblicke in Transitionsprozesse (Rutland - Weiferufeland – Georgien-Estland -Litauen) (Freiburg i. Br.: Edition Iuscrim, 2003); A. Eser, G. Kaiser, and E. Weigend, Von totalitarem zu rechtsstaatlichem Strafrecht Kriminalpolitische Reformtendenzen im Strafrecht osteuropaischer Lander (Freiburg i. Br.: Edition Iuscrim, 1993).

sition of the EU has only emerged in recent years. The recent convergence between the two institutions, due to the growing importance of fundamental rights in "small Europe" and its geographical enlargement, will not necessarily simplify the European framework. As a matter of fact, any hierarchy within the two dominant institutions is missing and several sub-regional systems from the past still maintain their validity, giving rise to increasing complexity.

In the discussion on the interrelationship between the national and the regional levels in the European "legal space", additional layers of complexity should be taken into account. The osmotic exchange across different levels and among their internal components brings about continuous movement in the legal field. Thus, rather than simply presenting the European context as a well-structured set of norms, it is more convenient and realistic to describe it as a permanently moving process. Furthermore, the impact of this framework on domestic law relies only partly on the legislator: the enforcement of regional standards for the protection of human rights is often a task given to different fora, both international and national[15].

These complex dynamics are at the origin of the present movement for reducing or banning severe punishments in Europe. Such an achievement, despite a few remarkable exceptions, has not been an automatic, linear, plain process arising from the "natural" evolution of law: it is quite recent and it is the result of long and intense efforts.

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15 P. Gerard, M. Van de Kerchove and F. Ost (Eds.), Fonction de juger et pouvoir judiciaire: transformations et deplacements (Bruxelles: Facultes Universitaires Saint-Louis, 1983). On the relationship between law and judge see G. Timsit, Gouverner ou juger. Blasons de la legalite (Paris: Presses universitaires de France, 1995). For the importance of the judge in light of international criminal law, see A. Cassese and M. Delmas-Marty (Eds.), Crimes internationaux et juridictions internationales (Paris: Presses universitaires de France, 2002); A. Cassese and M. Delmas-Marty (Eds.), Juridictions nationales et crimes internationaux (Paris: Presses universitaires de France, 2002). On the increasing power of the penal judge in domestic legal systems see G. Fiandaca (Ed.), Sistema penale in transizione e ruolo del diritto giurisprudenziale (Padova: Cedam, 1997) passim, G. Fiandaca, Il dirittopenale tra legge egiudice: raccolta di scritti (Padova: Cedam, 2002).

In the attempt to graphically describe a very complex dynamic, one could say that torture has been formally abolished in Europe as the result of regional imperatives, contained in conventional texts, and guaranteed and implemented by judicial or quasi-judicial supervisory mechanisms[16]. Starting at the European level, the prohibition has progressively spread to domestic criminal law.

Life imprisonment has followed a different path, and no consensus exists at this stage in Europe[17]. Only partial and imperfect bilateral relationships exist among the different levels of legislation. It seems that abolitionist positions began to appear in the European "legal space" starting with a few constitutions and some national ordinary legislation, but these have been (until now) isolated efforts with no impact on either the regional and universal level or on other national systems.

In any case, it is in relation to the death penalty that such an inter-level dynamic can be more precisely identified. The first attempts to abolish capital punishment go back to ancient times (in the modern age one can go back to the Enlightenment and the famous criminal code of Leopold the Second in Tuscany in 1786)[18]. However, the present situation results from a complex process of restraints that has evolved over the last half century. This normative process is multilevel, engaging not only domestic and regional legislations, but also quite often universal international law on the one hand, and different components within each level on the other. Furthermore, because abolition is a consequence of mutual influ-

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16 M. D. Evans and R. Morgan, Preventing Torture: a Study of the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment (Oxford: Oxford University Press, 2001).

17 For an updated overview on the topic see D. van Zyl Smit, Taking Life Imprisonment Seriously in National and International Law (The Hague: Kluwer, 2002), "Life Imprisonment as an Ultimate Penalty in International Law: A Human Rights Perspective", 9 Criminal Law Forum (1998) 5-54.

18 For an historical overview in Italy see O. Vocca, Evoluzione del pensiero criminologico sulla pena di morte (Da Cesare Beccaria al Codice Zanardelli), (Napoli: Jovene, 1984); M. da Passano, "La pena di morte nel regno d'Italia (1859-1889)", Materialiper una storia della cultura giuridica (1992) at 341. Concerning the position of the Classical School see Contro la pena di morte. Scritti di Francesco Carrara a cura di E. Palombi (Milano: Kluwer-IPSOA, 2001).

ences across different levels, the second feature of this process is that it is multidirectional. Hence, the restraints on the death penalty in Europe are the result of a legislative process which has followed a circular movement: starting from the internal level, it rose up to the regional and the universal levels, and then came down into domestic law. The different steps of such a process —i.e. the points composing the perimeter of the circle— confirm this image.

The starting point of the process can be found in the democratic constitutions adopted by some European countries at the end of the World War II, namely Italy (in a legal enactment in 1944, applying to the 1930 Criminal Code and then in the 1948 Constitution) and the Federal Republic of Germany (1949). The first one affirms the abolition of the death penalty except in the case of war (Article 2 7, para. 4, Constitution), and the second one recognizes the right to life (Article 2, para. 2, Grundgesetz) and the abolition of capital punishment (Article 102). Abolition as a reaction, once democratic liberties were reintroduced, in the states where the most horrible executions had been perpetrated would be a constant feature of the abolitionist movement in the years to follow.

In 1950, the European Convention of Human Rights (ECHR) aimed at reintroducing freedom and fundamental rights in Europe, deeply affected by the Nazi-fascist barbarism. Following Article 3 of the Universal Declaration of Human Rights ("Everyone has the right to life, liberty and security of person"), the ECHR strongly proclaims the right to life in Article 2[19], protecting the individuals unless otherwise provided[20]. Exceptions to this right are admitted by Article 2; among them, the death penalty is expressly mentioned in para. 1: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"[21]. Controversial points concern the questions of the serious crimes for which capital

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19 On Article 2 ECHR see J. Velu and R. Ergec, La Convention europeenne des droits de l'homme (Bruxelles: Bruylant, 1990), 167-183; G. Guillaume, "Article 2", in L. Petitti, E. Decaux and P.H. Imbert (Eds.), La Convention europeenne des droits de l'homme (Paris: Economica, 1999), 143-154.

20 W.A. Schabas, The Abolition of the Death Penalty, supra note 2, at 7.

21 J. Velu and R. Ergec, La Convention europeenne, supra note 18, at 183-184.

punishment is admissible, the special protected persons (juveniles, pregnant women, etc.), the procedural guarantees, and the methods of execution.

It is true that the ECHR does not provide the detailed guarantees and limitations that appear in other international instruments, namely the UN International Covenant on Civil and Political Rights (ICCPR), which contains more stringent limitations. This Covenant was drafted in 1957, adopted only in 1966, and not brought into force for another 10 years[22]. Affirming that no one shall be arbitrarily deprived of his life, the Covenant limits the application of the death penalty to "the most serious crimes in accordance with the law in force at the time of the commission of the crime"; it submits it "to a final judgement rendered by a competent court"; it introduces "the right to seek pardon or commutation of the sentence", and the possibility of amnesty; and it prohibits the execution of pregnant women, and the sentencing to death of persons below 18 years of age (Article 6). Nevertheless the judicial mechanism provided by the ECHR is much more effective than that established in the Covenant.

Under pressure from the international community, the abolitionist movement quickly gained new ground all over Europe in the following decades (1960s and 19 70s). Nowadays Article 2 ECHR no longer adequately reflects the actual situation attained with regard to the death penalty, since an increasing number of states have either taken the radical decision to remove the death penalty (previously admitted by their law or constitution); they have decided to maintain it *de jure* introducing a moratorium; or they have decided to limit it to only the most serious offences.

Without undertaking a detailed comparative analysis, we mention here the main features of the recent evolution of abolition in national legal orders[23]. Until a few years ago, the UK, Greece, Belgium, and France constituted the main exceptions to the trend. For

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22 W.A. Schabas, The Abolition of the Death Penalty, supra note 2, at 265.

23 For a comparative overview see Council of Europe, Committee on Legal Affairs and Human Rights" Report, Rapporteur: Mrs Renate Wohlwend, Liechtenstein, May 20, 1999.

a long time, the UK refused to abolish the death penalty. In 1965 the penalty was excluded for murder, but various other laws still provided for the death penalty in case of military offences. In 1998 the Crime and Disorder Act abolished the death penalty for other offences. Greece abolished the death penalty in the Criminal Code only in 1993, but it was still allowed for a number of offences under the Greek Military Criminal Code. A law restricted its application in 199 7, and that same year an amendment to the Constitution was adopted stating that the "death penalty may not be imposed, except in cases which are prescribed by law for felonies which are committed in time of war and are connected with it". Belgium abolished the death penalty for all crimes in 1996. Ireland removed the death penalty from its Criminal Code in 1990, and passed a Referendum to amend the Constitution in 2001. The most important exception was France, the only European country over that period to execute three persons by guillotine; the French exception only disappeared in 1981[24]. The political changes that occurred in the 19 70s and 1980s also pushed Portugal and Spain to firmly declare the right to life, and the move towards the abolition of the death penalty is reflected in the constitutions adopted after the fall of their totalitarian regimes (Portugal, Article 24, para. 2, 1976 Constitution; Spain, Article 15, 1978 Constitution).

Even with this evolution, Europe did not automatically become a death-penalty-free region. On the one hand, no international rule stating a prohibition had appeared. On the other hand, the boundaries of Europe were also undergoing rapid change, encompassing a number of countries that still allowed capital punishment in their legislation.

Concerning the first problem, a new movement in the circular process took place in 1983, when the Sixth Protocol to the European Convention of Human Rights (Sixth Protocol) was adopted, abolishing the death penalty in peacetime[25]. This historical text —adopted

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24 R. Badinter, L'abolition (Paris: Fayard, 2000); M. Forst, "The Case of Abolition in France", in R. Hood et al. (Eds.), The Death Penalty - Abolition in Europe (Strasbourg: Council of Europe, 1999).

25 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, as amended

several years before the Second Optional Protocol to International Covenant on Civil and Political Rights (Second Protocol) and which dates back to 1989— represents the very first text stating the prohibition of death penalty andmakes Europe a forerunner in the abolitionist field[26]. The Sixth Protocol came into force in 1985; in January 2003 it was signed and ratified by all the members of the Council of Europe, with the exceptions of Armenia, Russia and Turkey, who only signed, but did not ratify, the text.

Many years later, the EU adopted an abolitionist position, and in 1997 a Declaration annexed to the European Treaty of Amsterdam clearly stated such a rejection from "small Europe". The Nice Summit of December 2000 adopted the Charter of the Fundamental Rights of the European Union, whose Article 2 lays down the right to life without exceptions and the banning of the death penalty. Even so, the legal force of such text is widely discussed and the text is probably not enforceable, at least until it is incorporated into the new constitutional treaties prepared by the Convention.

As mentioned above, the boundaries of Europe have permanently changed in the last decades, significantly enlarging the field of application of the abolitionist position. When the post-communist countries joined the Council of Europe after the fall of the Berlin wall, the need for national legislation to change accordingly emerged rapidly. The willingness of these countries to quickly incorporate democratic principles into their domestic legal systems pushed them towards either the abolition of, or the imposition of moratoriums on, the death penalty. Azerbaijan, Bulgaria, Estonia, Georgia, Lithuania, Poland, Bulgaria, Latvia, and Turkmenistan to

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by Protocol No. 11 Strasbourg, 28.IV.1983: see W.A. Schabas, The Abolition of the Death Penalty, supra note 2, at 279-299; E. Spatafora, "Sul Protocollo addizionale alla Convenzione europea per la salvaguardia dei diritti dell'uomo relativo all'abolizione della pena di morte" 68 Rivista di diritto internazionale (1985) at 879; J. Velu and R. Ergec, La Convention europeenne, supra note 18, at 185.

26 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty Adopted and proclaimed by General Assembly resolution 44/128 of December 15, 1989: see R. Hood et al., The Death Penalty — Abolition in Europe, supra note 23, namely H.C. Krfiger, "Protocol No 6 of the European Convention on Human Rights".

mention the leading countries abolished the death penalty for all crimes during the 1990s. Ukraine abolished it in 2000 following a decision by its Constitutional Court.

In conclusion, by starting from the national constitutions of Italy and Germany, passing through the ECHR, descending into some national legislation, climbing back up to the regional level with the Sixth Protocol and the EU instruments, and finally redefining the legislation of some western and eastern European countries, we witness the circular movement of abolition in Europe. More precisely, the coexistence in Europe of several institutional mechanisms aimed at banning the death penalty follow the outline of two intersecting circles: one, the larger of the two, represents the activity of the Council of Europe, while the second, smaller one represents the activity of the EU. Paradoxically, the larger circle has been more effective than the smaller one, but this can be explained by the different modes of intervention adopted by the Council of Europe and the EU.

This process is far from perfect and sometimes there are breaks in this circular movement. Because retentionist countries still exist in Europe, from time to time risks of retrogression emerge in relationships with third countries, due to extradition or other administrative mechanisms of expulsion.

III. RETENTIONIST COUNTRIES AND STATE OF WAR: "BREAKS" IN THE CIRCLE

We now turn to the main cases in Europe where the death penalty still exists or is at indirect risk of being maintained because of certain geographical lacunae and some thematic exceptions. What remains to be seen is whether such weaknesses in the abolitionist movement are real breaks in the abolitionist circle, or whether they imply instead its transformation and possibly its extension. The answer can only be found by carefully analyzing these exceptions.

In "big Europe", some countries still do not fully comply with their international obligations. The main examples are Russia and, until recently, Turkey. Russia first introduced a moratorium, but this

has not been considered a sufficient guarantee by regional organizations for the protection of human rights. The situation in Chechnya is particularly worrisome: here, in spite of Russian law, two executions took place in 2000 because of a fundamentalist interpretation of the Islamic Sharia Law.

Concerning Turkey —which is constantly grappling with the Kurdish question—international observers report systematic violations of human rights and a number of cases have been brought before the ECHR for violation of Articles 2 and 3 of the Convention, namely regarding forced disappearances[27]. An amendment to the Turkish Constitution was passed on October 3, 2001 and came into force on October 17, 2001. The amended version of Article 38 stipulates that "the death penalty cannot be imposed except in times of war, imminent threat of war and for terrorist crime". As a consequence, the Turkish Criminal Code still allowed the death penalty as a form of punishment for a number of serious crimes. However, the situation has recently evolved because of pressure from the EU, which includes abolition as a condition for the accession of candidate countries, including Turkey. A new statute abolishing the death penalty has been adopted by the Turkish Grand National Assembly, through its enactment of Law no. 4771 which came into effect on August 9, 2002. This law provides for the abolition of the death penalty in peacetime (that is to say except in time of war or of an imminent threat of war) by amending, inter alia, the Criminal Code, so making it possible for Turkey to sign the Sixth Protocol and to present itself as a candidate to the EU.

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[27] See for instance European Court of Human Rights, First Section, Cifkey v. Turkey (Application n. 25704/94), February 27, 2001, para. 147: "the Court is satisfied that Tahsin and All Ihsan Qigek must be presumed dead following an unacknowledged detention by the security forces". Consequently, the responsibility of the respondent state for their death is engaged at para. 150: "In the light of the foregoing the Court finds that the investigation carried out into the disappearance of the applicant's sons was inadequate and therefore in breach of the State's procedural obligations to protect the right to life. There has accordingly been a violation of Article 2 of the Convention on this account also".

As the Turkish example shows, more relevant limits to abolition arise from the general admissibility of capital punishment during wartime. Such exceptions emerged at the end of the World War II, both before domestic courts, where several collaborators were executed, and before international tribunals, with the death sentences imposed by the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo[28]. Since then, international law has evolved significantly: the Statutes of the ad hoc Tribunals established in the 1990s in The Hague and in Arusha ban the death penalty[29], and this example has been followed in the Rome Statute[30].

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28 On the rationale of the punishment before the International Military Tribunal of Nuremberg (IMT) see H. H. Jescheck, Die Verantwortlichkeit der Statsorgane nach Volkerstrafrecht. Eine Studie zu den Nurnberger Prozessen (Bonn: Ludwig Rohrscheid Verlag, 1952), at 190-197. More recently K. Ambos, "On the Rationale of Punishment at the Domestic and International Level", in M. Henzelin and R. Roth (Eds.), Le droit penal à l'épreuve de l'internationalisation (Georg ed., Bruxelles, Paris, Geneve: Bruylant, L.G.D.J., 2002) at 305.

29 Concerning the sentencing before the ad hoc Tribunals see W. A. Schabas, "Sentencing by International Tribunals: a Human Rights Approach", 461 Duke Journal of Comparative and International Law (1997) at 499; S. Beresdorf, "Unshackling the Paper Tiger: The Sentencing Practices of the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda" 1 International Criminal Law Review (2001) at 51; P. Poncela, "Mesure et motivation de la peine dans les jugements du TPIY", in M. Henzelin and R. Roth (Eds.), Le droit penal à l'épreuve de l'internationalisation (Georg ed., Bruxelles, Paris, Genève: Bruylant, L.G.D.J., 2002) at 325; A. Carcano, "Sentencing and the Gravity of the Offence in International Criminal law" 51 International and Comparative Law Quarterly (2002) at 591; S. Manacorda, "Les peines dans la pratique du Tribunal Penal International pour la ex-Yougoslavie. L'affaiblissement des principes et la quête de contrepoids", in S. Manacorda and E. Fronza, La justice penale internationale dans les decisions des Tribunaux ad hoc. Etudes des Law Clinics en droit penal international de Paris et Naples (Milano, Bruxelles: Giuffre, Bruylant, forthcoming 2003). See also A. Cassese, International Criminal Law (Oxford: Oxford University Press, 2003) at 157-158.

30 Concerning the sentencing in the Rome Statute see W. A. Schabas, "Art. 23. Nulla poena sine lege", in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court (Baden-Baden: Nomos Verlaggesellschaft, 1999) at 463; W. A. Schabas, "Art. 76. Sentencing", ibid., at 981; M. Jennings, "Art. 78 - Determination of the sentence", *ibid*., 999; P. Kovacs, Le prononce de la peine, in H. Ascensio, E. Decaux and A.Pellet Droit international penal (Paris: Pedone, 2000) at 841.

Nevertheless, for a long time we have been without an absolute prohibition of the death penalty in individual states; several instruments leave open the possibility of introducing such an extreme sanction in situations related to war.

Until recent changes, the universal rules were more stringent on this point than regional ones. The Second Protocol admits a reservation "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime" (Article 2, para. 1). Thus, the conditions for such exceptions are explicit: a state of war; a crime of particular severity (serious); and a crime of a particular nature (military). That provision must be read in conjunction with the Fourth Geneva Convention of 1949 and its Additional Protocols, both admitting under certain circumstances the applicability of capital punishment. The first specifies which offences against civilians may be punished in this way: "only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began" (Articles 68 of the Fourth Geneva Convention)[31]. Moreover, subjective limits are set if the offender was under 18 years of age at the time of the offence (Fourth Geneva Convention, Article 68; Protocol I, article 77, para. 5; Protocol II, Article 6, para. 4), or if the perpetrator is a pregnant woman, or mother of a young child (Protocol I, Article 76, para. 3)[32]. A certain number of rights are also laid down in connection with trials that may lead to the infliction of capital punishment (Fourth Geneva Convention, Articles 74 and 75).

At the European level, the Sixth Protocol provides as follows: "A State may make provision in its law for the death penalty in re-

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31 Fourth Geneva Convention of August 12, 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949.

32 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, Article 6, §4.

spect of acts committed in time of war or of imminent threat of war" (Article 2)[33]. Compared to the Second Protocol, the restraints on the death penalty are less: the first restriction is attenuated, admitting the death penalty even in case of threat of war; and the second simply disappears, no mention being made of the seriousness and the nature of the offence.

Only in March 2002 was a new Protocol to the ECHR, the Thirteenth, signed, expressly referring to the "abolition of the death penalty in all circumstances", and admitting no derogation and no reservations (Articles 2 and 3). It thus banned the death penalty at the regional level also in case of war[34]. The Protocol has only been ratified by nine States (Bulgaria, Croatia, Cyprus, Denmark, Ireland, Liechtenstein, Malta, Switzerland, and Ukraine) and will come in force with the next ratification, once more giving Europe the status of forerunner in the battle against the death penalty.

The "opportunity" to maintain a residual role for the death penalty in the case of war has been largely exploited by the signatory countries. Italian legislation, for instance, provides an illuminating example of the risks hidden in such an approach that departs from the ordinary rules of criminal law and, more generally, from the classical and well-established guarantees orienting criminal policy in modern democracies. Article 2 7of the Italian Constitution, after banning the death penalty and reaffirming rehabilitation as the aim of criminal sanctions, admits its application in the cases foreseen by the "military laws of war" (para. 4). That implies a reference to the Military Criminal Code of War (MCCW) of 1941 (still in force even if substantial changes have been made), to other ordinary laws, as well as to the bandi diguerra, i.e. acts adopted by the administrative authority in the special event of armed conflict. The death penalty was then widely foreseen, and it could also apply to persons not belonging to the armed forces, as in cases of special offences whose

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33 F. Palazzo, "Pena di morte e diritti umani (a proposito del Sesto protocollo addizionale alla Convenzione europea dei diritti dell'uomo)" 27 Rivista italiana di diritto e procedura penale (1984) at 759.

34 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, Vilnius, 3.V.2002.

perpetrators may be either soldiers or civilians (see the offence to give shelter or to help an enemy spy or agent provided for in Article 62 MCCW)[35]. Because the MCCW is also applicable to the Italian army acting abroad, even in peacetime (Article 6 MCCW), the government felt it necessary to suspend the applicability of such a code for all peacekeeping operations in which Italy took part[36].

The situation changed in 1994 when two laws abolished all provisions on capital punishment in the Code and ratified the Second Protocol[37]. Still today, Italy, maintaining the original provision of Article 27, para. 4 of the Constitution, theoretically admits the possibility that a law or a government's act having the force of law reintroduces such a sanction[38]. The definitive banning of this power —via a constitutional amendment— is urgent.

The dangers arising from this "thematic exception" to the abolition are even bigger if one considers that the international instruments mentioned above refer both to international and internal conflicts. They could therefore be interpreted as allowing states to have recourse to capital punishment in cases of danger for the nation, i.e. in states of emergency. A state, using its power to append reservations to the Protocols, could maintain or introduce capital punishment in these areas of criminal law which are not concerned with the notion of war, but relate to the offences against the state itself. Article 15 ECHR[39] permits such a worrying conclusion by including

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35 F. Schiaffo, "La necessita di un omicidio: l'ordinamento italiano verso l'abolizione totale della pena di morte", Critica del diritto (1999) at 225.

36 P. P. Rivello, "La missione italiana nell" area del Golfo Persico ed il ritorno di pesanti interrogativi in tema di codici penali militari" Legislazione penale (1991) 165.

37 T. Padovani, "L. 13 ottobre 1994, n. 589 - Abolizione della pena di morte nel codice penale militare di guerra (Commento a: Commento all'art. 1 l. 13 ottobre 1994, n. 589)" Legislazione penale (1995), part. 2, 369-3 73; A. Bertolino, "Effetti dell'abrogazione della pena di morte dal codice penale militare di guerra" Rassegna della giustizia militare (1998) 23-27; G. Mazzi, "L'abolizione della pena di morte nelle leggi militari di guerra", Rassegna della giustizia militare (1994) 97-104.

38 F. Schiaffo, "La necessita di un omicidio", supra note 36, at 225.

39 The right to life cannot be suspended but in exceptional circumstances; a derogation is admitted only resulting from lawful acts of war Article 15 ECHR. See R. Ergec, Les droits de l'homme a l'epreuve des circonstances exceptionnelles.

the right to life (when death results from lawful acts of war) among the rights which can be suspended in time of emergency.

After 9/11, the vague notion of terrorism has become a *passepartout* for illiberal criminal policy oriented strategies, and the danger exists today that the death penalty may find a new field of application[40]. The confusion, supported by the US administration, between criminal policy against offences and the war against terrorism could lead to an increasing resort to capital punishment at the international level[41]. Under such conditions Europe could be brought to cooperate with retentionist countries: the risk of a break in the circle is imminent and concrete.

IV. EXTRADITION AND THE DEATH PENALTY: DOES THE CIRCLE ENLARGE, OR BREAK?

The EU, aware of the above danger, has recently adopted new steps for avoiding executions in third states. On December 17, 2001 the European Parliament adopted a resolution on judicial cooperation with third countries in the framework of combating terrorism, calling for full respect for the ECHR and admitting extradition only if the death penalty is not to be applied. For the same reasons, Article X, para. 2 of the Guidelines on Human Rights and the Fight Against Terrorism, issued on July 15, 2002 by the Committee of Ministers of the Council of Europe, reads as follows: "Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out."

The question is not new: the risk of the death penalty in cases of extradition, and more broadly in all the cases where individuals, via

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Etude sur l'article 15 de la Convention europeenne des droits de l'homme (Bruylant: Bruxelles, 1987) at 264.

40 For the previous situation see M. Janis, R. Kay and A. Bradley, European Human Rights Law. Text and Materials (Oxford: Oxford University Press, 2000), 387-401. See now B. Duner and H. Gartsen, The Death Penalty and War, 6 n. 4 International Journal of Human Rights (2002) 1-28.

41 See also A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", 12 EJIL (2001) 993-1002.

either administrative or penal procedures, are delivered to countries which have not yet abolished capital punishment, has often arisen in the past[42].

This mechanism has two possible opposite results: either the enlargement of the circle, i.e. the extension of the death penalty ban to retentionist countries as an effect of a refusal to cooperate (positive retroactive effects), or new breaks in the circle, when —under certain conditions— a European state delivers individuals susceptible of being sentenced to death (negative retroactive effects). Since the 1950s, this situation has progressively been taken into account, and written rules or judicial decisions increasing measures to reduce such a risk have been adopted at the national and international levels.

Historically, different phases can be distinguished. The first efforts aimed at introducing some restrictions on the extradition mechanism at the European and international levels. In a second phase, national and international courts developed stricter remedies. The failure to integrate these remedies into binding texts, and the interaction between judiciary and politics which still exists in the field of extradition, highlight today, in a third phase, the risks of breaks in the virtuous European circle.

Referring to the first phase, different formulae have been adopted in international instruments. The hypothesis where the requesting country undertakes in terms to replace the death penalty with life imprisonment is quite rare. The most common tool is the "conditional admissibility" of extradition, which allows the requested state not to deliver a person to a requesting retentionist state unless the latter provides assurances that the death penalty will not

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42 S.A. Williams, "Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance", 3 Criminal Law Forum (1992) at 191; D.K. Piragoff and M.V.J. Kran, "The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts", 3 Criminal Law Forum (1992) at 225; C.R. Roecks, "Extradition, Human Rights and Death Penalty: Where Nations Must Refuse to Extradite a Person Charged With a Capital Crime", 25 California Western International Law Journal (1994) at 189; J. Dugard and C. Van den Wyngaert, "Reconciling Extradition with Human Rights", 92 American Journal of International Law (1998) at 187.

be inflicted or executed. Such a solution appears in Article 11 of the European Convention on Extradition, adopted in 1957, stating that:

> *If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested party considers sufficient that death penalty will be not carried out*[43].

Analogous formulae appear in some constitutional texts and have been embedded in a number of bilateral agreements.

For quite a long time, domestic courts have hesitated to combine international and constitutional rules in order to guarantee the right to life of the individual to be extradited. In 1977, a decision by the Italian Corte di Cassazione, referring to a French request taken on the basis of a treaty signed between the two countries in 1870, limited the constitutional prohibition of the death penalty to the Italian legal order, with no effect on international relationships, except when such a prohibition was clearly stated in an international agreement. Article 11 of the European Convention for Extradition was considered not applicable to cooperation between the two countries, since France had not yet signed it at the time. The Italian Court simply underlined the "advisability" that the French authorities commute the death sentence for extradited detainees, even if — the Court said — the evaluation of such an undertaking belongs exclusively to the Ministry of Justice[44].

This conservative position has been progressively overcome. Only two years later, the rule contained in the earlier bilateral treaty with France was considered void by the Italian Constitutional Court[45]. No discrimination between individuals punishable in Italy

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43 A. Marchesi, "Estradizione e pena di morte secondo l" art. 11 della Convenzione europea di estradizione", 74 Rivista di diritto internazionale (1991) 281-300.

44 See before Cassazione penale, sez. I 9 maggio 1977, 21 Rivista Italiana di Diritto e Procedura Penale (1978) at 1466, commented by T. Delogu, "Delitti punibili con la pena di morte ed estradizione passiva", 1466-1472.

45 See also Corte Costituzionale 21-27 giugno 1979, n. 54, declaring inconstitutional the Extradition Treaty between Italy and France, 23 Rivista Italiana di Diritto e Procedura Penale (1980) at 216, commented by G. Salvini, "Delitti punibili con la pena di morte ed estradizione dopo la pronunzia della Corte costituzionale", 216-228.

and abroad concerning fundamental values of the internal legal order was held as admissible; indeed, if Italy had contributed to the exercise of the death penalty in case of offences committed in peacetime, it would have been tantamount to violating the Constitution. As a result, on the basis of the aut dedere aut iudicare rule, Italian courts were obliged to try the individuals they refused to extradite, at least until the adoption of a new treaty making extradition conditional on assurances given by France.

Despite the courts "efforts, precise limits to extradition (and comparable measures) have not been perfectly established. Recently, the growing awareness of the risks associated with such a loose legal framework has pushed both international and domestic courts to strengthen the formal guarantees for persons who might be sentenced to death following extradition or expulsion. Two complementary approaches have been followed: on the one hand, the procedure leading to execution is regarded as inhumane and degrading treatment; on the other hand, the notion of "sufficient assurances" by the requesting state has been narrowed.

As to the first question, starting with the leading case brought before the European Court of Human Rights in Soering v. United Kingdom and Germany in 1989[46], several decisions have confirmed that, under certain circumstances, a sentence imposing the death penalty could amount to a violation of Article 3 ECHR, which pro-

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[46] European Court of Human Rights, Soering v. United Kingdom and Germany, July 7, 1989, Series A, vol. 161, 11 EHRR, 439. See F. Palazzo, "La pena di morte davanti alla Corte di Strasburgo", 33 Rivista Italiana di Diritto e Procedura Penale (1990) 367-378; W.J.G. Van der Meersch, "L'extradition et la Convention europeenne des droits de l'homme. L'affaire Soering", Revue trimestrielle des droits de l'homme (1990) at 5; F. Sudre, "Extradition et peine de mort. Arret Soering de la Cour europeenne des droits de l'homme du 7 juillet 1989" Revue generale de droit international public (1990) at 103; A. Scherlock, "Extradition, Death Row and the Convention" 16 European Law Review (1990) at 8; R.B. Lillich, "The Soering Case", 85 American Journal of International Law (1991) at 128; C. Van den Wyangaert, "Applying the European Convention of Human Rights to the Extradition: Opening Pandora's Box?", 39 International and Comparative Law Quarterly (1990) 575. Add also F. Sudre, "Article 3", in L. Petitti, E. Decaux and P.H. Imbert (Eds.), La Convention europeenne, supra note 18, 155-163; M. Janis, R. Kay and A. Bradley, European Human Rights Law, supra note 40, 134-13 7.

hibits inhumane and degrading treatment. In this interpretation the damages which can arise from "death row", constitute inhumane and degrading treatment[47]. This doctrine has also been followed by national courts, as in the well known Short case, when the Netherlands refused to extradite an American soldier to the US[48].

Concerning the notion of assurances, more stringent conditions on extradition arise from the judgment rendered by the Italian Constitutional Court in 1996 inVenezia[49]. Venezia, an Italian citizen resi-

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47 W.A. Schabas, The Death Penalty As Cruel Treatment and Torture (Boston: Northeastern University Press, 1996) at 97; W.A. Schabas, The Abolition of the Death Penalty, supra note 2, 141-151; W.R.G. Hood, The death penalty, supra note 2, 107-113; P. Hudson, "Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?" 11 EJIL (2000) 833-856. For a case concerning an extradition requested by China to Hungary see Judgment (struck out of the list), Yanhg Chun Jin alias Yang Xaolin v. Hungary (application No. 58073/00), ECHR, March 8, 2001 (Articles 3 and 6 ECHR, Article Protocol 6) 22 Human Rights Law Journal (2001) 277-283.
See also South African Constitution's prohibition on cruel, inhuman or degrading treatment (S v. Makwanyane (1995) (6) Butterworths Constitutional Law Reports 665) and to the judgment of the Canadian Supreme Court in United States v. Burns (2001) SCC 7, February 15, 2001 where that Court, in a case concerning the extradition of a fugitive to the US, considered capital punishment to amount to cruel and unusual punishment. On this last decision see S. Borrelli, "Estradizione e pena di morte: considerazioni in margine alla recente sentenza della Corte Suprema del Canada nel caso Burns", Rivista Internazionale dei Diritti dell'Uomo (2001) at 807.
The US rejected the "Soering doctrine", as they clearly stated when they ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, by declaring that: "The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of United States, including any constitutional period of confinement prior to the imposition of the death penalty".

48 Short, Hoge Raad, March 30, 1990, NJ 249, translated in 29 International Legal Materials (1990) at 1375.

49 Venezia, Corte Costituzionale, Sentenza 26 giugno 1996, n. 223, commented by G. Diotallevi, "Esclusa l'estradizione per i reati puniti con la pena di morte", Cassazione penale (1996) at 3258; M. Palmieri, "Trattati di estradizione e pena di morte", Foro Italiano (1997, I) at 2060; G. Di Chiara, "Su estradizione e pena di morte (osservazioni a C. Cost. 2 7 giugno 1996, n. 223)", Foro italiano (1996, I) at 2576; F. Schiaffo, "Una sentenza storica in materia di estradizione e pena di morte (Nota a C. Cost. 27 giugno 1996, n. 223)", 39 Rivista Italiana di Diritto

dent in the US, was responsible for killing a tax officer in Florida. He escaped to Italy, and his extradition was requested by Florida. The Constitutional Court ruled that Article 689, para. 2 of the Italian Code of Criminal Procedure (CCP) admitting conditional extradition, as well as the law ratifying Article IX of the Treaty on Extradition between Italy and United States, should be considered as being contrary to the Italian Constitution which prohibits capital punishment (except in wartime, as explained above)[50]. The Court did not consider satisfactory an official assurance by the foreign authorities that capital punishment would not be exercised: indeed, the absolute guarantee arising from Article 2 7, para. 4 of the Constitution is not ensured by the "sufficient assurances" that such a penalty will not be pronounced or, if already pronounced, will not be carried out. The executive cannot engage the judiciary and the degree of reliability and effectiveness of the guarantees depends on the country applying for extradition.

Some recent cases brought before the European Court of Human Rights seem to extend the legal solutions originally developed in relation to extradition to similar problems concerning expulsion. These are cases in which a European country has refused to grant political asylum to the defendant, even though the defendant risks being sent back to a country where his life is in danger[51]. Many of

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e Procedura Penale (1996) at 1126. Referring to a previous case of extradition between Italy and US see Cassazione penale, Sez. I, 19 maggio 1986, 30 Rivista Italiana di Diritto e Procedura Penale (1987) at 95, commented by T. Trevisson Lupacchini: "Note a margine di una pronuncia in tema di estradizione dall'Italia verso Stati nei quali e ancora in vigore la pena di morte".

50 In the past see V. Delicato, "Estradizione e pena capitale nel nuovo codice di procedura penale", Rivista di diritto internazionaleprivato eprocessuale (1990) 313-328.

51 See for instance Abdurahim Incedursun v. the Netherlands, European Commission of Human Rights, Application No. 33124/96 and European Court of Human Rights, Application No. 33124/96, Judgment (struck out of the list), June 22, 1999, concerning the expulsion from the Netherlands of a Turkish citizen. For a request for asylum rejected by the same country with the risk that the defendant would be expelled to Iran, see Aspichi Dehwari v. The Netherlands, Application No. 37014/97, Judgment (struck out of the list), April 27, 2000. Add Lei Ch'an Wa v. Portugal, European Commission of Human Rights, Application No. 00025410/94, Judgment (struck out of the list), November 27, 1995, and Launder

these cases have been dismissed following agreements between the defendants and their host countries.

A comprehensive rule referring to the different cases mentioned above appears in Article 19, para. 2 of the Charter of Fundamental Rights of the European Union. This rule states that: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Because of the uncertain legal value of such a text, one is unclear about the real obligations currently imposed on the European states.

The optimistic view of the abolition of the death penalty arising from more recent legal developments is counterbalanced by recent applications of the "*de facto* expulsions" from European countries, which seriously threaten the right to life. We do not refer here to the cases brought before the European Commission of Human Rights, where the right not be extradited has not been recognized. We instead refer to the well-known Ocalan case, recently decided by the European Court of Human Rights. It shows plainly the risks of rupture of the abolitionist movement.

In 1999 Abudallah Ocalan, leader of the PKK, left Russia and arrived voluntarily in Italy. His extradition was requested by Turkey but was refused by Italy because of the political nature of his crimes. In fact Ocalan was strongly encouraged by the authorities to leave the Italian territory and, after a long trip, he arrived at the Greek Embassy in Nairobi, Kenya, where he was finally captured by the Turkish police. He was brought to Ankara where he was found guilty by the State Security Court of carrying out acts designed to bring about the secession of part of Turkey's territory and of train-

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v. UK, European Commission of Human Rights, Application No. 27279/95, December 8, 1997. The last case refers to a case of extradition from the UK to Hong Kong of an individual charged with bribery and fearing about his life under the criminal system of the PRC. Here the Commission stated that "having regard to all the evidence in the case, the Commission finds that the applicant has not established the existence of a real risk, let alone a "near-certainty", that in the event of his extradition to the HKSAR he would be deprived of life in violation of Article 2 (Art. 2) of the Convention or subjected to torture or inhuman treatment or punishment contrary to Article 3 (Art. 3)".

ing and leading a gang of armed terrorists for that purpose. Ocalan received the death penalty for these crimes (June 29, 1999), and that decision was confirmed by an Appeals Court and the Supreme Court (November 25, 1999). However, under pressure from the international community, the Turkish parliament did not allow the death penalty to be carried out following a preliminary ruling in favour of Ocalan by the European Court of Human Rights, that allowed for provisional measures (December 15, 2000). The sentence was subsequently commuted to life imprisonment by the Ankara State Security Court, which ruled that the offences of which the applicant had been convicted had been committed in peacetime and constituted terrorist acts.

In the final decision of the European Court of Human Rights, on March 15, 2003, it was decided that "the threat of implementation of the death sentence has been effectively removed" (para. 184) and consequently "the applicant's complaints under Articles 2, 3 and 14 based on the implementation of the death penalty must be rejected"[52].

It was once again under Article 3 that the Court found a violation of the Convention. Once the principle that "Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1", had been affirmed, the courts admitted that "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" (para. 19 7). It concludes, though, that "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".

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[52] Ocalan v. Turkey, Application No. 46221/99, European Court of Human Rights, First Section, Judgment, March 12, 2003, para. 195. Before the judgment, see W. A. Schabas, The Abolition of the Death Penalty, supra note 2, at 2 77; H. Schade, "Two Years after the Ocalan Trial: Revisiting the Principles at Stake", 22 Human Rights Law Journal (2001) 32-35.

The reasoning of the Court thus follows a different path. The imposition of a capital sentence as a consequence of an unfair trial, to which Ocalan had been subjected, must be considered, in itself, to amount to a form of inhumane treatment, since the accused wrongfully feared that he would be executed, and thus experienced a significant degree of human anguish. With regard to the violation of Article 6, the Court concluded —by six votes to one— that the imposition of the death sentence on the applicant following an unfair trial amounted to inhumane treatment in violation of Article 3.

Although the conclusion raised by the Court can be appreciated as an effort to adapt international human rights law to the variety of inhumane treatments that apply to people condemned to capital punishment, so developing and improving the Soering doctrine, the judgment does not deal with the attitude of some European countries that refuse, for political reasons, to grant asylum[53].

In the future, new cases might arise in relation to third countries and such hypocrisy on the part of European states could in fact deprive the defendant of any protection before regional courts. Given these new risks of breaks in the European abolitionist circle, one must pay attention, in relation to third countries, to the new possibilities offered by international law.

V. NEW ABOLITIONIST PERSPECTIVES: THE "RIGHT OF INTERFERENCE" IN FOREIGN DEATH PENALTY CASES

To complete the above picture, we must refer to the intervention some countries have made, either through international courts or directly before domestic jurisdictions, on behalf of their own nationals involved in domestic trials in retentionist countries.

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53 We refer here to Greece and Italy: here, only after Ocalan had "voluntarily" left the territory, did a judge grant him the status of refugee: see The Court at Rome, Second civil Section, October 1, 1999, in procedure no. 49565 RG.ACC in the year 1998, available online at: http://digilander.iol.it/ CONTROAPPUNTO1/apo/tribunale%20di%20roma.htm (accessed April 7, 2010).

The ruling of the International Court of Justice (ICJ) in 2001 in Le Grand Brothers is to some extent encouraging[54]. It recognized that the US had violated Article 36, paras. 1 and 2 of the Vienna Convention on Consular Relations of April 24, 1963 by failing to inform the defendants that they had the right to have the German Consulate notified of their arrest. According to the Court, an apology by the US would not suffice in cases where the individuals concerned have been subjected to prolonged detention or sentenced to severe penalties; in the case of such sentences it is incumbent upon the US to allow a review and reconsideration of the conviction and sentence taking account of the violation of the rights set forth in the Convention. Unfortunately, the outcome of the ICJ decision was not effective in this particular case: Karl La Grand was executed on February 24, 1999, and despite the provisional measure taken by the ICJ on March 3, 1999, Walter La Grand was executed on that same day.

Nevertheless the impact of Le Grand Brothers on American capital sentences is widespread. Following this first case, an attempt to stop an execution on this ground was made in the Valdez case[55]. In 2002, the Oklahoma Court of Criminal Appeals refused to follow the argument, but admitted the appeal "granting anyway petitioner's subsequent application for post-conviction relief", on the ground that "the jury was not presented with very important evidence bearing upon Petitioner's mental status and psyche at the time of the crime" (para. 27).

More recently, on January 23, 2003, the Mexican government instituted proceedings before the ICJ against the US, for the identical violation of Articles 5 and 36 of the Vienna Convention with respect to 54 Mexican nationals sentenced to death in various states of the US, for failing to inform the accused of their right to be assisted by the consular Mexican authorities. In its Order indicating provisional measures, issued on February 5, 2003, the ICJ indicated that the US must "take all

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54 ICJ, Judgment, La Grand (Germany v. United States of America), June 27, 2001. See the provisional measures, 20 Human Rights Law Journal (1999) 455-458 and the decision, 22 Human Rights Law Journal (2001) 36-58.

55 Valdez v. State, Oklahoma Court of Criminal Appeals Case, 2002 OK CR 20, 46 P 3d 703, Case Number: PCD-2001-1011, January 5, 2002, available online at: http://oscn.net/applications/oscn/ deliverdocument.asp?citeID= 380451

measures necessary" to ensure that three persons already sentenced are not executed pending a final judgment of the Court[56].

Even if at a different level, the EU is a proactive supporter of the abolitionist campaign in third countries[57]. It systematically intervenes in US criminal proceedings, especially when the accused is a European national[58].

One must look at this new strategy in connection with the more recent developments of US case law. I refer in particular to the Supreme Court decision taken in Atkins v. Virginia, of June 20, 2002, recognizing that the execution of mentally retarded persons is cruel and unusual punishment prohibited by the Eighth Amendment[59], and to its decision in Timothy Stuart Ring v. Arizona, delivered four days later, stating that jury sentencing in capital cases is mandated by the Eighth Amendment[60]. More radically, a District Court in New York has granted "defendant's motion to strike all death penalty aspects from the case on the ground that the Federal Death Penalty Act is unconstitutional for violation of due process"[61].

VI. CONCLUDING REMARKS: EUROPEAN NORMATIVE COMPLEXITY AND "DEATH OF THE DEATH PENALTY"

The main factor that has enabled the abolitionist movement to grow in Europe is the convergence of different constitutional and regional systems protecting human rights.

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56 Avena and other Mexican nationals v. United States of America, ICJ. Order of February 5, 2003 - Provisional Measures.

57 See Guidelines to EU policy towards third countries on the Death penalty, adopted by the European Council on June 3, 1998; and the EU Memorandum on Death penalty, February 25, 2000. These documents are available online at: http://www.eurunion.org/legislat/deathpenalty/Guidelines.htm and at http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm

58 See recently EU Statement on death penalty in the US State of Texas: John (Jackie) Elliot, Permanent Council No. 432, January 23, 2003.

59 Atkins v. Virginia, 536 US No. 00-8453 (2002).

60 Timothy Stuart Ring v. Arizona, 536 US No. 01-488 (2002).

61 United States v. Quinones, United States District Court Southern District of New York; July 1, 2002 available online at http://www.nysd.uscourts.gov/rulings/quinones.pdf (accessed April 7, 2010).

The dynamics of the European legal context are shaped by its complexity. Its plurality of languages and traditions, and its incoherencies, can be seen as both the strengths and weaknesses of the European "legal space" (espace juridique). Complexity constitutes a weakness because there is no supranational law imposed by the top on this issue, and every step is hard to achieve given that the specificity of national legal orders must be taken into account. This is, at the same time, a strength, because "ordered pluralism" in a democratic context among states with equal rights promotes continuous comparison across the various systems and brings about dynamic law-making processes in which human rights implemented by the judiciary play a prominent role.

The risks hidden in such a complex normative context cannot be ignored. Due to the aggressive strategies of retentionist countries beyond their borders, and because of the increasing overlap, in both language and strategy, between the "fight against crime" and war tout court, the exceptions related to the state of war, that one could consider as throwbacks to the past, are regaining dramatic importance. More subtle are the dangers arising from the increasing recourse to criminal and administrative procedures for the purpose of surrendering individuals to retentionist countries. Here, the development of European case law is not fully satisfactory, considering the dominant role played by political evaluations in the field of extradition and, even more so, expulsion where diplomatic considerations carry more weight than the standards of human rights law.

The path is in any case well established, and the new approach of some countries in national capital cases, where their citizens are accused, opens new chances for the abolitionist movement. Only when the "virtuous circle" of the European countries will be able to embrace — through international law — other regions of the world, can there be reasonable hope that the fight against the death penalty will be victorious. These developments would condemn the death penalty to death, thereby transforming a European achievement into a universal aim.

THE ABOLITION PROCESS OF THE DEATH PENALTY IN TURKEY

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I. WHY SHOULD THE DEATH PENALTY BE ABOLISHED?

For many years, I had been writing[1] and lecturing on why the death penalty should be abolished[2]. As justice Brennan says, the death penalty does not "comport with human dignity", "because it treats members of the human race as nonhuman objects, to be toyed with and discarded"[3]. On the other hand, humanitarianism aims to cause the minimum suffering to the offender and to others[4]. It certainly is against human rights. So are other criminal sanctions. For example, depriving people of their liberty is also against human rights. So should we abolish prison sentence too? Although there is a recent tendency to condemn the offenders to fines, the prison sentence is still the main pillar of the criminal sanctions, because it aims to rehabilitate the offender. Thus, what I am more concerned about is the purpose of criminal sanctions in relation to the death penalty. I am a criminal law academic and I always stress the fact that the main reason for the existence of criminal punishments is to prevent the commission of crimes and thus reduce criminality. This comprises both special and general prevention, i.e. deterrence to stop the offender from reoffending by rehabilitation and deterrence for

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1 SOKULLU-AKINCI, Ceza Yaptırımı (Criminal Punishment), Istanbul, 1994 (Post doctorate "dozent" dissertation); ICEL/SOKULLU-AKINCI/ OZGENC/ SOZUER/ MAHMUTOGLU/UNVER, Yaptırım Teorisi (Sentencing Theory), Istanbul, 2002, p. 49-62.

2 SOKULLU-AKINCI, "Purpose of Punishment and Death Penalty", Annales de la Faculté de Droit, 1998.

3 SALZBURG/DIAMOND et al., Criminal Law, Virginia, 1994, p. 140.

4 BECCARIA, dei Delitti e delle Pene, Milano, 1973, pp. 53-55.

the society a a whole by setting an example[5]. In other words imposing punishment is legitimate only if it has two purposes: one to reduce criminality and the second, to force the population to obey the norms of the Criminal Law[6]. Today we know that many hazardous actions such as drunken driving, fast driving and smoking causes death, but this does not restrain people from fast or drunken driving nor from smoking[7]. SO WHY SHOULD THE DEATH PENALTY DETER PEOPLE FROM COMMITTING CRIMES?

Thus, the death penalty does not have the features (characteristics) of a modern penal sanction. Penal sanctions aim to rehabilitate and bring the criminal back into the society. The death penalty cannot do this as Beccaria put it years ago: "*la pena di morte non ha mai resi migliori gli uomini*"[8] which means that the death penalty has never been able to make man better. How can it, if it puts an end to human life?

Some authors say that only animals are still punished physically and therefore corporal punishment reduces people to animals. Human dignity requires *noli me tangere*[9]. I personally go beyond this and as a person who is in close contact with animals; I believe that even animals do not deserve to be punished physically.

Moreover because of the frailty of human judgment, innocent people may be convicted because of capital crimes. During the twentieth century, 350 persons have been wrongly convicted in the United States and 23 innocent people have actually been executed. Proof of innocence after the execution will come too late[10], because the death penalty is an irreversible punishment; it's errors cannot be corrected[11].

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5 SOKULLU-AKINCI, Kriminoloji (Criminology), 6th ed. Istanbul, 2009, p. 115.

6 PRINS, Criminal Behaviour An Introduction to Criminology and Penal System, London, 1982, p. 120.

7 Van den HAAG, Punishing Criminals, Concerning a Very Old and Painful Question, New York, 1975, p. 212.

8 BECCARIA, p. 57.

9 Van den HAAG, p. 201.

10 Van den HAAG, pp. 212-219.

11 TANER, Ceza Hukuku Umumi Hükümler (General Principles of Criminal Law), Vol. 1, Istanbul, 1953, p. 590.

As Bentham said, "The most perfectly irremissible of any is capital punishment …. though other punishments cannot, when they are over be remitted, they may be compensated for". Only the death sentence is irrevocable[12]. An infliction of this sort is an indication of hostility rather than punishment[13].

II. THE DEATH PENALTY IN THE PAST

Several centuries ago, the means of execution were incredibly brutal and varied: people were disembowled, burnt, beheaded (guillotined), hung, torn into pieces, their heads were immersed under water and they were killed under torture[14]. People publicly rejoiced and enjoyed this as a spectacle. In those days, suffering was routine; anesthetics were unknown and even patients suffered horrendously. However, today modern medicine has made pain unfamiliar and inhuman[15]. So, today, we no longer want to make anyone suffer, including the criminals we condemn, because the aim of penal sanctions is not "to punish" any more, but "to rehabilitate". For this very reason prisons are not penitentiaries but they are "correctional institutes". A person put to death cannot be rehabilitated[16].

In the past, executions used to take place publicly. For example the French erected a guillotine on a platform in the Place de la Concorde and invited the public to witness the execution[17]. The same was true for Turkey until 1965. Executions were made in public. When I was a child, the executions took place in front of the Blue Mosque in Sultan Ahmet Square. The hanging bodies were left there to set an example.

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12 BENTHHAM, The Principles of Morals and Legislation, NY, 1948, p. 200.

13 BENTHHAM, p. 197; ERMAN (S), "Vahşi ve İlkel İntikam" (A Ferocious, Savage and Primitive Revenge), Milliyet daily newspaper, April 12, 1995, p. 20.

14 SUTHERLAND, Principles of Criminology, Chicago, 1947, pp. 335, 347.

15 Van den HAAG, 202.

16 ARTUK, "Ölüm Cezası" (Death Penalty), Prof. Dr. Jale Akipek'e Armağan (A Tribute to Prof. Dr. Jale Akipek), Selçuk Üniversitesi, Hukuk Fakültesi, Konya, 1991, p. 174.

17 BERNS, p. 76.

III. TURKEY'S ROAD TO THE ABOLITION OF THE DEATH PENALTY WAS A LONG ONE

The death penalty existed not just in the Turkish Criminal Code, which is now abolished. It also existed in the Military Criminal Code (1930), Law on the Prohibition of Smuggling (1932), Forest Law (1956), and similarly, in the Code of Execution of Criminal Sentences. There were also articles concerning the death penalty in the 1924, 1961 Constitutions and they may also be found in the present Constitution (1982).

Later on with every amendment of the Turkish Criminal Code of 1926, death penalties that figured in various articles were converted to life imprisonment. Before the complete abolition of the death penalty, only 25 crimes were punishable by death and since 1984, no death penalties have been carried out in Turkey, but only because they have not been ratified by the Turkish Grand National Assembly (GNA, the legislative organ, The Turkish Parliament). In other words, the existence of the death penalty in laws meant that people were convicted to death by a court and, the Grand National Assembly had to ratify this conviction in order for the death sentence to be carried out. However, no convictions have been ratified by the Parliament since 1984. In other words, there has been a *de facto* tendency towards the abolition of the execution of death penalty in Turkey.

Another development in Turkish Criminal Law has been the gradual decrease in the number of articles containing the death penalty[18]. For example, in 1990[19], the death penalty was converted to a life sentence in 13 articles[20].

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18 ICEL/SOKULLU-AKINCI/OZGENC/ SOZUER/ MAHMUTOGLU/UNVER,, İçel Suç Teorisi (Icel Criminal Theory) , Istanbul 2002, p. 57.

19 Law no. 3679, Nov. 21, 1990.

20 For detailed information and tables see GEMALMAZ, Türkiye'de ölüm Cezası (The Death Penalty in Turkey), Vol. 1, pp. 117-119; Also see GEMALMAZ, "The Death Penalty in Turkey (1920-2001): Facts, Truths and Illusions", Criminal Law Forum 13: 91-122, 2002; CENTEL, Türk Ceza Hukukuna Giriş (Introduction to Turkish Criminal Law), pp. 519-524.

In 2001, within the context of harmonization with the European Union some amendments were made to different Turkish laws, including article 38 of the Turkish Constitution[21]. In fact, a paragraph was added to this article stating that no death penalty shall be imposed except in the case of "war, threat of war and terrorist crimes". It should be noted that, this paragraph of the constitution did not fully comply with Protocol no. 6 to the European Convention on Human Rights concerning the Abolition of Death Penalty, because it also mentioned terrorist crimes. In fact, the reason it took so long for Turkey to sign and ratify this protocol was the intensity of terrorist acts in Turkey, and the false belief that capital punishment had a deterrent effect on crimes of terror[22].

After this constitutional amendment, other amendments were made in the relevant legislations in 2002 and death penalties were replaced by aggravated life imprisonment.

Following these regulations in domestic law, in 2003, Turkey signed[23] and ratified[24] Protocol no. 6 to the European Convention on Human Rights concerning the Abolition of Death Penalty which was put into effect in 1985 and abolished the death penalty except in "war time or imminent war threat". On the other hand, the Council of Europe opened Protocol no. 13 concerning the Abolition of the Death Penalty in all circumstances for signature on May 3rd 2002 and it entered into force in 2003[25]. This had two effects on me: first I was very happy about the direction humanity had taken, but the second was a feeling of hopelessness: it had taken so long to sign and ratify Protocol no. 6, and right after this we had Protocol no. 13 to explain!!!!! But, Turkey signed the 13th Protocol Concerning the Abolition of Death Penalty in all circumstances, in Sept. 9, 2004.

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21 Law no. 4709, dated Oct.3, 2001(Published in the Official Gazette, no. 24556 of Oct. 17, 2001).

22 On the contrary, fear of punishment has no deterrent effect on crimes of terror and crimes of passion.

23 Jan, 15, 2003.

24 June 4. 2003.

25 Opened for signature on 3.5.2002 and entered into force on 1.7.2003.

In the meantime, another change was made in the Turkish Constitution[26]. Following this, other amendments were made in the laws[27] too and the death penalty was abolished from all laws (except one). Finally the new Turkish Criminal Code of 2005[28] put an end to all worries because it did not contain the death penalty at all. As to the Protocol no. 13, it was ratified on Feb. 20, 2006 and entered into force on March 1, 2006.

IV. CONCLUSION

The road to the abolition of the death penalty was indeed a long one for Turkey, but it was finally achieved. The fact that no executions took place after 1984 was a good sign. On the other hand, if we have a short overview of the executions, they seem mostly to have taken place during military administrations[29]. Can we reach the conclusion that public opinion and the Grand National Assembly were against death penalty? I am not sure about public opinion, because opinion polls show otherwise. In fact, between the signature and ratification of the 6th and 13th Protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, quite a long time had elapsed in Turkey. Some colleagues say that the existence of this penalty in the legislation for a long period of time, although it was not executed, was a deterrent measure in response to the serious acts of terrorism which are experienced in Turkey[30]. Nowadays, especially the fact that some people insist on the death penalty being reintroduced into in the Turkish system for terrorist offences makes me wonder if the general public is really against the death penalty.

I have one last criticism: making my final checks, I wanted to have a last look in the Turkish legislation and to my great surprise

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26 Law no. 5170, dated May 7, 2004.
27 Law no. 5218, dated July 14, 2004.
28 June 1, 2005.
29 GEMALMAZ, (Death Penalty…) pp. 517-524.
30 GEMALMAZ, Türkiye'de Ölüm Cezası, Vol. I, p.117-119.

I found that art.1 and art. 20 of the Turkish Military Criminal Code still mention the death penalty. Taking into consideration articles 38 and 90 of the Turkish Constitution and article 5 of the Turkish Criminal Code, these articles of the Turkish Military Criminal Code are in fact invalid and inapplicable. Thus to be able to be more clear for those who are less acquainted with Turkish laws, on the one hand, article 38 of the Turkish Constitution, which regulates principles relating to offences and penalties, says in paragraph 9 that, "Neither the death penalty nor general confiscation shall be imposed as punishment". Again, the Turkish Constitution, in article 90, under the heading: 'ratification of international treaties', states in paragraph (5) that, "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".

On the other hand, article 5 of the Turkish Criminal Code states that, "The general provisions of this Code are to be applied also to the criminal offences under the special criminal codes and those codes that contain criminal provisions". This provision obliges every other criminal regulation to be in harmony with the Turkish Criminal Code by obliging the general provisions to be applied to all of them. The general part of the Turkish Criminal Code defines the criminal punishments in article 45 in the following terms: "The punishments to be imposed as sanction against the offenses are imprisonment and judicial fines". So no other criminal sanction, including death penalty may be imposed for the crimes that have been committed.

Thus, articles 1 and 20 of the Turkish Military Criminal Code are in fact invalid and inapplicable, but their existence in the system is indeed embarrassing.

RUSSIA'S CONSTITUTIONAL COURT AND THE DEATH PENALTY[1]

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On November 19, 2009 the Constitutional Court of the Russian Federation issued a decision, according to which the death penalty cannot be applied even after the expiration of the moratorium on capital punishment on January 1, 2010, which had been proclaimed by a previous decision of the Constitutional Court (February 2, 1999)[2]. The recent decision of the Constitutional Court focuses on the extension of that moratorium, and states a refusal to impose capital punishment till its abolition de jure. The Court bases it decision on the necessity to comply with international obligations, as well as on the fact that, according to the Constitution of the Russian Federation, the death penalty is a measure of a temporary character.

By becoming a member of the Council of Europe, and signing Protocol No. 6 to the European Convention on Human Rights on April 16, 1997, the Russian Federation undertook to adopt measures that would lead to a complete abolition of the death penalty[3], this being a pre-condition of Council of Europe membership. A *de facto* moratorium had therefore already been established by Presidential Decree No. 724 of May 16, 1996, entitled "For the stepwise reduction

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1 Presentation at the Capital Punishment Abolition International Symposium in Madrid, Spain, 9 – 10 December 2009. Svetlana Paramonova Researcher Max Planck Institute for International Criminal Law.

2 Decision of the Constitutional Court of the Russian Federation "On the explanation of the clause 5 of the decision of the Constitutional Court of the Russian Federation" from February 2, 1999 N 3-П; Decision of November 19, 2009. N 1344-O-P: http://www.ksrf.ru/Docs/Pages/default.aspx (official Website of the Constitutional Court of the Russian Federation).

3 Federal Statute "On the Entry of the Russian Federation into the Council of Europe", February 23, 1996 N 19-ФЗ: http://base.garant.ru/12144749.htm (official text).

of the application of the death penalty in conjunction with Russia's entry into the Council of Europe"[4].

Subsequently, capital punishment was expressly suspended by a decision of the Constitutional Court of the Russian Federation from February 2, 1999[5], Since than, by reason of an inconsistent judicial practice resulting from the ambiguous legal status of the signed, but not ratified Protocol No. 6, the death penalty has repeatedly been the subject of Constitutional Court decisions[6] Each of them prevented the application of capital punishment, upholding the 1999 decision.

However, according to the 1999 ruling, the moratorium would have elapsed by January 1, 2010, with the implementation of jury trial in all regions of the country, the last region being the Chechen Republic. Article 20 of the Russian Constitution[7] guarantees jury trial for all cases carrying a possible death sentence. In 1999, the Constitutional Court, considering article 20 in conjunction with article 19 (the principle of equality in rights and freedoms), decided that jury trial would be required in every region of the country in order to provide to all citizens, and across the entire territory of the Russian Federation, the equal right to have their case examined with the participation of jurors. The Court held that the application of the exceptional measure only in single regions of the country would have infringed the essence of the right guaranteed by article 20 and

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4 Presidential Decree of May 16, 1996 № 724 "For the Stepwise Reduction of the Application of the Death Penalty in Conjunction with Russia's Entry into the Council of Europe": http://www.law.edu.ru/article/article.asp?articleID=1159994 (the Federal Law Portal).

5 Decision of the Constitutional Court of the Russian Federation, February 2, 1999. N 3-П: http://www.ksrf.ru/Docs/Pages/default.aspx (official Website of the Constitutional Court of the Russian Federation).

6 See decisions of the Constitutional Court of the Russian Federation from October 17, 2006 N 434-O; May 15, 2007 N 380-O-O; October 16, 2007 N 682-O-O; December 18, 2007 N 935-O-O; January 24, 2008, N 54-O-O: official Website of the Constitutional Court of the Russian Federation http://www.ksrf.ru/Docs/Pages/default.aspx (official Website of the Constitutional Court of the Russian Federation).

7 The Constitution of the Russian Federation, December 12, 1993: http://www.constitution.garant.ru (official text).

furthermore, that it would have been an essential disturbance of the principle of equality provided for by article 19 of the Constitution. Therefore, the imposition of the death penalty was declared unconstitutional until implementation of jury trials in all regions of Russia.

On January 1, 2010, *jury trial was finally also implemented in the Chechen Republic*. According to the Constitutional Court's 1999 decision, formal obstacles to the application of capital punishment would no longer have existed after that date. However, the recent decision of November 19, 2009, signifies the *turning point towards the irreversible de jure abolition of the death penalty in Russia*. This corresponds to a continuous worldwide tendency to limit the use of capital punishment, as well as to a course towards its abolition, chosen by the Russian Federation when assuming certain international obligations, in particular the signing of Protocol No. 6 to the European Convention on Human Rights on April 16, 1997. The expressed intention of the Russian Federation to establish the moratorium on carrying out death sentences, and to take other measures towards the abolition of capital punishment, was one of the essential reasons for granting Russia membership of the Council of Europe. Moreover, the Constitutional Court's approach is in line with constitutional provisions. In article 20 part 2 of the Constitution, the death penalty is regarded as a measure of a temporary character: "*until its complete elimination*, capital punishment may be provided for by a federal law as an exceptional penalty for especially grave crimes against life, and the accused shall be granted the right to have his case examined by jury trial".

Russia has been a *de facto* abolitionist state since September 2, 1996, the last date on which a criminal was legally executed[8].

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8 The Constitutional Court prohibited the Application of death penalty in Russia: http://www.lenta.ru/news/2009/11/19/death/

I. BRIEF HISTORY OF THE DECISION

On October 29, 2009, the Supreme Court of the Russian Federation referred a petition to the Constitutional Court to explain whether the death sentence could be carried out after January 1, 2010. Ambiguousness on this question might have enabled Russian courts to legally impose capital punishment after January 1, 2010, in accordance with the national substantial and procedural legislative norms that remain in force.

However, uncertainty regarding the unhindered application of the national rules grew due to the fact that the Russian Federation had -in compliance with the appropriate formal requirements– acceded to international instruments directed at the abolition of capital punishment in peacetime. Having signed Protocol No. 6 to the European Convention on Human Rights, the Russian Federation is now under an obligation, as is required by article 18 of the Vienna Convention on the Law of Treaties, "to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty… until it shall have made its intention clear not to become a party to the treaty"[9] The Russian Federation has not ratified Protocol No. 6, but it has also not expressed an intention not to become a party thereto.

In view of the urgency and the extraordinary significance of the question, the petition was examined by the Constitutional Court within an extraordinary session. As a result, a decision was reached on November 19, 2009.

II. THE *DE JURE* CONTROVERSY

The controversy over *de jure* arose from the current legal provisions governing capital punishment. *Article 20 of the Russian Consti-*

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9 Vienna Convention on the Law Treaties, May 23, 1969. Ratified by the Russian Federation on April 29, 1986: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en.

tution, considering capital punishment as a temporary measure, still allows it "until its complete elimination". In accordance with the constitutional provisions, the *Criminal Code*[10], *the Criminal Procedure Code*[11] *and the Correctional Code of the Russian Federation*[12] provide the necessary substantial and procedural rules for imposing the death penalty. According to the Criminal Code, the death penalty is regarded as one of the available types of criminal punishments (article 59 CC RF). The Criminal Code permits capital punishment for five "especially grave crimes"[13] against human life: article 105 part 2 (murder under aggravating circumstances), article 277 (attempted murder of a government or public official), article 295 (attempted murder of a person carrying out justice or a preliminary investigation), article 317 (attempted murder of a law enforcement officer), and article 357 (genocide). Chapter 23 of the Correctional Code provides for the procedure to be observed when administering capital punishment. However, according to existing Russian legislation, no crime carries a mandatory death sentence. According to article 59 of the Criminal Code, capital punishment may, through the granting of a pardon, be commuted to a deprivation of liberty for life or for a term of 25 years. Moreover, women are not eligible for a death sentence, nor are men who committed criminal offences at an age younger than 18 and men above the age of 65 when the sentence is to be carried out.

With respect to the international treaties, the Russian Federation follows a *dualistic concept* of international law. Thus, international norms have to be transferred into domestic law in order to be legally enforceable. According to article 4 part 2 of the Constitution, "the Constitution of the Russian Federation and federal laws shall

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10 The Criminal Code of the Russian Federation, June 17, 1996, N 63-ФЗ: http://base.garant.ru/10108000.htm (official text).

11 The Criminal Procedure Code of the Russian Federation, December 18, 2001, N 174-ФЗ: http://base.garant.ru/12125178.htm (official text).

12 The Correctional Code of the Russian Federation: January 1, 1997, N 1-ФЗ: http://www.garant.ru/doc/main/uikrf/ (official text).

13 Article 15 of the Criminal Code of the Russian Federation: intentional acts, the commission of which carries a punishment that is provided for in the present Code in the form of deprivation of freedom for a term exceeding ten years or more severe punishment, shall be deemed to be *especially grave crimes.*

have supremacy in the whole territory of the Russian Federation". In principle, the norms of international treaties prevail over the national rules (article 15 part 4 Constitution). However, only those international norms are taken into account, which have been declared constitutional and have been enacted by the legislature in the Russian legal order[14] With regard to Protocol No. 6 to the European Convention on Human Rights, it means that this document has first to be ratified, and secondly, that national legal provisions regarding the death penalty need to be adapted accordingly. Only after a successful implementation of the Protocol's provisions into national legislation will it become conclusively binding for the Russian courts. Until now, Russia has merely been a signatory to the Protocol since April 16, 1997.

III. THE *DE FACTO* SOLUTION

The *de jure* controversy, which could have led to uncertainty surrounding the admissibility of the death penalty, was resolved by the decision of the Constitutional Court. *Decisions of the Constitutional Court have de facto the same legal effect as legal provisions*. Article 6 of the Federal Statute "On the Constitutional Court"[15] states that decisions of the Constitutional Court of the Russian Federation are binding on all legislative, executive and judicial authorities, on self-governing bodies, enterprises, establishments, organizations, officials, citizens and their associations in the territory of the Russian Federation. According to article 79 of the same Statute, any decision of the Constitutional Court of the Russian Federation is final, is not subject to appeal and comes into force immediately after its proclamation. It does not require confirmation by other state organs or officials.

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14 See for the procedure: Federal Statute "On International Treaties", July 15, 1995 N 101-ФЗ: http://base.garant.ru/10103790.htm (official text).

15 Federal Statute "On Constitutional Court of the Russian Federation", July 21, 1994 N 1-ФКЗ: http://www.ksrf.ru/Docs/Pages/default.aspx (official Website of the Constitutional Court of the Russian Federation).

The Constitutional Court's decision from November 19, 2009 was issued in the form of an "official interpretation" of its previous decision from February 2, 1999. According to articles 71 and 83 of the Federal Statute "On the Constitutional Court", such a decision has the same binding character as any other decision of the Constitutional Court (aside from decisions regulating the Court's internal organisation).

As a result of the Constitutional Court's ruling, application of capital punishment has been proclaimed unconstitutional across the entire Russian Federation. Unlike the previous one (February 2, 1999), the recent decision from November 19, 2009 does not provide for a possible reintroduction of the death penalty. It simply states the *de facto* cancellation of capital punishment until its *de jure* abolition.

IV. THE CONSTITUTIONAL COURT'S REASONING

The leitmotiv of the ruling was the necessity *to comply with universally recognized principles and standards of international law, and with international obligations* of the Russian Federation with respect to the abolition of capital punishment.

Given that the provisions of Protocol No. 6 have not yet been transferred into the domestic legal system, they could not serve as a legal basis for the definite abolition of capital punishment. Therefore, the Constitutional Court considered that its task was to prohibit, through its ruling, any further application of such a sentence until its *de jure* abolition, by interpreting relevant provisions of the Constitution and relevant judicial practice.

The Court interpreted its previous decision of 1999, where it had essentially subordinated the application of the death penalty to the guarantee of an equal right of all citizens to have their case examined by jury trial in the whole territory of the Russian Federation. It emphasized that both international norms and domestic constitutional provisions (in particular articles 19 and 20 of the Constitution) served as a basis for its 1999 ruling. For this reason, when giving an official interpretation of the previous decision and issuing

a new ruling, the Court *could not ignore, and hence should take into consideration the respective international norms and obligations*. The Court highlighted the Russian Federation's membership to the Council of Europe, and the measures directed at the abolition of capital punishment that had been adopted in this respect. The Court could not ignore that the Russian Federation's undertaking to sign Protocol No. 6 within one year, and to ratify it within three years of its accession to the Council of Europe, had been a condition for inviting it to become a member thereto.

In general, decisions of the Constitutional Court are of a normative nature, since they apply to an undetermined number of individuals, and normally for an undetermined range of time. This taken into account, the Court stated that its 1999 decision on the death penalty had relied on the entire framework of applicable legal provisions. Those included international human rights treaties directed towards the abolition of capital punishment, as well as international agreements concluded by the Russian Federation[16] The Constitutional Court cites UN General Assembly Resolutions 62/149 (2007) and 63/168 (2008), entitled "Moratorium on the Use of the Death Penalty"[17]. It affirms that, according to article 15 part 4 of the Constitution, "the universally recognized principles and the standards of international law and the international agreements of the Russian Federation form an integral part of its legal system". Moreover, the Court points to the significance of an *abolitionist dynamic* which seems to prevail in the world community, and which the Russian Federation, recognizing itself (as the preamble of the Constitution states) as a part of this community, was meant to follow.

Besides its reference to international obligations, the Court stresses article 20 of the Constitution, according to which the death

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16 See Universal Declaration of Human Rights, approved by the General Assembly of the United Nations, December 10, 1948; International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), December 16, 1966: http://www.un.org/en/documents.

17 UN General Assembly Resolution 62/149, December 18, 2007; UN General Assembly Resolution 63/168, December 18, 2008: http://www.un.org/ga/62/resolutions.shtml.

penalty constitutes only a transitional measure "*until its complete elimination"*. For the Court, the application of domestic criminal law provisions governing capital punishment no longer appears possible, as these provisions are incompatible with the principle of the right to life that has been developed on the basis of article 20 in conjunction with article 15 part 4 and article 17 of the Constitution. Moreover, previous decisions of the Constitutional Court regarding the death penalty do also form part of the framework of applicable legal provisions. The Court emphasizes that, with respect to the prohibition of the execution of death sentences, the Russian Federation is bound by constitutional provisions, as well as by international agreements, and by domestic legal regulations, passed by Parliament, the President, or the Constitutional Court.

V. CONCLUSION

Based on the Constitution and specific national and international provisions, the death penalty has not been applied in the Russian Federation for the last 13 years. As a result of the long-term moratorium on capital punishment, firm guarantees of non-application of the death penalty have been developed, establishing a *"legitimate constitutional regime"*[18], and leading to an irreversible process towards a definitive abolition of the death penalty.

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[18] See the Decision of the Constitutional Court of November 19, 2009.

THE SITUATION IN THE AMERICAN CONTEXT

THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE DEATH PENALTY[1]

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I. THE ISSUE OF DEATH IN THE AMERICAN CONTEXT

The Inter-American Court of Human Rights was installed thirty years ago, when the American Convention on Human Rights —subscribed forty years ago— which determines the legal basis for its establishment and defines its sphere of competence, took effect. It represents an important stage in the American process —always ongoing and at risk— of developing a homegrown system for protection of human rights. The seminal idea emerged in 1945, under the auspices of the Conference on Problems of War and Peace, which conducted its deliberations at an emblematic location for our continent: Chapultepec Castle, at the heart —in more ways than one— of Mexico.

The "American journey" toward recognition and effective exercise of human rights has been long and turbulent. It will continue to be so in the years to come. It represents a strong reaction to a deep-rooted authoritarian tradition: predating the European pres-

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1 Communication to the "International Seminar on the Abolition of Capital Punishment". Center for Political and Constitutional Studies / Institute of European and International Penal Law, Madrid, December 9-10, 2009. An initial approach to this topic, five years ago, appears in my Article cited in n. 59, *infra*.

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ence, active through conquest and colony, diligent in the nineteenth and twentieth centuries, and persistent in the twenty-first century. Its motives have been varied; its manifestations numerous. Activists in favor of human dignity included the defenders of indigenous peoples, the true insurgents, liberal democrats who brought the political decisions of the West to the American legal system, social movements at the dawn of the twentieth century, and the militants of the twenty-first century.

In this context —which frames its historical and contemporary circumstances— Inter-American jurisdiction on human rights has struggled against death inflicted by the agents of the incumbent powers or their emissaries. The reality of inferred death —formal and informal— does not abandon us, although it appears —let us be optimistic— to be in decline. On the one hand, extrajudicial executions: "Law of Fugitives", summary execution, extrajudicial execution, massacres[3]; on the other, capital punishment: punitive death. All of them manifestations of the "violent efficiency of the penal system," to quote Raul Zaffaroni[4]. In America —and especially in the subcontinent south of the Rio Grande, which is much more than a political border— it covers an increasingly limited geography; however, it persists despite good intentions and abolitionist provisions.

When we speak of the Western Hemisphere in the context of the inter-American system, we commonly refer to various portions,

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3 The *Informe de la Comisión para el Esclarecimiento Histórico*, of Guatemala, which analyzes the most violent phase of that country's historical conflict (1978-1983), refers to 626 massacres. Cit. IAHR Court, *Masacre Plan de Sánchez*, ruling of April 29, 2004. Several cases before the Inter-American Court have been identified with reference to this form of collective or mass execution (which has also appeared in other lawsuits identified differently). Thus: *Masacre Plan de Sánchez vs. Guatemala* (2004), *Masacre de Mapiripan vs. Colombia* (2005), *Masacre de Pueblo Bello vs. Colombia* (2006), *Masacres de Ituango vs. Colombia* (2006), and *Masacre de la Rochela vs. Colombia* (2007). As regards the elimination of members of indigenous communities, as a category in the set of violations against such groups, cf. the observations in my concurring opinion for the ruling of the Inter-American Court in *Yatama vs. Nicaragua*, of June 23, 2005.

4 *Muertes anunciadas*, San José, C. R., Ed. Temis / Inter-American Institute for Human Rights, 1993, pp. 11-13.

which we encompass under an eloquent expression: "the" Americas. To the north —mainly the United States, which did not sign the American Convention on Human Rights— debate centers on abolitionism and retentionism. To the south —which includes Mexico— abolitionist laws prevail. In the Caribbean contradictory currents persist; however, we are seeing a trend in favor of the abolitionist stance. The Inter-American Court —and the Inter-American Commission on Human Rights, an important cog in the system— operate under these circumstances.

I shall now briefly discuss the most relevant and recurrent issues in the abolitionist project —evident in the norms and the decisions resulting from them— in the inter-American *corpus juris*, oriented in the only direction that serves the cause of reason.

II. THE REGULATORY FRAMEWORK OF THE ABOLITIONIST PROJECT: THE CONVENTION AND THE PROTOCOL

I shall not elaborate on the intentions expressed in the texts leading to the Declaration of 1948 and the Convention of 1969. These and their consequences in the *corpus juris* highlight the defense of human life, and accordingly shun, reduce, or proscribe the death penalty. Here events have followed the same path as elsewhere — whether at the universal level or in Europe: death does not die swiftly, with a single blow; it needs to be hounded, and it has been necessary to confine it with perseverance.

It would be advisable to refer to the preparatory work of the Pact of San José to weigh up the tendencies at play and the solutions adopted. These were —as often is the case— formulas for compromise in anticipation of better times, which are invariably slow in coming. At the 1969 San José Conference, there was a strong majority view among the participating nations in favour of abolition, although this preference was not enough to see it established in the pact itself. Fourteen of the nineteen States attending the conference left explicit evidence of that conviction, on the one hand, and the resulting plan to formalize it in a binding text, on the other.

Argentina, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela defined their common position: "reflecting the broad majority sentiment expressed in the course of the debates on prohibition of the death penalty, in accordance with the purest humanistic traditions of our peoples, we solemnly state our unwavering aspiration to see the application of the death penalty eradicated forthwith in the Americas and our unyielding intention to make every effort possible to see that, in the short term, an additional Protocol to the American Convention on Human Rights —Pact of San José— may be signed that enshrines the definitive abolition of the death penalty and returns America to a position of leadership in the defense of the fundamental rights of man"[5]. The "firm ethos" —also present in some individual affirmations— was reflected in the Report of the Rapporteur of Commission I[6].

The term was not that short, nor would the concurrence of the States be unanimous once the Protocol was open for signing. This happened, in effect, on June 8, 1990, in a process similar to that of the European Convention and the United Nations International Covenant on Civil and Political Rights, to which were added the respective abolitionist protocols: of the former, Protocol 6 of 1983 and Protocol 13 of 2002; of the Pact, the second elective Protocol of 1989.

The Protocol was based on a series of precepts that are illustrated in its whereas clauses: the right to respect for life, the aforementioned abolitionist ethos, the obvious connection between that respect and this ethos, the irreparable condition of the death penalty, and the need for "an international accord that represents a progressive development of the American Convention" in the field.

However, the Protocol's plausible intention has proven insufficient to accumulate ratifications and overcome reservations. To date,

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5 Conferencia Especializada sobre Derechos Humanos, San José, Costa Rica, 7-22 November, 1969, *Actas y Documentos,* OEA/Ser. K/XVI/1.2, Washington, D. C., 1973, p.467.

6 *Actas y Documentos*, op. cit., p. 296.

only eleven countries have ratified it[7], in contrast to the 24 parties to the American Convention —an insufficient number, however, if we recall that the members of the Organization of American States are 35— and the 32 signatories of the Belém do Pará Convention on the Prevention, Punishment, and Eradication of Violence against Women.

How are we to interpret the fact that this Protocol is the instrument with the least coverage of all those constituting the inter-American *corpus juris* on human rights? Is the idea to keep an ace up their sleeves? Does this caution —for lack of a better word— coincide with the periodic suggestions to reinstate capital punishment in countries that have suppressed it even though they could not recover it without violating higher-ranking national decisions and their external commitments?

On the other hand, as in other instruments, the suppression of capital punishment is not absolute: so-called extremely serious military offenses committed in wartime are left pending. The State that ratifies or adheres to the Protocol may make reservations for such possibilities, as has occurred in some cases[8]. Total, unconditional abolition of the death penalty, along the lines of Protocol 13 of the European Convention of 2002, remains for the future.

III. INTER-AMERICAN JURISPRUDENCE

Added to the push to reduce the death penalty that I have mentioned is the judicial interpretation rooted, explicitly and consistently, in the principle *pro homine* or *pro persona*, which expands the space for protection of individual rights and liberties and has been invoked again in the Inter-American Court's most recent ruling on

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7 As of November 27, 2009, the corresponding instrument of ratification had been deposited by: Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

8 Thus, Brazil and Chile have expressed reservations to leave open the possibility of applying the death penalty in wartime for extremely serious crimes of a military nature.

the death penalty, handed down in *Dacosta Cadogan vs. Barbados* on September 24, 2009[9].

This abolitionist inclination is further spurred by the necessary re-reading of conventional texts with the idea —upheld by the European Court based on an assertion by Amnesty International, in *Soering vs. The United Kingdom*— that treaties are "a living instrument which (…) must be interpreted in the light of present-day conditions"[10]. This shows how the Court's authority to interpret international law works, as the Court itself has ruled —in dealing with an issue different from that being addressed here— in its *Advisory Opinion OC-20/09* of September 29, 2009, which excludes —altering a criterion that remained unchanged for a quarter-century— *ad-hoc* judges and national judges of the respondent State from participating in proceedings instituted through complaint or accusation by private citizens.

The jurisprudential actions of the Inter-American Court support this abolitionist approach in an important —and influential— series of advisory opinions, rulings and provisional measures. The jurisprudence applicable, through different channels and to different extremes, to my chosen topic is abundant and varied (in addition, obviously, to the numerous pronouncements relating to the killing of persons: extrajudicial execution).

The backbone of the jurisprudence established by Inter-American jurisdiction —explicitly associated with substantive or procedural issues relating to the death penalty— is contained in: a) two advisory opinions: *OC-3/83*, *Restrictions on the death penalty,* of September 8, 1983, and *OC-16/99*, *The right to information on consular assistance in the context of guarantees of due process,* of October 1, 1999; b) several rulings in actions against States in the area: mainly those referring to the cases *Hilaire, Constantine and Benjamin et al. vs. Trinidad and Tobago*, of June 21, 2002[11]; *Raxcacó Reyes vs. Guatemala*, of September 15,

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9 *Dacosta Cadogan vs. Barbados*, verdict of September 24, 2009, para. 49.

10 *Soering vs. The United Kingdom, Judgment (Merits and Just Satisfaction)*, April 23, 1989, para. 102.

11 Originally there were three different cases: *Hilaire, Constantine et al.*, and *Benjamin et al.*, merged by a ruling of November 30, 2001, and resolved in a single judgment of June 21, 2002.

2005; *Fermín Ramírez vs. Guatemala,* of June 20, 2007; *Boyce et al. vs. Barbados,* of November 20, 2007; and *Dacosta Cadogan vs. Barbados*, of September 24, 2009. To these we can add: c) provisional measures intended to ensure procedural propriety and protect rights in relation to persons facing sentencing or execution: the rulings in *James et al. (Trinidad and Tobago)*, of May 27, 1998; *Boyce and Joseph* (Barbados), of June 14, 2005; and *Fermín Ramírez* (Guatemala), of March 12, 2005.

Together, this series of decisions defines the criteria the Inter-American jurisdiction has upheld over slightly more than a quarter century, in the context of this core issue for the defense of human rights: a core issue in the sense expressed by Antonio Beristain in his study of capital punishment in the context of penal law: it influences all other issues in the system; it is a the drop that poisons the well[12].

In this regard, it is pertinent to mention a broad postulate of the Inter-American Commission on Human Rights —in use of its natural faculties as an organ of the OAS and the American Convention— seeking to obtain certain rulings by the Court on the issue. I refer specifically to the request for an advisory opinion of April 20, 2004, in relation to *Legislative rulings or other measures denying an appeal or other effective remedy to challenge the death penalty.*

In its request, the Commission asked that the Court "more accurately define how the American Convention on Human Rights and the principles, and the corresponding jurisprudence, of the inter-American system for Human Rights impose requirements or restrictions on legislative actions by the States, in particular with regard to the death penalty"[13].

The request referred to measures adopted in Barbados, Belize, and Jamaica and pointed out that "various Caribbean Community member States have considered, and in one case promulgated, constitutional amendments designed to counteract jurisprudence

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12 "Pro y contra la pena de muerte en la política criminal contemporánea", in *Cuestiones penales y criminológicas*, Madrid, Reus, 1979, p. 579.

13 "Introducción", para. 2.

on human rights of local justice systems and the Inter-American Commission and Court in relation to the application of the death penalty"[14]. To support the use of the Court's advisory function in the matter, it mentioned that "the majority of OAS member States that maintain the death penalty have not ratified the American Convention, and therefore are subject to the requirements of the American Declaration"[15].

The Court did not see fit to respond to the questions raised in the Commission's request by means of an advisory opinion. Instead, it stated its position in a resolution issued June 24, 2005, observing that the Court "on several occasions (…) has handed down rulings in relation to the imposition of the death penalty and its execution, both in contentious cases and provisional measures, and in advisory opinions". The Court listed such rulings, which are those I mentioned above.

The Commission added: "In such jurisprudence the Court has referred to issues related to the object of the request for an advisory opinion, which clearly present the court's position on the questions raised by the Commission". It then stated —in the form of a "complete and concise reply"— its decisions regarding all the topics mentioned in the Commission's request, and underscored, on conclusion of its considerations, that from them "it follows that the answers to the questions raised by the Commission can be extracted from a comprehensive analysis and interpretation of the Court's *corpus* of jurisprudence".

Finally, the Court remarked (in view of the relevance its decisions ought to have, which refers in turn to the binding force of pronouncements by the interpreter of the Convention, a matter of great importance that it is not our purpose to examine at this time) that this interpretation and application of conventional norms by the Court "should also constitute a guide for the actions of other States that are not parties in the case or the measures"[16]. The petition

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14 "Consideraciones que originan la consulta", para. 15.

15 *Ibid.*

16 *Resolución de la Corte Interamericana de Derechos Humanos de 24 de junio de 2005. Solicitud de Opinión Consultiva presentada por la Comisión Interamericana de Derechos Humanos*, paras. 7, 12 and 13.

for criteria relating to certain death penalty issues was not ignored: the Court expressly reiterated its jurisprudence.

IV. RESPECT FOR LIFE

The American Convention or Pact of San José devotes a precept —Article 4— to the proclamation of life and the limitation of punitive death. The former is comprised within a single, emphatic paragraph; the limitation extends along several paths and takes up five more or less detailed paragraphs.

The general proclamation, which the Inter-American Court has named the "substantive principle"[17], stipulates that "every person has the right to have his life respected"; it then adds a fluctuating formula, which reflects the intense debate over the interruption of pregnancy: "This right shall be protected by law and, in general, from the moment of conception"; and concludes with an affirmation that has been a constant reference in judicial rulings in the inter-American system: "No one shall be arbitrarily deprived of his life", a provision that the Court refers to as the "procedural principle"[18]. What follows is, as I have remarked, a series of clauses on limitation or resistance, and even —fortunately— prohibition of the death penalty.

For several years now our jurisprudence has placed the greatest emphasis on an aspect of protection of life that requires that particular accent. It has done so on the basis of a far-reaching ruling —*Villagrán Morales et al. or "Street Children" vs. Guatemala* of November 19, 1999— which underscores the positive side of the right to protection of life and the corresponding State duties: not only abstentions, but also measures that favor quality of life, personal development, the choice of one's own destiny.

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17 *Advisory Opinion OC.3/83 of September 8, 1983. Restrictions on the death penalty (Arts. 4.2 and 4.4) American Convention on Human Rights*, para. 53.

18 *Ibid.*

In this paradigmatic judgment the Inter-American Court stated: "In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur"[19].

V. LEGALITY AND ARBITRARINESS

Under the American Convention, the death penalty is conditioned, as is common, by the principle of legality. It must be provided for by law. This provision is stated, emphatically, in Article 4, in the part devoted to *lex praevia*, the manifestation of the principle of legality. However, it is necessary to measure the true reach of the legal reserve. On this point conventional norms concur —Article 30— which authorize the restriction or deprivation of rights —and among them the deprivation of the most valued: life itself— and the broadly tutelary concept contributed by the Inter-American Court in *Advisory Opinion OC-6/86* of May 9, 1986, on *The expression 'laws' in Article 30 of the American Convention*.

When jurisprudence defines the meaning of the term "laws", there is a twofold exigency that legitimates a law under the coverage of the Pact of San José: on the one hand formal, on the other material or substantive[20]. The American Convention contains no specific hypotheses that eliminate infringement of Article 4, in the manner of Article 2.2 of the European Convention.

Application of the death penalty should also respond to another condition: that it not be arbitrary. The first paragraph of Article 4 of the Convention repudiates arbitrariness, which is also rejected

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19 *Villagrán Morales et al. ("Street Children")*, judgment of November 19, 1999, para. 144.

20 Laws –this Advisory Opinion affirms– are "normative acts in the interests of the common good, enacted by the democratically elected Legislature and promulgated by the Executive", para. 35.

in the detention regime under Article 7.3. The norm on rejection appears in the International Covenant on Civil and Political Rights (Article 6.1), and reappears in the African Charter (Article 4). The Inter-American Court has explored and unraveled the concept of arbitrariness —so deeply rooted in authoritarianism— in ways that allow it to evade numerous unacceptable hypotheses, through broad *pro persona* interpretations, which invoke reasonableness, measure, necessity and proportionality[21].

At this stage the assessment of the court comes into play, weighing circumstance and experience based on those criteria, not on legality alone. This in turn leads to a constant erosion of the right to apply or impose punitive death, despite the express authorization of the law, as the Court has maintained in the relevant judgments —accompanied by an ample explanatory vote— on cases in Trinidad and Tobago, to which I will return below, and which opened an important chapter in the reflections of the Inter-American justice system on the matter.

VI. RESTRICTIONS AND PROHIBITIONS

We now turn to the regime of restrictions and prohibitions defined in five paragraphs of Article 4 of the American Convention. The Inter-American Court has examined this point and the orientation that results from it when its consequences materialize in general hypotheses and in specific cases. This precept —the Court stresses— reveals "an unequivocal tendency to limit the scope of the (death) penalty, whether in its imposition or in its application";

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21 The Court has associated arbitrariness (with reference to detention) with "methods (…) incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality". *Gangaram Panday*, judgment of January 21, 1994, para. 47. For deprivation of liberty not to be arbitrary, its ends must be compatible with the Convention, and it must represent an appropriate means of achieving those ends, necessary, and proportional. Cf. *Chaparro Álvarez and Lapo Iñiguez vs. Ecuador*, judgment of November 21, 2007, para. 93. Also, cf. *Yvon Neptune vs. Haiti*, judgment of May 6, 2008, para. 98.

thus, the Convention —and the Court that interprets and applies it— "sounds a clear note of progressiveness, in the sense that, without reaching the extreme of deciding to abolish the death penalty, it adopts the provisions required to definitively limit its application and its scope, so that it is gradually diminished and ultimately suppressed"[22].

This tendency projects in four directions: a) commination, in other words statutory prevision —which is reduction— of the death penalty for certain offenses; b) imposition, in other words, judicial disposition of the death penalty at the end of a process culminating in an individualized penal ruling; c) execution of that penalty; and d) interpretation, which constitutes a perspective for the examination and assessment of the other three dimensions.

When the Inter-American Court refers to this subject —both in *Advisory Opinion OC-3/83* on *Restrictions of the death penalty* and in various judgments— it encounters three groups of limitations for the death penalty in countries that have not ruled on its abolition[23]. First, the imposition or application of the death penalty is subject to compliance with procedural rules whose observance requires strict oversight and enforcement. Second, its sphere of application should be reduced to the most serious common crimes that are not related to political offenses. Finally, certain considerations relating to the offender must be observed, which may exclude the imposition or application of capital punishment.

This catalogue of contentions does not cover —or does not address with the desired clarity— two clear prohibitions of a prospective nature. In effect, Article 4, paragraph 2, states that "(the) application (of the death penalty) shall not extend to crimes to which it is not currently applied"; and paragraph 3 anticipates the step that would be taken, with greater emphasis, by the additional Protocol on the subject. It stipulates: "The death penalty shall not be reestablished in States that have abolished it".

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22 *Advisory Opinion OC-3/83*, cit., para. 52.

23 Cf. *idem.*, para. 55

In view of this latter norm, which is not merely a limitation, but a categorical exclusion, Professor Schabas appreciates, on sound legal grounds, that the Pact of San José "was in reality an abolitionist treaty, at least for those States that had already abolished the death penalty, because it provided that capital punishment would not be reinstated in the laws of States that had abolished it"[24].

The prohibition of the death penalty, which reflects a widespread rejection in a large part of the Americas, could constitute regional *jus cogens*, as the same author suggests[25]. This is further compounded by the consequences of *de facto* abolition, a point raised in the rulings in *Soering vs. United Kingdom* and *Öcalan vs. Turkey*, handed down by the European Court of Human Rights[26].

Even so, the temptation to broaden death penalty statutes has persisted, and the Inter-American Court has had to resist it. It has done so in performing advisory functions and in exercise of its contentious jurisdiction. In *Advisory Opinion OC-3/83, Restrictions on the death penalty* —one of the oldest pronouncements, which evidences the Court's historical concern for these issues— the Court defined a stance that it is pertinent to recall in this context.

In analyzing the above-cited paragraphs of the Convention, the Inter-American Court maintained that "it is no longer a question of imposing strict conditions on the exceptional application of execution of the death penalty, but rather of establishing a cut- off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so".

"Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner

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24 Schabas, William A., *The Abolition of the Death Penalty in International Law*, 2004, Cambridge University Press, 3rd ed., p. 367.

25 Cf. *idem.*, p. 376.

26 Cf. *Soering vs. The United Kingdom*, cit., para. 102-103. Also, cf. Schabas, *The Abolition of the Death Penalty in International Law*, 2004, Cambridge University Press, pp. 260-261.

any expansion of the list of offenses subject to the death penalty has been prevented".

"In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision"[27].

Attempts to bring back the death penalty have reached some internal penal laws, spurred on by conditions of insecurity and criminality, which breed deep social unease. This then starts to permeate the legislative agenda, with calls for greater penal rigor and reduced guarantees, as occurred with the reform of the Guatemalan penal code which, through Legislative Decree 81/96, expanded the application of the death penalty to include not only kidnapping and murder of a person —already capital offenses— but kidnapping alone – which was not. The *nomen juris* of the crime was not changed; what changed was its contents.

The Inter-American Court ruled against this reinstatement of the death penalty. In its ruling on *Raxcacó Reyes vs. Guatemala*, the Court stated: "although the *nomen juris* of kidnapping or abduction remains unaltered from the time Guatemala ratified the Convention, the factual assumptions contained in the corresponding crime categories changed substantially, to the extent that it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend the death penalty contained in Article 4.2 of the Convention"[28].

One heading of the substantive limitations concerns political crimes and the related common crimes. Admission of this regime has not been unanimous or peaceable. Some countries have expressed reservations or interpretative declarations: Barbados, in relation to

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27 *Idem*, para. 56.

28 *Raxcacó Reyes vs. Guatemala*, judgment of September 15, 2005, para. 66.

the exclusion of treason, if the latter is considered a political crime; Guatemala, in relation to related common crimes, although its reservation was withdrawn in 1986; and Dominica, also for the same category of crimes. It is noteworthy that the issue of political crimes has not been raised before the Court.

VII. THE "MOST SERIOUS" CRIMES AND THE "MANDATORY" DEATH PENALTY

Another heading of the substantive limitations, which has corollaries in the International Covenant on Civil and Political Rights (Article 6.2) and in the United Nations Safeguards (paragraph 1), restricts the death penalty to the "most serious" crimes. This has led to copious jurisprudence from the Court and inspired reflections on the exercise of State powers of characterization and penalization of offenses, in general, compatible with Inter-American human rights law. The judicial reflections, which flow from meditations on the death penalty, go further still, to the meaning and operation of the penal system.

The Inter-American Court had to define the scope of the expression "most serious crimes" on the basis of its findings in *Hilaire, Constantine and Benjamin et al. vs. Trinidad and Tobago*, which contain some of the Court's core decisions on the issue of capital punishment, but also on the penal system itself.

Both the conventional notion of "most serious crimes" and the jurisprudential interpretation of the Inter-American Court have a conspicuously restrictive character and entail a specific application of the politico-criminal idea of minimal penal Law, which was not invoked by that name in the preparatory work for the Convention. It involves the rational and moderate use of the punitive instrument, only in response to the most serious injuries to the most valued assets, with the penalties strictly necessary, an idea that has a strong Beccarian component[29]. The fact that the death penalty is limited to

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[29] As the famous last paragraph of Beccaria's peerless work clearly states: "That a punishment may not be an act of violence, of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least

the most serious crimes —the Court affirmed in *Advisory Opinion OC-3/83*— "indicates that it was designed to be applied in truly exceptional circumstances only".

Distinctions are drawn not only between extremely serious and less severe crimes, but also between serious crimes and the "most serious crimes", which are "those that affect most severely the most important individual and social rights, and therefore merit the most vigorous censure and the most severe punishment", as the Court recalled in its ruling on *Raxcacó Reyes*[30]. Needless to say, invoking these concepts in no way means that the Court favors capital punishment for the most serious crimes, it only affirms that their exceptional severity can warrant the most severe consequences provided for by the State's penal catalogue, in which capital punishment ought never to figure: the limit is set below such a sanction.

The point arose with regard to a well-known and highly disturbing subject: the so-called mandatory death penalty, as provided for in the laws of Trinidad and Tobago through the *Offences Against the Person Act* of 1925[31]. Under this concept, it suffices to prove the existence of willful homicide for the imposition of capital punishment to be found pertinent, or worse still, inexorable. Put differently —as stated in the ruling in *Dacosta Cadogan vs. Barbados*— "statutory and common law defenses and exceptions for defendants in death penalty cases are relevant only for the determination of the guilt (*rectius*, responsibility) or innocence of the accused, not for the determination of the appropriate punishment"[32].

The Trinidadian State itself had started to reform this statute before the Inter-American Court resolved the first lawsuit to which I have referred. The same had occurred with other reforms of the

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possible in the case given, proportioned to the crime, and determined by the laws". *De los delitos y de las penas*, trans. Juan Antonio de las Casas, with introductory study by Sergio García Ramírez, Mexico City, Fondo de Cultura Económica, 2006, p. 323.

30 Cit. para. 70, which follows the orientation of *Advisory Opinion OC-3/83*, cit., para. 54.

31 Cf. Section 4 of this ordinance, of April 3, 1925, cit. in *Hilaire, Constantine and Benjamin et al.*, cit., paras. 103 and ff.

32 *Dacosta Cadogan vs. Barbados*, cit. para. 55.

Caribbean penal system, among them those introduced in Jamaica by the Act to amend the Offences against the Person Act of 1992, which distinguishes between capital murder, punishable by death, and non-capital murder, punishable by life imprisonment[33].

The Court's decision recalled the need to address various statutory categories under willful homicide, which reflect the varying seriousness of crimes and explain the varying severity of applicable penalties[34]. I analyze this point in my explanation of vote on the judgments of Trinidad and Tobago[35]. Evidently, the Inter-American Court established here a rigorous barrier not only to the death penalty, but also to the characterizing authority of the State, as it has done on other occasions and for different reasons.

The excess of the legislating State was described by the Court as arbitrariness, which conflicts with Article 4.1 of the Convention[36] and implies a violation of the general duty provided in the latter to adopt measures to adjust the national order to the international order, as part of the commitment assumed by the State itself. In this context the issue of laws violating the Convention, challengeable before the Inter-American order, was reexamined. This occurs when it is possible to apply the law immediately, even though no specific act of application has yet been confirmed.

This was the Court's understanding, as expressed in *Advisory Opinion OC-14/94* of December 9, 1994, on *International responsibility for enactment and application of laws violating the American Convention on Human Rights*. When dealing with provisions of immediate application, it is not necessary that the transcendent law be applied for a violation to be denounced and the obligation to rectify the situa-

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33 Section 2.

34 Cf. *Hilaire, Constantine and Benjamin et al.*, cit., para. 102.

35 Cf. García Ramírez, *Temas de la jurisprudencia Interamericana sobre derechos humanos. Votos particulares*, 2006, ITESO/Universidad Iberoamericana. Puebla/ Universidad Iberoamericana. Mexico City / University of Guanajuato, Guadalajara, pp. 110 and ff.

36 Cf. *Hilaire, Constantine and Benjamin et al.*, cit., paras. 108-109 and resolution.

tion to exist; the mere enactment of the law in question violates, *per se*, the obligation assumed by the State[37].

It is worth recalling that the Committee on Human Rights has also understood —in communication 806/1998 of October 18, 2000, referring to *Eversley Thompson (Saint Vincent and the Grenadines)*— that the mandatory death penalty is incompatible with the right to life established in Article 6.1 of the International Convention.

The Inter-American Court could explicitly go to other extremes of this issue, elaborating on cases for applicability of capital punishment within the space permitted by Article 4, which would require a more detailed examination of the regime of restrictions and limitations on human rights and a review of the principles that the Court itself has invoked in other hypotheses: suitability, proportionality, and necessity, for example. As is known, the Committee on Human Rights has considered that "crimes that do not involve loss of human life cannot be punished with the death penalty".

Another problem posed by indiscriminate application of the death penalty in cases of intentional homicide derives from the irrelevance of forms of participation in the crime, which regularly influence the assessment of the penalty. The difference, for these purposes, between material responsibility —true responsibility— and complicity is well known, for example. However, the *Offences Against the Person Act* of Barbados maintains that whosoever "assists (or) advises" "another person to commit homicide" can be charged and condemned as the "primary perpetrator", and consequently subject to capital punishment.

VIII. COLLISION BETWEEN CONSTITUTION AND LAW

The reflections expressed in relation to this delicate question, which were also produced under the jurisdiction of other bodies, such as the United Nations Committee on Human Rights —with

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37 Cf. *Advisory Opinion OC-14/94*, cit., para. 93. Cf. the judgment reached by the Court in *Hilaire, Constantine and Benjamin et al.*, para. 116-118 and resolutions 2 and 8.

reference to Barbados, among other countries— and the Judicial Committee of the Privy Council, opened the door to further questions. We could observe, above all, that the penal statutes challenged in *Hilaire, Constantine and Benjamin* were inconsistent with constitutional norms on human rights.

Such norms, however, added to the inconsistency through what we might call an "ultra-active validity clause", which sheltered an unconstitutional law from impugnation, and used the protection it afforded to permit the subsistence of the mandatory death penalty[38]. Initially, the Privy Council overruled the subsistence of previous norms and interpreted the constitutional provisions so as to exclude the mandatory death penalty, but that criterion changed later.

The Inter-American Court sharply questioned the persistence of statutes favoring death in defiance of constitutional provisions favoring life. This time, it questioned it in the Trinidadian cases, in 2002, and it reiterated its position in 2009, in the ruling in *Dacosta Cadogan*, which drew the court's attention to the collision of section 2 of the Offences Against the Person Act and section 26 of the Constitution of Barbados.

At the pertinent procedural juncture, to withstand this onslaught, and others like it, Trinidad and Tobago invoked a limitation of enormous latitude established when it recognized the jurisdiction of the international Court, which could be exercised —the State maintained— "only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any ruling of the court does not infringe, create or abolish any existing rights or duties of any private citizen"[39].

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38 Article 26 of the Barbadian Constitution, which contains the "exclusion clause", prevents a review of the constitutionality of norms promulgated before the entry into effect of the Constitution, on November 30, 1966. Such is the case of Article 2 of the Offences Against the Person Act of 1868. Cf. Inter-American Court of Human Rights, *Boyce et al. vs. Barbados*, judgment of November 20, 2007, paras. 71 and ff.

39 Cf. *Documentos básicos en materia de derechos humanos en el Sistema Interamericano (Actualizado a mayo de 2008)*, 2008, Secretariat of the Inter-American Court of Human Rights, San José, Costa Rica, p. 72.

The Court rejected this broad limitation, which contravenes the object and purpose of the American Convention and subordinates supranational jurisdiction to national appraisals and authorizations. "It would be meaningless to suppose —the Inter-American Court affirmed— that a State that freely decided to accept the Court's contentious jurisdiction has at the same time sought to prevent it from exercising its functions as provided in the Convention. On the contrary, mere acceptance implies the unequivocal presumption of submission to the Court's contentious jurisdiction"[40].

In this finding, the Inter-American Court also reiterated an extensive position —contained in *Advisory Opinion OC-2/82*, concerning *The effect of reservations on the entry into force of the American Convention on Human Rights*— which makes clear the singular nature of treaties on human rights, with the consequences it entails. They are not traditional conventions, which establish rights and obligations between States; they are broader in scope: they recognize individual rights, and should be construed and applied accordingly[41].

In summary, the regional court left the criterion it had upheld unaltered: the inherently arbitrary *mandatory death penalty* is unacceptable even if it is statuted in a law conflicting with the State's Constitution itself. As is known, Trinidad and Tobago denounced the Convention. Such a denunciation has occurred only once in the history of the Inter-American System, and in this case it was motivated by reasons related to the death penalty: in the collision of abolitionism and retentionism, although specific arguments surrounded the dispute. Despite its being an isolated denunciation, it constitutes a significant event in the historical process leading to the abolition of capital punishment.

The issue, which appeared to be jurisprudentially settled by the rulings on Trinidad and Tobago, has resurfaced in recent years, and

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40 Cf. *Hilaire*, preliminary objections, judgment of September 1, 2001, para. 98. The Court issued similar findings in the judgments of preliminary objections of that date, in *Benjamin et al.*, para. 89, and *Constantine et al.*, para. 89.

41 Cf. *Advisory Opinion OC-2/82*, of September 24, 1982, para. 27 and ff.

even in recent days, first in *Boyce et al. vs. Barbados*[42], and secondly in *DaCosta Cadogan vs. Barbados*.

The Court's position has been unwavering, of course. It is noteworthy, as an encouraging sign, that in response to the *Boyce* ruling the State announced its decision to reform its national penal code in the terms requested by the Inter-American Court. The resistance was starting to yield. The change had not yet occurred when *Dacosta Cadogan* came before the Court, but in the course of the proceedings the State confirmed its intention to repeal the mandatory death penalty[43]. However slowly, resistance is abating.

In my view, the applicability of capital punishment for the most serious crimes could and should have an impact on the functions of the legislature and the judiciary, at their respective times. In my personal vote attached to the Court's ruling in *Cadogan* I stated that "the requirement of Article 4 extends both to the typification of the conduct and selection of the punishment and to judicial individualization for purposes of a conviction. This duality has not always been highlighted"[44].

IX. A RELATED ISSUE: DANGEROUSNESS AND DEATH PENALTY

In its hearings of death penalty cases, the Inter-American Court has had occasion to examine other crucial matters and redefine the boundaries of punitive power. Such was the case in *Fermín Ramírez vs. Guatemala*, in which the Penal Code established the possibility of imposing the death penalty on a defendant charged with murder if "a greater dangerousness of the agent is revealed"[45]. The impugna-

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42 Cf. *Boyce et al. vs. Barbados*, judgment of November 20, 2007, paras. 47 and ff. The State found that the fact that the death penalty was established by law cancelled the burden of arbitrariness. Needless to say, the Court rejected this argument. Cf. *Boyce et al. vs. Barbados,* paras. 56 and ff.

43 Cf. *Dacosta Cadogan vs. Barbados*, cit., para. 74.

44 My vote appears after the Court's judgment, on the Court's website: *www.corteidh.or.cr*

45 Cf. *Fermín Ramírez vs. Guatemala*, cit., para. 92.

tion of the death penalty added another issue to the debate: is it admissible to add dangerousness to the penal commination? Does a law that does so conflict with the provisions of Inter-American Law?

The Court recovered the criminal law of act or event, considered the material implications of the principle of legality in the normative structure of a democratic society, and rejected —not only for cases related to the death penalty— the invocation of dangerousness as relevant to the characterization of an offense and the corresponding punishability. The ruling declared this to be: "incompatible with the freedom from ex post facto law and, therefore, contrary to the Convention"[46]. This criterion, with others of the same nature, updates the meaning of Article 9, which is no longer circumscribed to the prior existence of penal statutes and the precise description they contain.

X. MAXIMUM PROCEDURAL EXIGENCY

I shall now discuss conventional exigencies apropos of the proceedings that culminate in the imposition of the death penalty. Many cases brought before the Inter-American Court include points of due process, violated by national authorities. This issue —which has also received considerable attention in the European jurisdiction— is usually brought under several headings, both in doctrine and legislation and in jurisprudence. It is the primary subject of Article 8 of the American Convention, under the epigraph "Judicial guarantees". The Court has taken the concept of due process as an expression of the broadest defense.

The procedural issue appears prominently in Articles 8 and 25, the latter relating to the judicial protection of fundamental rights, and also appears in other statutes, for different reasons: Articles 5, on integrity; 7, on liberty; 28, on the validity of judicial guarantees

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46 *Idem,* para. 96.

in cases of exception, and —of course— 4, in relation to the death penalty.

In this regard, it is worth emphasizing general procedural norms, on the one hand, and statutes that strengthen procedural rigor in capital cases. The latter is addressed by both the United Nations Safeguards —attracted by the Inter-American Court to establish the context, the standard, and the scope of procedural guarantees[47]— and certain extremes examined by Inter-American and universal jurisprudence: I refer specifically to hypotheses linked to consular protection.

The issue of the strict procedural constraints on the death penalty has been considered from two mutually complementary perspectives: a) under the comprehensive regime of procedural guarantees, in its two normative extremes: judicial guarantees (ACHR Article 8) and judicial protection (urgent and expeditious) of fundamental rights (ACHR Article 25), which includes the intangibility of habeas corpus and special injunctions in the case of states of exception; and b) under the specific regime covered by Article 4.2., also considering procedural references, similarly specific, set forth in paragraph 6 of the same Article 4.

Advisory Opinion OC-16/99 referred to the generic regime in these terms: "given the exceptionally grave and irreparable nature of the death penalty, [observance of] the due process of law, with all its rights and guarantees, becomes all the more important when [what] is at stake is human life"[48]. Failure to observe these exigencies violates due process and results in arbitrary taking of life. In other words, as stated in the Court's ruling in *Fermín Ramírez vs. Guatemala*, "respect for the set of guarantees that inform of due process and provide the limits to the regulation of the state's criminal power in a democratic society is especially impassable and rigorous when dealing with the imposition of the death penalty"[49].

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47 *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Resolution 1984/50 of the United Nations Economic and Social Council.

48 *Advisory Opinion OC-16/99*, cit., para. 135.

49 *Fermín Ramírez vs. Guatemala*, cit., para. 78.

Advisory Opinion OC-3/83 referred to the specific regime: "the fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not violate the Convention in those countries that had not abolished it"[50]. To inform its position on this point, the Court has demanded in its recent ruling in *Dacosta Cadogan*[51] —and I myself have done so in my explanation of vote— observance of the standard that the 1984 Safeguards require to guarantee due process in trials where the death penalty is a possibility.

What should the judge's position be on this issue, considering the clearly reductionist, protectionist orientation established by the substantive and procedural death penalty system? Equally guarantor of human rights, vigilant —and responsible, with other subjects in the process— of the regularity of prosecution, it must coincide in the exigency and thoroughness that govern the issue. This can nuance, in my view —and also, with some limitation, in the view of the Inter-American Court— the position and actions of the courts, derived from an accusatory regime conceived in its strictest terms.

The problem arose in the Court's deliberations on *Dacosta.* The application of the law, from the perspective of the defense, could prevent the defendant from being found eligible for the death penalty: there was a possibility —granting the arguments of the defense— that certain personal circumstances (use of intoxicants, drug use) might qualify the defendant for a statutory exclusion from capital punishment, but not necessarily from all punishment. This would be relevant not only for purposes of the hearing, but for the statutory framework of the proceedings, *ab initio*. However, the full burden of proof was placed on the defense, with no judicial initiative to assist it.

The Court acknowledged the existence of an omission on the part of the State in the case in reference. It warned that "the [State's] failure to guarantee these rights in a death penalty case could undoubtedly result in a grave and irreversible miscarriage of justice";

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50 *Advisory Opinion OC-3/83*, cit., para. 53.

51 *Idem,* para. 85.

in this area it is required that the right to life be interpreted and applied in such a manner that its safeguards become practical and effective (*effet utile*)"[52]. In my explanation of my vote, I went further still: "the [national criminal] tribunal's first concern in a case such as that before the Court should be the precise verification that the conditions on which the trial was based were satisfied"[53].

I do not share the idea that "according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probatory initiatives", limiting itself to "[waiting] for the other parties to request [them]"[54]. We should recall that it was not a matter of proving the guilt or innocence of the defendant, but the presence —or absence— of the statutory conditions for a prosecution that would necessarily end, in case of conviction, in the imposition of capital punishment.

XI. FOREIGN DETAINEES AND CONSULAR ASSISTANCE

Continuing our discussion of procedural issues, *Advisory Opinion OC-16/99, The right to information on consular assistance in the context of the guarantees of due process*, cited above, has particular relevance for the subject under consideration. In this opinion, the Court was able to state and argue its opinion centering on the right that Article 36 of the Vienna Convention on Consular Relations grants to foreign detainees. While the convention is not a human rights treaty, it defines —the Inter-American Court held— an individual right in the context of due process[55], irrespective of which it also establishes a specific legal relationship —with rights and obligations— between the detainee's State of origin and the State conducting the penal proceedings.

The cases of interest often involve subjects belonging to highly vulnerable groups, who need special attention from the standpoint

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52 *Idem*, paras. 84-85.
53 *Explanation of vote*, cit., para. 15.
54 *Explanation of vote*, cit., para. 18.
55 *Advisory Opinion OC-16/99*, cit., para. 87.

of access to justice. Their vulnerability is twofold: on the one hand, they are foreign citizens; on the other, they are detainees and criminal defendants (but this hypothesis could equally apply, with a guaranteeist leaning, to defendants facing administrative proceedings which will often culminate in the application of measures that severely affect their human rights: liberty, movement, residence)[56].

Mexico requested that the Court issue the opinion that concerns me here, associating its petition with the cases in which capital punishment can be imposed —or is effectively imposed— without advising the foreign detainee of his right to receive consular assistance. Evidently, the petition could have covered a broader scope: any penalties, not only death. It may have been limited to capital cases in view of their supreme importance and because of the relevance of placing emphasis where it needed to be, in light of practical considerations. For that reason *OC-16/99* —which the European Court cites in its ruling in *Öcalan vs. Turkey* and which was invoked by some participants in *LaGrand* and *Avena* before the International Court of Justice— is pertinent to our discussion of inter-American jurisprudence on the death penalty.

The Mexican petition referred to both the interpretation of the Vienna Convention and the Charter of the Organization of American States, both the American Declaration of the Rights and Duties of Man, and the International Covenant on Civil and Political Rights. The American Convention was passed over. It is pertinent to recall that the United States of America —but the petition referred not to an interstate contentious issue but to an enquiry on the interpretation of international instruments— is a signatory to the OAS Charter, the Vienna Convention, and the International Covenant, of which the petitioner requested an interpretation, but not the Pact of San José, for which it did not.

The Inter-American Court established its competence to examine the aforementioned instruments and recognized the detainee's right —faced with the resulting obligation of the State that detained him— to be informed of the possibility of receiving consular assist-

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[56] Cf. my explanation of vote concurring with *Advisory Opinion OC-16/99*, in García Ramírez, *Temas de la jurisprudencia Interamericana…*, op. cit., p. 12.

ance: Article 36 "concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law"[57]. By adopting this interpretation, the Court shifted, in favor of the individual, the borders of due process, as they have been shifted at the national level whenever a defendant is guaranteed the timely exercise of legal defense through warnings on the right not to incriminate oneself, to remain silent, to know the reason for his detention, to legal counsel, etc.

Referring to Article 14 of the International Convention, which establishes the right to due process, the Court stated that it "is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added"[58]. In my concurring explanation of vote I examined this expansive nature —never static or exhausted— of due process. The interest behind this issue —which intensely reflects the *pro persona* principle, developing its consequences— often appears in the jurisprudence of the Inter-American Court.

Also, the Court determined that such notification should be given before the defendant makes his first statement before the authority, and ruled that failure to observe the obligation to inform constitutes a violation of due process, similar in importance timeliness, and consequences to the failure to inform defendants of other means of defense. On the issue of timeliness, a particularly relevant point from the standpoint of the defense, access to justice, and protection for the defendant's rights, the Court adopted the most protective interpretation of the words "without delay", which Article 36.1 uses in the context of other expressions that refer to maximum promptitude, haste: "without unnecessary tardiness", "without delay". If one seeks to guarantee effective defense —and that is, in effect, the aim— the idea adopted by the Inter-American Court in relation to the opportunity of notification takes on its full meaning[59].

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57 *Advisory Opinion OC-16/99*, cit., Resolution 2. Also, cf. paras. 68 and ff. and 107 and ff.

58 *Idem*, para. 117.

59 Cf. *idem*, Resolution 3 and paras. 99 and ff.

The Inter-American Court considered, finally, that such inobservance implies an essential violation that tarnishes the process as a whole and diminishes the effectiveness of the sentence[60]. It established, then, the general criterion that would later be upheld by the rulings of the International Court of Justice in *LaGrand*, of Germany vs. United States, and *Avena*, of Mexico vs. United States[61].

It remains for the future —which should not be too distant— to explore the expansion of protective information provided to foreign detainees, to embrace cases in which they are not at risk of suffering the death penalty, and also to cases in which they are not detainees *per se*, but are in the midst of an advanced criminal process entailing a serious risk that warrants opportune acts of defense.

Such expanded protection could be supported by the motives that have led the Court to set, for the exercise of certain rights, earlier references than the decision to prosecute or detention. This expansion of guarantees has emerged, and will probably be developed further with the passing of time, in the areas of notification of charges, right to defense, *dies a quo* for a reasonable term (understanding the *dies* as the act from which the term whose observation serves the purposes of justice and protection of human rights begins).

XII. SPECIFIC PROCEDURAL GUARANTEES: IMPUGNATION, SUBSTITUTION, RECTIFICATION

The American Convention, among other instruments, contains a specific and additional definition of due process, which strengthens some guarantees for reasons relating to the impugnation of death sentences or in relation to measures seeking the extinction of punitive authority or penal benevolence. Such is the case of Article 4, paragraph 6, of the Convention, which refers to three acts that can

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60 Cf. *idem*, Resolution 7 and paras. 133 and ff.

61 Cf. my comment on this point in "*La pena de muerte en la Convención Americana sobre derechos humanos y en la jurisprudencia de la Corte Interamericana*", in *Boletín Mexicano de Derecho Comparado,* new series, year XXXVIII, no. 114, September-December 2005, pp. 1083 and ff.

lead to the lifting of a death sentence: amnesty, pardon, and commutation, which must be accessible to the sentenced person.

It is understood that these concepts are to be interpreted with reference to the current use of the respective terms, which also encompass institutions that have the same nature and the same effects as they do, even though they are given different names in local laws. What matters, in short, is to bring within reach of the defendant all available means of excluding capital punishment or preventing its execution.

This supposes, obviously, that there is legal provision for them; that some organ of public power has the authority to exercise amnesty, pardon, or commutation; that there is a proceeding —observing the rules of due process— leading to the relevant review and decision; and that the proper resources are within reach of the condemned.

The acts to which I am referring should be effective for the petitioner or beneficiary, in the sense that they can be granted in all cases, without prejudicial obstacles that deny the petitioner the benefit that the Convention provides. Total blockage of such access for lack of a public organ empowered to rule on petitions for reprieve is inadmissible. This issue emerged in *Fermín Ramírez* and *Raxcacó Reyes*, both in relation to Guatemalan law: Decree 32/2000 suppressed the recognized authority of an organ of the State to deliberate and rule on such matters[62]. This in turn led to the condemnation for negligence of Article 4.6 of the Convention, in relation to Article 2, which obliges [States] to adopt measures conducive to respect and protection of the rights invoked by Article 1.1.

The remedy should be processed "through impartial and appropriate procedures", in accordance with Article 4.6 of the Convention, in combination with its relevant provisions on the guarantees of due process established in Article 8. In other words —the Court stated in its ruling in *Hilaire, Constantine and Benjamin*— "it is not enough merely to be able to submit a petition; rather, the petition must be treated in accordance with procedural standards that make

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62 Cf. *Fermín Ramírez vs. Guatemala*, cit., para. 107.

this right effective"[63]. In other words, there will be true access to justice, replacing the death penalty, if the rules of due process are scrupulously observed; there will be no unyielding, previously established, impediments resulting from the severity of the crime or the conditions of the offender —under the catchwords of culpability or "dangerousness", for example— that block the granting of the benefits mentioned in the Convention outright.

The Court elaborated: "Article 4(6) of the American Convention, when read together with Articles 8 and 1(1), places the State under the obligation to guarantee that an offender sentenced to death may effectively exercise this right. Accordingly, the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy"[64].

It is important to mention that, in the view of the Inter-American Court, acts of grace are not the ideal means of remedying arbitrariness in the application of the death penalty, although they may be, obviously, to prevent its execution. In such cases, rectification should be placed in the hands of a jurisdictional organ, by means of a process of the same nature.

At first —*Boyce et al. vs. Barbados*— the Inter-American Court accepted rectification through political and administrative channels, although in the same ruling it affirmed that: "a distinction must also be made between the right under Article 4(6) of the Convention of every convicted person to "apply for amnesty, pardon, or commutation of sentence", and the right recognized in Article 4(2) to have a "competent court" determine whether the death penalty is the appropriate sentence in each case, in accordance with domestic law and the American Convention"[65].

Jurisprudence has progressed through *Dacosta Cadogan*, also of Barbados. Given that the remedy for injustice in jurisdictional venue is an act of justice, providing it is for a judicial organ; "sentenc-

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63 *Idem*, para. 186.
64 *Idem*, para. 188.
65 *Boyce et al. vs. Barbados*, cit., para. 60.

ing is a judicial function"; "the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime"[66].

XIII. SUBJECTS EXCLUDED FROM CAPITAL PUNISHMENT

I have mentioned that there are restrictions on the death penalty —or rather proscriptions— related to certain categories of subjects: those excluded from capital punishment. They are mentioned in Article 4.5, with different expressions that could leave room for doubt. Capital punishment shall not be "imposed" on persons under 18 or over 70 years of age "at the time the crime is committed", a reference that has a different impact when applied to crimes that are committed instantaneously and when referring to ongoing or continued crimes. Also, it shall not be "applied" to pregnant women.

In my understanding, neither of the two hypotheses refers merely to inexecution of the penalty —which would constitute deferral in the case of a pregnant woman— but of exclusion from being condemned to death. I acknowledge that this conclusion is debatable, but it concurs with the *pro persona* principle: faced with the choice of one of two possible interpretations of the words, I opt for that which offers the greatest protection for the individual.

XIV. PRECAUTIONARY OR PROVISIONAL MEASURES

The Court's precautionary function implies a third sphere of competence for this Court, in which issues related to the death penalty have also been raised. It happened initially in the deliberations relating to *James, Briggs, Noel, García and Bethel* (Trinidad and Tobago), in which the court was charged with attempting to halt the execution of convicts until the Inter-American Commission could

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66 *Idem*, para. 56.

rule on the regularity of the proceedings that had led to their death sentences[67].

Here the Court was not questioning the death penalty *per se*: the point challenged involved due process. In its 1998 ruling, the Court ordered that the execution be stayed, while the case was pending before the Commission: "if the State executes the presumed victims, it would create an irremediable situation and incur in conduct incompatible with the purpose and ends of the Convention, by disregarding the Commission's authority and severely compromising the very essence of the inter-American system"[68]. Clearly, it would be impossible to achieve the *restitutio in integrum* so often proclaimed in the debate on reparations.

The Inter-American Court understood that its provisional measures were binding for the State: they do not exhort; they order. Thus, the Court stressed that "the execution of Joel Ramiah by Trinidad and Tobago constitutes arbitrary deprivation of the right to life", a situation which "is exacerbated because the victim was protected by a provisional remedy ordered by this Court, which expressly stated that the execution should be stayed until the case was resolved by the inter-American human rights system"[69].

As is known, this issue of great importance appeared in *LaGrand*, before the International Court of Justice, which also confirmed the binding force of the measures. On their date of issue, March 3, 1999, Walter LaGrand was executed. In due course, the Court of The Hague would maintain that such measures did not constitute

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67 The first ruling on provisional measures in this case, which would be followed by others similarly examined by the Court, was issued on May 22, 1998. On the succession of cases and rulings in 1998 and 1999, cf. *Hilaire, Constantine and Benjamin et al.*, cit., para. 26 and ff.

68 *James et al.. Ruling on provisional measures requested by the Inter-American Commission on Human Rights in relation to the Republic of Trinidad and Tobago*, August 29, 1998, Whereas Clause 9.

69 Cf. *Hilaire, Constantine and Benjamin et al.*, cit., paras. 198 and 200 and Resolution 7.

a "mere exhortation", but "created a legal obligation for the United States"[70], an interpretation reiterated in *Avena*.

XV. EXECUTION OF THE PENALTY

Execution of the imposed or imposable penalty —through a regular process, it is understood— suggests other important questions. One of them concerns the method of execution. The Court has not ruled on this point. If the Court finds that the imposition of this penalty contravened the regime of the Convention there would be no point in examining execution procedures. In *Boyce,* the Court ruled that it "does not find it necessary to address whether the particular method of execution by hanging would also be in violation of the American Convention" (in addition to the violation implicit in the mandatory death penalty)[71].

However, this issue may be examined in light of Article 5.2 of the Pact of San José, which prohibits —with a *jus cogens* proscription, the Inter-American Court has ruled— submission to torture or cruel, inhumane, and degrading treatment. The Court's findings in this regard, when examining corporal punishments —flogging, executable in especially cruel, humiliating, or intimidating fashion— in *Cesar vs. Trinidad and Tobago*[72]. The considerations relating to execution of the penalty of flogging could be transposed, *mutatis mutandis*, to methods of execution of the death penalty.

The issue of execution —in particular its imminence, more or less relative— also leads us to examine the wait before a prisoner is executed, known as "death row" syndrome which can be very prolonged, anxiety-ridden, and harmful to human dignity. In *Soering* the European Court referred to this point[73], which has also drawn attention from the Inter-American Court in *Hilaire, Constantine and*

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70 *LaGrand case (Germany vs. United States of America) Judgment* of March 31, 2004, para. 110.

71 Cf. *Boyce vs. Barbados*, cit., para. 85.

72 Cf. *Cesar vs. Trinidad and Tobago*, judgment of March 11, 2005, para. 88.

73 Cf. *Soering vs. United Kingdom*, cit.

Benjamin: "the victims live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment"[74].

Finally, humanitarian considerations have led this Court to exclude execution of the death penalty in cases in which it might prove applicable. I am referring to the case in which a person is irregularly condemned to death. The Inter-American Court has ruled that in the new sentence —if there are grounds to issue one— the death penalty be replaced by another sanction. Such was the Court's finding, on the basis of equality, in *Hilaire, Constantine and Benjamin*[75].

XVI. SUSPENSION OF GUARANTEES

On reviewing the substantive, procedural, and executive information contained in the American Convention and examined by the jurisprudence of the international Court, it is important to mention a barrier of general scope, both for this subject and for others beyond the purview of the present discussion: the rights established in Article 4 of the American Convention, which include all those relating to capital punishment, are not subject to the suspension authorized, in extreme cases, by Article 27.1 of the Pact of San José. The exclusion of the hard core of rights —as it has been called— appears in Article 28.2.

This exception in favor of life covers both the substantive, procedural, and executive rights established in Article 4 and their broad jurisdictional safeguard, specifically the judicial guarantees indispensable for their protection. Consequently, it is similarly impossible to suspend habeas corpus and special injunctions (*amparo*) —or other judicial recourses or remedies that may exist in the national order— in the case of suspension of the state obligations intended to respond to exceptional circumstances of danger or emergencies.

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74 *Hilaire, Constantine and Benjamin et al.*, cit., para. 169.

75 Para. 215 and Resolution 11.

Inter-American jurisprudence has affirmed this position in two advisory opinions from the 1980s: *OC-8/87, Habeas corpus under suspension of guarantees*, of January 30, 1987[76], and *OC-9/87, Judicial guarantees in states of emergency*, of October 6, 1987[77]. Needless to say, the signatories of the American Convention need to adopt measures, under the terms of Articles 1.1 and 2 of that instrument, to adapt their national statutes to the standards of the Pact of San José in this area —as in all barring opportunely stated admissible reservations— particularly important if we consider that the suspension affects the protection of the Inter-American *corpus juris*.

It is worth noting that this obligation has not resulted in regulatory reforms —which would be constitutional— in all cases, with the danger inherent to the discrepancy between national constitutional provisions and statutes of international human rights law, above all if that difference —the source of dilemmas that put the rule of democracy and human rights at risk, whether in specific or more or less isolated cases— places in evidence the right to protection of life against the historical onslaught of capital punishment.

XVII. THE "FEDERAL CLAUSE"

Neither the Convention nor its interpreter, the Inter-American Court, overlook the problem that arises from the federal organization of the state obliged to respect and guarantee certain rights. Under the epigraph "Federal Clause", Article 28.2 of the Pact of San José establishes a specific obligation for federal states, which accentuates the general duties attributed to all states.

The central government —in other words the federation which put its name to the international agreement on behalf of the State as a whole— must "immediately take the pertinent measures, in accordance with its constitution and its laws, so that the competent authorities of (the) entities (which have jurisdiction in federated re-

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76 Cf. *Advisory Opinion OC-8/87*, para. 42.

77 Cf. *Advisory Opinion OC-9/87*, cit., Resolutions 1 and 2 and paras. 25 and 38-40.

gions or states) can adopt provisions conducive to the observance of this Convention". There is, then, a kind of "reinforced obligation": that which comes from the general obligation to take measures to ensure respect and protection for human rights, and the particular obligation resulting from the federal clause.

The Court, in turn, has been emphatic on this point, to which it has referred on several occasions: international precepts on human rights must be respected by the States independently of their unitary or federal structure[78]. In its ruling in *Garrido and Baigorria vs. Argentina*, in 1998, the Court affirmed: "A State cannot plead its federal structure to avoid complying with an international obligation"[79].

It is fitting to place the accent on the fact that the State must "immediately" adopt —as Article 28.2 orders— the measures in question, and we cannot fail to recall that refuge cannot be sought in obstacles of national law —whose existence is recognized in the international convention— that can and must be surpassed, to breach an international commitment. The accent on this issue is pertinent in view of the vast importance it evidently has had in international death penalty litigation¸ as confirmed, without looking further, in the cases *LaGrand* and *Avena* resolved by the International Court of Justice.

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78 Cf. *Advisory Opinion OC-16/99*, cit., Resolution 8 and paras. 138 and ff.

79 *Garrido y Baigorria vs. Argentina. Reparations*, judgment of August 27, 1998, para. 46.

ATTEMPTS TO REINSTATE THE DEATH PENALTY IN PERU

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"Il se trouva que ces gens se rendaient sur la Grande-Place pour voir pendre un certain tailleur nommé Adrian convencu de calvinisme. Sa femme était également coupable, mais comme il est indécent qu'une créature du sexe se balance en plein ciel, les jupes ballotantes sur la tête des passants, on allait selon l'ancien usage l'enterrer vivante".

Margarite Yourcenar, L'Oeuvre au Noir, p. 674
Bibliothèque de la Pléiade

I. INTRODUCTION

The constant struggle to achieve the abolition of the death penalty intensifies with the aim of ensuring that the minority of countries in which it remains in force repeal it, or at the very least, introduce a general moratorium on the execution of those death sentences that may be or that may have been pronounced. Thus, the participants in this campaign will not be satisfied with the "*de facto* abolition" of capital punishment; i.e. a scenario in which it would remain in the legislation of the states without it in fact being applied.

One can only be in agreement with this just and noble cause, if one wishes to strengthen respect for human dignity and human rights, in general. However, the objective that is sought would be incomplete if such efforts were to limit themselves solely to the repeal of legislation on the death penalty. To complete it, it is also essential to achieve the suspension or curtailment of the *de facto* application of the death penalty, which is above all in force in underdeveloped countries despite its formal abolition.

With the purpose of highlighting some aspects of this problematic situation, and limiting myself to the confines of my own knowledge, I shall present the Peruvian case, which is very similar to those

of other Latin American countries. My reflections will be presented in two parts: the first part will look at the development of the legislation and the second at certain manifestations and causes of *de facto* capital punishment. I shall end by setting out some conclusions.

II. PERUVIAN CONTEXT

The present situation of debate surrounding the death penalty in Peru may only be understood if the social, political, and legislative contexts of the country are taken into account. This debate is not characterized by highly theoretical or ideological arguments, but rather by frequent recourse to stereotyped affirmations for or against its inclusion or its abolition. One of its principal manifestations is the profusion of legislative proposals which contemplate its use on the perpetrators of various serious offences.

On the one hand, these initiatives reveal the light-handed way in which the punitive power of the State is treated or used, and, on the other hand, the existence of an atmosphere of violence that reigns across all social sectors. In this context, the institutions or legal and social categories lose all meaning. The death penalty is not legally in force, as there is no law in which it is envisaged to sanction an offence or a crime. However, the deaths or disappearances of people in periods of social crisis occur outside of any legal framework. It is a question of the physical elimination of the political opposition through official or illegally organized means of repression. It may also be considered that serving extremely long sentences under inhuman conditions implies the physical deterioration and demoralization of the prisoner. In parallel, recourse to lynching by the inhabitants of local neighbourhoods or villages, who feel unprotected by the organs of the State, also implies the brutal practice of death as a social sanction.

The fight against the death penalty will therefore only be effective insofar as action is taken either to stop or noticeably to curtail currents of opinion which, riding on the dominant feeling of insecurity among large sectors of the population, encourage and reinforce conservative perceptions that tend to label a great number of crimi-

nals as extremely dangerous and subject them to eliminatory measures such as the death penalty. Likewise, fundamentalist conceptions must be neutralized, which, on the basis of a dogma held as an absolute truth, advocate extreme solutions: for example, extreme cultural relativism that leads to the recognition of cultural patterns —thoughtlessly qualified as Millenarian— which open the door to bypassing due process and to the application of corporal, and even capital punishment. The essential understanding of cultural differences should be constrained by respect for fundamental rights.

III. LEGISLATIVE EVOLUTION

Art. 21 of the Constitution of 1920 only punishes by death the crimes of aggravated murder and treason against the Fatherland, in the cases defined by the law. This sanction was not contemplated in the Penal Code of 1924, and in its place, a penalty of imprisonment for an unlimited time span was established, with a minimum of 25 years for cases involving exceptionally dangerous criminals.

In the Constitution of 1933, art. 54, the same rule was maintained without modifying the Penal Code. Apparently, this showed that the prevailing opinion in governmental sectors continued to be opposed to the death penalty. The same attitude was clearly expressed in the preliminary recitals to the Code of 1924. It stated, for example, that the country found the application of capital punishment repugnant and that the judges refused to impose it. Moreover, it affirmed that security within society may be achieved by other "measures compatible with the lives of criminals". Finally, it pointed out that the dominant tendency in the world is to move towards abolition, which may be seen in "the great number of European and American States that have abolished it and others which are on the road to doing so".

These affirmations, however, do not correspond to the actual situation, since the death penalty was reintroduced under military rule and was applied to penalize acts of insubordination against the dictatorial government in place at the time. This political circumstance made it possible to modify the Penal Code to incorporate

capital punishment. This step was taken in 1949, by the Government with the dictator Dorian at its head, which cruelly persecuted the *Alianza Popular Revolucionaria Americana* (APRA) and the Communist Party. This sanction was contemplated for the crimes of aggravated homicide and treason against the fatherland. It was alleged that "the leniency with which current criminal law sanctions the most abominable crimes is met by the indignant rejection of the public conscience, which sees in it a type of impunity" and "that the notorious and undeniable increase of criminality in Peru over recent years calls for the State to be given the necessary means, however severe and drastic they may be, to prevent its disintegration". The application of the death penalty was extended, towards the end of Dorian's government, to the abduction of minors, "if the kidnapper or other, at the time of abduction, kills the minor".

The subversive activities of the 1960s, inspired by the Cuban revolution, led to increased use of the death penalty. Thus, in 1965, during the government of Belaúnde Terry, the Peruvian Parliament, dominated by APRA and Dorian's party, passed Law 15590, by which the notion of an act of treason against the fatherland and service to foreign powers, envisaged in the Constitution, was widened. It came to encompass not only the acts contemplated in articles 289 and 290 of the Penal Code, but also, and above all, to crimes against military security, insubordination, sedition, and those envisaged in articles 310 to 312 of the Penal Code; and in second place, cases that corresponded to those penalized in the Code of Military Justice. Moreover, treason against the Fatherland was widened to include the robbery of banks, commercial establishments, industries and in general to cover crimes against life, liberty and patrimony committed to provide resources for the guerrillas. The sanctions consisted of confinement in a prison or penitentiary for no less than five years, internment or death.

During the military government of Velasco Alvarado, the incoherent use of capital punishment and its more widespread application for political and social reasons became apparent. In 1969, Decree Law (DL) 17388 made it a lawful response to cases of violation or abduction of minors when the child concerned was seven or less years of age and, abducted minor, i.e., up to 18 years of age, if

the minor was killed. This was justified on the grounds that penalties involving the privation of freedom were ineffectual in combating "the proliferation of crimes", and that "capital punishment has intimidatory, exemplary and disciplinary effects which need to be employed for the benefit of society".

Against these criteria, in September 1971, the application of the death sentence was limited through DL 18968, to the crimes of treason against the Fatherland and to homicides resulting from the kidnapping or abduction of minors. It was argued, oblivious of what had been affirmed earlier, that "it has become imperative to apply penalties that meet the criminal and social ends of reforming the criminal, as a legal obligation of the State and a moral obligation of society, to which he belongs". This change of heart was, however, merely opportunistic, motivated by Velasco Allvarado's wish to avoid defeat during a political tour of the departments in the south, in which the execution of sentences involving the death penalty was an issue.

Two months later, citing an emergency situation and the need to sanction drastically the criminal use of explosives the death penalty was restored for such cases, in DL Nº 19049. Subsequently, in 1973, through DL Nº 19910, capital punishment was established for murder, robbery and attacks on members of the Police, if resulting in death to the victim. In 1974, it was envisaged, in DL Nº 20828, for the punishment of terrorist attacks against high-ranking Government members, in which death or any type of injury was inflicted on the victims. On this occasion, it was repeated that "the sanctions must be drastic, the proceedings summary and enforcement of the sentence immediate". The investigation and trial under military judges involved summary proceedings of 48-hours, including the execution of the death penalty.

At the end of the military government, a Constituent Assembly was set up to draft the Constitution of 1979. It determined that there should be "no death penalty, except for treason against the Fatherland in the case of a state of war". This provision was broadened in the Constitution of 1993. According to its art. 140, the "death penalty may only be applied to the crime of treason against the Fatherland in the case of war, and to the crime of terrorism, in accordance with the laws and the treaties to which Peru is a signatory party".

Nevertheless, death penalty was not specifically referred to in the various criminal law acts passed to punish those responsible for terrorism, despite the violence unleashed mainly by Sendero Luminoso. Life imprisonment was established for the most serious cases. This was clearly due to the fact that Peru was a signatory to the American Convention on Human Rights, whose Art. 4, para. 2, states that the application of the death penalty "shall not be extended to crimes to which it does not presently apply".

IV. ATTEMPTS TO REINTRODUCE THE DEATH PENALTY

Despite this regulatory context, there has been no end of proposals to restore the death penalty for various serious crimes. Over recent years, the populist promise to restore it made by the current president, Alan García, may be highlighted. This type of discourse, exploiting the feeling of insecurity produced by the poor functioning of the police force, the tax system and the judiciary in the fight against crime, has on the one hand, created a popular current of opinion in support of the death penalty and, on the other, the proliferation of draft legislation to define a framework for its restoration, among which the following proposals may be mentioned:

- Nº 00361 (26/09/1995), in which the reform of art. 140º of the Political Constitution of Peru is proposed, by contemplating "the death penalty for the offences involving the violation of the sexual liberty of minors under the age of 11".
- Nº 01082 (07/03/1996), which envisages the application of the sanction in cases where "death is caused or a serious injury is produced due to offences involving the sexual violation of minors". The same proposal was echoed in draft law Nº 02179 of 31.10.1996.
- N° 01296 (14/05/1996), which stresses that the death penalty will also be applied "to authors of the offences of aggravated sexual violation of minors in accordance with the provisions of the Penal Code". The contents of draft law Nº 01735 of 5.9.96 are also along the same lines.

- Nº 01704 (29/08/1996), which proposes the replacement of the text of article 140 of the Constitution, in which "the death penalty may only be applied to the offence of treason against the fatherland in the case of war, terrorism, and for offences against the sexual freedom of minors under the age of 11".
- Nº 01826, which proposes imposing the death penalty for "cases of sexual violation resulting in the death of a minor".
- Nº 03329 (06/11/1996), refers, similarly, to "the perpetrators of offences of aggravated sexual violation of minors under the age of 11 in which death ensues or which is the cause of serious and permanent physical or mental impairment in the victim".
- Nº 03329 (14/01/1998), stipulates that "the death penalty may only be applied to the offence of treason against the fatherland in the case of war, terrorism, aggravated homicide and the offence of the violation of sexual liberty, in accordance with the laws and treaties to which Peru is a signatory party".
- Nº 14812/2005-CR (07.04.2006) makes a provision "to add a paragraph to article 140º of the Constitution and to modify article 173º of the Penal Code, referring to the death sentence for crimes of aggravated sexual violence against minors".

V. ARGUMENTS BEHIND THE PROPOSALS TO INTRODUCE THE DEATH PENALTY

The arguments invoked in these various draft laws are similar to those that were brandished in favor of the death penalty through the various laws and decrees cited earlier. For example, the alleged support of public opinion, the vulnerability of people in the face of increasingly serious criminality, the need to reaffirm public security against terrorism and especially serious offences such as homicide and sexual offences against minors, the impossibility of reforming certain criminals regarded as highly dangerous.

The differences are related to the fundamentalist opinions that circulate between the supporters of the death penalty. They refer, for

example, to the ideas of Greek philosophers or criteria taken from the Bible or from the catechism of the Catholic Church, which attempt to show that capital punishment has for a long time been considered justifiable and effective. Tendentiously ignoring the position of the Vatican which, in a relative way, makes it clear that: "for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent." (Encyclical Evangelium Vitae (56), of Pope John Paul II).

Such recourse to aprioristic affirmations and religious criteria is opportunist and populist. So too are the repeated and incoherent proposals to restore the death penalty. Public opinion is confused and manipulated by such proposals, whose primary aim is to divert attention from the enormous failings of social justice.

VI. *DE FACTO* DEATH PENALTY

Peru has ratified the Inter-American Convention on Human Rights, which prohibits the restoration of the death penalty, and provisions restricting its application have been included in successive Constitutions. However, extra-judicial executions by the police or para-military groups have been tolerated by dictatorial governments in the past.

The fact that the security of the population is not duly guaranteed provokes a reaction by people, who, according to their income levels, either organize vigilante groups, or take self-defence into their own hands, which often involves the public lynching of people they suspect of having committed some crime or other.

The tolerance or acceptance of radical currents in communities creates a pluralism of legal systems and parallel jurisdictions, in which consuetudinary rights are upheld, which entail the application of corporal punishment and even the death penalty, and bla-

tantly ignore the fact that human rights as established in the Constitution limit the application of such traditional rights.

On the other hand, the infrahuman conditions in which life sentences are served in overcrowded and dilapidated penitentiaries converts such terms into a "slow death"; and this, in turn, seems to give the death penalty a sort of *de facto* validity.

Thus, as well as expressing our concern for the formal abolition of the death penalty and continuing to demand respect for human rights, it would also be advisable to fight the material and ideological circumstances that create fertile ground for attitudes that support the death penalty.

VII. CONCLUSION

In order to counteract these pressures in favour of the death penalty, it is necessary to remain active in the defence of human rights in general terms and in the reinforcement of the principles enshrined in international covenants. In relation to the situation in Peru, the following criteria should be reiterated:

- the mere threat of prison is ineffective to avoid the repeated perpetration of serious crimes and this is used as a pretext to re-establish capital punishment;
- the sanctions envisaged in the law are sufficiently effective provided that they are applied, since impunity is what causes the increase in criminal activity (for example, in the case of corruption);
- together with punishment, measures should be applied that reduce the personal and social causes that contribute to increased criminal activity;
- there is nothing to guarantee that the application of the death penalty may not be extended to other crimes and used with aims other than those that are specifically indicated;
- legislation and criminal policy that supports the death penalty constitute a disregard for the dignity of the person as well

as a step backwards in the process of establishing the rule of law.

The campaign for the universal abolition of the death penalty should also serve to reinforce respect for human rights, above all in relation to the removal of all parallel and informal systems of justice whether organized by governments or individuals.

THE DEATH PENALTY IN THE IBEROAMERICAN PENAL CODES (1975-2009)[1]

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1. In 1975 I wrote my first article on criminal law, focusing on the death penalty in Iberoamerican penal codes. The article in question appeared in a collection of essays entitled *La Pena de Muerte. Seis Respuestas* ("The Death Penalty-Six Responses"), published at a key moment in Spanish history and edited by my *maestro* Marino Barbero Santos, an example for us all in many fields[2] and a man who was committed to ensuring a penal code which respected human rights, and as such, firmly opposed to capital punishment. That first piece, the start of my career in criminal law, allowed me to externalise my hostility towards a form of punishment which goes against everything I believe and have always defended, both as a criminal lawyer and as a person. Furthermore, and although I was still unaware of it at the time, the fact that essay dealt with legislation in Iberoamerican countries would prove to be a portent of my connection to a region which has left its mark on my life and continues to do so.

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1 This essay should be understood as a continuation of the piece I published in 1975. As I mention in the following note, with respect to the 1975 article, I have omitted Haiti, as it is not an Iberoamerican state. Strictly speaking, I should have included Spain and Portugal in this analysis, as both are Iberoamerican states; nevertheless, I have preferred to limit the scope of my study, as I did in 1975, to the legislation applicable to countries in the Americas whose roots are in the Iberian Peninsula.

I would like to express my thanks to Professor Ferré Olivé, who, through his Latin American network of collaborators on the *Revista Penal* ("Penal Review") of which he is the managing editor, provided me with up-to-date information on a number of these countries. Similarly, my collaboration with Professor Ana Pérez Cepeda has been of key importance in making use of all the information found on the internet.

2 BERDUGO GÓMEZ DE LA TORRE: *La pena de muerte en el actual derecho penal iberoamericano*, in BARBERO SANTOS and others: *La Pena de Muerte - 6 Respuestas*, Valladolid 1975, pp. 79 ff.

Today, many years later, I want to set out the changes that Iberoamerican criminal law has undergone with regard to capital punishment.

It must be said that one cannot ignore the difference, so dramatically Latin American, between the content of a country's law and reality[3], strikingly evident during the first part of the period I have looked at. The use of violence on the fringes of law in countries in the Southern Cone, among others, which took the form of disappearances and executions (actually assassinations rather than executions), has marked the history of Argentina, Chile and Uruguay, as well as other countries such as Peru and Brazil. It should not be overlooked that these crimes against people's lives were committed by those who had the specific obligation to prevent them. Today, the consolidation of democracy has brought with it the abolition of the *Leyes de Punto Final* (the "Full Stop" or Amnesty Laws which ensured the end of the investigation and prosecution of those accused of political violence during dictatorships) and the demand for penal responsibility for those who, in the name of supposedly undeclared wars and the unjustifiable reasons put forward by the State, assassinated the very people whose rights they were obliged to protect.

2. Examination of current criminal law in Iberoamerican countries shows that in addition to those countries which had abolished the death penalty in 1975 —Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, Honduras, Mexico, Panama, Uruguay and Venezuela— the following countries have joined the list: Argentina, Bolivia, Chile, Nicaragua, Paraguay, Peru and El Salvador. Today, the only countries which retain capital punishment in their Penal Codes are Cuba and Guatemala.

Nonetheless, among the States I have classified as being abolitionist, a number of them still contemplate the possibility of apply-

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3 Victor Hugo, in a phrase often quoted by Carlos Fuentes, reflected this situation when, referring to the Colombian Constitution of 1863, he said that this was a constitution for angels, not for men: beautifully written but applied by nobody.

ing the death penalty under military law in times of war. As will be seen, this is the case in Brazil, Chile, El Salvador and Peru.

3. The period of time covered by this research is marked by the passing of the "Protocol to the American Convention on Human Rights to Abolish the Death Penalty" by the OAS Inter-American Commission on Human Rights in the city of Asunción on June 8[4]. Article 1 of the Protocol specifically declares that "The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction". Article 2, however, contemplates the possibility that those states signing up to the Protocol "may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature".

The Iberoamerican countries which to date have signed up to this Protocol without reservations are Argentina (2008), Costa Rica (1998), Ecuador (1998), Mexico (2007), Nicaragua (1999), Panama (1991), Paraguay (2000), Uruguay (1994) and Venezuela (1993).

Brazil (1996) and Chile (2008) have also ratified the Protocol, although they have applied the clause stipulated in Article 2.

The countries yet to sign the Protocol are thus Bolivia, Colombia (although there is a draft bill proposing its ratification), Guatemala, Honduras, Peru and the Dominican Republic. Cuba should also be included, even though it is not a member state of the OAS.

4. The countries in the first group, those that have ratified the Protocol without reservations are those which, in a legal sense, can be considered to be fully abolitionist. Within these States, special mention should be made of the recent incorporation of Argentina,

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[4] The legal reasons in the Preamble to this Protocol are based on Article 4 of the Inter-American Commission on Human Rights which recognises the right to life and restricts the application of the death penalty. The Preamble concludes "That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas".

whose Senate, in August 2008, unanimously approved the repeal of the Code of Military Justice, the only legal provision which still contemplates capital punishment, something which, incidentally, is not fully excluded from the country's Constitution[5].

The other signatories expressly state their abolition in their respective constitutions. Article 21 of the 1949 Costa Rican Constitution unreservedly establishes the right to life[6] and, although there is no reference to capital punishment, it should be remembered that Costa Rica abolished the death penalty in the nineteenth century. Article 23 of the 1998 Constitution of Ecuador[7], Article 22 of the 1917 Mexican Constitution, amended in 2005,[8] Article 23 of the 1986 Constitution of Nicaragua[9], Article 30 of the 1972 Constitution of Panama[10], Article

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5 Article 18 of the 1994 Argentinean Constitution states: *Queda abolida para siempre la pena de muerte por causas políticas, toda especie de tormento y los azotes* [The death penalty is for ever abolished for political matters, all forms of torture and beatings].

6 Article 21 expressly states: *La vida humana es inviolable* [Human life is inviolable]. Previously, the 1871 Constitution, Article 45 contemplated the possibility of applying the death penalty in the following cases: *I.- En el delito de homicidio premeditado y seguro, o premeditado y alevoso. 2.-En los delitos de alta traición. 3.- En los de piratería* [1) For the crime of premeditated murder, 2) For crimes of high treason, and 3) For crimes of piracy]. In 1882, the Constitution was amended by Decree N.VII and Article 45 was modified to read *La vida humana es inviolable en Costa Rica* [Human life is inviolable in Costa Rica].

7 Article 23.1 establishes *La inviolabilidad de la vida. No hay pena de muerte* [Human life is inviolable. There is no death penalty].

8 The Mexican Senate struck out the fourth paragraph of Article 22 of the 1917 Constitution which had stated: *Queda también prohibida la pena de muerte por delitos políticos y en cuanto a los demás, sólo podrá imponerse al traidor a la patria en guerra extranjera, al parricida, al homicida con alevosía, premeditación y ventaja, al incendiario, al plagiario, al salteador de caminos, al pirata y a los reos de delitos graves de orden militar…* ["The Death. Penalty is prohibited for political crimes, and as far as other crimes are concerned, it may only be applied to national traitors fighting for foreign powers, parricide, premeditated murder, arson, kidnapping, to highwaymen, pirates and those convicted of serious military crimes". Nevertheless…].

9 Article 23 states: *El derecho a la vida es inviolable e inherente a la persona humana. En Nicaragua no hay pena de muerte* [The right to human life is inviolable and inherent. There is no death penalty in Nicaragua].

10 Article 30: *No hay pena de muerte, de expatriación, ni de confiscación de bienes* [There is no death penalty, nor is there expatriation, nor the confiscation of one's assets].

4 of the 1992 Constitution of Paraguay[11], Article 26 of the 1967 Constitution of Uruguay 1967[12] and Article 43 of the 1999 Constitution of Venezuela[13] all express the same idea in different ways: the exclusion of the death penalty from their respective penal codes.

5. As has been mentioned, among the countries that have ratified the Protocol, only Brazil and Chile have chosen to reserve the death penalty for their military legislation. It is worth pointing out that these two nations have a diametrically opposed history with respect to the death penalty: Brazil has been a *de facto* abolitionist state since the nineteenth century whilst Chile still had capital punishment up until the 1980s.

In the case of Brazil[14], *de facto* abolitionism has a long tradition. The last execution was the hanging of the slave Francisco at Pilar de Alagoas in 1876. Since then, even in the periods in which the Brazilian legislation contained such a punishment, during the time of the so-called *Estado Novo* and more recently, during military governments, all death sentences have been commuted.

Today, Article 5 XLVII of the 1988 Constitution prohibits the death penalty "except in the event where war is declared, as set out in Article 84 XIX".

In such situations of war, the Military Penal Code contemplates the death penalty (Article 55), which is to be enforced by a firing squad (Article 56). The President of the Republic is then informed of the judgment and the execution will take place six days later (Ar-

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11 Article 4, after establishing the right to life, among other fundamental rights, declares: *Queda abolida la pena de muerte* [The death penalty is hereby abolished].

12 Among other guarantees, Article 26 ensures: *A nadie se le aplicará la pena de muerte* [The death penalty will not be applied to anybody].

13 Article 43 states: *El derecho a la vida es inviolable. Ninguna ley podrá establecer la pena de muerte ni autoridad alguna aplicarla.* [The right to human life is inviolable. No law may establish the death penaly and no authority may apply it].

14 Thanks here are due to Professor Ana Elisa Liberatore of the University of Sao Paulo and the public prosecutor William Terra de Oliveira for all information pertaining to Brazil.

ticle 57)[15] except in circumstances where the offence has taken place within an operational conflict zone, in which case the prisoner may be executed immediately.

In Chile, the history and the situation are different. Here, in 2001, Law Nº 19734 removed the death penalty from its ordinary legislation, maintaining it in the military penal code for times of war.

Article 19.1 of the Chilean Constitution states that *la pena de muerte sólo podrá establecerse por delito contemplado en ley aprobada con quórum calificado* [The death penalty may only be applied to an offence contemplated in laws approved with a qualified majority]. Article 240 of the Code of Military Justice establishes that *La pena de muerte se ejecutará ordinariamente de día, con la publicidad y en la forma que determinen los reglamentos que dicte el Presidente de la República, y al día siguiente de notificado al reo del "cúmplase" de la respectiva sentencia* [The death penalty will normally be carried out in daytime, in the form and with the publicity determined by the regulations decreed by the President of the Republic, and on the day following notification to the prisoner of "intent to proceed" with the respective sentence". However in times of war, execution will be carried out immediately in such cases where the crime requires a prompt and exemplary punishment in the opinion of the Commander in Chief of the Army or the commanding officer in the location under siege or blockaded by the enemy[16].

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15 The Brazilian military penal code contemplates the death penalty in the event of declared war for the following crimes: Treason (Article 355); aiding and abetting the enemy (Article 356); coercion of a commanding officer (Article 358); fleeing in the face of the enemy (Article 365); mutiny, rebellion or conspiracy (Article 368); surrender or capitulation of a command (Article 372); damage to goods or property of military interest (Article 384); abandoning one's post (Article 390); desertion in the face of the enemy (Article 392) and genocide (Article 401).

16 In many cases, Chilean military legislation contemplates the option of the death penalty. For crimes of treason, espionage and other crimes against the sovereignty and external security of the State (Article 244), Crimes against international law (Article 262), Crimes against the internal security of the State, (Article 270), Crimes against the order and security of the army (Article 272), Crimes against military honour and duty (Articles 287, 288, 303, 304 and 327), Crimes of insubordination, (Articles 336, 337 and 339), Crimes against the interests of the army (Article 347), Regulations relating to the Navy (Articles 378, 379, 383. 384, 391 and 393).

For the period in which we have analysed capital punishment, prior, that is, to the 2001 act, the penalty was applied, in compliance with a sentence passed in a court of law, on two occasions: in 1982, to two persons convicted of crimes of robbery with homicide[17] and in 1985 on two serial killers[18].

6. In the Countries which have not ratified the Asunción Protocol the situations are different. Colombia, the Dominican Republic and Honduras have long been abolitionist. Bolivia abolished capital punishment more recently.

In Colombia, which repealed the death penalty in 1910, Article 11 of the 1991 Constitution includes an express and unequivocal declaration of opposition to the death penalty: *El derecho a la vida es inviolable. No habrá pena de muerte* [The right to life is inviolable. There shall be no death penalty]. In order to be consistent with this declaration, a draft bill proposing ratification of the Asunción Protocol is currently before parliament[19].

The legislation of Honduras has been abolitionist since 1956 and its 1982 Constitution expressly prohibits capital punishment in Article 66[20].

In the case of the Dominican Republic, abolitionist since 1966, Article 7.1 of its 2002 Constitution, having declared the inviolability of life, establishes the following: *No podrá establecerse, pronunciarse, ni aplicarse en ningún caso la pena de muerte* [The death penalty may not be established, pronounced or applied under any circumstances].

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17 On October 22, 1982, Gabriel Hernández and Eduardo Villanueva - two agents from Chile's intelligence service, the CNI, were executed by firing squad for the crime of robbery with homicide. For further information on this execution, and the death penalty in Chile in general, see *TAPIA: Historia de la pena de muerte en Chile*, http://www.gtapia.diarioeldia.cl

18 The last time the death penalty was carried out was on January 29, 1985, when the two *carabineros* Carlos Alberto Topp Collins and Jorge Sagredo Pizarro were convicted of a dozen murders in Viña del Mar. See http://es.wikipedia.org/wiki/Pena_de_muerte_en_Chile

19 The full text of the draft bill to ratify the Asunción Protocol can be seen at http://web.presidencia.gov.co/sp.2009

20 Article 66 expressly states *Se prohíbe la pena de muerte* [The death penalty is prohibited].

In Bolivia, the last public execution by firing squad took place in 1971[21]. Article 15.1 of the country's 2009 Constitution expressly states "*No existe la pena de muerte"* [The death penalty does not exist]. This can be taken to mean that capital punishment, which was previously contemplated in Article 22, has now been removed from the Code of Military Justice[22].

These four countries, Colombia, Honduras, the Dominican Republic and Bolivia, would therefore have no legal obstacles to prevent them from signing up to the Asunción Protocol.

7. A second group of countries which have not ratified the Asunción Protocol comprises El Salvador and Peru. These two nations still maintain the constitutional option of applying the death penalty.

El Salvador, as contemplated by Article 27 of its Constitution, maintains the possibility of applying the death penalty only in *…los casos previstos por las leyes militares durante el estado de guerra internacional* [cases covered by military laws during a state of international war". The death penalty would therefore not be applicable in the case of civil war].

Article 9 of El Salvador's long-standing Code of Military Justice stipulates that the death penalty is to be carried out by firing squad, whilst the following article sets out a series of rules to restrict the application of the death penalty in case de multiple sentences[23] for a single crime: *no todos deberán sufrirla, aunque todos deberán ser condenados a ella en la sentencia. Si no pasaren de cinco, la sufrirá uno solo, sino pasaren de diez, dos, si no pasaren de veinte, tres, y excediendo de veinte*

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21 The last execution by a firing squad in a public place was that of the paedophile Claudio Suxo, during the first government of Banzer. For further information regarding the death penalty in Bolivia, see VARGAS LIMA: *La pena de muerte en la legislación boliviana. Evolución histórico-normativa y su proyección internacional* at http://www.monografias.com

22 Article 24 of the military legislation states that the death penalty shall be carried out by firing squad and shall also imply the stripping of the person's rank.

23 For further detail of dates and information concerning the death penalty, see the Amnesty International website: http://www.amnesty.org/en/death-penalty.

uno por cada decena o fracción de ella [whilst all should sentenced to it (capital punishment) in the judgment, not all should have this judgment applied. If there are no more than five, one is to be executed; if no more than ten, then two. If the number does not exceed twenty, then three shall be executed, and if more than twenty, one person is to be executed for each ten found guilty or fraction thereof]. To this end, *El juez enumerara los reos en la sentencia por el orden de su mayor culpabilidad* [The judge shall nominate the prisoners based on the extent of their culpability].

According to the information that we have accessed, the last execution in El Salvador was the application of a sentence passed by a court in 1973.

In Peru[24], Article 140 of the 1993 Constitution states: *La pena de muerte sólo podrá aplicarse por el delito de traición a la patria en caso de guerra y el de terrorismo, conforme a las leyes y a los tratados de los que el Perú es parte obligada* [The death penalty may only be applied in the case of treason in times of war and terrorism, in accordance with the laws and treaties to which Peru is a signatory].

This constitutional possibility is not included in Peru's Penal Code, but does feature in a restricted manner in its 2006 Code of Military Justice. Among other punishments, Article 21.1 establishes: *Pena de muerte por traición a la Patria en caso de guerra exterior* [The death penalty is applicable for treason in the event of war with foreign powers], also stipulated in the final paragraph of Article 66[25].

In Peru, the last executions took place in the 1970s[26]. As will be seen later, the present government has sought —unsuccessfully to date— to extend the possible scope of the application of capital punishment.

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24 I would like to thank my good friend Víctor Prado for the information he has provided on Peru.

25 The final paragraph of Article 66 states: *En caso de guerra exterior podrá aplicarse la pena de muerte, acorde con nuestra legislación.* [In the event of war with a foreign power, the death penalty may be applied in accordance with our legislation.]

26 The death penalty was applied for crimes of robbery with homicide and attacks on the armed forces involving homicide, based on that stipulated in Decree Law 19910. The Code of Military Justice was also applied in the case of a non-commissioned officer found guilty of treason.

8. The final group comprises Guatemala and Cuba, the only two Iberoamerican countries which still have the death penalty on their respective Penal Codes.

8.1. In Guatemala[27] Article 18 of the 1985 Constitution states:

> *"Pena de muerte. La pena de muerte no podrá imponerse en los siguientes casos:*
> *a) Con fundamento en presunciones;*
> *b) A las mujeres;*
> *c) A los mayores de sesenta años;*
> *d) A los reos de delitos políticos y comunes conexos con los políticos; y*
> *e) A reos cuya extradición haya sido concedida bajo esa condición.*
> *Contra la sentencia que imponga la pena de muerte, serán admisibles todos los recursos legales pertinentes, inclusive el de casación; éste siempre será admitido para su trámite. La pena se ejecutará después de agotarse todos los recursos.*
> *El Congreso de la República podrá abolir la pena de muerte".*
>
> [The death penalty. The death penalty may not be applied in the following cases:
> a) Based on unsubstantiated assumptions
> b) For women
> c) Those over the age of sixty
> d) Those convicted of political crimes or common crimes connected to political matters
> e) For prisoners whose extradition has been granted on this basis.
> In such cases where the death penalty has been imposed, all appeals permitted under law will be admissible, including cassation. The sentence will be carried out once all such appeals have been exhausted.
> The Congress of the Republic may abolish the death penalty.]

It should be pointed out that in addition to the constitutional cases of "positive discrimination", the Congress still has not moved to abolish the death penalty.

The 1973 Penal Code stipulates the death penalty for parricide (Article 131); murder (Article 132); rape resulting in death (Article 175); kidnapping and hijacking (Article 201) and forced disappearance resulting in death or injury (Article 201, part 3).

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[27] My thanks are due to Alejandro Rodríguez Varillas, Public Prosecutor and a former student at the University of Salamanca.

The death sentence is applicable in cases of parricide or murder … *si por las circunstancias del hecho, la manera de realizarlo y los móviles determinantes, se revelare una mayor y particular peligrosidad en el agente* [… if, due to the circumstances of the case, the manner in which the crime was committed and the determining motives, a major and particular danger is revealed in the agent]. In the event of rapes resulting in death, the death penalty is only mandatory where the victim is under ten years of age. In cases of kidnapping, capital punishment is the only penalty for the material or intellectual authors of the crime and it also appears as the sole penalty in circumstances involving forced disappearance resulting in the death or injury of the victim.

On numerous occasions the military penal code establishes that for such crimes as sedition where there are a number of authors, one in ten of the seditionists will be executed (Article 51).

Until 1996, the death penalty in Guatemala was carried out by firing squad; however in November 1996 Article 7 of the act establishing the procedure to be followed in cases of capital punishment stated that *se procederá a ejecutar la pena de muerte mediante el procedimiento de la inyección letal* [the death penalty is to be carried out by administering a lethal injection][28], setting out in detail the whole

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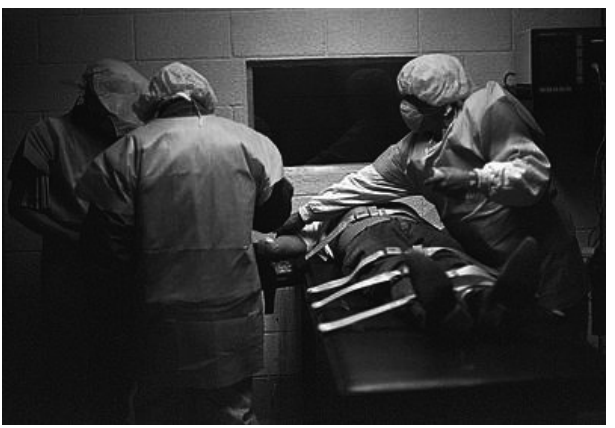
28 The first execution by lethal injection was that of Manuel Martínez Coronado that took place in February, 1998.



The photo can be seen on Amnesty International's website.

execution procedure. In accordance with initial clauses, the Guatemalan legislation declares *…que mientras en Guatemala esté vigente la pena de muerte, la ejecución de la misma debe realizarse de la manera más humanitaria posible no sólo para el reo que la sufre sino también para la sociedad que, en una u otra forma, es espectadora (sic)* [that whilst the death penalty is currently in force in Guatemala, its application should be carried out in the most humane manner possible, not only for the prisoner to be executed but also for society as a whole which, in one way or another, is a spectator.]

In compliance with this regulation, the execution will be carried out *…en forma privada en el interior del presidio que corresponda* [in private, in the interior of the corresponding prison facility] (Article 3). Privacy is, at the very least, questionable as, in addition to the authorities present as stipulated in this Article, the execution is also witnessed by *el Capellán Mayor, un Ministro de Religión o Culto que profese el reo, su esposa o conviviente y sus familiares dentro de los grados de ley, así como los representantes de la prensa hablada, escrita y televisada* [a prison chaplain, a minister of the prisoner's professed religion or church, his or her spouse or cohabitant or immediate family members, as well as representatives of the press, radio and television.]

The execution is suspended *…cuando el reo se hallare privado de la razón o padeciendo una enfermedad grave* [where the prisoner is deprived of the powers of reason, or is suffering from a serious illness], albeit *…únicamente por el tiempo estrictamente necesario para la recuperación de la normalidad* [only for as long as is strictly necessary in order to return to normality]. These stipulations are all from Article 4[29].

At least in two cases, the Inter-American Court of Human Rights has pronounced against the death penalty in Guatemala. These two occasions were the cases of Fermín Ramírez (20.6.2005) and Ron-

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[29] Article 7 of the Act, Decree Number 100-1996, of the November 28, 1996 sets out in great detail all the steps of the execution to be carried out by the executioner.

ald Raxcacó (15/9/2005 and 4/7/2006). In both cases the Court denounced the death penalty in cases of murder and kidnapping[30].

The Guatemalan Constitutional Court suspended the death penalty in 2002, arguing that the decision as to who could grant the *derecho de gracia* (the "right of grace" or official pardon) was not sufficiently defined. In March, 2008, Congress passed an Act regulating the pardoning of the death penalty, although this was vetoed by President Colom, meaning that the country remains *de facto* abolitionist.

It is important to highlight that since 2000 no execution has been carried out in Guatemala, although there are 15 prisoners condemned to death and pending appeal[31].

8.2. In Cuba, the last three executions took place in 2003[32] in application of the 2001 Law 93, the Acts of Terrorism Act. These executions signalled the end of the *de facto* moratorium which had been in place since 2000. The negative repercussions which followed them[33] resulted in a new *de facto* moratorium, and in February, 2008, Raúl Castro announced the commutation of the death penalty in the cases of the majority of condemned prisoners. Only three men are still under sentence of death, accused of terrorism[34].

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30 The sentences and resolutions can be read on the Inter-American Court of Human Rights' website: http://www.corteidh.or.cr

31 According to information passed on to me by Alejandro Rodríguez Varillas, during the armed conflict between 1982 and 1983, 11 were executed by firing squad, due to judgments passed by special courts which sat in secret. These courts were abolished in 1983. Between 1996 and 2000 the death penalty was carried out on five further people: two for aggravated rape, one for murder and two for hijacking and kidnapping.

32 In April, 2003, Lorenzo E. Capello, Bárbaro Leodán and Jorge Luis Martínez were executed for the hijacking of a passenger ferry with a view to taking it to the United States.

33 The information from *GROGG: Pena de muerte-Cuba. Una condena difícil de extirpar* can be seen at http://ipsnoticias.net

34 See the January 2009 Human Rights Watch Report on Cuba, which estimates that between 20 and 30 sentences have been commuted, although the exact number is not known owing to the refusal of the Cuban authorities to release such details.

The situation under current Cuban criminal legislation has as its point of departure the 1992 Constitution, which failed to mention the death penalty. Article 25 of the 1940 Constitution, applicable until late 1958, established: *No podrá imponerse la pena de muerte. Se exceptúan los miembros de las Fuerzas Armadas, por delitos de carácter militar y las personas culpables de traición, o de espionaje a favor del enemigo en tiempo de guerra con nación extranjera* "[The death penalty may not be imposed except in cases of members of the armed forces convicted of crimes of a military nature and those persons convicted of treason and espionage in favour of the enemy in times of war with a foreign power"]. The regime which took power in 1959 repealed the Constitution and the limitations it imposed on the death penalty by instigating the Revolutionary Courts based on the 1896 Mambí Army Act. The 1976 Constitution, like its more recent counterpart, did not mention capital punishment[35].

The first aspect that differentiates Cuba from other countries in the region is therefore the absence of constitutional limitations regarding the death penalty in its criminal code.

The institutionalisation of the new regime in the 1970s resulted in the 1976 Constitution and the new Legal Code 21 in 1979, which replaced both the Social Security Code and the Military Crimes Act.

Article 29 of the Penal Code states:

> *1. La sanción de muerte es de carácter excepcional, y sólo se aplica por el Tribunal en los casos más graves de comisión de los delitos para los que se halla establecida.*
> *2. La sanción de muerte no puede imponerse a los menores de 20 años de edad ni a las mujeres que cometieron el delito estando encinta o que lo estén al momento de dictarse la sentencia.*
> *3. La sanción de muerte se ejecuta por fusilamiento.*
>
> "[1 - The death penalty is exceptional in its nature and may only be applied by the Court in punishment of the most serious crimes.
> 2 - The death penalty may not be imposed on those below the age of 20, nor on women who commit their crime whilst pregnant, or who are pregnant at the time of sentencing.

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35 For further information regarding the evolution of Cuban legislation, see PEREZ KASPARIAN: *La Pena de muerte en la legislación cubana* at http://www.saraperezk.com

3 - The death penalty shall be administered by firing squad"]

In 1988, a new Penal Code was published as Law 62, in which Article 29 is unchanged. In 1997, Decree 175 introduced a new Penal Code, which also maintained Article 29.

The crimes for which the Penal Code anticipates the application of the death penalty mainly include crimes against state security and the most serious crimes against the individual: Crimes against national security (Article 91), Instigating armed action against Cuba (Articles 92 and 93), Aiding the enemy (Article 94), Espionage (Article 97), Rebellion (Article 98), Insurrection (Article 100), Usurping Political or Military Command (Articles 102 and 105), Terrorism (Articles 106, 107 and 108), Hostile acts against a foreign state (Article 110), Genocide (Article 116), Piracy (Article 117 and 118), Mercenaryism (Article 119), the crime of Apartheid (Article 120), Other acts against the security of the state (Article 124), Murder (Articles 263 and 264), Rape (Article 298) and Paedophilia with violence (Article 299).

Law 87, passed in 1999, increases the extent of punishment against a series of crimes. As far as this affects the area covered by this study, the Act imposed the death penalty for serious drug-trafficking crimes, the corruption of minors and robbery with violence. This political-criminal orientation was made clear by Fidel Castro who stated: "I sincerely hope that our judges will have no hesitation in applying the death penalty"[36].

In 2001 the applicability of the death penalty was extended by Law 93 against acts of terrorism.

Officially, the application of capital punishment is still considered exceptional, with its continued place in Cuban legislation justified by the situation of hostility to which the island's government is subject. One only need examine the list of capital crimes to see that the majority relate to the alleged defence of the state.

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[36] For further information regarding this moment in the evolution of Cuban criminal law see the Amnesty International document AMR 25/29/99 from the June 1, 1999: *Cuba. Preocupante aumento del uso de la pena de muerte*.

9. Overall the situation in Latin America during the period covered by this study is marked by a clear retreat of the death penalty from the various penal codes of the region. Nevertheless, from time to time, in certain countries there are movements in favour of the re-implementation or greater extension of the death penalty, normally regarding serious crimes against sexual liberty or terrorism.

By way of example, we have the case of Peru, where President Alan García has sought to implement the death penalty, firstly for cases of rape, involving the murder of children under the age of seven, and for cases of terrorism. The first case requires constitutional reform, something which to date has not happened. As far as the second case is concerned, in January 2007, the Congress of the Republic rejected Law 2575 which aimed to impose the death sentence on those convicted of acts of aggravated terrorism, leading or being a member of a death squad[37].

10. To summarise, and without overlooking the dichotomy between what the law actually says and the reality which historically has characterised with excessive frequency the majority of countries in the region, the situation with respect to the death penalty on a legislative level can be rated very positively.

The most significant development with regard to the death penalty during this period has been the passing of the Asunción Protocol, which has been a common theme throughout this project. The situation, reflected in this Paper, is a foretaste of the resolutions passed by the General Assembly of the United Nations in favour of a worldwide moratorium on the death penalty[38].

Finally, the following should be borne in mind:

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37 For more on these attempts, see the information and documentation from the 36th IFHR Congress, held in Lisbon, in 2007.

38 On the December 18, 2007, the General Assembly of the United Nations passed a resolution on a worldwide moratorium on the death penalty. The resolution was adopted 104 in favour, 52 against and 29 abstentions.
On December 18, 2008, the General Assembly of the United Nations passed a second resolution demanding a moratorium on executions. The resolution was passed by 106 votes in favour, 46 against and 34 abstentions.

- Since 2003, no execution has been carried out to enforce a legal judgment.
- Only two countries, Guatemala and Cuba include capital punishment in their Penal Codes.
- Brazil, Chile, El Salvador and Peru only retain the death penalty in their military legislation for times of war. In all cases, this limitation is constitutionally imposed.
- The remaining countries in the region do not have the death penalty on their legislation; in the majority of cases in is subject to a constitutional prohibition.

ATTACKING THE DEATH PENALTY IN THE ANGLOPHONE CARIBBEAN: A CRIMINOLOGICAL CONTRIBUTION

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I. THE DEATH PENALTY IN CONTEXT

At the time of writing (July 2006), 88 nations states had either abolished the death penalty for all offences, whether in peacetime or wartime, in civil or military law. A further 10 had abolished it for all offences save for treason in exceptional circumstances or under their military law in time of wax. Only 59 countries both retained the death penalty for murder (and some of them for other crimes, in particular trading in narcotics) and had carried out at least one execution within the past 10 years. Although a further 41 countries also retained the death penalty in law, they had not carried out an execution within this period, and at least 27 of them had, according to Amnesty International, committed themselves not to resume executions[1]. It is thus clear that the objective of the United Nations, through its Human Rights Treaties and other initiatives, to achieve a world-wide abolition of capital punishment is coming ever closer to fulfillment. The speed with which this movement has gathered pace is truly astonishing. Ten years ago, at the end of December 1995, there were only 73 abolitionist states compared to 98 in July 2006 and 29 that had not executed anyone for at least 10 years compared with 41. Furthermore, among the executing states, according to the

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[1] First published in H. Mueller —Dietz et al (eds) Festschrift für Heike Jung Baden— Baden Nomos (2007). The author thanks Dr Florence Seermmgal and Saul Lehrfreund for the very helpful comments he received from them while preparing this article. Amnesty International, *Facts and Figures on the Death Penalty,* Updated June 27, 2006. http:web.amnesty.org

figures published by Amnesty International —and one must read them with a severe health warning as many are merely estimates— only 18 countries were known to have carried out 20 or more judicial executions between 1999 and 2003 and only eight had apparently executed at least a 100, an average of 20 or more persons a year during the same period: China, the Democratic Republic of the Congo, Iran, Saudi Arabia, Singapore, USA, Vietnam and Yemen[2]. Furthermore, the number of persons being judicially executed has fallen in nearly all countries. For example, executions in Belarus fell from 29 in 1999 to one in 2003. Forty-one executions were carried out in the province of Taiwan in 1999 but only 7 in 2003. The figures for Singapore (the country that had made by far the greatest use of capital punishment in relation to the size of its population) showed a similar trend 43 in 1999 to 6 in 2004. Amnesty International received reports of executions in only 22 countries during 2005 and, apart from China[3]. where it is impossible to get any reliable figures; no other country was known to have executed more than 100 people. Leaving China aside, Amnesty recorded news of only 378 judicial executions worldwide in 2005, at least 94 in Iran and 86 in Saudi Arabia and 60 in the USA. The remaining 18 countries had executed between them at least 138 people an average of eight each[4].

In light of this seemingly inexorable movement, it is not surprising that scholars have begun to turn their attention to what might be done finally to persuade those countries that have not yet embraced abolition to do so. One such country is the Caribbean Republic of Trinidad and Tobago which, along with other independent nations of the region that were formerly British colonies, has resolutely resisted legal and diplomatic pressures to abandon the death penalty. To many it appears ironic that these nations, where the death penalty had been largely a weapon of imposed law on former slave and indentured-labour populations should, on gaining their independ-

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2 *See, Capita! punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. Report of the Secretary General,* United Nations, Economic and Social Council E/2005/3, paras.41-53.

3 The annual number of executions is estimated to be between less than 800 to 3,400 or evert more.

4 *Death Penalty News May 2006*, AI Index: ACT 53/002/2006.

ence, have enshrined in their Constitutions Savings Clauses that retained the criminal law and sanction for murder as it was prior to independence: namely, a mandatory sentence of death[5].

The purpose of this short essay in honour of Heike Jung, who has always championed the value of empirical enquiry to legal scholarship, is to chart the attempts that have been made by lawyers to bring about the abolition of the mandatory death penalty in the Republic of Trinidad and Tobago and other Caribbean countries, with the eventual aim of bringing about the complete abolition of capital punishment, and to show how an empirical criminological inquiry into the use of the mandatory death penalty, carried out by the author and his colleague Dr Florence Seemungal[6], has contributed to this effort.

II. THE SITUATION IN TRINIDAD AND TOBAGO

Executions in Trinidad are rare and sporadic, despite the fact the murders have been increasing at an alarming rate in recent years, and the sentence of death is mandatory upon conviction. One person was executed in 1994 and 10 men were executed in 1999, nine of them convicted of the same crime. Since then no one has been executed although in June 2005 some 83 persons were under sentence of death.

The annual number of deaths recorded by the police as murder had fallen from 143 in 1994 to 93 in 1999, but it then began to rise sharply to 171 in 2002 and to 387 in 2005. This was an increase from 7.6 recorded murders per 100,000 of the population of approximately

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5 For an excellent analysis of how this came about and what its consequences have been, see Margaret A. Burnham, Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean, *International Journal of Constitutional Law*, 3 9540, 2005, pp. 582-616.

6 The report: Roger Hood and Florence Seemungal, *A Rare and Arbitraiy Fate. Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago*, University of Oxford, Centre for Criminology, 2006, can be obtained free of charge from The Death Penalty Project, 50 Broadwick Street, London, W1F 7AG or www.thedearhpenaltyproject.org

1.26 million in 1993 to 30.7 per 100,000 in 2005, one of the highest incidents of culpable homicide in relation to population in the world. This has, as to be expected, created enormous concern, made all the more significant by an apparent decline in the proportion of them brought to justice[7]. An opinion poll carried out by the Trinidad Sunday Guardian in November 2003 found that 62 per cent of respondents said they were fearful of being murdered and two years later a further poll revealed that 55 per cent of respondents put crime as the major problem facing the country, citing the murder rate as their main concern.

III. THE LEGAL CHALLENGE

One of the main reasons why executions have been so rare is the success of lawyers in bringing cases before the Judicial Committee of the Privy Council in London (still the highest court of appeal for Trinidad and Tobago)[8] Of major importance was the decision in 1993 in the case of Pratt and Morgan v. The Attorney General for Jamaica which concerned the length of time that prisoners were kept on death row before being executed —up to 12 years— in both Jamaica and Trinidad and Tobago[9]. The Privy Council held that it would amount to inhuman and degrading punishment to execute a person who had been under sentence of death for longer than five years. The government of Trinidad and Tobago decided to try to speed-up the process by eliminating the possibilities of appeal to international tribunals. In 1998 it took the unprecedented step of withdrawing its accession to the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which

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7 The number of persons committed for trial charged with murder fell from a high of 88 in 1999 to only 38 in 2002 a decline of over 50 per cent..

8 The Caribbean Court of Justice (CCJ) was established in February, 2001 and inaugurated on April 16, 2005, with its headquarters in Port of Spain, Trinidad, but Trinidad and Tobago has yet to amend its constitution so as to be able to accept the jurisdiction of the CCJ. At present it is the final Court of appeal only for Barbados and Guyana. [1]

9 *Pratt and Morgan* v. *Attorney General for Jamaica*, 4 All E.R. 769 (PC) [1993].

allows the UN Human Rights Committee to receive claims from persons who believe that their treatment has been in violation of the Covenant. On re-acceding to the ICCPR Trinidad entered a reservation that the Human Rights Committee "shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death …" The Human Rights Committee held this reservation to be invalid[10] but in 2000, the government again withdrew from the Optional Protocol, although still remaining a party to the Covenant. As a member of the Organization of American States (OAS) since 1967 (having gained independence 1962), Trinidad and Tobago was bound by the American Charter and the American Declaration on the Rights and Duties of Man which protects accused persons from cruel, infamous and unusual punishments. It was also bound not to subject persons to cruel, inhuman or degrading punishment or treatment by the American Convention on Human Rights, which it ratified in 1991, and it recognized the jurisdiction of the Inter-American Court of Human Rights. In May 1998 (with effect from May 1999), the government withdrew from the Convention and the jurisdiction of the Court in a further attempt to shorten the period between conviction for murder and the ability to deal with all appeals within five years so as to be able to carry our executions. However, because it remains a member of the OAS its citizens can still petition the Inter-American Commission on Human Rights under the American Declaration. Both the UN Human Rights Committee[11] and the Inter-American Commission and Court have held that the mandatory death penalty is a violation of the respective conventions[12]. This view was also taken

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10 Communication 31/12/99, *Kennedy v Trinidad and Tobago,* decision on Admissibility.

11 See *Kennedy v. Trinidad and Tobago,* March 28, 2002,CCPR/C/74/D/845/1998 and *Thompson v. St Vincent and the Grenadines* (5 Dec. 2000), CCPR/C/70/D/806/1998, which held that the mandatory death penalty breached Article 6(1)- the right to life - of the International Covenant on Civil and Political Rights.

12 *Hilaire v. Trinidad and Tobago.* Inter-American Commission Report 66/99 (1999); *in Uilaire, Om-stantine and Benjamin and Others v Trinidad and Tobago* (Ser. C no 94 (2002) the Tnter-American Court held that the mandatory death penalty in Trinidad and Tobago, because "it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different… puts at risk the

in 2001 by the Eastern Caribbean Court of Appeal (which does not cover Trinidad and Tobago) because it deprived the person "upon whom sentence was passed of any opportunity whatsoever to have the court consider mitigating circumstances"[13], a judgment which, along with similar cases challenging the mandatory death penalty from St Christopher and Nevis and from Belize, was upheld in 2002 by the Judicial Committee of the Privy Council[14]. It was not surprising therefore that the Privy Council in 2003, in the case of Balkissaon Roodal v The State of Trinidad and Tobago, also found that the mandatory death penalty was an infringement of the right not to be subject to cruel and unusual treatment or punishment. The majority of the Board held that the savings clause (clause 6) of the 1976 Constitution of Trinidad and Tobago, which protected pre-constitution legislation from judicial change, could not override the duty of the courts "to construe and apply" the Constitution and Statutes so as to protect the guaranteed fundamental rights, including protection against the imposition of cruel and unusual punishment and treatment laid down in sections 1 and 2 of the Constitution. The Board noted that in Trinidad and Tobago "the crime of murder is based

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most cherished possession, namely human life, and is arbitrary according to the terms of Article 4 (1) of the Convention [because] it treats all persons convicted of the designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass subject to the blind infliction of the death penalty. And when it is used, as is the case in Trinidad and Tobago … to punish crimes that do not exhibit characteristics of the utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention. In support of its judgment, the Commission cited *Woodson v North Carolina* (1976), 428 U. S. at 304. See also William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge, 2002, 111.

13 *Spence and Hughes r. The Queen*, Criminal Appeal No. 20 of 1998. Eastern Caribbean Court of Appeal Judgment (April 2, 2001). See Saul Lehrfreund, International Legal Trends and the "Manda-tory" Death Penalty in the Commonwealth Caribbean, *Oxford University Commonwealth LawJour-nal* 1,(2001), 171-194.

14 *The Queen v. Peter Hughes* [2002] 2 AC, 259; also in relation to St Christopher and Nevis, *Bertiul? Fox v. The Queen* [2002] 2 AC 284; and in relation to Belize, *Reyes v. The Queen*, [2002] 2 AC 235. In 2006, The Privy Council held that the mandatory death penalty in the Bahamas was in violation of that country's Constitution, *ForresterBowe Jr. and Trono Davis v.The Queen* [2006] UKPC 10.

on the English common law [and thus] covers an extraordinarily wide spectrum of cases of homicide, most of which would not be regarded as murder in ordinary parlance"[15]. It therefore declared that the legislation should be interpreted to mean that death should be the maximum, not the only, penalty for murder; the sentence being left to the discretion of the trial judge. A minority of the Board, however, held that the existence of the savings clause meant that the Privy Council had no power to alter the law. A year later, on appeal from the State, a full nine-member Board of the Judicial Committee held, by 5 to 4, in the case of Charles Matthew that, notwithstanding that the state of Trinidad and Tobago did not challenge the fact that a mandatory death penalty was cruel and unusual punishment, it was indeed protected by the savings clause:

> …. section 6(1) provides that »nothing in sections 4 [protecting the right of the individual to life] and 5 [5(2)(b) which states that Parliament may not impose or authorize the imposition of cruel and unusual treatment or punishment] shall invalidate … an existing law. The law decreeing the mandatory death penalty was an existing law at the time when the constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with sections 4 and 5. It follows that… it remains valid"[16].

This decision was stigmatized by the minority, including Lord Bingham the Senior Law Lord, "as a legalistic and over-literal approach to interpretation …. unsound in law and productive of grave injustice to a small but important class of people in Trinidad and Tobago … The result of reversing Roodal is to replace a regime which is just in accordance with internationally-accepted human rights standards and (as experience in the Eastern Caribbean has shown)

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15 *Randal* v. *State of Trinidad and Tobago* [2005] 1 AC 328 at 338-9.

16 *Matthew v. State of Trinidad and Tobago* [2005] 1 AC 433 at 447. For a discussion of this and the preceding cases see Margaret A. Burnham, Saving Constitutional Rights from Judicial Scrutiny: the Savings Clause in the Law of the Commonwealth Caribbean, *The University of Miami Inter-Ameri-law Review,* 36 (2&3), 2005, 249-269. And Julian Knowles, Capital Punishment in the Commonwealth Caribbean: Colonial Inheritance or Colonial Remedy? in William A. Schabas and Peter Hodgkinson (Eds.), *Capital Punishment. Strategies for Abolition,* Cambridge University Press, 2004, 282-308.

workable by one that is unjust, arbitrary and contrary to human rights standards as accepted by the State"[17]. Thus, the decision in Matthew meant that the only way by which the mandatory death penalty could be repealed in Trinidad and Tobago is by Act of Parliament. Matthew's death sentence was set aside and a sentence of life imprisonment substituted, on the grounds that it would be a cruel punishment to execute him when he had been previously told that his sentence could be reviewed. The Privy Council recommended that the same considerations should apply to all prisoners on death row at the time of its judgment[18]. Yet the government had no intention of bringing in legislation to abolish the mandatory death penalty; nor, despite the expectation raised, did it commute to life imprisonment the death sentences of the approximately 80 prisoners who would have benefited from the Privy Councils recommendation. Instead, in mid-2005, the Attorney General, John Jeremie, announced the intention of the State to hang everyone on death row who was eligible as part of its overall strategy to deal with the escalating murder rate[19]. Although no executions have yet taken place, it is clear that the government has put its utilitarian justification for the death penalty —namely the belief that it is necessary to deter citizens from murder— above the recognized human rights principle that such a punishment should not be applied to all cases of murder whatever the circumstances may have been.

IV. AN EMPIRICAL ASSESSMENT

This, briefly put, is the background to a study of the realities of murder and the use of the mandatory death penalty. It aimed, through identifying the types of murder committed in Trinidad and Tobago and by following each case through the criminal justice process, to shed light on three issues. First, to what extent was the State successful in obtaining prosecutions for murder? Was there

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17 *Ibid.* [2005] 453 and 469 453.

18 Ibid. 453.

19 See Douglas Mendes and Gregory Delzin, Using the Bill of Rights to halt executions: a reply to Peter *Uodgkinson, Amicus Journal*, issue 15, 2005, 18-21.

evidence to support the State's contention that a mandatory death penalty would act as a general deterrent to murder? Second, what types of murder resulted most frequently in a conviction and thus a mandatory penalty of death? Were they the most heinous types of murder? And was the mandatory death penalty evenly applied to cases of murder or arbitrarily applied due to the way in which the system of criminal justice operated? Third, to what extent was the mandatory death penalty counterproductive by making it harder for the State to secure convictions for murder?

In order to obtain a sufficient sample of cases and to be able to follow them up from reports of their commission to any final outcome in court, the research covered two overlapping samples of cases: all 633 murders recorded by the police during the five-year period from January 1, 1998 to December 31, 2002[20] and all 297 defendants[21] prosecuted for murder and committed to the Trinidad and Tobago High Court for trial during the same period[22] access was gained to the police register of recorded cases of murder as well as to the records of prosecutions kept by the Director of Public Prosecutions and to records of the High Court and Court of Appeal.

Based on the police reports, supplemented where possible by other records, murders were grouped into five broad categories:

- Killings arising from a gang dispute or related to the trade in drugs including a subcategory where the killing was carried out like an assassination or execution (25%)
- Killings arising during, the commission of another crime, such as robbery or burglary and killings arising from a sexual assault (23%)

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20 However, in relation to 71 (11.2%) of these murders' prosecution had still not been completed when the fieldwork came to a conclusion on December 31, 2005.

21 The prosecution of 37 indicted persons had still not been completed by the end of 2005 and one person who had been found unfit to plead was still confined to a mental hospital. Thus a sample of 279 completed prosecutions for murder was obtained.

22 A substantial proportion (37%) of such cases having arisen from homicides recorded by the police well before January 1, 1998.

- Killings arising from a domestic dispute including not only all killings in which the perpetrator and the victim were related by marriage or other family bonds but also those which arose from common —law relationships or former common-law relation— relationships as well as child abuse and infanticide (17%)
- Killings as a result of an attack or fight arising from other inter-personal altercations or conflicts, usually between persons known to each other, including killings by police and security personnel in the exercise of their duty, and also those arising from inter-personal conflicts where innocent bystanders were killed (28%).
- Killings where the motive or relationship between victim and killer remained impossible to determine, the body having-been found either dumped or in other circumstances (8%).

Between 1998 and 2002 murders attributed to gang or drug-related disputes and those committed during the commission of another crime —most often robbery— increased very substantially, as did the number of killings where the body was found but the motive unknown. In 1998 these three categories made-up between them 41 per cent of the recorded murders, but by 2002 they accounted for 64 per cent. This was reflected in the method of killing, for deaths caused by gunshot wounds increased three-fold between 1998 and 2002, so that they accounted for 61 per cent of recorded murders in the latter year compared to only 31 per cent in the former. There is also no doubt that these kinds of murder account for the bulk of the increase since 2002.

Altogether, the police recorded 280 murders (44%) as unsolved and 353 (56%) as solved, by which they meant that a suspect had been identified and named. But the proportion of murders which the police recorded as solved was much lower for that class of murder winch had been increasing the most, namely gang and drug-related murders (19%), and particularly where the victims body had been dumped and the motive was unknown (only 6%). On the other hand, those of a domestic nature or involving a non-domestic inter-personal altercation were recorded as solved in the large majority of cases, for the suspect was usually readily identified. Taking into

account the cases for whom no suspect was arrested, the proportion of all recorded murders committed between 1998 and 2002 that had resulted in a conviction for murder by the end of 2005 was very low, only 1 in 20 (5.2%), with 17 per cent resulting in a conviction for either murder or manslaughter (see Table 1). But the success rate is probably even lower. The 38 persons convicted of a murder by the end of 2005 accounted for only 38 per cent of an estimated 1,000 persons who may have been involved in the 633 murders reported between 1998 and 2002. Including the 88 persons convicted of manslaughter only 126 (13%) had been convicted of homicide[23].

The conviction rate for gang-related murders and those where the body was dumped or found was extremely low. By the end of 2005 only 2 of the 208 recorded murders of this kind resulted in a conviction for murder and two for manslaughter - 2 per cent together, although they had made up 33 per cent of the recorded killings. By contrast, 16 per cent of murders committed in the domestic situation resulted in a conviction for murder. Although they accounted for only 17 per cent of all recorded murders[24] they made up 52 per cent of the 33 murders where a conviction and mandatory death sentence had resulted. As far as other types of inter-personal altercations and disputes were concerned, only two of the 175 recorded murders of this type resulted in a conviction for murder and sentence to death and less than a quarter of these murders resulted in a homicide conviction of any kind. Of those murders committed during the course of involvement in another crime —usually robbery— for which the outcome was known (121), only 12 (10%) had resulted in a conviction for murder with a further 12 cases ending with a manslaughter conviction. Thus 80 per cent of such crimes had so far evaded punishment.

This analysis showed conclusively that the general probability of a recorded murder resulting in a conviction for murder in Trinidad and Tobago is not only very low, but that no category of cases

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23 In 70 cases one person was convicted of manslaughter, in four cases two were convicted, in two. three and in one five persons were convicted.

24 Another 24 were convicted of manslaughter: thus 39% of the recorded domestic murders had resulted in a homicide conviction.

could be identified with a very high probability of conviction and mandatory sentence to death for murder. Nor even of a conviction for murder or manslaughter.

These findings were reinforced by the study of persons indicted for murder in the High Court of Trinidad and Tobago. Of the 279 indicted for murder where proceedings had been completed, only 5 8 (21%) —1 in 5— had been convicted of murder and 57 of them were mandatorily sentenced to death[25], whereas 35 per cent were convicted of manslaughter. Altogether, whether by withdrawal of prosecution or finding by a jury, 44 per cent had been acquitted. Furthermore, the success rate in obtaining convictions for murder appeared to be declining. Of the prosecutions begun in 2002 that had so far been completed only two (7%) had resulted in a conviction for murder.

Table 1: Clear-up rates for murders recorded 1998-2002 by type of murder

Outcome	Gang\drug relatcdA body found unknown motive		Committed during another crime		Domestic re-lated murders		Other interpersonal disputes		Total	
	N	%	N	%	N	%	N	%	N	%
No suspect identified	170	81.7	75	51.7	2-	1.9	27	15.4	274	43.3
Suspect committed suicide/ killed or died	3	1.4	1	0.7	35	33.3	6	3.4	45	7.1
Suspect arrested\ charged but not prosecuted	9	4.3	2	1.4	I	1.0	5	2.9	17	2.7
Case against suspect dismissed in Magistrates Court	9	4.3	3	2.1	4	3.8	17	9.7	33	5.2
Prosecution withdrew charge at High Court	3	1.4	3	2.1	2	1.9	8	4.6	16	2.5
Acquitted in High Court	4	1.9	13	9.0	8	7.6	42	24.0	67	10.6
Convicted of Manslaughter .	2	1.0	12	8.3	24	22.9	39	22.3	77	12.2
Convicted of murder	= 2 .- •	1.0	'• 12 •	8.3	17	16.2	2	1.1	33	5.2
Total convicted of murder, or manslaughter.	4 •'	2.0	24	16.6	41	39.0	41	23.3	110	17,4
Case ongoing	6	2.8	24	16.6	12	11.4	29	16.6	71	11.2
TOTAL AND PERCENTAGE OF CASES	208	32.9	145	22.9	105	16.6	175	27.6	633	100

N.I.J. Per cent of each outcome read down columns; total percentage from all cases.

25 One, who was under the age of 18 at the time of the offence, was detained indefinitely at the President's Pleasure. Leaving aside those whose plea to manslaughter was accepted by the court, still only a third (32.8%) of tbe 177 persons tried by a jury for murder were convicted of murder.

Taking into account the outcome of appeals, by the end of 2005 only 23 of the 57 persons sentenced to death —8 per cent of those prosecuted for murder— remained under sentence of death, including five whose domestic appeals had yet to be heard and 15 who were waiting a hearing before the Privy Council. Thus, it is clear that after very lengthy delays and great expense to the State the number of convictions for murder and death sentences that will eventually be upheld will be only a tiny fraction of the cases originally indicted and an even smaller fraction of all murders recorded by the police.

Not only were domestic-related murders the most likely to be cleared-up by the police, when the accused were brought to trial they were also the most likely to be convicted of murder and sentenced to death. Although domestic homicides accounted for only a fifth of all persons prosecuted, they accounted for over a third (35%) f all persons convicted of murder. Analysis of the characteristics of cases and of defendants in the cohort of cases prosecuted between 1998 and 2002 showed that several other variables were associated with a higher probability of prosecution resulting in a conviction for murder and sentence to death. In order to find out which of these were the most influential variables associated with a conviction for murder it was necessary to use multivariate analysis. A logistic regression analysis calculated which variables best predicted the dependant variable —in this case whether a murder had or has not ended with a conviction for murder— and showed how the probability (odds) of being so convicted was affected by the presence or absence of a particular variable. For each defendant it calculated the probability that he or she would be convicted of murder. The regression analysis took 13 variables, with 46 attributes, into account and weighed their relative influence in affecting the probability of a defendant being convicted of murder. Five variables were left in the final model, each with a statistically significant relationship with a conviction for murder:

- type of murder: whether gang-related, committed during the commission of a crime, domestic-related interpersonal conflict
- co-defendants: none or more
- counts of murder: one or more than one
- victim's sex: male or female

– race of accused and victim(s): African accused \ African or "mixed parentage" victim(s); East-Indian accused \ East-Indian victim(s); East-Indian accused \ other race victim(s); African accused \ other race victim(s); Mixed-parentage accused \ other race victim(s)

The logistic regression model identified correctly 94.1 per cent of those not convicted of murder and 53.4 per cent of those convicted of murder - an overall 85.7 per cent correct classification. When each defendant's probability of being convicted for murder was grouped into one of seven bands, it was seen that almost a third of the persons indicted and prosecuted in the High Court for a recorded murder had a probability of actually being convicted of murder of.05 (5%) or lower (see Table 2). Indeed, 58 per cent of those indicted had, according to the model, a probability of no more than 21 per cent of being convicted of murder. In other words, 80 per cent of such persons escaped a murder conviction. At the other end of the scale only 5 per cent of defendants were identified who had at least a 58 per cent probability of being convicted for murder.

Table 2: Probability of a defendant indicted for murder being convicted of murder

Probability	Number of persons indicted for murder	Percen-tage of cases indicted for murder	Average (mean) probabi-lity of a murder convic-tion	Average (mean) probabi-lity of those actually convic-ted of murder	Number convic-ted of murder and sent-enced to death	Percen-tage of those convic-ted of murder
0.05 or lower	88	31.5			3	5.3
>0.05to0.13	52	18.6			4	7.0
>0.13to0.21	22	7.9			5	8.8
TOTAL very low: 0.21 or lower	162	58.1	0.07	0.12	12	21.1
Low >0.21to0.30	54	19.4			8	14.0
Medium-low >0.30 to 0.46	17	6.1			6	10.5
TOTAL low to me-dium: >0.21 to 0.46	71	25.4	0.28	0.30	14	24.6
Medium-high >0.46 to 0.58	32	11.5			23	40.4
High >0.58 to 0.87	14	5.0	0.72	0.-73	8	14.0
TOTAL Medium-high to high > 0.46 to 0.87	46	16.5	0.59	0.60	31	54.4
Total	279	100			57	100

As regards the 57 persons convicted of murder and mandatorily sentenced to death, Table 2 reveals that 12 of them (21%) had a probability, according to the model, of being convicted of murder of 0.21 or lower: the average probability of the 12 sentenced to death being 0.12 (12%). Altogether 26 (46%) of those sentenced to death belonged to a category of defendants who had less than a 50 per cent chance of being convicted of murder - the very low and the low to medium groups combined in Table 2. In fact, the average probability of being convicted of murder and sentenced to death of these 26 defendants was only 0.21 (21%). The fate of those who were convicted of murder and sentenced to death in this group could certainly not be said to be even-handed when compared with other defendants with similar case characteristics who had been indicted for murder. Indeed, in such cases a death sentence could be regarded as presumptively excessive[26]. Thirty-one of the 57 (55%) sentenced to death had an average probability of receiving such a fate of 60 per cent, but only eight of the 57 belonged to a category of cases where it might be said that their treatment was reasonably even-handed: i.e. the characteristics of their cases meant that their average probability of being mandatorily sentenced to death after being indicted for murder was 0.73 or 73 per cent[27].

The logistic regression analysis also revealed the following differences in the odds of being convicted of murder, all of them statistically significant:

- the small minority of defendants who had been charged with more than one count of murder (only 5% of the total) were, as to be expected, significantly more likely (with odds 5.3 times

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26 In his famous study of discretionary death sentencing in Georgia in the United States. David Baldus and his colleagues argued that where offenders convicted of murder were in a category where less than 0.35 were sentenced to death, such a sentence would be presumptively excessive. See David Baldus, George Woodworth and Charles Pulaski, Equal Justice and the Death Penalty. A Legal and Empirical Analysis, Boston: Northeastern University Press, 1990, 60.

27 Baldus *et al* at p. 60 suggested that it would only be presumptively evenhanded to sentence a person to death when all those with similar case characteristics had a probability of being sentenced to death of 0.80 and over. For a discussion of this study see Roger Hood, *The Death Penalty. A Worldwide Perspective,* 3rd ed. 2002, Oxford University Press 190-200.

greater) than those with only one count of being convicted of murder[28].

- The minority with at least one co-defendant (42% of the total) were 6.55 times more likely to be convicted of murder (i.e. if one was convicted the other was more likely to be convicted as well)[29].
- the odds of a defendant of East-Indian descent who killed an East-Indian victim (20% of the cases) being convicted of murder was nearly four times (odds of 3.84) that of a defendant of African descent who killed an African victim[30].
- the odds of a defendant who had killed during the commission of another crime (32% of cases) or had killed in a domestic situation (20% of cases) were both significantly higher than for defendants who had killed during an altercation (39% of cases): 3.04 and 5.5 times respectively[31].

V. IMPLICATIONS FOR GOVERNMENT POLICY

What implications did these findings have for the three questions raised above relating to deterrence, fairness in application and the efficiency in securing convictions of the mandatory death penalty?

It is a well-established axiom of penal policy that penal sanctions can only be effective in deterring those who contemplate crime if they are applied with a high degree of certainty and without too long a delay. In fact, this is the raison d´etre for making the death penalty mandatory. Delays of several years between a crime and the punishment of an offender, as occurs in Trinidad and Tobago, blunts

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28 Fifty of the 58 convicted of murder had, in fact, only faced one count.

29 Of the 58 convicted of murder, 40 (69%) had no co-defendant or only one co-defendant.

30 East-Indians who killed East-Indians made up 38% of the 58 convicted of murder.

31 Those who killed while committing another crime made up 29% of the 58 convicted of murder and those who killed due to a domestic dispute accounted for 36% of the 58.

the perceived connection between the two, let alone producing problems of memory, loss of interest, and, it appears, possibilities of suborning witnesses. Severity only occasionally inflicted will fail to have an impact on those who are willing to take risks[32]. The matter is further complicated when the risks of death, as appears to be the case in Trinidad and Tobago as regards gang and drug-related activity and in inter-personal conflicts, may appear to be much higher by not striking out against an opponent than by doing so. The fact that only five per cent of murders recorded by the police between 1998 and 2002 had by the end of 2005 resulted in a conviction for murder and a mandatory sentence of death, and that even the proportion of defendants prosecuted for murder whose death sentences stand after appeal is only 8 per cent, indicates how unlikely that penalty is to be as an effective deterrent to all types of murder.

It is ironic that the very type of murder which is perhaps least likely to be the result of carefully planned crime, namely those arising largely from jealousy, passion, loss of temper and revenge in a domestic or post-domestic relationship where emotion usually over-rules consideration of the threat of later punishment, is the type of killing most likely to end up with a conviction for murder. But even here, the study showed that of the 93 recorded domestic-related murders in which proceedings had been completed only 17 (18%) had resulted in a murder conviction and of the 56 actually prosecuted between 1998 and 2002 64 per cent evaded conviction for murder and sentence to death. All the evidence suggests therefore

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[32] For a review of the evidence relating to the general deterrent effects **of** capital punishment, see Roger Hood, *The Death Penalty op. cit.* 208-232. See also, on the recent spate of econometric studies, which have claimed to isolate a deterrent effect, the judgment of the economist Steven Levitt, Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that do not, *Journal of Economic Perspectives, 18* (1), 2004, 163-190, that the probability of execution in the United States is so low that it could only have, at the best, a tiny marginal effect on the homicide rate., at p. 176. See also Stephen D. Levitt and Stephen /. Dubner, *Freakonomics,* Penguin Books, 2005, 124-5. For the most recent reviews see John J. Donohue III and Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate *Stanford Law Review* 58 2006, 791 -845, and Jeffrey Fagan, Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment *The Ohio State Journal of Criminal Law,* forthcoming 2007.

that the problem faced by law enforcement in Trinidad and Tobago is to increase the certainty of punishment. The occasional and long delayed mandatory sentence to death is very unlikely to add weight to the deterrent effectiveness of a poorly enforced criminal law.

It is a paramount principle of justice that it should be administered fairly and equitably between like cases. Discussion of this issue usually refers to discretionary sentencing decisions once a person has been found guilty of a crime, but it is also relevant to the issue of conviction if the system of law enforcement and administration of criminal justice works in such a way that the result is one where the vagaries of the process are such that there is a high degree of chance and arbitrariness in the outcome, especially where the outcome is a mandatory death sentence. The implications of the findings of this study are inescapable - the chances of a person who committed a murder in Trinidad and Tobago suffering sentence to death was very rare. Even among those brought to justice the majority of persons had only a low probability of being convicted of murder and sentenced to death. Infliction of the death sentence was therefore both rare and arbitrary. To borrow the words of Justice Potter Stewart of the United States Supreme Court in the famous case of Furman v Georgia in 1972, whether a person is convicted of murder and sentenced to death in Trinidad and Tobago can be regarded as "cruel and unusual in the same way that being struck by lightning is cruel and unusual"[33].

Furthermore, most countries that have retained the death penalty have subscribed to the view that it can only be imposed on those who commit the worst of the worst murders[34]. In. the United States of America, the statutes of those states that retain capital punishment have defined broadly the categories or characteristics of murders that are death eligible and have put in place a trial system that provides discretion to the prosecutor whether or not to seek

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33 *Furman v Georgia* 408 U.S. (1972), 92 *Supreme Court Reporter* 1972 at 308.

34 For an excellent discussion of what might constitute a worst of the worst case under a discretionary death penalty law, see, Edward Fitzgerald, Q. C. The mitigation exercise in capital cases in Proceedings of the Death Penalty Conference 3 rd - 5 th june 2005, Barbados. London: Simmons, Muirhead and Burton, 2006.

the death sentence and to the jury as to whether the convicted person should be sentenced to death. Even so, this has not protected the system from being accused of arbitrariness and discrimination in the application of capital punishment[35]. In India, the Supreme Court has laid it down that the death penalty should be reserved for the worst of the worst cases[36] and should never be applied mandatorily[37]. As mentioned above (pages 31b-63), the Inter-American Commission on Human Rights, the U.N. Human Rights Committee and the Judicial Committee of the Privy Council have all held that a mandatory death penalty is in breach of the international conventions on the grounds that consideration of potential mitigating circumstances of offenders and offences is a condition sine qua non for the non-arbitrary and humane imposition of capital punishment[38]. In line with article 6(2) of the International Covenant on Civil and Political Rights, which states that where the death penalty still exists it should be reserved for the most serious offences, most countries have accepted that the category of murder is too wide to be treated as a common entity in which all cases are of equal heinousness. The findings of this study certainly show that in practice the death penalty in Trinidad and Tobago falls most often on certain types of murder, those committed between intimates often in domestic situations, and those committed during commission of another crime. The majority of those convicted of murder whose prosecutions began during 1998-2002 were, as far as could be ascertained, not per-

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35 See Roger Hood, *The Death Penalty, op. cit.*, 172-207.

36 *Bachan Singh v State of Punjab* 2 SCJ [1980] 474 at 524 and [1983] 1 SCR 145 at 252 and 256.

37 Murder committed by a life-sentenced convict was made subject to a mandatory death penalty by the Indian Penal Code (Section 303). This was struck down in 1983 by the Supreme Court of India in *Mithu* v *Punjab* because »it deprived the Court of its wise and beneficent discretion in a matter of life and death … So final, so irrevocable and so irresistible is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fan, just and reasonable«. *Supreme Court Reports* (1983) 2 S.C.R. at 692-693.

38 In *Baptiste v. Grenada,* Inter-American Commission Report 38\00 (2000), para 59.

sons with criminal histories marked by convictions for violence[39]. The death penalty was rarely enforced for gang or drug-related crimes, largely because the perpetrators are usually immune from law enforcement. Nor was it often enforced for homicides arising from quarrels between citizens. This was either because witnesses did not come forward and the case therefore could not proceed or, if they did come forward, the prosecution often accepted a guilty plea to manslaughter, or the jury brought in an acquittal. Nor were those most likely to be convicted of murder and therefore mandatorily sentenced to death necessarily those who had committed the most heinous murders. Furthermore, the system as it operates produced a pattern of murder convictions biased towards certain types of unlawful killing, those defendants of East-lndians descent who killed East-Indian victims, often following a domestic dispute, being far more likely to be sentenced to death than persons of African descent who killed African victims.

If cannot be doubted that great difficulties have been faced by the prosecution authorities in Trinidad and Tobago in bringing cases before the courts and obtaining convictions. The reasons are well documented in the Trinidadian press and have been frankly identified by the Director of Public Prosecutions[40]. "Witnesses intimidation appears to be a key factor" along with the "heavy reliance on the oral evidence of eyewitnesses and insufficient emphasis on objective and/or scientific evidence as a means of establishing guilt"[41]. Not only do witnesses sometimes fail to come forward when it comes to the trial, even when they do so they may be reluctant to testify. The situation is not helped by the long delays that occur between the killing and the trial. That convictions have been easier to obtain

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39 Forty of the 58 (69%) of those convicted of murder had no recorded previous conviction in the prosecution file.

40 Lettter from Mr G. Henderson, Director of Public Prosecutions, dated June 29, 2005 to the Editor of the *Trinidad and Tobago Newsday*, in response to an article by Francis Joseph published on June 26, 2005 entitled No murder convictions for 2005 — Accused Persons Walking Free.

41 See, Geoffrey Henderson, Public Confidence in the Criminal Justice System and Crime Reduction, Paper presented to a conference held at the Centre for Criminology and Criminal Justice, UWI, St Augustine Campus, February 2006.

in cases that involved domestic disputes is understandable because there are usually no gangs or other par-tics likely to threaten witnesses or put pressure on jurors. Notwithstanding the problem of intimidation, it is the experience of other jurisdictions that witnesses are sometimes also reluctant to testify where they believe that a conviction for murder would lead automatically to the imposition of the death penalty. Similarly, jurors may be more reluctant to convict a person of murder where the consequence will be a death sentence and will choose instead to convict of manslaughter even when the facts indicate that the blows were struck or the weapon used deliberately. And prosecutors of course can also use their discretion to accept a guilty plea to manslaughter, and are especially likely to do so if they believe that the prospects of conviction for murder at a jury trial are relatively low and that a mandatorily imposed death sentence would be unwarranted given the facts of the case. In other words what amounts to a kind of sentencing discretion shifts from the court down to witnesses, prosecutors and jurors. In England and Wales and Canada, for example, murder convictions were much easier to obtain after capital punishment was abolished. Killings that result directly from altercations between the parties concerned leave room for interpreting the killing as a response to provocation or as a result of blows delivered in a fight that were not intended to cause grievous bodily harm or kill - the essential facts to prove in order to convict a person of murder rather than manslaughter as a result of bodily harm arising from gross negligence, provocation or diminished responsibility.

Of the 97 persons convicted of manslaughter 21 were sentenced to imprisonment for periods of 10 years or longer. It is possible (we have no means of knowing for certain) (hat some or all of them would have been convicted of murder had there not been a mandatory sentence of death. The judicial comments in the following case illustrate the disadvantage of an inflexibility of the law of murder when tied to a mandatory death penalty.

> Addressing the defendant in The State v Elias Robin Hemy, who had been found guilty of stabbing a young man to death, The Hon Justice Volney said: "... the Jury has found you guilty of the lesser offence of manslaughter... The evidence on which they could have found that you were provoked was that you were short paid by one dollar; that when you brought this to the attention of the deceased, who

was then a 16-year-old man -sorry, boy, and at the time when he had come out of your maxi taxi that you were driving, this is what he did and this is what lie said to you: "I came in at Arouca", meaning that the fare that he had to pay was the correct fare and the fare that you were demanding was the wrong fare. This is borne out by two prosecution witnesses. You insisted, against the weight of evidence, that you told him no, that he came in at Tunapuna, to which he replied "You are an old man, you stupid or what, I came in at Arouca. You must be drunk or what". And after you told him you don't drink or smoke, be again replied, "Is Arouca I came from boy", and then you didn't say what was the curse, but you said he cursed you. You then opened the driver's door, took out your key from the ignition, took a knife, which was exhibited in this court, which looking at it alone is enough to drive shivers into any human being, and you went up to him saying that you wanted your fucking money. This is you, a maxi taxi driver in this country, priority Bus Route or no priority Bus Route.

You pushed him, according to you, with your hands and he said "A11 right, all right I would pay you". You got your money, your one dollar, and it was then on the evidence, clear evidence it would seem to me, that you inflicted a stab wound in the heart of the deceased thereby ending 16 years of his life.

The jury finding you not guilty of murder means that you have seen the luckiest day of your life, because if in this country today a maxi taxi driver would react to those words and that conduct of no more than a boy by arming himself deliberately, the purpose of mind, and proceed assaulting the boy for a dollar, a passenger for one dollar, and after you got your dollar, you deliberately stabbed him to death, if a Jury finds that, as this Jury has done, finds that the reasonable man, meaning that every taxi driver out there would be entitled or excused in murdering a passenger —I beg your pardon, let me correct myself, because the Jury have found you not guilty of murder— of unlawfully killing a passenger, then Lord have mercy on this country and people who travel on maxi taxis. It pains me to understand how twelve adults, which is their right under the law of this country to return a verdict like this, could find that the reasonable man, sober, expected to have the self-control of a 46-year-old man, would arm himself with a knife and deliberately go and kill a young passenger even after the passenger, on the evidence, appeared to be right.

The jury may have given you mercy by their verdict. But I can find no mercy for you. And I must send a message to the public out there, including every maxi taxi driver in this country, and it is this: If they follow your example and they get a verdict as merciful as you have gotten from a jury of their peers, then it is the duty and function of the Judge to ensure that the right message is nonetheless sent to them, which is that they can expect a severe sentence of years of in-

> carceration, which I propose to do so, to impose in order to level the two arms of justice … You are sentenced to 30 years with hard labour commencing today.

The evidence from this study has thus shown that there are strong empirical reasons why the Government of Trinidad and Tobago should reassess its rationale for continuing to support the use of the mandatory death penalty, especially because it has not denied that international legal institutions have declared it a cruel and unusual punishment. If the mandatory death penalty were abolished (failing complete abolition) it is likely that witnesses, prosecutors and juries would be more likely to make sure that those accused of murder who are guilty of murder are convicted of murder if not of a lesser offence. The greater certainty of conviction for murder might prove to be a more effective deterrent and greater certainty of punishment would bring with it greater uniformity and fairness in the administration of justice. Thus criminological research has added weight to the legal arguments of those who maintain that the retention of the mandatory death penalty for murder in Trinidad and Tobago, as elsewhere, serves no useful purpose and is arbitrary and unfair in its enforcement.

THE ABOLITION OF THE DEATH PENALTY IN BRAZIL

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I. INTRODUCTION

From September 9 to 11, 2009, the International Colloquium for the abolition of death penalty was held in Madrid, under the auspices of the University Castilla-La Mancha, the International and European Criminal Institute and the Spanish government (Ministry of Presidency). Following it, from February 22 to 24, 2010, another meeting took place in Geneva to deepen these discussions. These meetings are part of an international campaign for the abolition of the death penalty in the entire world.

There are innumerable international agreements that recommend the abolition of capital punishment across the world, and in some cases a moratorium.

On December 18, 2009, the United Nations General Assembly approved the Resolution 63/168, entitled "Moratorium on the use of death penalty". In this document, the idea that the application of a moratorium on executions is part of a world tendency for the abolition of death penalty was adopted, building on the decision adopted by an increasing number of states. In July, 2009, the Parliamentary Assembly of the European Security and Cooperation Organization adopted a resolution "on a moratorium of the death penalty and towards its abolition". The Human Rights Committee remains involved with the issue of the death penalty, within the framework of the International Covenant on Civil and Political Rights.

Until July, 2008, 141 countries had abolished the death penalty. 93 of them were fully abolitionist, 10 were abolitionist only with regard to common crimes and 38 could be considered de facto abolitionist (the death penalty is still in their legal system but not im-

plemented). The other 56 countries and territories still implement the death penalty.

It is important to note that Brazil, which it has not applied the death penalty for a long time, is internationally regarded as an abolitionist country in relation to common crimes, although the death penalty is still legalized in the case of declared war. For this reason, the National Council of Criminal and Correctional Policy —NCCCP— has approved a proposal for a constitutional amendment, now under analysis by the Ministry of Justice's Secretary of Legislative Issues, to suppress the death penalty in the Constitution of 1988, details of which are presented in the following topics.

The proposal gained additional support after the International Seminary of the Brazilian Institute of Criminal Sciences (São Paulo-Brazil, from 16 to 18 august, 2010), when the final plenary approved by acclamation, with the presence of more than 1,000 jurists, professors, lawyers, judges and prosecuters, a manifesto against the death penalty which was forwarded to the Brazilian Ministry of Justice and will be sent to the United Nations Organization.

II. HISTORICAL NOTE

In Brazil there is no legal basis for the death penalty for common crimes. But it has not always been so. After Brazil was discovered and colonized there was a period of severe sanctions in the penal area, absolutism in government (monarchy) and intolerance by the Catholic Church. In this scenario, the Cabral fleet arrived in Brazil bringing 20 convicts setenced to death the hold. In the letter that Pero Vaz de Caminha wrote to Dom Manuel it is revealed that prisoners played a useful role in the expedition, helping: to penetrate the unknown territory. They left the ships many times in order to approach the indigenous people. Two were left in the new territory to obtain information about their habits and local resources and to disseminate the word of God. Our first inhabitants of European lineage, abandoned to their own fate, saw their sentence commuted. One of them is mentioned in the letter written to the king: "one

who knew the language of the indigenous people came back and informed us of everything"[1].

During the colonial period, the death penalty, so extensively indicated through the Royal Ordinances, was, in the absence of an organized justice system, imposed by captains or governors. Its execution was not frequent, because defendants escaped or hid in the vast territory beyond police control. Our Ordinances of the Kingdom established the death penalty in more than 70 situations, from lese-majesty to sodomy, from homicide to theft. Execution, although diversified, was carried out through hanging, preceded, according to the case, by cruel treatment, and could be followed by dismembering, burning of the corpse and loss of assets.

After Independence (1822), although the royal legislation from the kingdom was provisionally kept in force, the **Constitution of 1824** expressively abolished cruel punishment. The law from September 11, 1826, in its 1st article, stated that the sentence proclaimed in any part of the empire would not be executed before being brought to the knowledge of the Emperor, so that he could forgive or diminish the penalty (Constitution of 1824, art. 101, §§ 8 and 9). Only in 1830 was the first Criminal Code of Brazil promulgated, whose arsenal of penalties included death by hanging, strictly imposed in case of insurgency of slaves, qualified homicide and murder for the purpose of robbery[2].

The miscarriage of Justice that resulted in the hanging of the farmer Manuel Motta Coqueiro, in Macae, Rio de Janeiro, in 1855 contributed to the de facto abolition of the penalty. He was charged with the murder in 1852, at his resort in Macabu, of the settler Francisco Benedito and all his family, with the assistance of two slaves, Faustino and Florentino, in revenge for a possible illicit amorous relation between the settler and one of his daughters, of rare beauty. Sent to judgment by jury, the Defendant, called by the local community the Beast of Macabu, was convicted, after two sessions, by unanimous decision, to hanging, despite his reiterated and vehe-

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1 Luís Francisco Carvalho Filho. *O que é pena de morte*, p. 26/7.

2 Heleno Fragoso. In Pena de morte. Coimbra: Faculdade de Direito da Universidade de Coimbra, 1967, *Pena de morte*. p. 73.

ment protests of innocence. It was later discovered that a judicial error had led to Motta Coqueiro's conviction. The mistake resonated in public opinion and Dom Pedro II, making use of his moderator power, started systematically to commute death sentences and impose "galés" instead (hard labour for life), clinging, for that purpose, to any circumstance favorable to the defendant, even where little evidence existed[3].

Dom Pedro II acceded favorably to all petitions pleading for grace on behalf of free and freed men, and after 1860, extended the favor to slaves, even when they were charged with serious crimes[4]. There are records of executions after 1855, almost uniquely of slaves. For instance, five slaves were executed on October 9, 1873, three of them involved with the same murder. However, it is also certain that the last conviction signed by the Emperor was dated 1876. The last hanged person was a slave called Francisco, resident in the city of Pilar, province of Alagoas. Developments then assured the concession of Imperial Grace from 1856 onwards to white men, gradually extended to freed men and, eventually, to slaves. Until the end of the Empire, the death penalty existed only on paper.

With the proclamation of the Republic, decree 774/1890 elliminated the death penalty from legislation and, when the Criminal Code was later passed, this penalty was not included, anticipating the Constitution of 1891, which finally abolished the "galés" and judicial banning, and declared on article 72: the death penalty was also abolished, with the exception of military legislation in times of war.

With the advent of the Vargas dictatorship, by the end of the 1930's, the death penalty was reestablished, even in civil legislation in times of peace. Besides the military legislation for war times, the law established the death penalty for any crime that could jeopardize the existence of the State (sedition, war, insurrection), and homicide. The Decree-Law 86, of January 20, 1938, authorized the crea-

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3 Nelson Hungria, A pena de morte no Brasil. In: Pena de morte. Coimbra: Faculdade de Direito da Universidade de Coimbra, 1967, p. 176.

4 René Ariel Dotti.. Rituais e martírios da pena de morte. In Revista Brasileira de Ciências Criminais, Vol 7, No. 26, April/June 1999, p. 274.

tion of the Security Tribunal, located in the capital of the Republic, with competence to impose the death penalty, which, however, was never applied. It is true that, outside legal procedures, there were cases that sent people to their deaths. An example is the case of Olga Benario Prestes, German-Jewish wife of the communist leader Luis Carlos Prestes. She was handed over to the Nazi troops by the Brazilian dictator, Getulio Vargas, to die in the gas chambers on German territory.

The re-democratization in 1946 abolished the death penalty in peace times through article 141 of the Federal Constitution, maintaining it for military purposes in situations of declared war. With the advent of the military dictatorship, in 1964, the death penalty was again reintroduced in Brazil (National Security Act 898/69). This act was in force from 1969 to 1979 but, again, no executions were carried out. In 1970, in the city of Salvador, a young militant of the Brazilian Revolutionary Communist Party (BRCP), and sentenced with the murder of a sergeant from the Air Force, was convicted to death by the Military Justice, but was not executed. The sentence was continually deferred. He was excluded from the amnesty, however, escaped from prison in 1979 and was given asylum abroad. He returned to the country in 1985 worked as a criminal lawyer in the justice system[5].

Therefore, even if we include the many dictatorships through which Brazil has gone during its history, the last execution dates back to 1876.

The supporters of the death penalty were defeated by a large majority in the plenary session of the Constituent Congress, in 1988 (392 votes against, 90 in favor and 18 abstentions)[6]. Presently the only situation validating a death sentence recognized in the Constitution (art. 5º, XLVII) is that of declared war. According to article 60, § 4º, section IV, the prohibition of the death penalty, an individual right and guarantee, is an entrenched clause, which means that no constitutional amendment is allowed to abolish it.

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5 Luís Francisco Carvalho Filho, op. cit., p. 34.

6 Ibid., p. 35.

However, the death penalty remains in the Military Criminal Code (Decree-Law 1.001, of October 21, 1969), for numerous cases, always in war times. The Military Code, in its Book II, sets forth the conditions for its application. Almost every crime committed in war times is sanctioned with death penalty, even those which in peace times would entail a minor penalty. I quote some of them: treason (art. 355), favoring the enemy (art. 356), coercion of a commander (358), qualified cowardice (364), spying (art. 366), riot (art. 368), incitement before an enemy (art. 371), surrender or capitulation (art. 372), qualified abandon of a convoy (art. 379), special damage (art. 383), poisoning, corruption or causing an epidemic (art. 385), abandon of a position (art. 390), defection before the enemy (art. 392), release of a prisoner (art. 394), homicide (art. 400), genocide (art. 401), theft (art. 405), forray (art. 406), carnal violence (art. 408).

So, from theft to criminal damage, the death penalty is authorized. During the 2nd World War, it is known that such crimes were also punished with the death penalty but were always commuted before execution.

III. MEDIA AND PUBLIC OPINION

It is important to mention that, despite the majority decision in the Constituent Assembly in 1988 against the death penalty, opinion polls showed that this enjoys enormous popular support. Three years after the Constituent Assembly, in 1991, one of these polls showed that 60% of those interviewed was in favor of the death penalty, believing that the justice and correctional systems cannot meet the populations's expectations. Support for the death penalty can be irrational, stirred up by the media and fear of the increase of criminality, but the fact is that the general feeling of impunity, associated with the demoralization of public institutions, generates a perception that the death penalty is the panacea for social problems in times of crisis. In 2007, for instance, the date of the last extensive poll on the death penalty by Datafolha, it was found that 47% of the interviewed people supported the death penalty. Soon after a brutal murder of a child in a kidnapping attempt in Rio (Joao Helio's case),

also in 2007, the percentage of those in favor of the death penalty increased to 55%. That shows clearly that the action of the media and episodic brutal crimes have a decisive influence on public opinion in the country.

IV. DISCREPANCIES IN THE APPLICATION OF PRISON AND THE DEATH PENALTY

A fact not perceived by the population, especially the poor who displays a pivotal role in the situation of increasing crime in Brazil, is that the execution of the death penalty, in all countries that apply it, inevitably hits the least wealthy hardest.

In the US the execution of a black man who murders a white person has always been more likely than that of a white man who murders a black person. Out of 2,307 people executed from 1930 to 1980, in the southern states, 1,659 were black (71,91%). From 1976 to 1991, out of more than 150 executed people, only one was a black man convicted for the murder of a black man. If the victim is white and the defendant is black, the chances of the defendant being sentenced to death are four times higher than the contrary. Out of more than 16,000 executed people, only 30 were whites convicted for the murder of blacks. On the other hand, although the latter represented only 12% of the population of the country in 1991, 48% of the people convicted to death were black.

A poll conducted in the state of Georgia showed that when a victim is white and the defendant is black, the likelihood of the defendant being sentenced to death is 22%; however, when the victim is black and the defendant is white, this probability is almost zero. In the same state it was revealed that, during the sixties, white people were murdered twelve times more often than black people. In a survey conducted by the state of Texas, it was revealed that in each group of four people defended by lawyers appointed by the State (defendants without financial means to pay their lawyers), in lawsuits in which the death penalty could be applied, three were sentenced to death; on the other hand, only one out of three people defended by private lawyers was sentenced to death.

In the seventies, about 65% of convicted people awaiting execution were non-qualified labourers, 60% were unemployed at the time when they committed the crimes[7]. Bryan Stevenson, North-American lawyer, states that 100% of those sentenced to death in the United States are poor, 40% are black and 15% Hispanic[8]. Between 1976 and 1993, 85% of the executed had as victims white people, while 50% of those murdered were blacks. Also in this time frame, no white defendant was executed for the killing of a black[9].

In Brazil, the situation is not different when we look at custodial sentences. Professor Sergio Adordo, from the Violence Study Nucleus from the University of Säo Paulo, has been studying lawsuits in courts of Säo Paulo for 20 years. Between 1984 and 1988, in Penha, a lower-class neighborhood in Säo Paulo, he verified that black people represented 24% of the population, but received 48% of the convictions. The northeasterners, usually treated with prejudice in states of the south of the country, represent 18% of the population, but 27% of the convictions. Around 5% of the population does not have a profession, referred to officially as "people with undefined occupation". But 35 out of 100 convicted people were in this situation. Another significant aspect is the prison population. The most recent investigation by the Ministry of Justice indicates that around 65% of all prison inmates are black and 95% are poor. Adorno analyzed 500 criminal cases in the city of Säo Paulo in 1990 and ascertained that 38% of those convicted 38%, were convicted of theft using violent means. Black people are arrested more often than whites, in the ratio of 58 to 46. This suggests that they were subjected to greater vigilance by the police. It was also shown that 27% of the whites are released under bail, whilst only 15% of the blacks receive that benefit. Only 25% of the blacks bring defense witnesses to court, which

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7 Amnesty International. The question of the death penalty, 1998, p. 22.

8 Maria Bierrenbach. Maria Bierrenbach. A favor da vida-contra a pena de morte. In Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 52.

9 Maria Stella Gregori e Tulio Khan. A volta de um velho debate. In: Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 102.

is deemed an important aid to defense, while 42% of the white defendants have recourse to this benefit[10].

V. INTIMIDATION AND THE DEATH PENALTY

Furthermore, there is no reliable data showing a decrease of criminality in response to the death penalty. All international surveys, as well as the Brazilian increase in incarceration, show that both the death penalty and prison are ineffective in the prevention of mass crimes.

The United States, between 1966 and 1991, —a period when the possibility of the death penalty was nationally suspended by a decision of the Supreme Court (1972-76)—, offers a privileged viewpoint (Folha de São Paulo, 1993). In Florida, the annual homicide rate with the application of the death penalty (taking the reference of the same population of 100 thousand inhabitants), decreased from 13.4 to 11.7. In Colorado, the same occurred: from 7.4 to 5.9. Texas is the American state that has executed most prisoners since 1976, but there the homicide rate increased exactly in the period of executions from 12.9 to 13.2, reaching its peak of 16.9 in 1980. That is also what happened in California: the rate increases from 9.3 to 10.1. Comparing with those states which did not have the death penalty during this period, the figures also contrast; in New York, the average annual rate of homicides is 10.04 and in Massachusetts only 3.7.

Why did murderers from Missouri (with death penalty and homicide rate of 9 per 100 thousand inhabitants), from the same period, not chose to commit their crimes in the neighbor state, Kansas, without the death penalty and with a homicide rate of 5,1 in the same population spectrum? The dissuasive potential of the death penalty has never been proved. It is not possible to assert how many people avoid killing for fear of being executed. Thus statistics are an ally of the abolitionist cause. A significant change of homicide rates was never verified to justify the restoration or the abolition of the death

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10 www.pime.org.br/mundoemissao/justicacond.htm, consulted on 22/11/09.

penalty in a particular territory[11]. In 2004, in the United States, the average homicide rate in states with the death penalty was 5,71 for each 100 thousand inhabitants, but in the states without the death penalty it was only 4.02[12].

Florida had, from 1976 to 1978, one of the lowest homicide rates of its history. In 1979, with the reintroduction of the penalty, the rates abruptly increased by 28% in 1980; in 1984, the rates were even higher than the period in which executions did not occur. The State of Florida, where the death penalty was suspended for more than 15 years, the perverse and useless effects of the adoption of the death penalty became evident. Comparing the last three years of suspension of the death penalty with the three years following its reintroduction, we may note a contrast between the lowest and highest rates of homicide for the state's entire history[13].

Albert Camus expressed this situation well: the defendant ends up being sentenced less for a crime he or she has committed and more for all the crimes that might otherwise have been committed. *"étrange loi, en vérité, qui connait la meurtre qu'elle entraine et ignorera toujours celui qu'elle empêche"* [it's a strange law that knows the murders it entails itself, but remains forever in ignorance of those it prevents][14].

VI. THE INFORMAL DEATH PENALTY IN BRAZIL: SUMMARY EXECUTIONS

In Brazil, although the death penalty is not official, it is nonetheless institutionalized. The police kill poor, black, slum dwellers, especially male from 15 to 24 years old. The numbers reveal a current policy of silent extermination, in prisons and similar insti-

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11 Luís Francisco Carvalho Filho, op. cit., p. 54/5.

12 Anistia Internacional, A questão da pena de morte, 1998.

13 Maria Stella Gregori e Tulio Khan. A volta de um velho debate. In: Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 86-90.

14 Nereu Lima. *Pena de morte: pedagogia da violência*. In Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 72.

tutions. The inhumanity of genocide against the local indigenous people and the slavery system have left a stain, creating a mentality of disrespect for the most elementary and fundamental rights. Antonio Houaiss estimates that Brazil imported around 3.6 million black slaves, against 700 imported by the United States. In the late nineteenth century to the mid-twentieth century, the life expectancy of slaves in the toil of the plantations did not exceed six or seven years. There is a total banalization of death in Brazil, which can be perceived by the number of families below the poverty line, child mortality rates, murders of young people etc[15].

Homicide is the main cause of death in the 15 to 44 year age bracket[16]. The profile of victims and criminals is the same: urban workers with low wages, unskilled, male, black or brown, migrants, single, with low level of education, young, earning a salary below 100 US dollars per month and residents of the peripheries of cities, with no criminal record or any previous encounter with the police.

The main victims of violence are precisely the preferential targets of public power, its discrimination and arbitrariness[17]. The high rates of criminality and homicide affects disproportionately the poorer classes, especially in the "favelas" (slums). There is a strong negative co-relation between average incomes and the homicide rate. In some cities, rates for the poorest areas are 4.5 times higher than in other richer regions. The city of Rio de Janeiro, the poor areas of the North Region and the Baixada area had homicide rates of around 55 per 100,000 inhabitants during the 2000-2005, whilst in the rich South Region the rate was 12,6 per 100,000.

In Rio de Janeiro and Säo Paulo, only 10% of homicides are prosecuted in the courts; in Pernambuco, the rate is a meager 3%. Only half of those 10% of homicide cases that reach the courts of Säo Pau-

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15 Maria Bierrenbach, A favor da vida-contra a pena de morte. In: Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 53.

16 Relatório Especial da ONU para Execuções Sumárias, Philip Alston, 2008, p. 7. http://www.global.org.br/pub/FCKeditor/arquivos/File/relatorios/%7B5CDC8111-85E7-4DAA-9D58-B10ED88DE26A%7D_Relatorio-Alston2008.pdf

17 Maria Bierrenbach, A favor da vida-contra a pena de morte. In: Marques, João Benedicto de Azevedo. Reflexões sobre a pena de morte, 1993, p. 55.

lo result in conviction. Between 1980 and 2002, the homicide rate in Brazil has practically tripled, reaching its peak of 30.4 in 2002. The numbers have decreased slightly in the following years, from 28.3 in 2004, to 27 in 2005 and 25 in 2006, but they remain far higher than the world average.

While the official homicide rate in São Paulo decreased in the last years, the number of deaths resulting from police action increased from 2006 to 2008 (in 2007 the police force in service killed one person per day). In Rio de Janeiro, policemen in service are responsible for almost 18% of the total number of deaths, killing three people a day. In 2005, there were 278 cases of resistance followed by death (the usual way in which the police describe, for legal purposes, the murders they commit). In 2006 there were 495 (the increase is due in great part to the high number of cases of resistance registered in May). In 2007, to October, 311 such cases were registered. According to the official statistics, there were 6,133 homicides (not including deaths resulting from police action). The total number of deaths was 7,463. In 2006, the percentage of deaths from police action was 14% (there were 6,323 deaths and 1,063 people killed by policemen, making of a total of 7,386)[18].

According to Paul Chevigny, the most reliable indicator to define abuse of the lethal force is not death itself but the number of shootings with the involvement of the police, because each shooting could potentially cause a death. In situations of armed confrontation, what is expected is that the number of people wounded by the police is always lower than the number of deaths. If the police kill more than they wound, this suggests that they shoot to kill, without considering the need for the action. Surveys acrried out in the United States indicate that when the proportion of civil deaths in relation to the death of policemen is higher than 10, the police are using lethal force in a disproportionate manner in relation to the threat, for purposes other than the protection of life in an emergency. In New York, this proportion was above 10 only in four years of its history. In São Paulo, only in one year in the period studied was

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[18] Un Report of Summary, Arbitrary and Extrajudicial Killings, Philip Alston, 2008, p. 8.

the proportion below 10. The average in the decade is 14.9 civilians killed for each policeman, almost 50% higher than what is considered internationally acceptable.

Despite the fact that intentional homicide went down 60% between 2000 and 2008, deaths caused by police action did not decrease in the same proportion. They fluctuated up and down. As a result, statistically, that proportion increases when there is a strong decrease of homicide committed by civilians.

Deaths in the prison system in Brazil occur mainly in the violent context of rebellions started by groups of prisoners, where killings are committed by prisoners, prison officials or policemen dispatched to control the disturbance or rebellion. The failure of the State to provide providing for inmates basic needs and security motivates the growth of bands that seek too fill the gap where by offering benefits for their members. The deficient conditions of Brazilian penitentiaries as well as the serious overcrowding are well documented. The correctional system was designed for only 60% of the present prison population throughout the country and many penitentiaries have a population two or three times their maximum capacity.

The problem in Säo Paulo State is especially serious. In Säo Paulo one finds 20% of the country's population and 34% of the country's correctional population. On October 30, 2007, there were 140,680 inmates in 143 penitentiaries. Cells equipped to accommodate eight inmates receive up to 25 inmates, that sleep in shifts in beds or on the floor.

The main penitentiary rebellions include: in October 1992, 111 prisoners were killed when the military police tried to recover control over the Carandiru penitentiary in Säo Paulo after a rebellion; one person was sentenced for those deaths, but the conviction was overturned in February, 2006. In 2001 there were simultaneous rebellions in 29 different penitentiaries in Säo Paulo. In 2002, 10 people died and 60 escaped from the prison in Embu das Artes in Säo Paulo. In 2003, 84 prisoners escaped from the Silvio Porto prison in Paraiba. In 2004, 14 inmates were killed and some mutilated during a rebellion in the Urso Branco complex in Rondonia. In 2004, 34 inmates died during a rebellion in the Benfica prison, in Rio de

Janeiro. In 2007 25 inmates were burned alive by other inmates in Ponte Nova prison, in Minas Gerais.

VII. CONCLUSION

In the light of the persisting extraordinary necessities of Brazilian society and taking into consideration the situation of violence in Brazil, the death penalty would not contribute to improving the security of the population. It would rather deepen the endemic violence environment that persists.

Our task lies beyond symbolically pointing towards the abolition of the death penalty in case of declared war, which is already underway in a Bill before the Ministry of Justice for an amendment to the Brazilian Constitution. Like so many other countries, we must also continue to reduce the current abyssal inequalities, as well as fight police and state violence, as this will allow Brazilians to attain more civilized living conditions.

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THE DEATH PENALTY IN THE UNITED STATES: JURISPRUDENTIAL AND SOCIAL EVOLUTION[1]

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Professor Manacorda uses the image of the circle to describe the evolution of the abolition of the death penalty in Europe[2]. It is still not possible to talk about abolition in the United States of America, but we can talk about evolution in the form of waves that rise with greater or lesser force, break, and, finally, recede. And the different stages in the evolution of the death penalty in the USA demonstrate that we are now facing a break in the wave as it starts to recede. Although abolition by a federal entity, in other words, through legislation or by a ruling of the Supreme Court is not on the horizon, a constant fall may be noted over various years in the practice of the death penalty as well as in its popular support. Comparing the two waves of the death penalty in the USA, and the present-day break in the wave, and even its recedence, we may even venture to think of a definitive retreat in the long-term.

I. HISTORICAL PERSPECTIVE: THE EBB AND FLOW OF TWO CYCLES

At the time of the American Revolution, "treason, murder, involuntary homicide, rape, robbery, theft, criminal incendiarism, [and]

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1 This research was completed on June 20, 2007 and translated from the French into Spanish by Marta Muñoz de Morales UCLM. The present article was translated from the Spanish into English by Antony Ross Price in July, 2010.

2 See, the article by Stefano Manacorda in this publication.

forgery were all capital offences in England"[3] and, consequently, in the colonies, where public executions of convicted felons was commonplace. Thus, the death penalty was not considered a "cruel and unusual" punishment when the Eighth Amendment to the U.S. Constitution was adopted in 1791, which prohibits such punishments. For almost one and a half centuries, the number of executions increased progressively, reaching almost 200 executions in 1935[4].

Afterwards, the number of executions progressively fell, reaching zero in 1968. The *de facto* moratorium, attributed in part to the appearance of *Réflexions sur la guillotine* by Albert Camus in the United States, lasted for 9 years[5]. From 1977 until 1983, executions began again little by little, turning into a wave that reached its peak in 1999, when 98 people were executed. If the figure appears small in relation to the 200 people executed in 1935, it is because today, the difference between the number of people sentenced to death and the number of executions in one year is greater, given the lengthier appeals procedures today. During the 1990s, juries declared about 300 guilty verdicts each year which resulted in the death sentence[6], while in 1935, the number of convictions and executions was more or less the same[7]. After 1999, the figure for both executions and convictions fell to 53 executions and to about 102 convictions in 2006[8]. We may therefore ask what is it that that made the second wave advance and who and what, since 1999, has played the role of Camus to make it ebb.

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3 Diane Marie Amann, The death penalty in America, speech at the first meeting of the French-American "ID" Network, Paris, April 10-11, 2006.

4 *Ibid*.

5 *Ibid*. See, equally, the US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Key Facts at a Glance: Executions", http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm.

6 See, Richard C. Dieter, *A Crisis in Confidence: Americans' Doubts About the Death Penalty*, Rapport, Death Penalty Information Center (June 2007), p. 7: http://www.deathpenaltyinfo.org/CoC.pdf).

7 See, for example, the web site maintained by the State of Indiana, which details the dates of conviction and execution of 77 murderers sentenced to death in the State since 1990 and in which it may be seen that a maximum period of two years can take place, although very often only a few months (consulted 8 July, 2007: http://www.clarkprosecutor.org/html/death/executions.htm).

8 Loc. cit.

II. JURISPRUDENTIAL EVOLUTION: OPEN TEXTURE NORMS AND ADAPTED STRATEGIES

It is necessary to go back to 1972, as although it is true that there were no executions between 1972 and 1976, Camus had nothing to do with it. It is in fact a matter of the *Furman v. Georgia* case[9], in which the Supreme Court ruled that the absence of rational criteria for the application of the death penalty meant that it was applied in contravention of the eighth and fourteenth amendments to the Constitution.

Whereas the eighth amendment permitted the death penalty in 1791, the fifth amendment subjected the imposition of the penalty, as in any other criminal sanction, to the principle of *due process*[10]. In other words, the person facing justice should have the benefits of a just and fair trial. The guarantee of *due process* was taken up again in the fourteenth amendment, one of the reconstruction amendments after the American Civil War, with the aim of guaranteeing *equal protection*, in the face of both state and federal jurisdictions.

In the *Furman* case, the accused alleged that he had been surprised when committing a robbery of a house. While trying to escape, he fell over and his gun went off, accidentally killing one of the owners of the house. He was condemned to death for murder, mainly on the basis of his testimony. The Supreme Court invalidated the decision, considering that the application of the death sentence was too "arbitrary and capricious" to satisfy the requirements of the eighth and fourteenth amendments. This single categorical decision on the matter, contrary to the majority of High Court decisions, contains only one paragraph. The opinions of the different concurring and dissenting judges go no further when clarifying the matter. One of the judges, for example, who held that the conviction was motivated for reasons of racial discrimination although this had not been

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

10 The fifth amendment of the Constitution of the United States –one of the ten amendments that figure in the *Bill of Rights* ratified on December 15, 1971- establishes that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, […] nor be deprived of life, liberty, or property, without due process of law […]".

proven, wrote that these sentences were "cruel and unusual in the same way that being struck by lightning is cruel and unusual"[11].

Following this decision, the majority of States modified their penal procedures introducing additional guarantees that had the aim of reducing arbitrariness. In 1976, the High Court approved these modifications in the case of *Gregg v. Georgia*[12]. A majority of judges considered that given that guarantees existed against arbitrariness and discrimination in the application of the death penalty, this did not in itself constitute a violation of the Constitution. If this decision unleashed the second wave of executions, then earlier jurisprudence relating to cruel and unusual punishments provided some clues to neutralize it.

The prohibition of cruel and unusual treatment is an *open texture norm*: a name given to a judicial interpretation in the light of present and past circumstances. In his concurring opinion in *Furman,* Justice Douglas cited the *Weems* case in 1910 for this last notion, stating that "It is also said in our opinions that the proscription of cruel and unusual punishments is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"[13]. (humane, as opposed to inhuman). Justice Douglas also cited the *Tropo v. Dulles* case of 1958[14], that referred back to *Weems*[15] and which became the standard reference in relation to the Eighth Amendment. In *Trop*, the Supreme Court judged that it was contrary to the Eighth Amendment to revoke citizenship as a punishment. It explained that at the heart of the matter it was a question of human dignity[16]. The formula "cruel and unusual punishment" "[i.e. The

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11 *Furman*, cit. nº 7, p. 309 (concurring opinion Stewart, J.).

12 V. *Gregg v. Georgia*, (1976, US) 428 U.S. 153.

13 *Furman*, cit. nº 8, p. 241-242 (concurring opinion Douglas J.) (quoting *Weems v. United States*, (1910, US) 217 U.S. 340, p. 378).

14 *Trop v. Dulles* (1958, US) 356 U.S. 86.

15 See, Amann, cit. nº 1; equally "International Law and Rehnquist-Era Reversals". Georgetown Law Journal, Vol. 94 (2006), p. 1319-1346, especially pp. 1335-1336.

16 That involves standards of decency. Trop, cit., nº 12, p. 100 (Warren C.J., decision of a majority of justices)

Amendment] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[17].

However, Justice Douglas did not consider the death penalty inadmissible in itself, unlike his two colleagues, judges Brennnan and Marshall. Although these two judges never validated a conviction, considering that the death penalty was contrary to the Constitution under any circumstances, the other judges favoured –and still do so- the solution of applying the death penalty on a case by case basis[18]. Only Justice Blackmun, who was among the dissenting judges in the *Furman* case, changed his opinion: concluding finally that the penalty was unjust, more than 20 years after *Furman*, and writing that "from this day forward, I no longer shall tinker with the machinery of death"[19].

Thus, as from 1976, there was a fall in cases relating more to procedural questions and to crimes punishable by the death penalty[20]. But certain cases concerned not the category of offence, but the perpetrator of the crime. In 2002, the Supreme Court specifically prohibited the death penalty for the mentally retarded[21] and, in 2005, for those between 16 and 18 years old at the time their offence was committed (a decision in 1987 prohibited the death sentence for minors up to 16 years old)[22]. These two recent decisions have been the

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17 Amann, cit., nº 1 (quoting *Trop*, cit., p. 101).

18 *Ibid*.

19 *Ibid*. (quoting *Callins v. Collins* [1994, US] 510 U.S. 1141 [dissenting opinion of Justice Blackmun], p. 1130).

20 For example, the rape of an "adult" has not been punished by death since 1977. See *Coker v. Georgia* (1977, US) 433 U.S. 584 (the rape of a 16-year-old married woman is not suitable for the death penalty). More recently, the jurisdiction of Louisiana established the death penalty in the case of the rape of a child. The Supreme Court overturned this penalty in a case relating to the rape of child of under twelve years old. See *Kennedy v. Louisiana*, 554 U.S. (2008).

21 See, N. Norberg, The principle of *stare decisis* gives way to the principles of *due process* and of dignity: the Supreme Court of the United States and the death penalty in the *Revista* 2002, 917 (discussing, among other things, the *Atkins v. Virginia* case [2002, US] 536 U.S. 304.

22 See *Roper v. Sinmons* (2005, US) 543 U.S. 551 (the murderers were between 16 and 18 years old); *Thompson v. Oklahoma* (1987, US) 487 U.S. 815 (the murderers were under 16 years old). See also D.M. Amann, Le transnationalisme face à la transition, in *Revista* 2005, 967 (discussing the *Simmons* case).

source of controversy, not because of their consequences, but due to the comparative method used by the Court. In the United States, the right to sanction criminal behaviour corresponds more to the Federal States than to the federal government. So, the imposition of federal regulations in matters concerning the death penalty is seen as usurping their rights. Imposing rules based on foreign norms appears even less acceptable to them.

In *Trop*, the Court declared that the interpretation of the formula "cruel and unusual" should be based on evolving standards of decency. It made clear, later on, that "[the] first indicator of these norms is both federal and state legislation"[23], to which the Court added its own appreciation. But after 1989, a majority of the Court rejected, in the context of the eighth amendment, any consideration other than the right of Americans or American public opinion[24]. This changed in 2002.

In *Atkins*, having concluded that a "national consensus" had formed against the death penalty in the case of the mentally retarded, the Supreme Court added that "in the world community", the application of the death penalty to criminals that suffer from mental illness is "rejected by an overwhelming majority"[25]. In the *Roper* case, the Court once again achieved a national consensus, on this occasion in relation to the execution of minors. It then qualified this consensus in reference to foreign and international law[26], in the light of which the United States is the only country in the world in which the death penalty is imposed on criminals who were underage at the time of committing their offence. The majority underlined that

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23 N. Norberg, cit. nº 19, p. 918.

24 *Ibid*.

25 Atkins, cit., nº 19, p. 316, nº 21 (quoting the *Brief for The European Union* as Amicus Curiae in the *McCarver v. North Carolina* case, OT. 2001, nº 00-8727, p. 4, that had come before the Court at the time of an earlier case that covered the same question as the *Atkins* case, but which the Court did not judge due to a legal amendment in the State of North Carolina).

26 The Court cited article 37 of the Convention relating to children's rights; article 6(5) of the International Convention on Civil and Political Rights; article 4(5) of the InterAmerican Convention on Human Rights; article 5(3) of the African Charter on the Rights of Children; *Criminal Justice Act*. 11 & 12 Geo. 6, ch. 58 (United Kingdom); and the practices of other countries.

this "shocking reality"[27] was not binding, but reinforced the opinion that the punishment was disproportionate and, therefore, contrary to the Eighth Amendment. For their part, the dissenting judges rejected this reference to the world outside the United States, stressing the fact that only the rights of the American people and public opinion in America could be taken into account in the interpretation of "cruel and unusual" punishment.

This vision of the interpretation of the constitution runs contrary to history, given that the Supreme Court has referred to foreign and international norms ever since its creation[28]. Moreover, as Justice Breyer declared, the eighth amendment speaks of "cruel and unusual" punishment, but does not say *where*.

This jurisprudential evolution reflects the evolving standards of public opinion.

III. THE EVOLVING STANDARDS OF PUBLIC OPINION: TOWARDS A CLEARER VISION OF HUMAN JUSTICE?

The renewal of the death penalty at the end of the seventies and its rise in the eighties and nineties corresponds to two interrelated movements: the war against crime set in motion by President Reagan and the rise of religious fundamentalism supported, and even encouraged, by the president. As a consequence of these two movements neither the offence, nor the criminal were tolerated. For some time, Americans supported the death penalty, believing it to have a dissuasive effect[29]. It was expected to prevent more deaths, either by pure dissuasion, or by preventing recidivism. At present, 60% of Americans no longer believe that the death penalty is dissuasive[30], and, for over six years, although fundamentalism and the war against crime continue in force, support for the death penalty as well as its application is losing ground.

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27 *Roper*, cit., nº 20, p. 575.
28 Vol. 98 (2004), p. 43-57.
29 *Idem*, p. 4.
30 *Ibid.*

In 1994, 80% of Americans supported the death penalty[31]. Today, 62% support it[32]. This drop in support is not due to a re-edition of Camus. It is principally due to the problem known as "innocence": since 1973, more than 120 people condemned to death and more than 200 people condemned to prison were later proved to be innocent, either due to examination of their DNA, or due to investigations undertaken by journalists, students and other people outside the justice system[33]. Trust in the US justice system is a serious problem for the average American and leads to some soul searching; to the point where two thirds of Americans believe that the system can not be restored, and 58% express support for the moratorium[34].

Meanwhile, efforts still go into reducing the field of application of the death penalty. For example, the lethal injection is today questioned in various States and has been the subject of an appeal to the Supreme Court[35]. Used in 37 of the 38 federal States which practice the death penalty, this method risks inflicting a cruel and unusual punishment in the case of human error when administering the injections[36]. For this reason, there has been a moratorium on its use in California and in Florida since 2006[37].

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31 See Amann, cit., nº 1.

32 See Dieter, cit., nº 4, p. 16.

33 *Idem*, p. 4.

34 *Idem*, p. 11 (it should be highlighted that among the people interviewed that came from the south of the United States, where the majority of the executions took place, the figure rose to 59%).

35 Vid. *Baze v. Rees*, 553 U.S. (2008), the protocol on lethal injections of Kentucky does not violate the Constitution.

36 The majority of States use three products in lethal injections. The first should leave the convicted prisoner unconscious and immune to pain; the second paralyzes the muscles and the third provokes a cardiac arrest. A study on executions in the four States revealed that in 43% of cases, the first injection of an anesthetic did not work as envisaged, and the convicted prisoner was, perhaps, conscience during the procedure. In addition, one of the products by itself caused a very painful burning sensation.

37 See, Dieter, cit., nº 4, p. 11-12; see on the contrary, *Taylor c. Crawford*, (2007, US CA8 [Mo]), F. 3º, 2007 WL 1583874. It is a decision of the Federal Appeals Court that held competence over the State of Missouri, in which it was judged that the lethal injection did not imply "*wanton infliction* of a cruel and unusual punishment".

A second legal battlefield is the exclusion from juries of people that express doubts over the death penalty. At present, 40% of Americans believe that they would not be fit for jury service under these circumstances because of their opposition to the death penalty due to moral reasons. The problem therefore arises of juries that do not reflect the real diversity of the population, depriving the defendant of the right to an impartial trial[38].

The Supreme Court relied on the sorts of figures that are mentioned above, to reach a consensus in the *Akins* and *Roper* case. In 2002 and 2005, the Court observed that the second wave of death penalty convictions had swollen and was receding. The definitive abatement is still a long way off, but perhaps less so than it was in the first wave, which lasted almost 200 years. Afterwards, the fight against life-imprisonment, without parole, will begin, which is a reality at present, while "public opinion" will be better informed thanks to "humane justice".

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38 *Idem*, p. 3.

THE APPROACH IN ASIA

THE DEATH PENALTY IN JAPAN

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I. INTRODUCTION

Even a casual observer of the death penalty in Asia would conclude that the region has become the world center for capital punishment[1]. For reasons having to do more with its own national circumstances than with the influence of its neighbors, Japan remains firmly in the retentionist camp and the possibility of change can only be foreseen in the long term. This is despite the fact that Japan is one of the most industrialized countries in the world with a highly educated population of around 127 million. The purpose of this article is to briefly present the reality of the death penalty in Japan. This article provides information about the practice of the death penalty in Japan and speculates about its future, taking into consideration the practice of judicial and administrative agencies as well as the state of public opinion measured by opinion polls carried out periodically by the Japanese government.

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1 The co-authors thank Ingram Weber for his supervision of the English version.

Pointed out by American Professor of Law David T. Johnson in an interesting and controversial article of 2008, *Japanese Punishment in Comparative Perspective*, in Japanese Journal of Sociological Criminology, 2008, No. 33, p. 52.

II. HISTORICAL DEVELOPMENT OF JAPANESE CAPITAL PUNISHMENT

Before the current Penal Code (1907) came into force, there were two successive Penal Codes in Japan. 1) The *Shin ritsu koryo* of 1870, still under the influence of Chinese tradition, represented new legislation for offenses and punishment. It provided three types of capital punishment: hanging, decapitation and head gibbeting. 2) Japan then adopted the European legal system in order to achieve a prompt modernization. The first modern penal code was promulgated in 1880 and was modeled after the French *Code Pénal*. The previous three types of capital punishment were reduced to just hangings. These laws corresponded with major reforms taken in order to launch the modernization period, known as the Meiji era, beginning in 1868. During the previous period, Chinese influence had been paramount.

The death penalty remains in the current Penal Code of 1907. Article 11 Paragraph 1 provides for capital punishment by hanging at a penal institution[2].

III. OFFENSES ELIGIBLE FOR CAPITAL PUNISHMENT

The Japanese Constitution, enacted in 1946 after the Second World War, does not explicitly refer to the death penalty. Nevertheless, the death penalty is stipulated both in the Penal Code as well

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2 Article 11 Paragraph 1 stipulates: "The death penalty shall be executed by hanging at a penal institution." For a Spanish version of Penal Code General Part, see MUÑOZ CONDE, Francisco, *La Parte General del Código Penal Japonés*, in *Revista Penal* No. 5 (2000) available at http://www.uhu.es/revistapenal/index.php/penal/article/view/280/270 and *Revista de Derecho Penal,* Rubinzal Culzoni, Buenos Aires, 2006-I, pp. 389-408. Its English version is available at http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf; the Japanese version available at http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%8CY%96%40&H_NAME_YOMI=%82%A0&H_NO_GENGO=H&H_NO_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_NAME=M40HO045&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1

as in complementary legislation. Eighteen offenses are eligible for the death penalty and they can be grouped as follows: 1) Political offenses against the State, either as a leader of a domestic rebellion[3] or causer of foreign aggression[4]; 2) Offenses against public or common security, such as arson[5] or use of explosive substances[6]; 3) Offenses against individuals, such as homicide[7], murder or robbery-murder[8].

In general, these offenses presuppose that death or endangerment of human life has occurred. Likewise, in special laws outside the Penal Code, there are six other offenses which can be punished with the death penalty[9]. However, most of the cases where the death penalty has been ordered involved murder or robbery-murder. Death penalty judgments for other offenses were handed down in only six cases in the last thirty years. Most death penalty judgments were for murder cases with multiple victims[10].

IV. CONSTITUTIONALITY OF CAPITAL PUNISHMENT

For a long time, many objections have been raised against these rules concerning the death penalty, both at the national as well as the

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3 Article 77, 1st paragraph.
4 Article 81.
5 Article 108.
6 Article 117.
7 Article 199.
8 Article 240, second part.
9 Offenses outside the Penal Code: use of explosive substances (Article 1 of the Penal Regulations on Control of Explosive Substances), crashing of airplanes and causing death thereby (Article 2 paragraph 3 of the Law on Punishment of Endangerment of Airplanes), hijacking of airplanes and causing death thereby (Article 2 of the Law on Punishment of Hijacking), killing of a hostage (Article 4 of the Law on Punishment of Taking Hostage), killing in a duel (Article 3 of the Penal Regulations on Duel), piracy causing death (Article 4 paragraph 1 of the Law on the Punishment of Piracy, enacted on June 19, 2009).
10 *Shiho tokei nenpo* [Judicial Statistics Yearbook]; those offenses were arson (one case), offense against Penal Regulations on Control of Explosive Substances (four cases) and Overturning of Trains and Causing Death Thereby (Article 126 paragraph 3 and Article 127, one case).

international level[11]. One reason is that the death penalty is at odds with the human rights guarantees written in the Constitution[12].

Nevertheless, since 1948 the Supreme Court has been consistent on the constitutionality of the death penalty[13]. In 1948 the highest Japanese court decided that "If a capital punishment implies an elemento of cruelty in its method of execution, it would be unconstitutional, for example, burning, crucifying, head-pillories or boiling. On the other hand, capital punishment in general cannot be regarded as a cruel penalty"[14].

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11 See, for example, the report of United Nations Human Rights Council, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/126/06/PDF/G0812606.pdf?OpenElement; the report of United Nations Human Rights Committee, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/415/73/PDF/G0741573.pdf?OpenElement; the reports of the Japanese Federation of Bar Association, available in English language at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBAReport.pdf. Japanese legal scholars have also critized regulations and practice of the death penalty: Shigemitsu DANDO, *Shikei haishi ron*, 1st ed. 1991 and 6th and last ed. 2000. Also, Chihiro SAEKI, Yasuharu HIRABA and Shigemitsu DANDO, *Shikei haishi wo motomeru* (1994). These authors have jointly requested the abolition of the death penalty, *Shikei haishi wo motomeru keijiho kenkyusha no appeal*, in 1993 that was supported by 279 criminal law scholars in Japan. Also there are in Japan many legal organizations against death penalty: Amnesty International Japan, The Forum Shikei haishi and Japanese Federation of Bar Association. See, for example: http://www.amnesty.or.jp/modules/wfsection/article.php?articleid=2242, http://www.jca.apc.org/stop-shikei/epamph/dpinjapan_e.html.

12 The Japanese Constitution of 1946 stipulates that: "All the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs" (Article 13). Also, torture and cruel punishment are explicitly forbidden (Article 36) and due process of law is guaranteed: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law" (Article 31).

13 In Japan there is no Constitutional Court and therefore ordinary courts decide petitions concerning the constitutionality of laws and other official decisions.

14 Japanese Supreme Court, Grand Bench judgment on March 12, 1948, in Supreme Court Reporter on Criminal Matters Vol. 2, p. 191. There were three bases for the judgment: the first concerning a formal requirement of due process of law, according to Art. 31 of the Constitution and the other two were related to issues of general and special prevention.

More recently, the Japanese Supreme Court has held the same opinion: "The death penalty can be applied only when the criminal's responsibility is extremely grave and the maximum penalty is unavoidable from the viewpoint of balance between the crime and the punishment as well as that of general prevention, taking into account … the nature, motive and mode of the crime, especially the persistence and cruelty of the means of killing, the seriousness of the consequences, especially the number of victims killed, the feelings of the bereaved, social effects, the age and previous convictions of the offender, and the circumstances after commitment of the crime"[15]. The Court has also pronounced its opinion in favor of the constitutionality of detention on death row. The Court explained in its judgment of July 19, 1985, that the execution of the death penalty after thirty years on death row is still legal and does not constitute a "cruel penalty" prohibited by the Constitution"[16].

V. PRACTICE OF CAPITAL PUNISHMENT

1. Judgment and execution

Japan executes at least one person every year. According to public statistics, only during the period between 1990 and 1992 were

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15 Judgment delivered on July 8, 1983 by the Second Petty Bench of the Supreme Court, cited in: *Human Rights Committee. Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant Fifth periodic reports of States parties due in 2002;* Japan, December 20, 2006, paragraph 128, available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm. Recently, there have been judgments in the same vein: seven in 2008, eight in 2007, eight in 2006 and seven in 2005; none of them bring new arguments to support death penalty and only cite the previous judgment of 1948.

16 Japanese Supreme Court, judgment of July 19, 1985, Hanrei jiho Journal No. 1158, p. 28. In the Sadamichi Hirasawa case, known as "Teigin case", the Court has pointed out that detention on death row was necessary and did not constitute a "cruel punishment" prohibited by the Constitution. The defense lawyers had submitted 17 requests for a new trial and 5 for amnesty. Therefore, although the detention continued for over 30 years, most of the time was dedicated to these proceedings and the rest of time was only a few months. Hirasawa was not released and died because of an illness in prison in 1987.

executions suspended. In 1993 there were seven (7) executions, and the highest number of fifteen (15) was reached in 2008. In 2009, seven (7) executions took place, and the number of convicts on death row awaiting execution amounted to one hundred and three (103)[17].

2. Judicial decisions on the death penalty

Among Penal Code offenses eligible for the death penalty, the abstract set of punishments for each offense leaves the judge with only a small margin to decide the concrete punishment in the particular case. The general part of the Penal Code does not give guidelines or rules for interpretation concerning aggravating or mitigating circumstances. For example, within crimes against the State, the punishment is death or life imprisonment. On the other hand, for offenses against public health and against individuals, the range is larger: death, life imprisonment and imprisonment for not less than three, five or seven years. Nevertheless, when it comes to imposing the death penalty, Japanese case law only includes judgments concerning offenses against individuals (homicide and robbery causing death or injury). On with this matter, one of the biggest discussions at the present time relates to what the rules are to distinguish between death and life imprisonment in cases of homicide[18].

3. Convicts on death row

According to the Japanese Criminal Procedure Code, the execution of the death penalty takes place on the basis of the order of the Minister of Justice[19]. The order must be given within six months

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17 See Annual Report of Prosecution Office, 2006, cited in *Alternative Report to the Fifth Periodic Report of Japan on the International Covenant on Civil and Political Rights*, Japan, December 2007, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBAReport.pdf, and statistics about the praxis of death penalty, prepared by private persons, available in Japanese at http://www.geocities.jp/hyouhakudanna/number.html

18 Except the (limited) guidelines of the Supreme Court in the judgments where the constitutionality of the death row period was decided, see supra note 16.

19 Article 475 of Criminal Procedure Code.

from the day on which the judgment became final[20]. It also provides that the execution must take place within five days from the issue of the order.

Nevertheless, in practice these provisions are not obeyed, since it has been common practice for a long period to elapse between the final judgment and its execution. Until recently, the death penalty (without subsequent requests) was executed approximately eight years after the final judgment[21].

On the other hand, in cases where appeals or revision and retrial requests are submitted, the period of time before an execution can be extended. Some offenders sentenced to death remained on death row for thirty years. Nevertheless, the Supreme Court, in its July 19 1985 judgment, denied that execution after long periods on death row can be considered a "cruel punishment" prohibited by the Constitution[22].

Another reason for suspending an execution is the health of the convicted person. When a convicted offender is ill, the government suspends execution. Although the most important reason for providing a stay of execution is at the discretion of the Minister of Justice[23]. The law obliges the minister to issue an execution order within six months following the judgment. But there are some exceptions, as occurred in the case of the children killed in an elementary school in Osaka on June 8, 2001 ("Osaka Kyoiku University Ikeda Elementary

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20 Article 476 of Criminal Procedure Code.

21 According to Criminal Procedure Code, all co-offenders must be convicted by a final judgment before even one of them may be executed. For example, concerning the Aum sect terrorist attack in the Tokyo subway on March 20, 1995 ("Chikatetsu sarin" case), there were many offenders. Some had already been sentenced to death finally but for others the procedure had not concluded. Nobody will be executed until all of their judgments become final. For more information about this case, see, for example: http://www.japantimes.co.jp/weekly/ed/ed20050326a1.htm; http://news.bbc.co.uk/2/hi/asia-pacific/3491488.stm; http://www.cdc.gov/ncidod/EID/vol5no4/olson.htm

22 "Teigin case". The first judgment dates back to July 24, 1950, supra note 16. More information about this case is available in English at http://www.nytimes.com/1987/05/11/obituaries/sadamichi-hirasawa-is-dead-was-on-death-row-32-years.html?pagewanted=1

23 As occurred in the period 1990-1992 when executions were suspended.

School case"). The final judgment dates back to August 28, 2003. The offender wanted to be executed as soon as possible and he was executed only within a year after the first judgment (on September 14 2004)[24].

On the other hand, the procedures subsequent to conviction and sentencing to death are characterized by a number of unacceptable features that involve human rights breaches: (i) the lack of mandatory appeal in death penalty cases[25]; (ii) the *de facto* process of "social extinguishment" of the convicted prisoner[26]; (iii) the inadequate diagnosis and treatment of prisoners with mental illness. Moreover, there are some practical problems in the procedures leading to the commutation of punishment[27].

In conclusion, the United Nations treaty monitoring bodies have expressed concerns regarding Japan's application of the death penalty. In particular they focused on the fact that conditions of detention do not meet international standards. These standards include

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24 More information, in Japanese, at http://www.memomsg.com/dictionary/D1096/739.html

25 In recent years, there has been an increasing trend towards death penalty judgments becoming final without referral to a higher courts for review. In addition, after the first judgment is confirmed, there are insufficient legal safeguards for convicts to exercise their rights. Since the court public attorney system is not available after final judgment, it becomes difficult for convicts to submit retrial or pardon petitions.

26 DT. Johnson (2006), p. 73. Characterized by prolonged solitary confinement, limitation on visits, lost of contact with his family, the prohibition of conversation or even eye contact with prison guards, *Hanging by a Thread Mental Health and the Death Penalty in Japan, Amnesty International*, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_09_09_amnesty_japan.pdf, p. 16.

27 Once a capital punishment is confirmed, the chances of commuting the death penalty to a life sentence with mandatory labor, are almost zero. The last occasion when a commutation took place was in 1975, when the death penalty was commuted for a life sentence with mandatory work. On the other hand, even though amnesty is legally provided, it has been rarely applied in death sentences. A number of convicts that insist on their innocence and therefore ask for a retrial, remain on death row for prolonged periods of time. As of May 27 2007, among the convicts on death row for more than 10 years, four of them have been on death row for more than thirty years. Nevertheless, not even the oldest of them ones have obtain ed an amnesty and some of them die in prison of natural causes.

the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners[28] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. On this matter, the United Nations Human Rights Committee has made specific demands to the Japanese Government for more than a decade[29].

4. The execution of the death penalty

(1) Lack of information about the exact day of execution. In practice, convicts are only informed of their impending execution on the morning of the hanging, while their family and defense lawyers are not told of the execution until after it has occurred.

(2) Suspension of execution. Even though execution of mentally ill prisoners is forbidden by Criminal Procedure Code (Art. 479 paragraph 1), it is almost impossible to control compliance because even prisoners themselves cannot access their

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[28] For example, under the title Discipline and punishment, rule No. 27 prescribes "Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."

[29] A number of criticisms raised by the UN Human Rights Committee in 1998 (Concluding observations: Japan, 19/11/98, Document CCPR/C/79/Add.102) were repeated in the last report of the Committee (Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Japan, UN Document CCPR/C/JPN/CO/5, October 2008). The 2008 report pointed out that "convicts on death row are confined in an individual cell day and night, allegedly in order to protect their mental and emotional stability" (Concluding observations, paragraph 21), cited in *Hanging by a Thread…* supra note 26, p. 12. UN Human Rights Committee, in Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.28, November 5, 1993, comment 4; Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.102, November 19, 1998, paragraph 23. UN Doc. CCPR/C/JPN/CO/5, December 18, 2008, paragraph 21. See also *Alternative Report to the Fifth Periodic Report of Japan on the International Covenant on Civil and Political Rights*, Japan, December 2007, supra note 17.

medical records and doctors from outside the prison's medical staff are not allowed to examine a prisoner[30].

Lastly, there is no legal provision to restrict the execution in cases of elderly people[31].

VI. SURVEY OF PUBLIC OPINION

The result of the last public opinion survey, carried out by the Japanese Government through the Cabinet office in December 2009, in order to collect information on the level of public knowledge concerning criminal system, had the following results[32].

Five point seven percent (5.7%) of those interviewed gave the following reasons in support of the abolition of the death penalty: a) It is better to let the offender live and expiate their crimes (55.9%); b) Not even States may kill a person (42.3%); c) The death penalty makes it impossible to correct miscarriages of justice (43.2%); d) Even as official punishment, killing is against humanity and is barbarous (30.6%); e) Serious crimes will not increase even if the death penalty is abolished (29.7%); f) Even those who have committed serious crimes still have the possibility of rehabilitation (18.9%). Among this abolitionist group, 35.1 percent said that the death penalty should be abolished immediately, and 63.1 percent believed that the death penalty should be reduced gradually until it is finally abolished.

However, the majority of the Japanese population (85.6%) supported a retentionist position. Their reasons for supporting the death penalty differed. Some emphasized retribution while others stressed general prevention (deterrence): a) If the death penalty were abol-

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30 An in-depth report on this matter can be found at *Hanging by a thread…*, supra note 26.

31 On December 25, 2006 four executions took place. Two of them were 77 and 75 years old.

32 1944 adult Japanese nationals answered questions about Japanese basic legal systems from November 26 to December 6, 2009. Both the questionnaire and the collected information are available in Japanese language at http://www8.cao.go.jp/survey/h21/h21-houseido/index.html

ished, victims or their families would be dissatisfied (54.1%); b) Serious crimes must be compensated by life (53.2%); c) Serious crimes will increase if the death penalty is abolished (51.5%); d) Those who committed serious crimes tend to commit similar offenses if they survive (41.7%).

Even among this retentionist group, when asked to predict the future, only 34.2 percent believed that it may be right to abolish the death penalty at some point in the future. Sixty point eight percent (60.8%), however, expressed the opposite position: the death penalty should not be abolished, even in the future. Therefore, the majority of the retentionists believed that the death penalty should not be abolished.

VII. JAPAN'S INCREASING EXECUTION RATE

As noted above, Japan's execution rate has risen over the last few years. The recent surge in executions has led many observers to conclude that Japan has entered a new and more aggressive death penalty period[33].

In addition to the resurgence in Japanese capital punishment, there are at least three qualitative signs of death penalty expansion:

1) Prosecutors have adopted a more aggressive policy to charge cases as capital and to appeal non-death sentences in potentially capital cases. In recent years prosecutors have sought a death sentence in numerous cases they would not previously have considered capital: cases with a single victim or cases with juvenile offenders. At the same time, prosecutors have become increasingly willing to invoke populist sentiments as support for their own capital desires. At one trial in 2003, for example, a Tokyo prosecutor made his case for a death sentence by handing a judge a petition signed by 76,000 people. Taking into account the Japanese criminal procedural system, it is the prosecutor more than any other actor who controls the

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33 JOHNSON, supra note 1, p. 53.

course of capital punishment, as it is the prosecutor who controls both the inputs into the system –which cases to charge as capital- and the outputs –which cases to present to the Minister of Justice for the signature that authorizes the hanging. Lastly, it is worth mentioning the speed at which executions now take place after the judgment becomes final. From 1993 to 1999, each execution took at least 7 years, but from 2000 to 2005 only one out of twelve took that long[34].

2) Court practice is the second sign of expansion. In recent years, trial courts have become more willing to impose death as a criminal sanction and appellate courts have become more inclined to uphold sentences of death. In 2004, the Japanese Supreme Court upheld thirteen sentences of death, the same amount it pronounced in the previous five-year period. Forty years ago, in 1970, the Supreme Court, led the way in reexamining capital punishment in two cases ("Shiratori" and "Saitagawa"). However, in 1999 the same court overturned the life sentence of a man convicted of robbery and murder. In 2008, the Hiroshima High Court reversed its own ruling of life imprisonment when it imposed a sentence of death on a man who was a minor when he killed a young woman and her infant daughter in the city of Hikari (Yamaguchi Prefecture). The High Court sentence was a response to an order by the Supreme Court that it should revisit the sentence with a mind to meting out the ultimate punishment[35].

3) Thirdly, an extra judicial factor helps explain the expansion trend: the Japanese media. In recent years the media has expressed increasingly enthusiastic support for capital charges, convictions and executions. At present, even the Asahi Shimbun, Japan's most progressive national newspaper, publishes editorials arguing that the death penalty is "unavoidable" and "inevitable" in certain cases[36]. More broadly, news stories in the print and electronic media routinely focus on the heinous-

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34 JOHNSON, supra note 1, p. 54.

35 JOHNSON, supra note 1, p. 55.

36 See, for example, editorials on April 24, 2008, and May 27, 2008.

ness of homicide offenses, the needs and desires of victims and survivors, and the public's support for capital punishment[37].

VIII. JAPANESE GOVERNMENT AND THE DEATH PENALTY

Today, the death penalty enjoys high levels of support among the public, as well as among government officials and politicians (the constituted political powers), especially, the Parliament and Cabinet Ministries. Nevertheless, such support is due to the broad secrecy in which the death penalty is shrouded and the lack of public discussion and critical opinion in the media.

In its report to the Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights, the Japanese government stated that "in the Japanese legal system, the death penalty is applied only to particularly serious crimes (murder or intentional acts involving serious risk of injury to human life)"[38]. "The majority of the public believes the death penalty to be inevitable for extremely heinous and atrocious crimes […] and since such heinous crimes, such as murder and homicide during a robbery resulting in multiple deaths are still being committed, the Government's view is that imposing the death penalty on those who have committed extremely heinous crimes and whose criminal responsibility is extremely grave cannot be avoided, and that abolishing the death penalty is not appropriate"[39]. In response to the Committee, Japan took the view that it was not appropriate to introduce a general moratorium on the implementation of the death penalty

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37 JOHNSON, supra note 1, p. 55.

38 UN Human Rights Committee, *Consideration of Reports Submitted By States Parties Under Art. 40 of the Covenant, Fifth periodic reports of States parties due in 2002*, Japan, UN document CCPR/C/JPN/5, April 25, 2007, paragraph 128.

39 UN Human Rights Committee, *Consideration of Reports Submitted By States Parties Under Art. 40 of the Covenant, Fifth periodic reports of States parties due in 2002*, Japan, UN document CCPR/C/JPN/5, April 25, 2007, paragraph 130, available at: http://www2.ohchr.org/English/bodies/hrc/hrcs94.htm

against those so sentenced. The argument was not put in terms of a preference by Japan to continue using the death penalty but rather in terms of the negative effects of a moratorium. The delegation said that a moratorium could result in an even more inhumane situation by suspending executions and then, following revocation, the condemned prisoners would have their hopes dashed and again be liable to be executed. Hence, it was not appropriate to provide a general moratorium on the execution of the death penalty for all those who received the sentence[40]. In its written report the government also expressed concern that an alternative to the death penalty, such as life imprisonment without the possibility of parole, "is problematic in terms of criminal policy and [because] the personality of the inmate may be completely destroyed through the lifelong confinement"[41].

IX. LEGAL DOCTRINE

Contrary to public opinion, the majority of Japanese legal scholars support an abolitionist position. Traditionally, the opposite opinion prevailed, based on retributive foundations. Seiichiro Ono, former Professor at Tokyo University (and former teacher of abolitionist Professor Dando), based his retentionist position on moral retribution. Other scholars like Tadashi Uematsu, former Professor of Hitotsubashi University, supported the death penalty on the basis of deterrence[42]. Also, Professor Takeshi Tsuchimoto, a former

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40 UN Human Rights Committee, *Replies to the List of Issues (CCPR/C/JPN/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Japan*, UN Document CCPR/C/JPN/Q/5/Add.1, 23/9/08, available at: http://www2.ohchr.org/English/bodies/hrc/hrcs94.htm

41 *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant. Fifth periodic reports of States parties due in 2002*, JAPANCCPR/C/JPN/5, April 25, 2007, paragraph 131, p. 38, available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm

42 For example, his article *Shikei haishiron no kansho wo kirau*, in Horitsu no hiroba Vol. 43 No. 8, 1990.

prosecutor, is well known for his support for harsh punishments[43]. Generally, contemporary Japanese legal scholars that support the death penalty base their position on the retentionist majority opinion of the population.

Nevertheless, among the younger generation of legal scholars, the abolitionist trend is increasing. The first Japanese legal scholar that openly supported the abolition of the death penalty was Shigemitsu Dando, Professor Emeritus of Tokyo University and former Justice of the Supreme Court[44]. Also, the abolitionist positions of Chihiro Saeki and Yasuharu Hiraba[45], both from Kyoto University, are worth noting.

Average citizens usually know little about the situation concerning capital punishment in other countries, like the United States of America, China, Europe, and even South Korea.

X. CONCLUSION

Despite the fact that over 80 percent of Japanese support the death penalty, we are convinced that there is a trend in Japan toward its limitation and abolition in the long term. The reasoning of most death penalty advocates is not sufficiently founded and can be modified through information. The retentionist opinion may be overturned by opening up public critical analysis and discussion of the death penalty. According to the results of public surveys, there are two main reasons for the public's wide support of the death penalty:

1) The primitive thought of vengeance and revenge. This feeling appears in answers such as "Serious crimes must be compensated by life" or "If the death penalty were abolished, victims or their families would be dissatisfied".

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43 This scholar published a number of editorials both in newspapers and television programs, such as his article in Sankei Shinbun on May 12, 2004.

44 His book "Shikei haishi ron" was published for the first time in 1991; its 6th and last edition was in 2000, supra note 11.

45 Dando, Saeki and Hiraba, *Shikei haishi wo motomeru*, 1994, supra note 11.

2) The belief in the deterrence effect of the death penalty. Over 60 percent of respondents believe that serious crime will increase if the death penalty is abolished.

Lack of information plays a crucial role in shaping both these points. The deterrence effect of death penalty has not been proved by all scientific examinations. Countries that have abolished the death penalty have not discovered any increase in serious crime. However, most Japanese do not know that the deterrence effect of the death penalty is not recognized, and are also unaware that many countries have already abolished the death penalty.

From this point, despite the fact that, in the near future, there are no signs of a reduction of the retentionist trend referred to in VII, it is indeed possible to foresee at least four factors that could play a crucial role towards the abolition of the death penalty in Japan, and it is plausible to speculate on its limitation in the future:

1) The trend toward the harmonization of Japanese and international law[46].

2) The new system of the victims' participation in criminal procedure[47]. Recently, victims and their families had no right to take part in criminal proceedings. For example, no information was given to them about the investigation or the treatment of the case. They did not have any opportunities to express their opinions and they were treated by the state merely as a source of information. This led many victims to become dissatisfied

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46 The political reform that took place in Japan during Meiji era (1868) is a good example.

47 The main reform legislation dates back to 2004 –see its web site http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=138. Nevertheless, the complete reform took place through a number of legislation. In 2007, the new law "Hanzaihigaishato no kenririeki no hogo wo hakaru tame no Keijisoshohoto no ichibu wo kaiseisuru horitsu" modified the Criminal Procedure Code and other legislation. In 2008, another reform was enacted "Hanzaihigaishato no kenririeki no hogo wo hakaru tame no keijitetsuzuki ni fuzuisuru sochi ni kansuru horitsu" in order to improve victim's assistance and help. On the basis of these reforms the new victim's participation system in criminal trials and criminal compensation system (similar to the French law "action civile") came into force on December 1, 2008.

with the criminal process. An earlier reform designed to give victims a greater voice was abandoned after it was found to increase expressions of vengeance. A new system of victim participation, about to be introduced, is designed to increase compensation for damages, while simultaneously assuaging retributive sentiments.

3) The new juror-courts that came into force on May 21, 2009[48], in which three judges and six lay persons constitute a court. The cases of offenses eligible for the death penalty must always be handled with laypersons. These public trials will increase the public's understanding of criminal offenses and highlight the citizen's duty to take part in judicial decisions that influence the lives of criminal offenders. This kind of democratic involvement of citizens in judicial decisions will open new avenues for fruitful public debate among a population with high levels of education and economic welfare. However, it is not possible at this early stage to predict whether the new juror-courts will increase or decrease death penalty sentences[49].

4) Lastly, lifelong imprisonment without parole represents a plausible transitory option[50] towards a balance between the right to live and the present state of affairs concerning the death penalty and the public support for it referred to in VI.

Since the Middle Ages, the more human rights have prevailed, the more humanitarian criminal penalties become. As Japan is a member of the international community, we hope for the abolition of the death penalty in Japan in the long term.

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48 The first trial with mixed panels took place in Tokyo, from August 3rd, 2009.

49 At present (September 20, 2010), there has not been a case in which this new court with laypersons passed a sentence of death. There has not even been a case in which the prosecutor recommended such a sentence. The Prosecutors' Office seems to be taking a cautious attitude in proposing the death penalty by hanging to panels with lay participants, although such proposals are anticipated in the next few months.

50 Life imprisonment without parole has also been criticized as a "cruel penalty".

CURRENT CHINESE EFFORTS TO ABOLISH THE DEATH PENALTY

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Nowadays, no one in Chinese academic circles working in the field of criminal law argues against abolition of the death penalty. "If" the death penalty should be abolished is no longer an issue in academic discussion. "How" to abolish the death penalty is the topic. The simple way to immediately abolish the death penalty overnight is considered unrealistic, both politically and socially. The general policy on the death penalty in China is to maintain it but strictly restrict its use. The practical approach advocated by scholars and followed by the Chinese judiciary is known as *de facto* abolition.

According to the current international standard, the meaning of abolishing the death penalty includes three types of abolition: total abolition, partial abolition and *de facto* abolition. Total abolition is an ideal one but objective, which is not easy to achieve, since it would require complete abolition throughout the legal system: the death penalty shall not only not be imposed in practice any more, but no reference will be made to it in the constitution and the laws of the nation. Partial abolition refers to the situation where the death penalty exists only in martial law, but no longer in normal criminal law. *De facto* abolition means that the death penalty can still be formally part of the law, however, it shall not be imposed, usually, for at least a long time. The three types of abolition form the framework for abolition of the death penalty. Although pro-abolitionists may advocate that it is only total abolition that is perfect, the global development of efforts to abolish the death penalty shows us that total abolition is usually achieved after a longer or shorter period of *de facto* and/or partial abolition.

A careful comparison reveals the official policy on death penalty in China: to maintain, but to restrict the death penalty could as a position, be compatible with efforts to abolish death penalty. At least,

people may easily agree that the strictest restrictions should lead to one of the forms of abolition: *de facto* abolition! In China, realistic efforts to abolish the death penalty realistically, can be therefore towards *de facto* abolition.

In the Chinese legal system, a practical system to restrict immediate execution has been established: the so-called death penalty with a two year suspension. In the Chinese penal system, the death penalty suspended for two years is not so much as a type of independent punishment a system for the implementation of the death penalty. This type of punishment can only be imposed upon those sentenced to death according to the specific provisions of criminal law and the facts of the case, however, immediate execution is considered unnecessary. If, for instance, a defendant is convicted of an offence that does not carry the death penalty, according to the specific provisions of criminal law, or, if the circumstances in a specific capital case show that the immediate execution is not necessary, the sentence of death penalty with a two year suspension shall be announced.

According to Chinese criminal law and criminal procedure, the sentence of death that is suspended for two years shall be reduced to a life imprisonment if the criminal does not willingly offend again in these two years. If no further crimes are committed within these two years, the sentence shall be reduced to imprisonment for a fixed term of between 15-20 years, in practice usually 18 years. Only in the case where the criminal willfully commits a crime at anytime within these two years, will he immediately be executed, if it is verified by the Supreme People's Court. In practice, final executions are extremely unusual. Therefore, the death penalty suspended for two years in China pushes the legal order towards *de facto* abolition of death penalty.

Procedurally, Chinese criminal proceedings excise a "second trial is final" system. However, there is an additional procedure for the death penalty: a death penalty verification procedure. All death sentences for immediate execution shall first be verified by the Supreme People's Court, no matter whether the accused has raised an appeal, whereas the two-year suspended death sentence is usually verified by the High People's Court at the provincial level.

Besides its other duties when verifying these sentences involving the suspended death penalty, the Chinese Supreme People's Court is principally there to check and evaluate the circumstances which have been considered to show that immediate execution is unnecessary. For the circumstances to exclude immediate execution, there are many provisions in Chinese criminal law, such as minors under the age of 18 years old when committing the crime and pregnant women at the time of the trial, who shall not be sentenced to death, even with a two year suspension! There are many more points in relation to this function that have been recognized in legal practice, such as the victim's loss, incidental acts, indignation, and so on. Wherever this type of circumstance excluding immediate execution is ascertained, the original sentence will normally be disapproved by the Supreme People's Court. Chinese criminal law circles, have trtied very hard both academically and practically, to expand the scope of these circumstances to exclude immediate execution. Among them, the most Chinese concept is probably the circumstance of "neighborhood", since Chinese people have lived as neighbors not only for years but for generations, especially in the countryside and in less developed areas. It will create obvious unease to social harmony when a neighbor is executed! The Supreme People's Court in China has normally withheld its approval of the death sentence with immediate execution, when it is found that the victim and the actor are neighbors.

More efforts have been made in this direction to provide greater support for the Supreme People's Court to reject immediate execution. Recently, the most adventurous circumstance under debate is "compensation". However, a conclusion is yet to be reached. Under this circumstance, the victim and his family may get a handsome payment to compensate what they have lost, better than nothing when the accused is executed. However, the sense of justice in the society will be negatively challenged and many difficult issues such as the price of a life will be raised. How to find a satisfied solution is still a question! In any event, Chinese academics and practitioners are still trying to invent more circumstances which shall lead the courts to exclude imposition of the death penalty, especially with regard to immediate execution.

Fairly speaking, this way of restricting the death penalty is very helpful in reducing the numbers of those executed. According to a senior official in the Chinese Supreme People's Court, immediate execution has been restricted in the area relating to willful murder. Now, executions in China are now limited to the crimes of murder, serious bodily harm, kidnapping, robbery, and drug trafficking, considering the fact that the total number of capital crimes in Chinese criminal law is 44! In the first four types of capital crimes, only a death sentence that results in death may be imposed for these crimes. Drug trafficking is an exception to this "rule". The historical lesson of the Opium Wars in 1840, which set China back into her darkest era for about one hundred years until 1949, may be connected to the fact that China still has to fix the standard amount of drug before the drug criminal law. However, it is reported that the number of immediate executions that the Supreme People's Court rejected in 2008 was for the first time in its history less than the number of approvals. Unfortunately, the number of executions remains a "state secret" known only by the Chinese authorities.

Everyone knows that publication of the number of executions will be of great help to further abolition. At present, there is no sound basis for the number of executions to remain a "state secret". People may logically infer that the execution numbers must be too high! But people should not be left with the impression that the Chinese authorities are sanguinary and unwilling to reduce the number of executions Chinese history over the last two thousand years or more has taught its rulers that misuse of the death penalty would soon lead to the collapse of a dynasty or a kingdom. In addition, there is a realistic motivation for the Chinese government to greatly reduce the numbers of those executed: its eventual ratification of the International Covenant on Civil and Political Rights (ICCPR). China signed this important international human right document in 1998 and has been heavily urged by the international society to ratify it. With its high number of executions, however, China would certainly not be able to keep to its obligations under that particular international human right convention!

The difficulty in reducing the number of executions rests in changing public opinion. It is commonly agreed in Chinese society that life repaid with life conforms to the rules in Heaven and on

Earth. People are hesitant to accept the explanation of human right protection in support of abolition. Furthermore, people can easily be confused by this argument. In their eyes, the murderer can immediately save his own life and will benefit from abolition. However, what benefits will arise for law-abiding people from abolition? It is universally agreed that life is the most valuable right for a person. Freedom is also valuable, but not as high as life in the hierarchy of human rights. Accordingly, abolition would mean that we could only use imprisonment to deprive the murderer of a less valuable right, his freedom, in compensation for his debt in depriving other's of most valuable right, the right to life. Chinese people certainly do not think straight, it appears as all these arguments are very retributive. However, these arguments are taken for granted not only by Chinese people but also held by people in about half of the world.

Eloquence alone will not change public opinion of this sort. It is principally a practical matter. Current Chinese efforts to restrict the death penalty pay great attention to consideration of the benefits of not inflicting the death sentence and the losses or even damage of inflicting it for the sake of society. In any event, people will agree that murder won't disappear under the threat of the death penalty, however, the death penalty may not be inflicted when there is no murder! China has been trying to establish a system in which crimes including capital crimes will hardly occur. This is the commonly accepted route for abolition in Chinese society today. The social benefits which people can expect from abolition will therefore be contributing factors to swing the weight of public opinion behind abolish. The clearer the social benefits people and society can enjoy, the weaker the weaker the role played by public opinion.

China has been seeking to build up her comprehensive control system for social security, which integrates criminal sanctions with all types of other methods that include but that are not limited to ideal and moral education, spiritual civilization, supervisory systems, security, mediation, crime-prevention systems, amongst others, to prevent crimes, especially capital crimes, from happening! In past thirty years, since 1979, China has been carrying out an open policy of reform and has made great achievements in building up her legal system according to the requirements of the rule of law. However, it is no easy task for China as a country with such a large

population and with such an extensive programme of social reform. The Chinese reform is going well so far. With the support of the new social security system, more circumstances excluding immediate execution have been recognized and adopted. And we hope, with further development, China shall also make better progress in abolishing the death penalty.

DEATH AS A PENALTY IN THE SHARI'A[1]

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I. THE SOURCES OF ISLAMIC LAW

The Shari'a, Islamic law, is based on two sources, the Qu'ran[3] and the Sunna[4] (sayings and deeds of the Prophet Muhammad). The

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3 The *Qu'ran* contains the "words of Allah" (God) inspired upon the Prophet and uttered by him in the presence of others who memorized these utterances and wrote fragments of them at that time. There are many verses attesting to the divine origins of the *Qu'ran,* such as: 42:51, 26:192, 42:7, 16:102, 17:106, 41:11-12-99. The *Qu'ran* was definitively transcribed some 40 years after the death of Prophet Muhammad by the third Khalifa, Ufhman ibn Affan. It was completed in 651 A.D. The work on that compilation commenced under the first Khalifa, Abu Bakr. Four copies were made in 651 A.D., some say seven, and the text was verified by the Prophet's surviving companions, the *Sahaba.* One copy was kept in Makkah [Mecca], one was sent to Damascus, another to Iraq, and the fourth to Yemen. These four master copies were called "Imam", and all subsequent books containing the *Qu'ran* were based on them. No one ever questioned the authenticity or accuracy of that original transcription. The *Qu'ran,* meaning readings, is arranged in 114 *Sura* or chapters of unequal length and numbered consecutively. Each *Sura* differs in the number of *Ayat* or verses, which range from 3 to 286 verses.

4 The complete record of the *Sunna* was compiled by Ishaq Ibn Yassar 136 years after the death of the Prophet in 11 A.H. (A.H. refers to *Anno Hejira),* which is the beginning of the Islamic calendar. 1 A.H. corresponds to the year 622 A.D., which is the year of the Prophet's flight from Mecca to Medina. The most reliable sources of the *Sunna* are Imam Muhamad al- Bukbari, al-Sahih al-Bukhari (Imam al-Nawawi ed., 6 vols. 1924) which contains 7,275 confirmed *Hadith* and Imam Muslim Ibn Hagag, Al-Sahih Muslim (n.d.). Imam al-Bukhari and Imam

Qu'ran is the principal source of the Shari'a, which is supplemented by the Sunna

While the Qu'ran is the controlling source, both constitute the primary sources of Islamic law[5].

The prescriptions contained in these two primary sources of Islamic law, however, require interpretation. In fact, many of the Prophet's sayings or Hadith (which are part of the Sunna) interpret some of the Qu'ran's verses. After the Prophet's death (11 A.H., 632 A.D.), the need for interpretation became more acute[6], and this, in turn, led to the need for supplemental sources of law to apply whenever the two primary sources were inconsistent or silent on a given question. These sources of law include: Urf (custom), Istihsan and Istihlas (equity), Maslaha (public interest), Ijtihad (best reasoning)[7]. Since the Shari'a is

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Muslim were contemporary, they died respectively A.H. 257 and A.H. 261 and their works endured the passage of time.
Suite 2…
Al-Bukhari notes that there is agreement concerning the 7,275 *Hadith* contained in his *Sahih,* though, because of repetition and overlaps, there are actually only 2,762 separate *Hadith. Id.* At that time there were 200,000 alleged *Hadith* in circulation. The Bukhari work was translated into French in *Les traditions islamiqucs* (O. Hondas and W. Marc^iis trans., multi-volume work published between 1903-14). The debate over what *Hadith* is *Sahih,* meaning true, is as extensive as the one over the interpretation of each *Hadith.* The reconciliation of inconsistent and contradictory *Hadith* is another complex issue which is best addressed in Ibn Qutayba, *Ta'Wil Mukhtatafat al-Hadith* (*Interpretation of Differences in the Hadith,* 1936), translated as *he traite des divergences du Hadith d'Ibn Qutayba* (G. Lecomte trans., 1962). For a contemporary work which however covers only 632 *Hadith,* see Mulana Muhammad Ali, *A Manual of Hadith* (1983).

5 This is based on the *Qu'ran.* See *Surat al-Nissa'a,* 4:59.

6 This was due to the fact that the number of alleged *Hadith* proliferated and reached 200,000, *supra* note 2. But also because several *Hadith* were inconsistent, and some were inconsistent with the *Qu 'ran.* See Ibn Qutnayba, *supra* note 2. This required the development of a new technique to reconcile or explain away these divergences. See Ahmad Hassan, *The Early Development of islamic Jurisprudence* (1991).

7 A mainstream approach in *Urn usul al-fiqh* lists these sources as follows: **Principal Sources**
1. The *Qu'ran*
2. The *Sunna*

God-given law to humankind[8], it has to be integral; consequently, doctrinal concepts, legal approaches, techniques of interpretation, and judicial decisions cannot be conflicting or contradictory, but merely different as to one another[9]. All of this gave rise to Fiqh (the science of law)[10] and to the development of the science of interpretation of the Shari'a - ilm usul al-fiqh[11] (the science of the princi-

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3. *Ijm'a,* consensus of opinion of the learned scholars, also of the learned judges
4. *Qiyas,* analogy

Supplemental Sources

5. *Istislah* or *Maslaha,* consideration of the public good
6. *Al-istihsan,* reasoning based on the best outcome, or equity
7. *Al-Urf,* custom and usage
8. The practices of the four first "wise" *Khalifa,* a form of authoritative precedent
9. The edicts of the *Khalifas* and local rulers
10. The jurisprudence of judges
11. Treaties and pacts
12. Contracts (The *Shari'a* considers a contract the binding law between the parties, so long as it does not violate the *Shari'a).*

Suite 5…

13. *Ijtihad* (see *infra* note 25).

An early illustration of the ranking of the sources of the *Shari'a* and recognition of *ijtihad* is a dialogue, more like an interview, between the Prophet and Muadh Ibn-Jabal whom he appointed a judge in Yemen. The *Hadith* is essentially as follows:

The Prophet: "How wilt thou decide when a question arises?" Muadh: "According to the Book of Allah" [the *Qu'ran].* The Prophet: "And if thou findest naught therein?" Muadh: "According to the *Sunna* of the messenger of Allah." The Prophet: "And if thou findest naught therein?" Muadh: "Then I shall apply my own reasoning." [Meaning *Ijtihad]* The *Hadith* indicates the Prophet's agreement with this approach. It should be noted however that not everyone is capable of *Ijtihad*. There are several conditions and qualifications concerning who may exercise that function. See also *infra* note 25.

8 See *supra* note 1.

9 For a contemporary perspective, see, e.g., Bernard G. Weiss, *The Spirit of Islamic Law* (1998).

10 *Al-fiqh* is the science or knowledge of the prescriptions of the *Shari'a* which derive from its specific sources. It includes all prescriptive norms, judgments, and learned opinions.

11 *Ilm usul alfi.qh* developed in the second century of *Hejira* in part after Muslims from many different cultures whose language was not Arabic needed to be guided by certain rales of interpretation to avoid the confusion that differ-

ples of interpretation of the law). Several schools of jurisprudence developed, known as

Madhahib (plural of Madhab)[12]. The Sunni (now comprising some 90% of the world's estimated 1.2 billion Muslims) recognize four schools[13], each one of them subsequently spawning one or

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ent linguistic and cultural perspectives can bring to the interpretation of the *Shari'a.* Thus, it is the science of the rules through which to ascertain the prescriptions of the *Shari'a.* It includes the ranking of sources of law and sources of interpretation, rules of linguistic and as well other substantive rules of interpretation. For example: The *Qu'ran* has precedence over all other sources followed by the *Sunna;* for the *Qu'ran,* the latest in time verse controls, and the same goes for the *Hadith;* the specific verse or specific *Hadith* controls over the general verse or *Hadith,* etc. The first text on *ilm usual al fiqh* was compiled by Iman Mohammed ibn Idriss el-Shafe'i (d. 204 A.H) in his authoritative text *Al-Risala.* See *Rv;ala-el-Shafe'i* (Majid Khadduri trans., 1961); see also Mahammad Abu Zahra, *Usui td-Fiqh* (1958); Abdel-wahab Khallaf, *Ilm Usui al-Fiqh* (8th ed. 1947), Zakaria el-Berri, *Usui al-Fiqh al-Islami (The Principles of Islamic Law)* (1980).

12 See, e.g., Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (1991); Joseph Schacht, *An Introduction to Islamic Law* (1964); N.J. Coulson, *A History of Islamic Law* (1965). After the Fourth *Khalifa* All, who was the Prophet's nephew, a political dispute arose as to whether the *Khalifa* (ruler) would be elected from among the Muslims or chosen from the descendants of the Prophet. Proponents of the latter established the *Shi'a* movement.

13 They are as follows: Maliki, for Imam Abu Abdulla Malek Ibn Anas (deceased A.H. 179), Imam Malek was the first to have gathered all the *Fatawa* (plural of *Fatwa)* from the first *Khalifa,* Abou Bakr **(11** A.H.) to approximately 170 A.H. This was done at the request of the then *Khalifa* el-Mansour. Abou Hanifa, for Imam Nu'man ben Thabit who was referred to as Abu-Hanifa (which means literally, father of the upright religion) (d. A.H. 150). Shafe'i, for Imam Muhammad bin Idriss al-Shafe'i, see *supra* note 7. Hanbali, for Imam Ahmad ibn Hanbal (d. A.H. 240). For a contemporary perspective on these schools, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (1997); Norman Calder, *Studies in Early Islamic Jurisprudence* (1993); Mohammad Kamali Hashim, *Principles of Islamic Jurisprudence* (1997); Joseph Schacht, *An Introduction to Islamic Law* (1964); and, NJ. Coulson, *A History of Islamic Law* (1965); see also, e.g., David A. Funk, "Traditional Islamic Jurisprudence: Justifying Islamic Law and Government", 20 *S.U. L. Rev.* 213 (1993); Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems", 26 *Am. J. Comp. L.* 187 (1974). For a different perspective, see George Makdisi, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court", **1** *Zeitschrift fur Geschichte der Arabisch-Islamischen Wissenschaffen* 233 (1984). It should be noted that these four schools or *Madhahed*

more sub-schools[14]. The Shi'a also developed several schools and sub-schools[15].

There were also other jurisprudential schools that came out of certain religious or political movements throughout the history of Islam[16].

These Madhahib rank the secondary and tertiary sources of law differently, and pursue separate analytical approaches and methods to the Shari'a's interpretation[17]. Ilm usul al-fiqh recognizes this diversity within a holistic framework.

One of the great doctrinal debates among all schools of jurisprudence, but more so between Sunni and Shia'a, is whether the Qu'ran and the Sunna are to be interpreted literally, or on the basis of the

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are not deemed contradictory to one another, but different in a way that is not inconsistent with the *Qu'ran* and the *Sunna.*

14 For example, the *Abu-Hanifa* school had two sub-schools founded by Abu Yusuf Ya'qub al-Ansari and Muhammad al-Shaybani. Al-Shaybani was the first scholar to compile Muslim teachings on international law. See Majid Khadduri, *Siyyar al-Shaybani: The Law of War and Peace in Islam* (1955). The *Hanbali* school, which is the most orthodox of the four, spawned the *Wahabi* school, named after its founder, Abdel Wahab, whose views are even stricter than those of Imam Ahmad Ibn Hanbal. That school is followed mainly in Saudi Arabia.

15 Iran is the only Muslim State that is almost entirely *Shi'a,* and it follows the school known as the *Ithna-Asharia,* or the twelfth, after the *Shi'a* twelfth recognized Imam, ruler, who, in their belief was "occulted" while in a cave, and who is expected to "reappear" at some time to lead the righteous to the right path. See *Shi'Ism: Doctrines, Thought and Spirituality* (Seyyed Hossein Nasr, *et. al.,* Eds., 1988). The *Qu'ran* however specifies that only Jesus of Nazareth who has been elevated in life to the side of Allah is to return to Earth before the Day of Judgment to lead the people of the world to the righteous path of Islam.

16 Among these are the *Mu'tazala,* the *Khawarij,* and the *Sufi* whose movement spawned several branches in different Muslim countries at different periods. See C. Glasse, *The Concise Encyclopedia of Islam* (1984).

17 For a classic authoritative Muslim approach using a historical analytical technique, see Tbn Khaldoun, *al-Muaaddhna* (F. Rosenthal trans., 3 vols. 1958) and the multi-volume work Ibn Khaldoun, *Kitah al-'Ibar* (History). For an analysis of Ibn Khaldoun's philosophy of history, see Muhsein Mahdi, *Ibn Kkaldoun's Philosophy of History* (1971). Another leading Muslim historian is al-Tabari. See al-Tabari, *Kitdb Ikhtilaf al Fuqaha'a (The hook on the Differences of Scholarly Interpretation}* (F. Kem ed. 1902). For a short contemporary analysis, see Joseph Schacht, "The Schools of Law and Later Developments", in *Law in the Middle East* (Majid Khadduri and Herbert Liebesny Eds., 1955).

intent and purpose of the text, or both[18]. Whether one approach or the other is followed will determine if the unstated legislative policies of the many different aspects of the Shari'a shall he deemed relevant to the textual interpretation of the Qu'ran and the Sunna}[19] It is probably in that respect that there exists the greatest divergence of views between what I would consider the three broad categories of thinking and practice. The first is the "Traditionalists" who represent the prevailing religious establishments, respectively in the Sunni and Shi'a worlds[20]. The influence of these two establishments is controlling in part because of their dominant role in education. Their teachings at Islamic universities, like al-Azhar (which is the Sunnis foremost academy) and Najaf and Qum (which are the Shi'a's foremost academies), as well as in the schools throughout most of the Muslim world, make their views the most popularly diffused and accepted ones. Sunni "Traditionalists" are essentially literalists, but unexplainably their approach also includes the recognition that the Prophet and his four first successors, called the "wise ones", relied on the purposes of the Shari'a in their interpretations of the letter of the Qu'ran. The second category is the "fundamentalists" who are essentially dogmatic, intransigent, and literal. They seek the solu-

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18 This debate is characterized by the great debate between *al-zaher,* the obvious or literal meaning, and *al-baten,* the hidden meaning or the purpose. The *Sunni* support the *al-zaher* approach unless the purpose or hidden meaning is evidenced in some aspect of the *Qu'ran* or *Sunna.* The *Shi'a* allow resort to the *al-baten* meaning for interpretation of the literal text. For a contemporary perspective, see Bernard G. Weiss, *'The Spirit of Islamic Law* (1998).

19 That debate is characterized by whether the *Shari'a* is dynamic or static. For a contemporary "traditionalist" reformist approach, see Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (1986); see also Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (1951). For a "traditionalist" view, see M. Mawdudi, *Toward Understanding Islam* (A. Ghandi trans., 5th ed. 1954).

20 The *Shi'ii* have an established hierarchical religious structure that gives its clergy even more authority over their followers than the *Sunni.* This is due to the fact that the *Shi'a* clergy originated in Southern Iraq and in Iran where, particularly in Iran, the historical role of organized clergy in prior "religious" regimes was well entrenched. Suffice it to recall the Zoroastrian tradition and its dominant hierarchical clergy. For an early history of Iranian society, see J.M. Cook, *The Persian Empire* (1983); see also R. Frye, *Islamic Iran and Central Asia (7th- 12th Centuries)* (1979).

tions of earlier times as a panacea for complex contemporary problems, some even turning to political activism and violence as ways of propagating their views[21]. The third is a category consisting of a few secular reformists and a few forward thinking "traditionalists", which the mainstream "traditionalists" and "fundamentalists" refer to [in varying degrees of disapproval] as the llmani[22]. The llmani

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21 This was not, however, always the case. In fact, the term "Fundamentalist" has its origins in several reform movements which sprang out at different times and places over the last seven centuries. What these movements have in common is their search for a more ascetic, orthodox, and simpler way. The *Muwahhidun* was a fundamentalist movement in Morocco in the twelfth century A.D., while a similar movement was developed by Ibn Taymiya in Syria (1263-1328 A.D.), and Ibn Khaldoun in Egypt (1332-1408). This gave rise to the *ai-Salaf al-Salih {The Right Path)* movement in Egypt at the turn of the twentieth century A.D. spurred by Sheikh Mohammad Abdou, *Mufti,* who was a disciple of Jamal el-din el-Afghani, a reformist of the mid-1800s. These however were reform movements grounded in established "Traditionalist" *Sunni* doctrine. Contemporary movements however are a reaction to, or a consequence of corruption, bad government, and poverty in different Muslim countries. As a result, they have also developed a political movement, and some groups believe in carrying out a *Jihad* or holy war by use of violent means. See, e.g., W. Montgomery Watt, *Islamic Fundamentalism and Modernity* (1988); John L. Esposito, *Islam and Politics* (2d. ed. 1987); Hassan Hanafi, "The Origin of Modern Conservatism and Islamic Fundamentalism", in *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Ernest Gellner ed., 1985); Martin S. Kramer, *Political Islam* (1980). See also M. Cherif Bassiouni, "A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States", in *The Islamic Impulse* 244 (Barbara Freyer Stowasser ed., 1987). That book also contains several contributions on various aspects of Islamic Fundamentalism.

22 Which means those who use *Tim* or knowledge. Those opposed to this approach argue that the use of scientific knowledge to re-examine the assumptions, interpretations, and applications of the *Shari'a* is either inappropriate, unacceptable, or anathema depending upon one's degree of intellectual closeness and religious fanaticism. But the *llmani* approach has been advocated by no lesser scholars than Ibn Taymia and Ibn Khaldoun, *supra* note 21, For two contemporary scholarly views, see Fazlur Rahman, *Islam and Modernity. Transformation oj an Intellectual Tradition* (1986) and Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam.* (1951). The Twentieth Century had such leading reformists from among the ranks of "Traditionalists" clergy, like Sheikh Mohammad Abdu of Egypt and, later in the 1940s, Saved Qutb of Egypt who was the intellectual light of the Muslim Brotherhood. See Sayed Qutb, *Social Justice in Islam* (there are several translations that **weTe** published in several countries in different years). The present Rector of al-Azhar, Sheikh Hassan Tantawi, has

seek to achieve the legislative goals of the Shari'a by recognized jurisprudential techniques, including Ijtihad, in light of scientific knowledge[23]. The llmani also search for the purposes and policies of the Shari'a in order to address contemporary problems.

Writings by Muslim scholars will usually reflect the views represented by these three categories. Consequently, the reader, whether Muslim or non-Muslim, who is unfamiliar with these distinctions and with the complexities of the Shari'a, will face difficulties in understanding all these theories and their applications[24]

As Islam spread to regions with cultures different from the Arabic one where Islam was first rooted, the jurisprudence and doctrine of the Shari'a, which developed in these non-Arab societies differed[25]. But, since the Qu'ran is God-given and cannot be altered, these jurisprudential and doctrinal differences had to be reconciled and this gave rise to a great deal of sophistry and strained arguments. In time all of this became very complicated, and it limited knowledge of die Fiqh and Em usul al-fiqh to those who could de-

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become among the *Sunni* clergies a mild reformist. A few years ago, as Egypt's *Mufti,* he issued a statement that bank interests are not *Riha* (usury). This was the first time that such a statement was issued by a leading *Mufti,* since Imam Ahmad Abdou had ruled in the 1930s that postal savings passbooks could bear a "fixed profit". Since the 1970s, a new concept called "Islamic Banking" has developed to get around the problem of usury and banking interests. See M. Cherif Bassiouni and Gamal Badr, *Interests and Banking in Islam* 34 (1990). For a reformist view of Islamic criminal justice and contemporary standards of human rights, see M. Cherif Bassiouni, "Sources of Islamic Law and Protection of Human Rights in the Islamic Criminal Justice System", in *The Islamic Criminal Justice System* 3 (M. Cherif Bassiouni ed., 1982) [Hereinafter *Islamic Criminal Justice].* It should be noted that *ilmani* is to be distinguished from *almani* which refers to agnostics.

23 See *infra* note 25.

24 For general works on Islam, see John L. Esposito, *Islam: The Straight Path* (1988); Gerhard Endress, *An Introduction to Islam* (1988); J. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (3 vols. 1973)

25 The problems that the *Shari 'a* had to address in the simple bedouin desert society of the Arabian Peninsula offered few precedents for more complex societies in the Indian sub-continent and other societies. For a contemporary perspective, see Martin Gerber, *Islamic Law and Culture* (1999); Ira M. Lapidus, *A History of Islamic Societies* (1988); see also Laurence Rosen, *The Justice of Islam,* 154-186 (2000).

vote many years to their study[26]. The knowledgeable became the elite, the advisers to the rulers, and the teachers to the masses. This may explain why the Sunni "traditionalist" clergy, in order to preserve their power, decided in the fifth century A.H. (twelfth A.D.) to foreclose resort to Ijtihad, or best reasoning, as a source of law and as a method of interpretation[27]. Since Ijtihad is the basic source of progressive development, its closure preserved the past and condemned the future to follow that past[28]. No Muslim country has so far dared to officially re-open the door to Ijtihad, even though the need to resort to it in light of so many scientific and technological developments is obvious.

To understand the Shari 'a in all its complexities requires knowledge of its jurisprudential and scholarly interpretations and applications not only over time —fifteen centuries— but also throughout the many regions of the Muslim world which are characterized by

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[26] To become a graduate of the main *Sunni* Islamic university, al-Azhar, and receive the degree of *Islamia,* equivalent to a doctorate, requires twelve years of studies after high school. The *Shi'a,* for reasons stated above, see *supra* note 18, always had a hierarchical clergy from prior civilizations that kept a tight grip on their followers. This is true even today, and Iran is the prime example. The fact that the Iranian people's language is *Farsi* makes it even more difficult for ordinary Muslims to know Arabic and consult the *Qu 'ran* in its original language. Thus, the Iranian clergy is the necessary intermediary between the faithful and the *Shari'a,* as well as its interpreter, which explains their power. This is also why the excesses committed by the Iranian revolution, particularly the legal and judicial abuses, all done with the approval of the religious-political leadership of the Ayatotlahs, went mostly unchallenged. One example is the seizure of American diplomats in Teheran in 1979. See M. Cherif Bassiouni, "The Protection of Diplomats in Islamic Law", 74 *Am. J. Int'l. L.* 609 (1980). There were also numerous other excesses by the Revolution which summarily executed many persons, and tortured and arbitrarily detained many others in complete violation of Islamic precepts of criminal justice. See Bassiouni, *The Protection of Human Rights in the Islamic Criminal Justice System, supra* note 20.

[27] Muhammad T. Amini, *Fundamentals ofLitihad* (1986); Fazlur Rahman, *Islam and Modernity; Transformation of an Intellectual Tradition* (1980); Hassan Hanafi, *The Origin of Modern Conservatism and Islamic Fundamentalism in Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Ernest Gellner ed. 1985).

[28] But see, Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", 16 *International Journal of Middle East Studies* 3 (1984).

different cultures, customs and mores that influenced the way they interpret and apply the Shari'a.

II. CRIMES AND PENALTIES IN THE SHARI'A[29]

The Shari'a contains three categories of crimes: Hudud[30], Qesas[31], and Ta'azir[32]. Their sources of law vary, and frequently multiple sources of law have to be combined to complete the definition of a given crime, arrive at its elements, and establish its evidentiary requirements. The Sunni and Shi 'a jurisprudential schools all differ as to some of the elements of the crimes contained in these three categories and their evidentiary requirements. It makes the study of these crimes more difficult.

1. Hudud Crimes

The Hudud[33] are established in the Quran and they are supplemented by the Sunna. They consist of seven specific crimes[34], one requires the penalty of death [Haraba], three allow it as an option [Ridda, Zena, and Baghi], and three carry other corporal penalties. The legislative policy of these crimes is general deterrence, hence the severe penalties of death and corporal punishment. To evidence

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29 See, M. Cherif Bassiouni, "l'Islam face à la deviance", in *Les dijferents aspects de la culture islamique* 303 (A. Bouhdiha and M. Ma'ruf al-Dawalibi Eds., 1995); Muhammad Abu Zahra, *Al-Jarima Wal-Uquba f'il islam* (1974) *(Crime arid Punishment in Islam).*

30 Aly Aly Mansour, "Hudud Crimes", in *Islamic Crimiyial Justice System, supra* note 20, at 195.

31 M. Cherif Bassiouni, "Qesas Crimes", in *Islamic Criminal Justice, supra* note 20, at 203. See also M. Cherif Bassiouni, "Les crimes relevant du precepte de Qesas", 4 *Revue Internationale de criminologie et de police technique* 485 (1989).

32 Ghauti Benmelha, "Ta'azir Crimes" in *Islamic Criminal Justice, supra* note 20, at 211; Abdul-Aziz Amer, *Al-Ta'azir fil Shari'a al-Islamia* (1969) *(Ta'azir in the Islamic Shari'a).*

33 The word *Hudud* in Arabic means the limits, or the limits proscribed by Allah.

34 Muslim scholars disagree as to whether these crimes are 7 or only 5, by excluding the two crimes established in the *Sunna* and not specifically mentioned in the *Qu'ran.*

the intended general deterrence policy, as opposed to pure retributiveness, each crime has specific elements and stringent evidentiary requirements that must be proven to an extent that goes beyond a doubt[35].

The policy goals of these crimes were developed in the days of the Prophet and the first four succeeding Khulafa[36] in their interpretation of these crimes' elements and their evidentiary requirements. Subsequently, however, these and other enlightened interpretive approaches were narrowed by rigid formalism that precluded progressive interpretation.

The following is a brief description of each of the seven Hudud crimes, their elements, evidentiary requirements, and penalties. They are not listed in any order of priority, in fact the various schools of jurisprudence list them in different order, and also differ as to whether they are seven or five. It must be emphasized that these crimes reflect policy goals that differ as to each crime, but all of them share the characteristics of the theory of general deterrence reflected in the severity of the penalty and the specificity of the evidentiary requirements.

1.1. Ridda

Ridda, or apostasy, is to renounce Islam. Whether Ridda should be deemed a Had is questionable because it is not specifically mentioned in the Qu'ran[37]. Ridda means more than a change of heart about religious belief in Islam as most "Traditionalists" and all

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35 Muslim scholars however refer to evidentiary standard in different terms, but they all agree that, in case of doubt, the *Had* penalty shall not be applied. The Prophet in a *Hadich* admonished against doubtful evidence. See Ma'amoun Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", in *Islamic Criminal Justice, supra* note 20, at 109.

36 In Arabic, *khulafa* is the plural of *Khalifa.*

37 The verse of the *Qu'ran, Surat al-Baqarak,* 11:127, which touches upon this subject refers to Abraham and is quite general. It does not specifically criminalize *Ridda,* which led some scholars to deem *Ridda* a *Sunna*-created crime that should be deemed part of *Ta 'azir* and not part of *Hudud.* Thus, its penalty should not be deemed obligatory.

"Fundamentalists" believe[38]. Apostasy in the early days of Islam meant that the person left or was about to leave the realm of Islam

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[38] Some "Traditionalists" and the "Fundamentalists" mistakenly equate blasphemy to apostasy. One controversial case was when a Muslim author, a United Kingdom citizen of Indian origin, Salman Rushdie, was condemned by Iranian Mullahs for blasphemy because his book, *The Satanic Verses,* contained blasphemous statements. Some secular Muslims disagreed, as did some traditionalist *Ulama* (religious scholars). See M. Cherif Bassiouni, "Remarks", in *Proceedings of the American Society of International Law* 432 (1989). For a contrary view, see Alaa-El-Din Kharoofa, *Hukm Al-Islam Fi Jara'im Salman Ronshdie (The Judgment of Islam on the Crimes of Salman Rushdie)* (1410 A.H., 1987 A.D.).
Another recent case occurred in Egypt, when an Associate Professor of Arabic Literature at the University of Cairo, Faculty of Arts, Dr. Nasr Hamad Abu Zeid, wrote a booklet entitled, *Naqd al-Khitab al-Dini* (1995)(A *critique of the Divine Language)* (published by Madbouli Press, Cairo, Egypt). The book, and others of his writings which dealt with the *Qu'**ran*** from a literary perspective, took the position that the divine discourse should not be taken literally. Instead, that it intended to convey an impression with words that evoke certain images in the minds of people. The approach falls within the category of those who do not view the *Qu 'ran* as requiring, in all instances, a literal interpretation. This is contrary to the basic precepts of fundamentalism. Egypt has secular criminal code which does not contain *Ridda.*. But Egypt's domestic relation laws apply the *Shari'a* to Muslims. So, a group of persons brought a civil action in domestic relations court to force a divorce of Abu Zeid from his wife, as non-Muslim men cannot marry Muslim women. The basis for the action was that Abu Zeid appealed first to the Appellate Court of Cairo, which surprisingly ruled against him and upheld the trial Court's judgment, in its Decision No. 287, dated June 14, 1995. Abu Zeid then appealed to the Egyptian Supreme Court, arguing that *Ridda* was a crime, and its elements are established in the *Shari'a,* that he never intended to reject Islam or to commit blasphemy and that the trial Court lacked the power to order his divorce (the enforcement of which was suspended). To everyone's surprise, the Supreme Court's Chamber on Civil, Commercial and Domestic Relations Matters, consisting of five judges, affirmed the Appellate Court's judgment in a decision dated August 5, 1996 (30 *Rahe'e Awed* 1417 A.H). The Supreme Court's judgment was deemed by many to be concerned with the politics of religion, as was the trial court's. See *al-Ahrar* (a Cairo daily opposition newspaper), August 18, 1996, at 3. But in January of 1997, the Giza Court of Appeals for Emergency Matters, held that the original trial Court judgment was not enforceable. So, the trial court judgment stands, but cannot be enforced. This meant that the Supreme Court's ruling did not have to be reversed by a judgment *en banc* of that Court. Thus, the couple remains married. But no one knows what that unenforced precedent means. See also David Forte, "Apostasy and Blasphemy in Pakistan", 10 *Conn. J. Int'lL.* 27 (1994).

to join the enemies of Islam. In contemporary terms, this is equivalent to high treason. Thus, the simplistic approach to apostasy by the "Fundamentalists" and among some of the "Traditionalists" is not in keeping with the legislative purpose of the Shari 'a. A revealing indication of that is the fact that the four Sunni schools of jurisprudence differ as to when Ridda shall be deemed conclusive. Each school provides for different elements that need to be proven, and they also allow for different periods of time for the transgressor to change his/her mind about Ridda—which range from one to ten days. Thus, if it is a question of time, it has also to be reconciled with another overarching principle of Islam, namely, that there can be no compulsion in Islam[39]. Consequently, I submit that the natural lifetime of the transgressor is as good a criterion as the range of one to ten days[40]. Of greater relevance however to this interpretation is a Hadith which recounts that a person was brought before the Prophet for committing Ridda. The Prophet dealt with the question as follows: The Prophet asked what he had done, and was told that the transgressor had been found throwing his spear into the sky saying, "I want to kill you, God". The Prophet asked the transgressor why. The reply was to the effect that his loved one, which he was to marry, had died of a sudden illness and that he was angry at God for having taken her away from him. The Prophet looked at his companions and opined to the effect: "Is it not enough for you that he believes in God to want to kill him!" Ridda was found not to have been established, and thus no penalty was applied. The meaning imparted by this authoritative Hadith is self-evident, yet, surprisingly, that meaning has been lost on the "Fundamentalists" and other proponents of the simplistic, primitive, and atavistic response of killing those who disagree with their un-Islamic orthodoxy - and by the standards of these extremists, it probably includes this writer for some of the progressive views stated herein.

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39 No compulsion in religion is specifically stated in the *Qu'ran, Surat al-Baqara,* 2:256.

40 Bassiouni, *I'Islam face a la deviance, supra* note 27, at 315-316.

1.2. Baghi

Baghi, or transgression or uprising, is based on a verse of the Qu'ran which reveals that the proscribed conduct is in the nature of a rebellion because the word "aggression" is used in the relevant verse of the Qu'ran[41]. The Qu'ran does not provide a penalty for Baghi. The four Sunni schools differ as to the elements of that crime, but the consensus is that it is equivalent to an armed uprising against the legitimate ruler. The death penalty is optional, and a range of penalties other than death can be applied, including for example exile.

1.3. Sariqa

Sariqa, or theft, is punishable by cutting off the hand of the offender, which is prescribed in the Qu'ran[42]. But the elements of that crime are very stringent[43]. They require, inter alia: 1) a trespassory taking by breaking into a restricted or protected or private area; and 2) the taking must be of some value reaching the Nissab, or required level which differs in the four Sunni schools. The second Khalifa, Umar ibn el-Khattab[44], in a period of drought that was called the year of famine, suspended the penalty and his ruling remains to-date a jurisprudential landmark. Yet, his decision was unilateral, unfounded on any precedent, and not based on the literal words of the Qu'ran. His rationale was that an unarticulated element of that crime is that the theft occurs in a just Islamic society. Thus, whenever a society cannot provide for the need of its people, or be just, then the penalty should not apply. This enlightened approach can only be characterized as predicated on the purposes of the Shari'a and not on the letter of the proscription. Consequently, enlightened

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41 *Surat al-Hujurat,* 49:9.

42 *Surat al-Ma'ida,* 5:38.

43 See Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence, supra* note 33.

44 Fazal Ahmad, Umar: The Second Caliph of Islam (1965).

contemporary legislation can follow the same approach, and many States have done so[45].

1.4. Haraba

Haraba, or brigandage is referred to in the Qu'ran as those who wage war against Allah and the Prophet, and by extension against the legitimate rulers of Islamic societies. Such transgressors could be executed, or have their hands and feet from the opposite side cut off, or be exiled[46]. Thus, there is no mandatory death penalty unless, according to scholars, the Haraba results in a homicide. In that case, they interpret the Qu'ran's provision on Haraba as requiring the death penalty.

1.5. Zena

The penalty provided in the Qu'ran is flogging[47]. The Prophet, however, imposed the death penalty by stoning for the married transgressor, but that preceded the advent of the Qu'ran's provision that provides for flogging[48]. This led some scholars to say that the Prophet's practice was overridden by the Qu'ran, while others distinguish between the married and the unmarried, holding that the Qu'ran's verse applies to the latter, and the Prophet's Summa to the former.

The evidentiary requirements needed to prove this crime are very stringent. Specifically, four eyewitnesses must testify that a hypothetical thread could not pass between the two bodies - in other words, actual sexual penetration. The requirement of four eyewit-

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45 The States listed *infra* in note 54 have all eliminated the cutting off the hand for theft and have only a prison sentence of relatively short duration. Other States like Afghanistan, Iran, Pakistan, Saudi Arabia, and the Sudan have not done so.

46 *Surat al-Ma'ida,* 5:33.

47 *Surat al-Nur,* 24:2.

48 The Prophet's imposition of this penalty raised questions with some scholars about whether the penalty for *Zena* for unmarried persons is not in the nature of *Ta'azir* instead of *Had.*

nesses means that what is really proscribed is an act of sexual intercourse performed publicly (otherwise it is difficult to see how there could be four eyewitnesses). But in cases adjudicated by the Prophet, it was clear that the penalty should not be applied in cases of doubt and that the satisfaction of the evidentiary requirements made proof of that crime very difficult. In one of these cases a woman came to the Prophet to confess her adultery. The Prophet asked if there were witnesses, but there were none. She insisted that her confession be received, but the Prophet insisted that she return four times to have her reiterated confessions be the equivalent to four eyewitnesses. When she did that, he still insisted that she corroborate her confession with external evidence. She then confessed to being pregnant. The Prophet, clearly wanting to avoid applying the penalty, deferred it until she gave birth, otherwise the penalty would affect her unborn child. Eight months later she returned, but the Prophet again refused to apply the penalty because she had to breastfeed the child, and he asked her to return nine months later. When she returned, he asked her if she wanted to recant her confession, but she confirmed it. He then felt that he had no choice but to order the penalty carried out. When his companions returned from the stoning, he asked them if they had heard her recant. They asked why and he said that, if she had, they should have stopped the stoning. This Hadith of the Prophet reveals the intended deterrence policy of the penalty, the stringent nature of its proof, and the lenient approach of the Prophet in the interpretation of the crime and in the application of the penalty.

1.6. Badhf

Badhf means slander, but it is essentially the defaming of the character and reputation of a chaste woman[49]. This crime is found in the Qu'ran, and its penalty is flogging[50]. It does not include the

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[49] This verse of the *Qu'ran* was revealed after it was rumored during a caravan trip, that the Prophet's youngest wife, AYcha, also many years younger than him, was attracted to a young warrior-leader among the Prophet's close followers.

[50] *Surat al-Nour,* 24:4. That verse specifically requires 4 witnesses.

death penalty. Scholars disagree as to whether the defamation should be made in public or not since proof of the crime requires four witnesses.

1.7. Shorb al-Khamra

Shorb al-Khamra, or drinking alcohol, was referred to in the Qu'ran in three successive verses which were revealed in three stages over a nine-year period[51]. Only the last revelation stated a clear prohibition against the drinking of alcohol, but it did not include a penalty. This question has historically been debated by all schools of jurisprudence which discuss at length what substances constitute alcohol, whether fermented grain, fruit, and grapes fall into that category or not and at what point does fermentation become the type of alcohol that is prohibited. Since the Qu'ran does not provide a penalty, the Prophet declared that it would be flogging. The Madhahib disagree as to how many floggings and by what means they are to be administered, i.e., caning or whipping or whether another penalty could be designed to prevent future drinking of alcohol. Consequently, the penalty does not exclude rehabilitation for alcoholics. This aspect of the penalty is more akin to Ta'azir than to &Had.

2. Qesas Crimes

The Qesas are based on verses of the Qu'ran which establish certain principles to be applied whenever certain transgressions against the person occur[52]. These verses are more in the nature of principles

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51 *Surat al-Baqarah,* 2:219, then *Surat al-Nissa'* 4:43, then *Surat al-Ma'ida,* 5:90-91. The Arab desert tribes drank the liquor of fermented dates. The habit was so prevalent that the *Qu'ran* gradually prescribed against drinking alcohol and praying and then admonishing against drinking alcohol, and then finally prohibiting the drinking of alcohol as something induced by the devil. It took several years between the first and the last pronouncement of the *Qu'ran* on this question. This gradualism is recognized as having its basis in the *Quran's* legislative policy which took into account customs and mores.

52 *Surat al-Baqarah,* 2:178-179. One of the meanings of the word *Qesas* is equivalence. Thus, he who has suffered a wrong is entitled to redress by its equivalence. Some have referred to it as *Talion* law. The *Madhaheb* have interpreted the

because they do not contain the elements of the crimes which fall in that category or their evidentiary requirements[53]. The Sunna and other sources complement these provisions. Qesas crimes are essentially transgressions against the physical integrity of a person. They include homicide and infliction of physical injury. The verses in the Qu'ran that deal with this subject provide that the victim has the right to inflict or have inflicted upon the perpetrator the same harm as the victim suffered, and that may include death[54]. Alternatively however, it provides for Diyya or victim compensation which the Qu'ran deems preferable to the first alternative. Lastly, these verses conclude with the preferred option, namely forgiveness by the victim, and of course the heirs of the victim. This reveals the enlightened legislative policy of victim compensation as an alternative to any penalty, and reconciliation between victim and transgressor[55]. Furthermore, the last portion of the verse exhorts the victim to

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crimes falling in the category of *Qesas,* as being different from those deemed to be subject to *Diyya.* See Ahmad Fathi el-Bahnassi, *Al Diyya fil Shari'a al-Islamia (Diyya in the Islamic Shari'a)* (1967), and Ahmad Fathi el- Bahnassi, al-Qesas fil *Fiqh al-Islami (Qesas in the Fiqh of Islam).* It is the opinion of this writer that this is not the only interpretation of the *Qu'ran* which did not establish two categories of crime, but only one, for which the penalties range from the infliction of the same harm, or *Qesas* to *Diyya* to forgiveness. See *Surat al-Baqarah,* 2:178-179; *Surat al-Ma'ida,* 5:45; *Surat al-Nisaa,,* 4:92. See also Bassiouni, *Qesas Crimes, supra* note 29; Bassiouni, *Les Crimes relevant du precepte de Qesas, supra* note 29. The position of this writer is based on the verses of the *Qu'ran* cited above.

53 See *Surat al-Baqarah,* 2:178-179; *Surat al-Ma'ida,* 5:45; *Surat al-Nisaa,* 4:92. The right to request the death of the perpetrator who killed a victim is inherited by certain heirs of the victim

54 The verses cited *supra* in notes 50-51 descended in response to the desert tribes' tradition to follow the customary law that called for: "an eye for an eye, and a tooth for a tooth". That law, known as *Talion* law is originally found in the *Torah.* The *Qu'ran* mentions it specifically in *Surat al-Ma'ida,* 5:45. But in pre-Islam Arab society, it led to a cycle of revenge that went on for generations. Thus, the purpose of the *Qu'ran* was to reduce the resort to such practices, and to induce victims to accept compensation instead of seeking revenge. How such a clear purpose of the *Qu'ran,* supported by the Prophet's *Hadith* and other commentaries, has been ignored for centuries attests to the primacy of human atavism over the express policy of the *Qu'ran* whose relevant verses lead to this writer's interpretation.

55 See Muhammad Moheidditi Awad, *Bada'il al-Jaza'at al-Jina'ia fil Mojtama' al Islami (The Substitute Criminal Penalties in Islamic Societies)* (1411 A.H., 1991 A.D.).

forgive the transgressor and clearly states that it is the preferable choice over the two others, namely: infliction of equivalent harm as that which was wrongly perpetrated, or victim compensation. These verses speak for themselves, even though their historical interpretation has given greater emphasis to the first two alternatives, probably because this was the custom of the time for the Arab culture, as well as other cultures which accepted Islam.

In light of the purposes of Qesas, many countries, including those which declared in their constitutions to be subject to the Shari'a as their supreme source of law, have interpreted Qesas as permitting its codification in a way that allows the State to prosecute and punish these crimes in lieu of any of the Qesas's alternatives, namely: Diyya and forgiveness. These States enacted criminal laws that provide for the death penalty in certain types of premeditated or intentional murders and imprisonment for other homicides and for physical injury[56]. Thus, these laws have curtailed the death penalty in some cases, where, under a strict interpretation of Qesas, this would have had to be subject to the victim's consent. Presumably States can eliminate the death penalty if they choose and impose instead alternative punishment. But in this case, it is the belief of this writer that victim compensation should be paid as a form of Diyya which is the Shari'a's alternative to other sanctions against the perpetrator.

3. Ta'azir Crimes

Ta'azir crimes, also referred to as offenses instead of crimes insofar as they also represent lesser crimes. These crimes or offenses derive for conduct analogous to that which is prohibited by Hudud and Qesas crimes. Ta'azir offenses can also be established by secular legislation. Their penalties, according to several of the jurisprudential schools of the Sunni and Shi'a traditions, can be the same pen-

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[56] These countries include: Algeria, Egypt, Iraq, Jordan, Lebanon, Morocco, Syria, and Tunisia. The late scholar (who was a leader of the Muslim Brotherhood organization), Abdel Qader Oda, in *Al-Tashri' al-Jina'i al-Islami* (2d ed. 1969), acknowledges the validity of secular legislation for *Qesas* and *Ta'azir* crimes, though he takes the position that *Qesas* in homicide carries the penalty of death if the victim's heir insists on it.

alties as provided for Hudud and Qesas crimes[57]. However, since Ta'azir crimes can be legislated, they can be the subject of penalties other than death. It is entirely optional and nothing in the Qu'ran requires the application of the death penalty[58]. The penalty choices for these crimes reflect cultural perspectives and social policy choices.

In conclusion, the Shari'a mandates the death penalty for only two of the Hudud crimes, as discussed below, provided that the stringent elements of the crimes and their evidentiary requirements are met[59]. Qesas and Ta'azir do not have the same mandatory nature of penalties as for Hudud crimes, as described above[60]

4. Repentance as a Bar to Punishment[61]

Repentance and forgiveness are two consistent themes throughout the Qu'ran. Since Islam is a holistic religion, repentance and forgiveness are not limited to the Hereafter, but apply also to this world. The Qu'ran specifically provides that an offender who has committed a crime may repent and, if the repentance is made and is genuine, that person should not be punished[62]. Repentance, as a bar to punishment, will vary depending upon the crime, but it cannot be considered if it is the result of fear of apprehension or discovery. For example, in Hudud crimes: Sariqa (theft) requires repentance and restitution before discovery of the fact or apprehension; the Had of Haraba is specifically mentioned in the Qu'ran, as subject to

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57 Ahmad Abdel Aziz al-Alfi, "Punishment in Islamic Criminal Law", in *Islamic Criminal Justice, supra* note 20, at 927.

58 Several Muslim States apply the death penalty to legislative crimes, or on the basis *oi Ta'azir.* But that is their policy choice, it is not mandated by the *Shari'a.*

59 See Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence, supra* note 33.

60 See Mohammad S. el-Awa, *Punishment in Islamic Law: A Comparative Study* (1982).

61 See Ibn Rushd, *Bidayat al-Mogtabid* 488 (vol. 2 n.d.); Ibn Taymia, *Al-Fatawa al-Kobra* 200 (vol. 4 n.d.).

62 A trial should however be held to determine the positive and sincere nature of the repentance.

repentance[63], Zena (adultery), is also subject to non-applicability of the penalty in case of repentance[64]; for Sariqa (theft), the Qu'ran also specifically provides for repentance[65]. Repentance is surely grounds for remission of all penalties. Why repentance is not recognized and applied by contemporary Muslim legal systems, which apply the Shari'a, as part of contemporary theories of rehabilitation for crimes of offenders can only be attributed to their selective application of the letter of the law taken without regard for Shari'a's enlightened spirit.

III. CONCLUSION

In Hudud crimes the penalty of death is specifically required in the Qu'ran, for Haraba, (if a death occurs), but it is questionable whether for Ridda, and Zena the death penalty provided by the Sunna is mandatory. Baghi allows the death penalty as an option, but does not mandate it. These and other Hudud crimes must satisfy all evidentiary requirements, and doubt is always interpreted for the benefit of the accused. Where there is doubt, the penalty cannot be applied. Repentance under certain conditions is also a bar to the application of the penalty, or a basis for its mitigation.

There is no requirement of the death penalty in any Ta'azir offenses, but it is optional. The death penalty in Qesas is either conditional or optional.

Muslim States can, therefore, curtail the death penalty by legislation and remain consistent with the Shari'a[66]. The existence of the death penalty for several crimes in Muslim States is a policy choice, but not one which is necessarily mandated by the Shari'a.

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63 *Surat al-Ma'ida,* 5:34, where it is stated, "Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful". Muhammad Marmaduke Picktball, *The Glorious Qu'ran* 106 (1977). See also *Surat al-Imran,* 3:159.

64 See *Surat al-Nissa'a,* 4:16.

65 Among the many verses on this question, see *Surat al-Ma'ida,* 5:3; *Surat-al-Imran,* 3:159.

66 Libya, for example, has reduced the death penalty in 1980 to only four crimes.

Most of the Muslim States that apply the death penalty for a variety of crimes rely on the optional alternatives provided by Hudud, Qesas, and Ta'azir crimes.

The Qu'ran offers ample guidance to enlightened legal policy for the purposes of establishing a just and humane society. The Muslim opens every prayer and should start every deed with the words from the Qu'ran in the Fatiha, the opening of the scripture: "In the name of Allah, the source of mercy, the Merciful". It is mercy that is Islam's hallmark because it is Allah's foremost characteristic. The just, el-Adel, is also one of Allah's divine characteristics[67]. How Muslim societies have managed to stray so far away from these and other noble characteristics of Islam can only be explained by reasons extraneous to Islam.

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[67] Allah is referred to in the *Qu'ran* with 89 names or characteristics. Among them: The Merciful, The Compassionate, The Beneficent, The Exonerating, The Oft-Forgiving, The Oft-Pardoning, and The Just. See Muhammad A. Zimaity, *The Most Magnificent Names of Allah* (1971).

HUMAN DIGNITY, CAPITAL PUNISHMENT, AND AN AFRICAN MORAL THEORY: TOWARD A NEW PHILOSOPHY OF HUMAN RIGHTS[1]

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I. INTRODUCTION: THREE CONCEPTIONS OF HUMAN DIGNITY

From an African, i.e., sub-Saharan, moral perspective, why should one think that capital punishment is an impermissible violation of human dignity? The typical answer one would receive is that it is degrading to intentionally kill human beings because their lives have a spiritual nature that has come from God (Cobbah 1987; Wiredu 1996: 157-171; Bujo 1997: 15-28, 143-156; Kasenene 1998: 20-55; Ramose 1999: 49-64, 138-145, 163-195; Ilesanmi 2001; Deng 2004; Bhengu 2006: 29-87[2]). Such an account of why the death penalty is degrading is problematic in at least three respects. First, many of us

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2 Although few of these texts mention the death penalty, it is clear that if their authors were to address it, they would appraise it in light of the inherent value of spiritual life.

are much more confident that the death penalty is degrading than we are that human life is an offshoot of a divine realm, meaning that we should seek a secular explanation of its degradingness. Second, even for those of us who are confident that God exists, many believe that there should be a public appraisal of legal coercion that is independent of supernatural views, again pointing us toward a secular rationale for abolishing the death penalty on grounds of disrespect. Third, we should want an account of why capital punishment is degrading that coheres with plausible thinking about the human rights we have more generally, but respect for the dignity of our ensouled life cannot straightforwardly ground rights to a fair trial, freedom from torture, freedom of expression and association, choice of employment, and other liberties that do not necessarily involve life and death matters.

Now, the standard Western idea that the death penalty is degrading of our capacity for autonomous decision making neatly avoids these three problems. This liberal principle, philosophically grounded in the ideas of Immanuel Kant (1785/2002, 1797/1991), is often thought to underwrite the judgment that capital punishment is degrading, and it is both secular and intuitively entails and explains a wide array of human rights[3].

However, my aim in this article is to see whether one can plausibly judge the death penalty to be degrading for African reasons other than a principle of respect for a soul and different from a more Western principle of respect for autonomy. Drawing on ideas common in sub-Saharan moral thinking, I develop a third conception of dignity as, roughly, the view that what is special and inviolable about human nature is our capacity for communal relationship of a certain kind. I demonstrate that a principle of respect for the dignity of such a capacity is grounded in widespread African beliefs about ethics, entails that the death penalty is undignified, and on the face of it does no worse than the Kantian theory at both avoiding

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3 Kant himself was a notoriously staunch defender of the death penalty, but contemporary Kantians inspired by his work tend to believe that Kant misapplied his own fundamental moral principle.

a religious foundation and accounting for a broad range of human rights.

Being a moral, political, and legal philosopher and not a social scientist, I make no claim as to whether many sub-Saharan Africans have in fact held the dignity-based rationale against the death penalty that I articulate. Indeed, the death penalty is legal in more than 30 countries on the African continent (Smit 2004: 2)[4], and, in those countries where it is not, often much of the population wishes that it were. Instead, the claim I make for the "African" status of my abolitionist argument is that it coheres with fundamental views about morality that are common among indigenous communities and contemporary intellectuals in a wide array of countries below the Sahara desert. Another title for this article could be "How to Be an African Abolitionist"; *supposing* that one wanted to conceive of the death penalty as degrading in light of some sub-Saharan moral-philosophical ideas, I aim to demonstrate a way to do that with a principle that promises to ground human rights generally[5].

I begin by spelling out some of the essentials of the African ethic of *"ubuntu,"* the Nguni word for humanness in South Africa that has cognate terms across the sub-Saharan region (e.g., *"Botho" in* Sotho-Tswana, "Hunhu" in Shona, and "Utu" in Swahili). Africans widely take *ubuntu* to be the concept at the heart of moral thought, and they typically think it entails communitarian norms of a certain kind. Using the techniques of analytic philosophy and avoiding appeals to the supernatural, I provide a philosophical interpretation of *ubuntu* that unifies many ideas associated with it in the form of a foundational principle of morally right action. In the following section, in order to tease out a plausible explanation of why an *ubuntu* ethic might entail that capital punishment is an indignity, I critically examine the South African Constitutional Court's several reasons for thinking so, using them as a foil. In a 1995 case, *The State versus T. Makwanyane and M. Mchunu*, this Court unanimously ruled that

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4 Chenwi (2007) presents a comprehensive analysis of the legal aspects of the death penalty in Africa.

5 For non-dignity-based explanations of why the death penalty is objectionable on African grounds or for African societies, see Owoade (1988); Oke (2007).

the death penalty is unconstitutional, at least for crimes other than treason (Constitutional Court of the Republic of South Africa 1995[6]), with one central rationale being that it is inconsistent with the value of *ubuntu* that was mentioned in the interim Constitution binding at the time[7]. I distinguish eight reasons the Court presents for thinking that an ethic of *ubuntu* forbids the death penalty as undignified and show that none of them is plausible. Specifically, I demonstrate that each of the Court's ubuntu-based rationales against capital punishment "proves too much" in that it entails that the use of deadly force is wrong in cases of self- and other-defense where it appears not to be wrong. In the next section, I work out a new; more promising reason for thinking that *ubuntu* prohibits capital punishment for being degrading. I show that this secular but characteristically

African rationale for the indignity of the death penalty permits the use of deadly force against aggressors when intuitively permissible and also appears able to account well for several other human rights besides the right not to be executed. In the concluding section of the article, I indicate some topics for future research, namely, those related to choosing between the more Western, Kantian conception of dignity and the African one that I articulate here.

II. THE AFRICAN ETHIC OF *UBUNTU*: PRIZING COMMUNAL RELATIONSHIPS

A good starting point for understanding sub-Saharan morality, or the major strain of it that I explore, is the widespread maxim that is usually translated in English as "A person is a person through other persons" or "I am because we are." The Kenyan John Mbiti, in

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6 Future references to this court case will use the abbreviation "CCRSA" and will refer to relevant paragraphs, not pages. Maduna (1996) provides a summary of the case, in which all 11 justices wrote separate opinions for the same conclusion.

7 The final South African Constitution that was adopted in 1996 does not use the word *"ubuntu,"* although the South African Constitutional Court as well as lower ones still appeal to it on occasion as a fundamental value when interpreting legal documents.

his classic, post-war survey of African worldviews, takes the maxim to be a "cardinal point in the African view of man" (1969:108-109), and a large majority of scholars agree with him on this score.

To most non-African readers, the above phrases will indicate nothing normative and instead will bring to mind merely some empirical banalities about the causal dependence of a child on her parents or society. However, such statements express a moral claim (as is made clear in, e.g., Wiredu 1992; Menkiti 2004). Personhood, selfhood, and humanness in characteristic sub-Saharan worldviews are value-laden concepts. That is, an individual can be more or less of a person, self, or human being, where the more one is, the better. The ultimate goal of a person, self, or human in the biological sense should be to become a *full* person, a *real* self, or a *genuine* human being, i.e., to exhibit virtue in a way that not everyone ends up doing. The phrases say that achieving the state of being a *mensch* is entirely constituted by relating to others in a certain manner. In the way that "an unjust law is no law at all" (as per St. Augustine), or just as we might say that a jalopy is "not a *real* car" (Gaie 2007: 33, emphasis original), so Africans would characterize an individual who does not relate positively to others as lacking *ubuntu*, lacking humanness. Indeed, those who fail to relate properly are sometimes described as animals.

Exactly which sort of relationship is key to having *ubuntu* and acting rightly?[8] The uncontroversial answer is, roughly, a communal one, as can be seen from this brief survey of the views of some prominent African intellectuals. First off, note the following summary of the moral aspects of Mbiti's analysis of African worldviews: "What is right is what connects people together; what separates people is wrong" (Verhoef and Michel 1997: 397). Next, consider these remarks from black consciousness leader Steve Biko in an essay that explores facets of culture that Africans widely share: "We regard our living together ... as a deliberate act of God to make us a community of brothers and sisters jointly involved in the quest for a composite answer to the varied problems of life. Hence ... our action is usually joint community oriented action rather than the individualism

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8 Much of the rest of this section is drawn from Metz 2007, 2009a, 2009b.

which is the hallmark of the capitalist approach" (1971: 46). Finally, here is a summary of African ethical thinking from Desmond Tutu, winner of the Nobel Peace Prize and renowned chair of South Africa's Truth and Reconciliation Commission:

> When we want to give high praise to someone we say, *"Yu, u nobuntu"*;"Hey, so-and-so has *ubuntu."* Then you are generous, you are hospitable, you are friendly and caring and compassionate. You share what you have Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* —the greatest good. Anything that subverts or undermines this sought— after good is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good. (1999: 31, 35)

Note that apparently for Mbiti, Biko, Tutu, and several others who have reflected on African morality[9], harmonious or communal relationships are valued for their own sake, not merely as a means to some other basic value such as pleasure. Hence, in light of these points, one could rework the vague statement that "a person is a person through other persons" to say something more precise such as "A human being lives a genuinely human way of life insofar as she values harmony with other human beings" or "A person becomes a real person through communal relationships."

Now, these remarks about the moral fundamentality of harmony and community are suggestive but imprecise, from a philosophical perspective. What is the most attractive sense of "harmony" and "community," and exactly how must one engage with these relationships in order to act rightly? I answer these questions by proffering the following basic and comprehensive principle of right action:

> U: An act is right just insofar as it is a way of living harmoniously or prizing communal relationships, ones in which people identify with each other and exhibit solidarity with one another; otherwise, an act is wrong.

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[9] For yet another, representative comment, consider these remarks about the practices of the G/wi people of Botswana: "[T]here was another value being pursued, namely the establishing and maintaining of harmonious relationships. Again and again in discussion and in general conversation this stood out as a desired and enjoyed end in itself, often as the ultimate rationale for action" (Silberbauer 1991: 20).

To identify with each other is largely for people to think of themselves as members of the same group —that is, to conceive of themselves as a "we," as well as for them to engage in joint projects, coordinating their behaviour to realize shared ends. For people to fail to identify with each other could involve outright division between them, i.e., people not only thinking of themselves as an "I" in opposition to a "you" or a "they" but also aiming to undermine one another's ends. To exhibit solidarity with one another is for people to engage in mutual aid, to act in ways that are expected to benefit each other (ideally, repeatedly over time). Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathizing with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be indifferent to each other's flourishing or to exhibit ill will in the form of hostility and cruelty.

An equivalent way of phrasing my theoretic interpretation of the African ethic of *ubuntu* is to say that an action is wrong insofar as it fails to honour relationships in which people share a way of life and care for one another's quality of life, and especially to the extent that it esteems division and ill will. Note that the combination of sharing a way of life and caring for others' quality of life, or, what is the same, of identifying with and exhibiting solidarity toward others, is basically a relationship that English speakers call "friendship" or a broad sense of "love." So, it also follows that the present moral theory can be understood to instruct an agent to respect friendly relationships, and especially to avoid prizing ones of enmity.

Such a principle is fairly specific about the kind of relationship that gives one full personhood, viz., *ubuntu, in* an African ethic, and it does a reasonable job of philosophically explaining what makes an action wrong. Breaking promises, stealing, deceiving, cheating, abusing, and the like are well characterized as being *unfriendly,* or, more carefully, as failing to respect the value of friendship. They involve discord in at least one of the following senses: the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is subordinating the other, as op-

posed to coordinating behaviour with him; the actor is failing to act for the good of the other, but rather for his own or someone else's interest; or the actor lacks pro-attitudes toward the other's well-being and is instead unconcerned or malevolent.

This is a secular moral philosophy that is independent of the claim that people's lives warrant respect in light of having their source in God. It is also a communitarian perspective that differs from dominant Western moral theories, particularly in virtue of deeming relationships of a certain kind to have basic moral worth. For instance, neither the Kantian, who advocates respect for autonomy, nor the utilitarian, who directs one to maximize the general welfare, nor the contractualist, who prescribes acting in ways that no one could reasonably reject, ultimately values for its own sake a relationship in which people identify with one another.

Construing morally sound practices in terms of honouring relationships of identity and solidarity on the face of it well captures several common (not universal) facets of behaviour and thought below the Sahara. For example, sub-Saharans often think that society should be akin to family; they tend to believe in the importance of greetings, even to strangers; they typically refer to people outside the nuclear family with titles such as "uncle" and "mama"; they recurrently believe it important to acknowledge ancestors throughout the course of one's life; they frequently believe that ritual and tradition have a certain degree of moral significance; they tend to think that there is some obligation to wed and procreate; they usually do not believe that retribution is a proper aim of criminal justice, inclining toward reconciliation; they commonly think that there is a strong duty for the rich to aid the poor; and they often value consensus in decision making, seeking unanimous agreement and not resting content with majority rule. I have the space merely to suggest that these salient (not invariant) practices are plausibly entailed and well explained by the prescription to respect relationships in which people both share a way of life and care for one another's quality of life. I am not contending that this principle has been believed by even a majority of Africans; my point is rather that it promises to capture in a theory several salient aspects of a communal way of life and ideas associated with talk of "*ubuntu*" that have been widespread below

the Sahara, and hence that it qualifies as "African."[10] If one wanted a moral theory that is grounded in the mores of many sub-Saharan peoples and is comparable in form to the Western principles of Kantianism, utilitarianism, and contractualism, the injunction to prize harmony would be one plausible instance.

Now, it is not clear whether a moral philosophy informed by *ubuntu* entails that the death penalty is an objectionable violation of human dignity. I have so far made no mention of "dignity" in articulating the basics of an African ethic, and it is not obvious from what I have said how the idea of dignity might figure into it. Many Africans do speak of the importance of human dignity, however, and, as I explain below, some conception of human dignity appears essential if one is going to account theoretically for human rights. Therefore, in the rest of this article, I search for the best way to integrate a notion of human dignity into the moral theory developed in this section, one that would plausibly account for the judgment that the death penalty is degrading. In the next section, I critically explore the reasons the South African Constitutional Court has given for thinking that a proper understanding of an *ubuntu* morality entails that capital punishment is an indignity. Although I agree with the Court that an attractive interpretation of *ubuntu* rules out the death penalty as incompatible with human dignity, my claim is that the Court has presented the right conclusion for the wrong reasons.

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10 This conception of what makes something African implies that there could be accounts of morality beside the one I propose that are also worthy of the title. Furthermore, this conception implies that some idea could count as "African" without being unique to the African continent. I am therefore not saying that there is anything utterly geographically distinctive about the moral theory I articulate; though it does differ in striking ways from Kantianism, utilitarianism, and contractualism, which dominate Western normative theoretical analysis of human rights.

III. THE SOUTH AFRICAN CONSTITUTIONAL COURT ON WHY *UBUNTU* ENTAILS THE INDIGNITY OF CAPITAL PUNISHMENT

Here I consider and reject eight different explanations the South African Constitutional Court has given in *The State versus T. Makwanyane and M. Mchunu* for thinking that an *ubuntu* ethic entails that the death penalty is an unconstitutional violation of human dignity. I demonstrate that all eight rationales suffer from the same problem in that each entails that the use of deadly force in other-defense against aggressors is wrong in cases where it is right (or seems to be right, for all one can tell)[11]. I proceed in roughly the order of the court's discussion.

1. Unequal Treatment

According to one justice, it follows from an *ubuntu* ethic that capital punishment is degrading since it involves one person treating himself as more valuable than another person, hardly a mark of a desirable kind of harmony or friendship.

> An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. (CCRSA 1995: para. 225)

Capital punishment appears not to respect the fact that people are of equal value, since those doing the executing lord themselves over those being executed.

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[11] This argumentative strategy is not an alien imposition on an African ethic, for it is common cause among those who have addressed the use of force in sub-Saharan moral thinking to note that it may be used in self- and other-defense. Consider representative claims from the literature such as these: "In African ethical thinking, violence in self-defence is justifiable" (Kasenene 1998: 41), and "The authority of law rests in the first place upon its recognition of self-defence as an inalienable individual or collective right. . . . This is the basis of *ubuntu* constitutional law"(Ramose 1999: 120). See also the reflections of the Christian independence leader of Zambia in Kaunda (1980).

The most straightforward explanation of why those doing the executing are treating themselves as superior is that they are intentionally killing others. However, that rationale counter intuitively rules out as degrading the killing of aggressors for the sake of other-defense. Consider the following hypothetical case, ETHNIC CLEANSING, which is designed to show that intentional killing is not inherently degrading.

> You are a peacekeeper who sees four men chasing an innocent, elderly woman with machetes, trying to kill her merely because she has a different ethnicity. You have a machine gun. After firing a warning shot to deter the men, they are not scared off and continue after the woman. You shoot the four aggressors, reasonably judging it to be necessary and sufficient to protect the one innocent. They die, and she lives.

I submit that the use of deadly force in ETHNIC CLEANSING is morally justified. But if intentionally killing another person in itself were impermissibly degrading, then ETHNIC CLEANSING would be unjustified. I conclude, therefore, that *ubuntu* is not best interpreted as forbidding the death penalty as degrading merely because it involves the intentional killing of another and, for that reason, unequal treatment. I therefore seek some other reason for thinking that the death penalty is invariably degrading on grounds of *ubuntu,* while using deadly force in other-defense need not be.

2. Denying a Second Chance

The proper valuation of community is standardly understood among Africans to rule out vengeance and even retribution as good reasons for punishment. Instead, most friends of an *ubuntu* ethic believe that, in order for punishment to be justified, it must be at least likely to bring about some desirable result such as making people's lives go better. Specifically, one value commonly held by adherents to an African ethic is reconciliation between the offender, his victim, and the broader community (see, e.g., Tutu 1999; Bell 2002: 59-107). Perhaps force should be used only when it is likely to morally reform the offender so that he mends broken ties and more generally properly values communal relationships, something the death penalty does not effect.

> [T]he death penalty rejects the possibility of rehabilitation.... One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of *ubuntu*. One of the relative theories of punishment (the so-called purposive theories) is the reformative theory, which considers punishment to be a means to an end, and not an end in itself —that end being the reformation of the criminal as a person, so that the person may, at a certain stage, become a normal law-abiding and useful member of the community once again. ... This, in my view, accords fully with the concept of *ubuntu*. (CCRSA 1995: para. 241-243)

In short, since the death penalty treats the person as incapable of reform, as unable to live harmoniously with others, perhaps it is impermissibly degrading.

Let us reflect on these remarks in light of ETHNIC CLEANSING. If one must always leave open the opportunity for rehabilitation, then one should never intentionally kill anyone, for such an action would always be a "rejection of rehabilitation as a possibility." But would it be impermissibly degrading to shoot the aggressors for the reason that it would treat them as beyond redemption and prevent them from having any more harmonious relationships? No. Hence, it cannot be that executing offenders is impermissibly degrading simply because it denies them a second chance[12].

3. Psychological Torment

Perhaps it is not the bare fact of intentional killing that is degrading by virtue of unequal treatment ("Unequal Treatment") or foreclosing the possibility of reform ("Denying a Second Chance"), but rather the process leading up to and including that act. There is little need to rehearse the large literature revealing the mental an-

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[12] There are additional problems with a rehabilitationist rationale against the death penalty. For one, there might be cases in which capital punishment would in fact be necessary to reform an offender; perhaps no other penalty would lead an offender to know what it was like for his victim and to feel remorse as a result, or perhaps only impending death would prompt an offender to mend personal relationships broken long ago. For another, rehabilitationism rules out even life imprisonment without parole, for that, too, would be a "rejection of rehabilitation as a possibility," supposing capital punishment was.

guish that death row prisoners suffer prior to execution. It might be thought that knowingly inflicting such torment on them is degrading of them, as the Court maintains here:

> Convicted persons in death row … are subjected to a fate of ever increasing fear and distress. They know not what their future is and whether their efforts will come to nought… The measure of a country's greatness is its ability to retain compassion in time of crisis. This, in my view, also accords with *ubuntu*— and calls for a balancing of the interest of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual. (CCRSA 1995: para. 247, 249-250; see also para. 356)

There is no doubt that *ubuntu*, as an ethic that prescribes living in a harmonious way with others, usually forbids doing something that one foresees will cause someone severe anxiety, fear, and other negative emotions and feelings. The question is whether it is always impermissibly degrading to do so.

I do not think so. Consider now a case different from ETHNIC CLEANSING, in which no psychological torment was imagined to be present among the aggressors before being killed. Here instead is IGLOO, another thought experiment designed to test the claim that it is necessarily wrong, because degrading, to knowingly cause another mental anguish:

> You live in a very cold and isolated area in an igloo with your spouse and child. You have only one neighbour, who has his own igloo. You see that his igloo is deteriorating and urge him to fix it up. He elects not to do so, spending his time ice fishing instead. One day it becomes clear to both you and your neighbour that a major storm is headed your way. Your neighbour's igloo now defunct, he enters yours. However, there is not enough room in your igloo for your neighbour plus you and your family. When he is asleep, you remove him, installing you and your family. However, when you and your family sleep, he removes you and yours, forcibly retaking your igloo. The storm approaching, you eject him again, this time binding his legs and arms (and carrying him far away where you will not hear his screams), having reasonably judged such action to be necessary and sufficient to protect you and your family. Your neighbour suffers extreme mental agony, not knowing whether he will survive the storm, but reasonably suspecting not. He dies, and you and your family live.

Your actions in IGLOO are permissible, I submit, despite the fact of imposing great mental anguish upon your neighbor prior to his being killed. It therefore cannot be the bare presence of foreseen psychological torment leading up to intentional killing that makes an action impermissibly degrading by an attractive interpretation of an ubuntu morality.

4. Premeditation

At another point, the Court says that the ethic of *ubuntu* entails that the death penalty is degrading because it involves a planned and calculated killing, not merely an intentional one preceded by psychological torment. Consider these remarks:

> *[U]buntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity. ... It is against this historical background and ethos that the constitutionality of capital punishment must be determined.
> The death penalty sanctions the deliberate annihilation of life … This "planned and calculated termination of life itself" was permitted in the past. ... Is it *now* permissible? (CCRSA 1995: para. 263-265; see also para. 314, 316, 357)

Of course, the question posed at the end is rhetorical, the implied answer being "no."

The case of IGLOO serves as a forceful counterexample to this rationale against the death penalty. If premeditated killing (perhaps along with the imposition of psychological torment) were enough to render an action degrading and hence wrong to perform, then it would be wrong to kill your neighbour in IGLOO. But it is not wrong to do so. Therefore, premeditated killing cannot be what about the death penalty that the friend of *ubuntu* should find degrading.

5. Inalienable Right to Life

A different explanation of why capital punishment might be degrading in light of an African morality is that it violates a right to life that everyone has and no one can lose, simply because they are human beings in the biological sense (not in the sense of having

ubuntu, which, of course, varies widely among people). Consider these remarks from the Court:

> [There is a need to] recognize the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings, so that South Africans may also appreciate that even the vilest criminal remains a human being *(Furman v Georgia, supra).* In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both. (CCRSA 1995: para. 311; see also para. 313, 229 as well as Gbadegesin 1985)

According to this reasoning, the bare fact that a killer is a member of the human family, a potential part of a communal relationship, means that he has a right to life that would be violated by the intentional killing of him inherent to execution, even if doing so would (hypothetically) deter others and save more lives.

However, if, by the ethic of ubuntu, those who *have killed* retain an inviolable right to life simply by virtue of being human, then so do those who are merely *attempting to kill*. Aggressors, no less than offenders, are of course human beings. And so this rationale counter intuitively implies that all cases of killing aggressors when necessary and sufficient for other-defense are impermissible. If "inherent in all human beings" is a right to life that may not be violated by intentional killing, then it would be impermissible to kill the aggressors in ETHNIC CLEANSING and IGLOO. But it is, in fact, permissible. Hence, this purportedly ubuntu-based account of why the death penalty is degrading is implausible.

6. End-Seeking

Often the death penalty is imposed because it is expected to have certain consequences, perhaps in the thought that it would protect society from the offender, cost less than life in prison, or make the victim's family obtain "closure." Regardless of whether capital punishment would in fact benefit society in these ways[13], it might be

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[13] Which is normally unlikely —recidivism rates are extraordinarily low for murder, and it costs more to execute than to imprison because of the appeals process.

thought that it would be degrading to impose the death penalty as a means to any end.

> [E]ven if the end was desirable, that would not justify the means. The death penalty violates the essential content of the right to life embodied in Section 9, in that it extinguishes life itself. It instrumentalizes the offender for the objectives of state policy. (CCRSA 1995: para. 313)

This rationale seems to leave open the possibility that the death penalty could be justified as an "end in itself," apart from any of its results. However, it is unlikely that an ethic of *ubuntu* could entail such a retributive claim, for, as noted above, most believe that properly valuing harmonious relationships means rejecting retribution and instead maintaining that justified punishment must be expected to have some good consequence such as repairing broken relationships or protecting society. But if the Court is correct that *ubuntu* rules out sacrificing life for the sake of any benefits doing so might produce, then there is nothing left by which to justify the death penalty.

However, this rationale runs afoul of both ETHNIC CLEANSING and IGLOO. In both cases, life itself is being extinguished for the sake of realizing good outcomes of saving innocent lives. Since it appears to be perfectly permissible to "instrumentalize" an aggressor's life so as to benefit the innocent, it cannot be end-seeking as such that entails that the death penalty is degrading, from the standpoint of *ubuntu*.

7. Deterrence

It might be thought that it is not the pursuit of just any end that would make the death penalty objectionable but the particular end of deterrence. If one executes someone in order to cause others to fear a penalty and thereby desist from crime, it might seem as though one is treating him merely as a means, something *ubuntu* would likely forbid as unfriendly or discordant behaviour.

> The state is the representative of its people and in many ways sets the standard for moral values within society. If it sanctions by law punishment for killing by killing, it sanctions vengeance by law. If it does so with a view to deterring others, it dehumanises the person

> and objectifies him or her as a tool for crime control. (CCRSA 1995: para. 316)

Of course, a state might adopt the death penalty for a reason other than deterrence, in which case this rationale would not apply. However, one of the two most common rationales for capital punishment is deterrence, the other being retribution. If it were true that *ubuntu* ruled out retribution, and if it were also true that it forbade deterrence, then it would seem that *ubuntu* would be inconsistent with the major rationales proffered for the death penalty, again leaving little, if anything, left to justify it.

Neither ETHNIC CLEANSING nor IGLOO concerns deterrence, and so, in order to test the current rationale, I need to construct a case that does. Think about ETHNIC CLEANSING:

> You are a peacekeeper who sees four men chasing an innocent, elderly woman with machetes, trying to kill her merely because she has a different ethnicity. You have a machine gun. After firing a warning shot to deter the men, they are not scared off and continue after the woman. You shoot one of the aggressors, reasonably judging it to be necessary and sufficient to scare off the other three and thereby protect the innocent. The aggressor you have shot dies, the other three run away out of fear for their lives, and the woman lives.

In this modified version of ETHNIC CLEANSING, you are using "a person as a tool for crime control," in particular, as a deterrent, but it does not look impermissible to do so. Even if the person is being used as a tool, he is not being used *merely* as a tool, which would indicate indignity.

8. Total Control After the Offense

This is the Court's last rationale for thinking that it follows from an *ubuntu* ethic that the death penalty is a violation of human dignity. The basic idea is that it would be degrading to bind and kill someone who is not presently committing any crime.

> Force used by the State in cases of self-defence or dealing with hostage-takers or mutineers, must be proportionate to the danger apprehended; the issue arises because two or more persons compete for the right to life; for the one to live, the other must die. The imminence of danger is fundamental; to kill an assailant or hostage-taker

> or prisoner of war after he or she has been disarmed is regarded as murder. Executing a trussed human being, long after the violence has ended, totally lacks proportionality in relation to the use of force, and does not fall within the principles of self-defence. (CCRSA 1995: para. 355-356)

Note that no mention is made of *ubuntu* here. The Court does not explicitly ground this reasoning in African morality, but it is widely held that African thinking about the use of force permits it in cases of self- and other-defense (see note 10). And so it is natural to see whether the death penalty coheres with the norms governing the employment of deadly force for purposes of defense from aggressors. The Court maintains not and hence implies that the death penalty is degrading, since it is beyond the realm of other-defense to kill someone who has aggressed but who no longer poses a threat.

As will be clear below, this rationale points in the direction of the one that I shall claim is successful. However, as the Court expresses itself, the rationale is vulnerable to objection. Consider a new hypothetical case, SHARK, in which it appears permissible to kill someone who has aggressed and is no longer a threat himself, if doing so is essential for preventing a threat for which he is nonetheless responsible.

> You and your brother are innocent, but nonetheless have a common enemy. Your enemy kidnaps your brother and throws him in shark-infested waters. You reasonably judge that binding your enemy and tossing him into the water would be necessary and sufficient to redirect the sharks' attention and thereby save your brother. Your enemy dies, and your brother lives[14].

The case suggests that it can be permissible to kill a "disarmed" and "trussed" human being who no longer poses the threat of death or comparable harm. One might object that in SHARK it is not true that the killing is done "long after the violence has ended." In one sense that is true, for the sharks are still a threat. However, the thrust of the Court's reasoning is that capital punishment is degrading because the "killing by the state takes place long after the crime was

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14 For a case that makes the same point but is even more hypothetical or "unrealistic," see McMahan (2004: 721).

committed" (CCRSA 1995: para. 138). SHARK is a counterexample to that claim.

That completes my critical discussion of the reasoning that the South African Constitutional Court provides for thinking that African morality entails the indignity of capital punishment. I have distinguished eight *ubuntu*-based explanations that the Court gives for the degradingness of the death penalty, and I have argued that all of them face a common problem; each entails that certain killings in other-defense are impermissible that in fact appear permissible, at least to those who do not hold pacifism, a line of thought far from dominant in African thinking about violence. In the following section, I aim to present an account of why an *ubuntu* morality forbids the death penalty as degrading that is both more African and more plausible for permitting deadly force against aggressors.

IV. A NEW INTERPRETATION OF HUMAN DIGNITY IN LIGHT OF *UBUNTU*

An attractive *ubuntu*-based understanding of dignity would provide reason to think that capital punishment is invariably degrading but that killing in other-defense is often not. As I have shown above, executing offenders and killing aggressors can share many of the same features; they both could involve intentional, even premeditated, killing of a subdued assailant who suffers psychological torment beforehand, which killing is done for the sake of good outcomes such as protection of the innocent, perhaps by means of deterrence. In light of all the potential similarities between the death penalty and deadly force, what might be the moral difference between them?

I submit that a salient difference concerns the identity of the individuals who could be saved by killing the assailant. In the case of an aggressor, killing him is most clearly permissible when doing so is necessary and sufficient to prevent the killing of (or other, comparable harm to) those threatened because of wrongful choices he has made. That is a common feature in ETHNIC CLEANSING, ETHNIC CLEANSING, IGLOO, and SHARK; in all four cases, kill-

ing an aggressor is essential to save those whom he is responsible for threatening with death. In contrast, the death penalty never serves that function[15]. Even if killing an offender turned out to deter other killings, those saved by the killing of the offender would not be those *he* has put in a situation of facing the prospect of death (or similar injury). If there is a principled[16] difference to be found between imposing death on an offender as a way to punish (and perhaps to prevent further murder) and using deadly force against an aggressor as a way to protect innocent lives, this must be it.

The question now is whether there are resources within an African ethic of *ubuntu* to underwrite the moral significance of this difference. I submit that there are. Recall that *ubuntu* urges us to live in a harmonious way and to eschew discord. I pointed out that an attractive understanding of harmony is in terms of the combination of identity and solidarity, or, roughly, friendship, where discord is naturally construed as enmity. This secular strand of African thinking instructs us to prize friendly relationships, and it will therefore be of use to reflect on the normativity of friendship.

Imagine a situation in which you are being unfriendly to an existing friend; in the terms developed here, you have thought of yourself as an "I" separate from her (not as a"we"), you have undermined her goals (rather than shared them),you have sought to harm her in some way (instead of having acted to benefit her), and you have failed to emotionally care about her and be moved to act for her sake (and have instead been callous and self-interested). Suppose, now, that you can do one of two things. On the one hand, you could end the unfriendliness and seek to make amends with your friend. On the other hand, you could make two new friends. Reflection on the proper way to value friendship suggests that, if you

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15 Well, almost never. See the two idiosyncratic counter examples I come up with below.

16 There could be other, empirical differences. For example, one might suggest that the death penalty does not in fact deter and hence will not save any lives, whereas killing in other-defense might well serve the function of protecting the innocent. However, even if, *per argumentum,* the death penalty did deter, I and many readers would still have the intuition that it would be degrading.

must choose, you should do the former action. Generally speaking, ending unfriendliness takes priority over promoting friendliness.

Suppose, now, that you refuse to end your unfriendliness and continue to mistreat your friend (whom we presume does not warrant it by virtue of having been unfriendly herself). If a third party were in a position to force you to stop, even if it cost you two prospective new friends, he would be justified in doing so. For instance, if he were able to get you to stop being mean by threatening to withdraw some privilege or to tell others of your behaviour, he would not be dishonouring the value of friendship in doing so —just the opposite. He would be failing to respect friendship, however, if he threatened to cut off your arm to get you to stop being mean or if, after you had stopped being mean and had apologized, he threatened you in public so as to make others fearful of the consequences of being mean.

What do these thought experiments have to do with the difference between the death penalty and deadly force? This: the adherent to an ethic of respect for friendly relationships can sensibly reject the execution of offenders while accepting the killing of aggressors because only aggressors are, *by virtue of being killed, being forced to correct their own proportionately unfriendly relationships. Even if* capital punishment were to prevent substantial enmity, viz., killings, elsewhere in society by means of deterrence, it would not be essential to protect anyone threatened by the *offender's* own proportionate discordance.

To capture this point in a clear way, I submit that this principle follows from U, the abstract *ubuntuist* prescription to live harmoniously or to honour communal relationships:

> U1: An act is wrong if it involves substantial discord [A] —unless the discord is directed to a discordant agent and is reasonably foreseen as necessary and sufficient to protect those threatened by a proportionate degree of his discordance [B].

This principle forbids the death penalty but permits deadly force. The [A] clause rules out using a very unfriendly means, such as killing, for the sake of anything, even the promotion of friendliness or the prevention of other unfriendliness. But then the [B] clause makes an exception to A's blanket prohibition against coercion. One may

treat another in a very unfriendly way when and only when doing so is directed against a person whose actions have been, are or will be unfriendly, is no greater than his unfriendliness, and is expected to protect those on the receiving end of his unfriendliness.

U1 is not vulnerable to purported counterexamples that one might be initially tempted to suggest. For instance, although capital punishment might serve the function of deterrence and hence prevent discord proportionate to what the offender has done, it would not be necessary to end any proportionate discordance that the *offender* is engaging in or responsible for. The person on death row is no longer torturing, mutilating, or killing, and so the death penalty would not help those threatened by *his* proportionate discordance. Furthermore, even if execution were to mend discordant relationships that the offender still has, e.g., with the victim's family, this discordance would not be *proportionate* to the discordant action of execution.

However, there do turn out to be conceivable situations in which U1 would not entail that the death penalty is wrong. First, it follows from the principle that the death penalty would be justified if it somehow brought a killer's victims back to life. My intuition suggests that, in that merely possible world, the death penalty would in fact be justified, and so I do not take this implication to be a problem for U1.

For another, somewhat more realistic exception, U1 would not forbid capital punishment if it were necessary and sufficient to prevent others from carrying out nefarious plans for which the offender is responsible. Imagine the offender has been culpable for directing crimes against humanity. He has inspired people to commit genocide, provided them weapons, coordinated their attacks, rewarded them for their misdeeds, etc. Suppose, for the sake of argument, that executing him would be the only way to successfully prevent his underlings from carrying out more atrocities that he has authorized. Then execution would be of a person who has been discordant, would be proportionate to the degree of his discordance, and would be necessary and sufficient to protect those threatened by his discordance. Again, my intuition suggests that execution would be justified in this extraordinarily rare case. For my part, I see no rel-

evant difference between execution in such a case and killing in the above other-defense cases, particularly SHARK.

I conclude that U1 is grounded in the normativity of friendship, which an appealing, secular African ethic directs one to prize, and that it adequately differentiates between the death penalty and deadly force. However, U1 makes no mention of human dignity, and part of my task in this article is to propose a new, African-inspired conception of dignity that not only would explain why executing offenders is (nearly always) degrading and why killing aggressors need not be, but also would promise to ground human rights more generally. The general idea of human dignity is that of a superlative final value that (nearly) every human being in the biological sense has so long as she remains alive. Philosophically, the most plausible way to account for universally binding duties not to seriously interfere in people's lives for the greater good, i.e., for *human* rights, is to appeal to the idea that individuals have a dignity that demands respect. So, if offenders have a human right not to be executed, and if aggressors lack a human right not to be killed (when doing so would alone save the lives of their potential victims), which conception of human dignity explains these judgments? And which conception of human dignity also promises to underwrite a variety of additional firm judgments about human rights, such as the claim that potential victims have a human right against political institutions to protection from aggressors?

I suggest that it is the idea that a human being has a dignity *in virtue of her capacity for communal* relationships, i.e., for relations of identity and solidarity. On this view, what makes us more special than the animal, vegetable, and mineral kingdoms is that we can love others in a way that no other entity can[17]. Of course, some people with this capacity do not actualize it and instead misuse it, but, by the present view, they retain a dignity nonetheless that demands respect. Note that a person could have the ability to engage in loving or friendly relationships if she were a purely physical creature,

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[17] I set aside the empirical issue of whether higher animals such as chimpanzees, dolphins, and elephants are capable of communal relationships in the relevant sense.

and so this view is independent of any spiritual notion that a person's dignity is a function of God. In addition, although a person does need the Kantian ability to make voluntary decisions in order to engage in communal relationships, they are not one and the same thing; for one could make deliberative choices that have nothing to do with one's identity and solidarity with others.

The idea that people's dignity is constituted by their capacity to identify with others and to help them for their sake explains the appeal of U1 well. Killing in other-defense need not degrade the aggressor's capacity for such friendship, because (and when) only such an action ends the proportionately unfriendly relationship between him and the people threatened by it. However, capital punishment invariably[18]degrades the offender's capacity for friendship, since execution would not be essential to end the proportionately unfriendly relationship between him and his victims. Hence, the African-inspired and dignity-based moral principle that would forbid the death penalty as degrading but permit killing in other-defense is this:

> U2: An act is wrong (at least in part) because it degrades the individual's dignity that she has in virtue of her capacity to engage in harmonious relationships.

While I conceive U2 as entailing and explaining U1, I am as yet unsure of how U2 and U precisely relate to one another, specifically, of whether they are ultimately equivalent, whether U2 is more fundamental than U, or whether they need to be combined in some way. That deep and tricky issue in moral philosophy need not be settled in order to recognize a promising new theoretical basis for human rights; reflection on U's injunction to prize harmonious relationships has led me to posit U2 as a plausible dignity-based explanation of the human right of an offender not to be executed and of an aggressor's lack of a human right not to be killed.

U2 also provides a prima facie attractive account of a wide array of other human rights claims. The basic idea is that violations of human rights may be philosophically conceived in terms of sub-

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[18] Aside from the unusual, hypothetical exceptions mentioned above.

stantially *unfriendly behaviour*. More carefully, according to this perspective, a human rights violation just is a serious degradation of people's capacity for friendly relationships, which failure takes the form of a significant degree of unfriendly behaviour that is not a proportionate, counteractive response to another's unfriendliness. What genocide, slavery, systematic rape, human trafficking, apartheid, and totalitarianism arguably have in common is, roughly, that those who engage in these practices treat people who are not being unfriendly in an extraordinarily unfriendly way, e.g, by thinking of others as separate and inferior, seriously undermining others' ability to pursue their own goals, seeking to grossly impair their quality of life, and exhibiting emotions such as *Schadenfreude* as well as motives such as self-interest.

In addition, U2, as a principle of respect for superlative value of our capacity for communal relationship, entails a human right against those with the relevant means to use deadly force and criminal procedure as needed to prevent the above kinds of human rights violations. That is, people have not merely the negative right not to have their capacity for community interfered with (when they have not misused that capacity) but also the positive right to protection from such interference. In addition, this principle probably entails that the poor have positive human rights against those with the relevant means to provide socioeconomic goods such as food, shelter, education, healthcare, culture, and other resources needed to develop their capacity for identity and solidarity.

Before concluding this article, I address two criticisms of U2 that readers are likely to have. One major strategy for replying to both is to show that U2 is no worse off than its strongest competitor, namely, the Kantian view that humans have a dignity insofar as they are capable of autonomous deliberation. In some cases, U2 can use argumentative resources available to the Kantian to avoid objections, while, in other cases, the objections might be unavoidable, but then they are, too, for the Kantian.

First, then, one might suggest that U2 does not entail U1. It might seem that killing an aggressor when necessary and sufficient to protect his potential victims from being killed by him, which U1 permits, is in fact to degrade the aggressor's capacity for harmonious

relationships, which U2 forbids. After all, he is being killed, meaning that this special capacity of his is being obliterated.

However, the logic of respect for dignity implies that it is possible to impair or even to destroy the capacity that grounds it without such behaviour constituting an impermissible indignity. To see this, consider the Kantian conception of respect for the dignity of persons. What has a superlative inherent worth for the Kantian is our capacity to make voluntary decisions. However, almost no Kantians are pacifists; they nearly all believe that the use of police and military force can be justified. How is that possible, if coercion stunts the actualization of the capacity to make a free choice? The answer is roughly that respecting the capacity to make a voluntary choice means responding proportionately to the way a person has elected to employ that capacity (e.g., Metz 2006). If a person has chosen to act wrongly, e.g., in a way that attacks another, most Kantians believe it would not be degrading to use force in response to this wrongful choice, at least if doing so were essential to protect others' capacity to choose for themselves. The friend of U2 can say parallel things; it need not be degrading of an aggressor's capacity to engage in friendly relationships if one must use force to prevent him from engaging in extremely unfriendly ones.

A second objection one might make to U2 is to point out that its conception of dignity limits the scope of those who have human rights. There are some human beings who are incapable of engaging in friendly relationships, e.g., the severely retarded. U2 entails that any such beings lack dignity and hence lack human rights, which might seem counterintuitive.

In reply, the friend of U2 can point out that the Kantian conception of dignity equally entails that severely retarded individuals lack dignity, meaning that the present objection provides no reason to reject U2 in favour of its most powerful, Kantian rival. Furthermore, the defender of the Kantian conception often provides reasons for not mistreating severely retarded individuals in spite of their not having a dignity (see, e.g., Kant 1781/1981: 239-241), reasons that can be invoked on behalf of U2. For example, if we generally mistreated severely retarded individuals, then we would dull our moral sensitivities and be more likely to mistreat persons. In addition, severely

retarded individuals are similar to normal adult human beings, so that when one mistreats the former, one is expressing disrespect for the latter[19]. Lastly, since persons often care about severely retarded humans, mistreating them constitutes a lack of respect for persons.

V. CONCLUSION: HARMONY VERSUS AUTONOMY

I do not have the space to defend this African-inspired conception of dignity systematically. My aim in this article has instead been to articulate a new analysis of dignity grounded in a secular, Afro-communitarian moral perspective and to demonstrate that it: explains why the death penalty is a degrading violation of an offender's human right, explains why deadly force need not violate any human right of an aggressor, and promises to account for many other intuitive claims about human rights. I hope to have shown that a principle of respect for our capacity to love is an underdeveloped view inspired by sub-Saharan moral thinking that is worth taking seriously as a philosophical ground of human rights. I conclude by posing questions that should be answered elsewhere, supposing that I have accomplished my aim here. There are two major projects I suggest should be undertaken in future work.

First, it would be revealing to consider how well U2 accounts for other cases of "forced life and death choices" besides killing aggressors in defense of others. For instance, how might U2 handle cases of "innocent threats," i.e., situations in which a choice must be made between killing an innocent person who is a threat to oneself and letting oneself be killed? How would it deal with "redirected threats," that is, so-called "trolley cases" in which a impersonal threat such as a runaway train will kill a greater number of innocents unless a third-party steers it away toward a smaller number whom it will kill? U1,as it stands, forbids killing in cases of innocent

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[19] Consider why burning an effigy is disrespectful: damaging a mere likeness of a person can express disrespect of that person. Similarly, damaging something like beings capable of friendly relationships might be disrespectful of those beings.

and redirected threats, but further reflection on U2 might lead us to add onto it.

Second, U2 needs to be systematically compared with its strongest rival, which, as I have said, I take to be the Kantian conception of dignity. Precisely how could conceiving of dignity as grounded on autonomous agency forbid the death penalty but permit killing in other-defense? How might a Kantian theory deal with innocent and redirected threats? How do the Kantian theory and U2 compare when it comes to grounding human rights, say, to a fair trial or not to be tortured?

I like to think that the discussion in this article indicates one major respect in which African ideas about morality should be addressed by analytic ethicists, philosophers of law, and human rights theorists. Although it is extremely likely that human rights are philosophically grounded on a conception of human dignity, I submit that it is not clear which conception is the most attractive. I have suggested that they are unlikely to rest on a conception of human dignity *qua* spiritual essence. However, at this point, it is an open question whether they are grounded on the more Western notion of dignity as the capacity for autonomy or the more African construal of dignity in terms of the capacity for harmonious or communal relationships. I hope the reader will agree that there is some important and fascinating cross-cultural normative philosophical work to be done.

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THE DEATH PENALTY AND DRUGS

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I. If the principle of humanity[1] requires that all penal intervention begin with the utmost respect for the human being —who, in the case of the criminal, should not be subjected to cruel, inhuman or degrading treatment or punishment—, the incompatibility of the death penalty with a satisfactory understanding of that principle is obvious[2]. It was already considered so, in 1977, in the Stockholm Declaration, signed by countries participating at the International Conference on the abolition of the death penalty organized by *Amnesty International*, which qualified the death penalty as "the ultimate cruel, inhumane and degrading punishment", and urged governments to "take steps for the immediate and total abolition of the death penalty"[3].

All in all, —and even when the Human Rights Committee of the United Nations, formerly the Council of Human Rights, stated in resolution 2005/59, that it was convinced of the "right of everyone to life" and "that the abolition of the death penalty is essential for the protection of this right"[4]— the fact that the prohibition of the

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1 J. L. de la Cuesta Arzamendi, "El principio de humanidad en Derecho Penal", *Eguzkilore, XXX Aniversario de la Fundación del IVAC/KREI. Homenaje a nuestro fundador el Profesor Dr. Dr. h.c. Antonio Beristain,* num. 23, 2009, pp. 209 ff.

2 On the setbacks of life imprisonment with the principle of humanity, a much more controversial question at an international level, see J. L. de la Cuesta Arzamendi, "El principio de humanidad", *cit.*, pp.216 ff. Also, R. Stokes, "A Fate Worse than Death? The Problems with Life Imprisonment as an Alternative to the Death Penalty", in J. Yorke (ed.), *Against the death penalty,* Birmingham City University, Ashgate, 2008, pp. 281 ff; D. Van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law,* Kluwer Law International, The Hague, 2002.

3 *The Death Sentence. Amnesty International Report*, London, 1979, p. 232.

4 E/CN.4/2005/L.10/Add.17. http://www.unhcr.org/refworld/docid/45377c730.html

death penalty arises from nothing more than the international ban on cruel, inhuman and degrading treatment and punishment, is a state of affairs that continues without unanimous support on the international stage. Nevertheless, humanitarian concerns have for some time led to lobbying to restrict the use of capital punishment, which, in accordance with art.6(2) of the International Covenant on Civil and Political Rights (ICCPR), should never be imposed on either minors under 18 years of age, or pregnant women, nor for any but the most serious crimes, respectful of the principles of criminal, penal and procedural legality and the right to a pardon or commutation of the sentence.

There are no end of international texts, moreover, that argue for its abolition: thus, in the framework of the United Nations, lobbying finally led to the Second Optional Protocol to the ICCPR (1991)[5]; at a European level there are two specific additional Protocols to the Rome Convention on this matter: num. 6 (1983) on abolition in times of peace; and num. 13 (2002) that proposes the abolition of capital punishment under all circumstances.

The examples of the Statutes of the International Criminal Tribunals on the former Yugoslavia and for Rwanda are likewise worth mentioning, as well as the Rome Statute of the International Criminal Court[6], all of which —with jurisdiction to prosecute the most serious international offences that incite the greatest condemnation— have renounced the inclusion of the death penalty in the range of penalties that they envisage[7].

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5 W. Schabas, "The United Nations and Abolition of the Death Penalty", in J. Yorke (ed.), *Against the death penalty, cit.*, pp. 9 ff.

6 W. Schabas, "Life, Death and the Crime of Crimes. Supreme Penalties and the ICC Statute", *Punishment and Society*, 2, 2000, pp. 263 ff.

7 The Committee on Human Rights —for which the death penalty has to be carried out "in such a way as to cause the least possible suffering" (General Observation 20 (44), April 3, 1992)— and the regional European and inter-American courts have also pronounced against certain aspects of the death penalty, which would in any case appear incompatible with the provisions contained in various international texts: their imposition in an unfair process or by a court of questionable independence and impartiality, certain forms of confinement on death row, certain execution methods… Precisely, this line of European jurisprudence relating to the application of art. 3 in matters of extra-

II. It is common knowledge that the earlier texts and the important moratoriums on the use of the death penalty[8] have driven a renovated international movement in favour of the abolition of the death penalty, although they have not managed to put an end to capital punishment across the world. Despite the progressive drop in the number of retentionist countries, the death sentence persists, and particularly in five countries —Saudi Arabia, China, United States, Iran and Pakistan— which, according to reports from the United Nations[9], in 2007, were responsible for 88% of all executions.

It is no easy matter to determine the number of convicted persons executed for drug trafficking each year, but, according to the latest reports[10], from among the 58 countries that maintain the death penalty, 32 retain it to sanction not only the most serious forms of trafficking but a wide and varied set of drug-related criminal offences[11]: Saudi Arabia, Bahrain, Bangladesh, Brunei-Darussalam, China, North Korea, South Korea, Cuba, Egypt, United Arab Emirates, the United States of America, Gaza (Palestinian Territories), India, Indonesia, Iran, Iraq, Kuwait, Laos, Libya, Malaysia, Myanmar, Oman, Pakistan, Qatar, Singapore, Sri Lanka, Syria, Sudan, Taiwan, Thailand, Vietnam and Yemen; the law in force in 13 of them imposes mandatory death sentences in some cases[12].

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dition has been repeated in some legal texts such as the Protocol for the reform of the European Convention on the Suppression of terrorism 1977 (2003).

8 Thus, for example, at the UN level, after resolution 62/149 (November 15, 2007), December 18, 2008, the General Assembly approved a second Resolution on a moratorium on the use of the death penalty.

9 UN General Assembly 2008: Implementing a moratorium on executions. (http://www.amnesty.org/en/library/asset/ACT50/016/2008/en/03afbd2e-74ee-11dd-8e5e-43ea85d15a69/act500162008en.html)

10 P. Gallahue and R. Lines, *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association, April, 2010 (http://www.ihra.net/files/2010/06/16/IHRA_DeathPenaltyReport_Web.pdf)

11 Not only drug trafficking, but also patterns of cultivation, preparation and even possession of illicit drugs, in some countries. E.A.Fattah, "The use of the death penalty for drug offences and for economic crime. A discussion and a critique", *Revue Internationale de Droit Pénal*, vol. 58, 3-4, 1987, pp. 723 ff.

12 P. Gallahue and R. Lines set down as included under such circumstances Brunei-Darussalam, Egypt, United Arab Emirates, India, Iran, Laos, Malaysia, Oman, Singapore, Kuwait, Syria, Yemen and Sudan. *The Death Penalty, cit.*, p. 17.

All in all, for the most part, the commitment to the death penalty in relation to drugs may be considered rather more "symbolic"[13], given that no execution has taken place on those grounds in the last three years. That is why some countries, such as Brunei, Laos, Myanmar and Sri Lanka are considered "*de facto*" abolitionists by some sources[14]. Other countries maintain a "low commitment"[15], and have only rarely carried out executions for drug-related crimes on in recent years. In contrast, there are six countries —Saudi Arabia, China, Iran, Malaysia, Singapore and Vietnam— that display a "high commitment" to the death penalty for drug-related offences[16], although Malaysia —where it is said that capital punishment is maintained only for these types of offences[17]— and Singapore appear to be reducing the number of people executed each year, and Vietnam is at present reconsidering both its policy and its practice[18].

In any case, if we look at the existing reports over the last twenty years, whereas the number of countries with the death penalty has fallen, the number of those whose legislation carries the death penalty for drug-related offences has increased[19]. So much so that in places such as China or Indonesia, as reported by the Anti-Death Penalty Asian Network (ADPAN), executions take place especially on 26th June, "International Day Against Drug Abuse and Illicit Trafficking"[20].

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13 Bahrein, Brunei-Darussalam, Cuba, United Arab Emirates, United States of America, Gaza (Palestinian occupied territories), India, Laos, Oman, Qatar, Myanmar, South Korea and Sri Lanka, P. Gallahue and R. Lines, *The Death Penalty, cit.*, pp. 38 ss.

14 See Amnesty International report on Executions in 2009: www.amnesty.org/en/deathpenalty/abolitionist-and-retentionist-countries.

15 Bangladesh, Egypt, Indonesia, Pakistan, Kuwait, Syria, Thailand and Yemen. P. Gallahue and R. Lines, *The Death Penalty, cit.*, pp. 30 ff.

16 P. Gallahue and R. Lines, *The Death Penalty, cit.*, pp. 20 ss.

17 P. Gallahue and R. Lines, *The Death Penalty, cit.*, p. 49.

18 P. Gallahue and R. Lines, *The Death Penalty, cit.*, p. 6.

19 R. Lines, *Death penalty for drug offences: a violation of International Human Rights Law,* IHRA, London, 2007, p. 7.

20 Amnesty International, End the Death Penalty for Drug-Related Offences, June 22, 2009, http://www.amnesty.org/en/for-media/press-releases/end-death-penalty-drug-related-offences-20090622

III. Leaving to one side the inadmissibility of the death sentence as such, and moving on to the arguments in favour of its application, two reasons are generally put forward to justify the adoption of such an extreme reaction against drug trafficking as the death penalty[21]: justice (retribution) and prevention.

From the point of view of justice, understood in terms of retribution, the most extreme currents consider that the application of the death penalty is the only way of restoring the social order that the most serious offences violate; for those on the side of prevention, the death penalty would, in broad terms, be necessary to deter citizens from committing these criminal acts.

1. The retributionist theories —that are generally attributed to KANT and HEGEL[22]—, beginning with the need to "see Justice done", understand that the nefast consequences of violating the social order may only be restored if the evil of the offence is compensated by the evil that is implicit in the punishment, the objective seriousness of which should be of similar or equivalent proportions to the seriousness of the criminal offence.

Setting aside the historic variability of ethical-social valuations that guide the categorization of criminal offences by their seriousness, which a comparative review of penal systems also highlights, the Western tendency, supported in international texts, is to reserve the sternest penal responses for the most serious and violent crimes against life. But even in this framework, the distances continue to be substantial with regard to the importance and the hierarchization of protected values and the reactions that aggressive acts against those same values deserve; these differences are accentuated, in particular, if moving outside of the framework of individual legal rights we consider their nature in terms of state and/or collective rights.

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21 J. L. de la Cuesta, "¿Pena de muerte para los traficantes de drogas?", in R.Cario, *La pena de muerte en el umbral del tercer milenio*, Edersa, Madrid, 1996, pp. 203 ff.

22 Still, A.Torío López, "La conception kantienne de la peine capitale: un problème d'interprétation", *Revue Internationale de Droit Pénal*, 58 3-4, 1987, pp. 609 ff.

In any case, it should be remembered that the seriousness of a crime not only depends on the legal right that is protected, but equally on the importance of the punishable act (destruction, damage, endangering). It is only from the combination of these elements that the seriousness of the acts may be determined and, in consequence, the importance of the response that it deserves from the retributive perspective.

It is widely known that drugs (both illicit and licit) are by definition harmful substances the abuse of which can have serious consequences for individual and public health. So too are the important social and public health problems that are linked to their illegal trafficking and to the criminal organizations dedicated to their trade, which not only threaten socio-economic order, but have the power and the capacity to penetrate and to corrupt certain really large political systems.

All options to legalize drugs remain, for the moment, off the international agenda[23]. Punitive interventions relating to illicit drugs, beginning of course with what has been said and on the basis of the applicable international conventions, structure a set of criminal offences that centre fundamentally on the traffic of those substances, which go so far as to include, except for a small handful of countries, even possession and consumption. These facts are aggravated by the concurrence of certain circumstances and especially in the case of the organized trafficking of drugs that are more harmful to health.

The penalties envisaged for drugs trafficking (in particular, for the leaders and bosses of the organizations) are not exactly soft. This is so, despite it mainly being a matter of behaviour that is not directly harmful to life or to individual health but to public health, which is endangered through the introduction and distribution of uncontrolled substances that are dangerous for individual health.

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23 J. L. de la Cuesta Arzamendi/I. Blanco Cordero, "¿Es posible la normalización de las drogas? Perspectiva jurídico-penal", in A. Vega (Ed.), *Drogas. Qué política para qué prevención*, San Sebastian, 2002, pp. 187 ff.

Thus, in criminal law, guided by parameters of retributive justice, an attack on public health can not be the same as an attack on the life or the health of an individual. The purpose of protecting public health, a legal right of a collective nature, is to act as a barrier to ensure (in a mediatory way) the protection of the life and health of an individual; rights of a clearly superior relevance in the context of criminal safeguards and which, if attacked in the same way, should therefore lead to more serious criminal sanctions.

Moreover, and with respect to the same legal right, attacks that simply create danger (however serious the danger created) do not deserve to be equated with those that result in harm or destruction. For all these reasons, it is absolutely disproportionate to impose the most serious penalty for acts that not only do not attack legal rights of the greatest importance, but which are categorized as posing a danger to public health; the unjust matter specific to drug trafficking offences. And this is so, even if it is a question of punishing the main leaders of organized drug trafficking, as the grave dangers to public health should not be likened to the destruction of human life under these circumstances (all of this, obviously, without prejudice to punishing each person for all of the acts that take place).

The imposition of the death penalty for the most serious acts of drug trafficking should therefore be rejected from the perspective of retribution.

Moreover, and because of all the above, it is right to insist that drug trafficking is not a case of those "most serious crimes" referred to in the International Covenant on Civil and Political Rights. In fact, article 6(2) of the International Pact, referring to the abolition of the death penalty, which it considers desirable, states:

> "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".

The absence of greater precision in the wording of the expression that is used —the vagueness of which has been criticized by even

the Secretary General of the United Nations[24]—, left the decision over when it is a case of the most serious crimes, in principle, in the hands of individual states and the majority of the retentionist countries have stood by this in the case of drug-trafficking crimes[25]. However, in the light of the earlier considerations, as well as the various documents and declarations drawn up by the special rapporteurs of the Human Rights Committee and Commission of the United Nations, it appears evident that the concept —which should be associated with international crimes that have lethal or extremely serious consequences— has to exclude non-lethal crimes and only covers the most serious and violent cases of attacks on life (homicide/murder)[26].

2. Utilitarian perspectives stress that, aside from seeking justice, the penalty, as pointed out by the authors of the German Alternative-Project for a European Criminal Law and Procedure, is none other than a "bitter necessity" in a community of imperfect beings[27], and is therefore justified by its utility, by its necessity with a view to the prevention of criminal acts. In line with FEUERBACH, prevention theories, also called relative theories, distinguish between general prevention and special prevention. Identified in a negative way with the intimidation of the public which, through the threat of criminal action, deters the public from committing crimes, general prevention —in its positive modality— stresses the pedagogic and integrative functions of criminal law with respect to the social order

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24 UN Secretary General, *Report of the Secretary General, Capital punishment and Implementation of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, UN Doc. E/1995/78, para. 54; and *Report of the Secretary General, Capital punishment and Implementation of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, UN Doc. E/CN.15/2001/10, paras. 144, 88.

25 W.Schabas, *The Abolition of the Death Penalty in International Law,* 3rd ed., Cambridge University Press, 2002, pp.105, 108 f.

26 R.Lines, *Death penalty, cit.,* pp. 15 ff. See also R.Lines, "A 'Most Serious Crime'? – The Death Penalty for Drug Offences in International Human Rights Law", *Amicus Journal,* 21, 2010, pp. 21 ff.

27 J.Baumann and others, *Alternativ-Entwurf eines Strafgesetzbuches,* AT, 2ª ed, J.C.B.Mohr (Paul Siebeck), Tübingen, 1969, 29.

and fundamental norms of coexistence. The theories of special prevention construe the punishment as a particular intervention (corrective or social rehabilitation) that affects the individual, which is intended to prevent crime, or, in the case of those held to be incorrigible, to ensure their separation or incapacitation.

Even when the principal criteria is preventive necessity, a certain proportionality is not unknown to the theories on prevention, which is necessary to guarantee the rationality and the credibility of the penal threat when establishing the sanction that is applicable to each crime or offence: to punish everything with the most serious penalties, would evidently diminish the effectiveness of the deterrent; moreover, when acts of lesser importance entail the most serious penalty, the punitive barriers are broken down with regard to the commission of the most serious offences, which can no longer lead to greater criminal sanctions.

From the special preventive perspective, it is undeniable that the death sentence when imposed and applied has a radical effect (a prisoner once executed will not offend again…), but it is no less true that other means of incapacitation, without attacking the right to life in such a radical way, can also be highly effective. Moreover, the success of measures favouring dissociation —in matters relating to terrorism and organized crime— weaken the arguments of those who give credence to the inevitability of capital punishment for these categories of offenders due to special preventive considerations.

With regard to general prevention, which is the preferred argument when proposing that capital punishment be imposed on drug traffickers, the authors recall that the intimidatory effect of the death penalty on criminals (in particular, the most serious) remains unproven. And the conclusions of investigations such as those of T. SELLIN[28] remain perfectly valid, which highlighted:

– that in countries with common frontiers and equivalent economic and social conditions, the crime rate is very similar, without it being influenced by the fact that the death penalty

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28 T. Sellin, *The Death Penalty,* American Law Institute, Philadelphia, 1959.

exists and is applied in one of the countries and not inthe other.

– In no way does the abolition of capital punishment usually increase the number of offences, which would otherwise have received that punishment that were.

More specifically and with respect to drug trafficking, some time ago, on the basis of experience in Egypt, FATTAH[29] highlighted the negative consequences of imposing the death penalty under such circumstances for security and the administration of the police and the justice system: the application of the death penalty not only heightened the ingenuity of the traffickers to pass by undetected (and sharply increased their income), but they became more threatening, as the use of more serious violence became more extensive (which was not going to result in higher penalties), principally when confronting the forces of law and order engaged in their persecution. All of this, alongside the noticeable tendency in the Justice Administration to search for "technical" reasons to avoid intervention in less serious cases and not to have to impose such an extreme penalty as envisaged in the law…

IV. Evidently, alongside the lack of justification from the preventive and retributive viewpoints, the use of the death penalty with respect to drugs-related crimes may also be compared with arguments of a general nature that are brandished against the use of the death penalty in what is now an extensive debate between the positions for and against its use[30]:

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29 "The use", *cit.*, p. 726.

30 J. L. de la Cuesta, "¿Pena de muerte para los traficantes de drogas?", in R. Cario, *La pena de muerte en el umbral del tercer milenio*, Madrid, 1996, pp. 209. See also M. Barbero Santos, "La pena de muerte en la Constitución", *Sistema,* 42, 1981, pp. 31 ff; A. Beristain, *Cuestiones penales y criminológicas,* Reus S.A., Madrid, 1979, pp. 580 ff; C. García Valdés, "Los argumentos en la polémica acerca de la pena capital", in *La pena de muerte 6 respuestas,* Universidad de Valladolid, 1975, pp. 123 ff; G. Landrove Díaz, *Las consecuencias jurídicas del delito*, 6th ed. revised and updated in collaboration with M. D. Fernández Rodríguez, Ed. Tecnos, Madrid, 2005, pp. 33 and f.

- the inviolability and sacred nature of human life of which neither citizen, nor even judge, should be able to dispose;
- the anachronism and the illegitimacy of the death penalty in a democratic society based on the theoretical model of Rousseau's social contract: the citizens having no rights to dispose, cannot transfer their rights to the sovereign;
- the cruelty, radicalism and intrinsic injustice of a penalty that in itself and not only because of the execution methods, constitutes an evident physical torture (as well as preventing, as is obvious, all possibility of correction or social rehabilitation of the convicted prisoner) and which creates the figure of the executioner, who has to put an end the prisoner's life;
- the existence of other less harmful and more effective penalties against all categories of offences;
- the "lack of intimidatory effectiveness", in general and for those offenders for whom its application is sought: thus, in the end professional criminals may see it as a "professional risk" (professional crime) and, in the case of terrorism or political crime, there are many experiences that demonstrate the "negative glorifying effect" that the death penalty and its application can have;
- the irreparable nature of miscarriages of justice, quite frequent and with very varied causes: unsatisfactory police activity, incompetent legal defence and legal counsel, errors in the legal assessment or with the jury…;
- the frequency of psychiatric illness in prisoners awaiting execution; and, finally,
- the demoralizing effects of capital punishment, its often very selective, unequal and discriminatory nature…

V. In view of the plurality of arguments against its application, and despite the important international movement for abolition and the lack of justification from the retributive and preventive perspectives, it is worth inquiring into what it is that drives certain countries to maintain this "legal death" that BECCARIA had already as-

sociated with murder more than two centuries ago[31], in particular with respect to drug traffickers.

FATTAH[32] points out that criminological analysis highlights how provision for and the application of the death penalty to these and other crimes (such as socio-economic crimes) neither responds to rational retributive demands, nor to the prevention of these crimes; which as is known will not be achieved. On the contrary, the use of the death penalty in these cases —even in the knowledge that, as Amnesty International highlighted some time ago, it constitutes no real solution[33]— is, in their judgment, an especially significant and serious irrational response to a problem that, because of its complexity, the system is unable to control. And, as an irrational response, it seeks to confront the frustration generated by a set of infractions that appear daily in the media as a cause of very extensive harm to the economy, the political system and the security and wellbeing of society as a whole[34].

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31 *De los delitos y de las penas,* Aguilar, Madrid, 1976, pp. 121 and f.

32 "The use", *cit.*, p. 729.

33 Amnesty International, *The death penalty: no solution to illicit drugs*, London, 1987.

34 In reality, irrationality is not something that is precisely unknown to current drugs-related criminal policy, centred as a priority on the use of penal instruments to fight a phenomenon that is very insensitive to penal threats and that is governed by its own patterns and parameters. In fact, criminal law seeks to reduce the offer in a setting of high demand, but, if the aim is to assure individual health through the protection of public health, regardless of the criminal sanctions envisaged for serious attacks on fundamental rights, the extension of public health campaigns combined with the controlled distribution of certain substances among drug dependent users would probably be much more effective. Moreover, and with respect to questions of public health referred to so many times to justify penal regulation, it would be advisable not to ignore the many effects of insecurity generated by illegality itself: it is this which, as well as raising prices, complicates access by drug dependent users, who finally commit violent attacks against property to satisfy their habit. Added to all of this, despite the arguments at the time of frequent penal reforms, the big traffickers are only rarely affected by police and legal action, whereas it is the small traffickers (normally consumers) who experience the daily application of criminal law, when they are in need of assistance and not exactly repressive interventions. It would certainly be advisable to move towards normalization in criminal policy in this area, which without abandoning penal instruments would make it possible, as it is for other health-threatening substances. J. L. de

In fact, as criminological studies highlight, it is due to the ineffectiveness of criminal law in the face of uncontrollable traffic and consumption (scant illegal traffic is interrupted by the police)[35] which is accentuated by demands not only for wider police powers, but also for more severe sentences against drug traffickers and the imposition of more severe sentences (among which capital punishment) on the biggest traffickers. And there are no few citizens, in the same sense (even in the abolitionist countries) who, moved by the same irrationality, continue to propose the application of the death penalty under certain circumstances and for other crimes. The fight against capital punishment should also encompass the search for a rational approach to these deep-seated frustrations.

VI. It is finally appropriate to refer to the arguments used by the retentionist countries in response to international demands for a moratorium on executions and in favour of abolition. These, in effect, frequently indicate not only that there is no international consensus with regard to abolition, but that, rejecting the nature of the human rights question, they affirm that it is a question of domestic criminal justice, over which neither the UN nor other States have any authority to intervene[36].

This is precisely the reason why the creation of the Academic Network for the abolition of the death penalty[37] should be welcomed with great enthusiasm and support. Few instruments are in

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la Cuesta Arzamendi/I. Blanco Cordero, "Estrategias represivas *versus* políticas de reducción de daños: las drogas en un Estado social y democrático de Derecho", in J. C. Carbonell Mateu, J. L. González Cussac, E. Orts Berenguer (Eds.), *Constitución, Derechos Fundamentales y Sistema penal (Semblanzas y estudios con motivo del setenta aniversario del profesor Tomás Salvador Vives Antón),* T. I, Ed. Tirant lo Blanch, Valencia, 2009, pp. 437 ff.

35 J. L. de la Cuesta Arzamendi, "Características de la actual política criminal española en materia de drogas ilícitas", in J. L. Díez Ripollés, P. Laurenzo Copello (Eds.), *La actual política criminal sobre drogas. Una perspectiva comparada,* Ed Tirant lo Blanch, Valencia, 1993, p. 77.

36 UN General Assembly 2008: Implementing a moratorium on executions. (http://www.amnesty.org/en/library/asset/ACT50/016/2008/en/03afbd2e-74ee-11dd-8e5e-43ea85d15a69/act500162008en.html)

37 http://penademuerte.wordpress.com/

effect better placed than this one to respond to the arguments of the retentionist countries, by:

- presenting solid arguments that the death penalty is indeed a question of human rights and is not merely a question of internal criminal justice, and
- ensuring that an international consensus exists, at least in academic circles, with respect to the need for universal abolition of the death sentence.

REFLECTIONS ON THE DEATH PENALTY[1]

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At this moment, a man named Robbie Johnson[2] is sitting in a cell on death row in the state of Texas, in the southern United States. He is completely isolated. For twenty-two hours each day, Robbie sits in his cell, unable to communicate with other prisoners, contemplating his approaching death. For two hours, he is permitted to walk up and down in a small fenced-in area, a kennel of sorts, but he is never allowed to interact with other prisoners. In fact, he is never allowed to touch another human being, since individuals condemned to death in Texas are denied all human contact from the time they are sentenced, to the time their executions are carried out. He receives few visits, so he tries to stay busy by writing letters to pen pals or helping other prisoners with their legal appeals.

Robbie landed on death row when he was only 19 years old. One year earlier, at the age of 18, Robbie was out of work and needed money. Exercising the spectacularly bad judgment that is often typical of teenagers, he decided to rob a convenience store. Robbie didn't own a weapon, so he borrowed his uncle's shotgun. He went to the store, never intending to hurt anyone. But when the store clerk reached for something under the counter, Robbie thought he was reaching for a gun. He panicked and shot the clerk, killing him instantly. When Robbie realized what he had done, he threw his uncle's gun on the ground and ran home. In tears, he told his grandfather what had happened. His grandfather promptly marched him

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1 This essay derives from remarks delivered by the author at the 16th International Seminar of the Brazilian Institute of Criminal Sciences (IBCCRIM) on August 26, 2010.

2 The name and facts have been changed slightly to protect the prisoner's privacy.

down to the police station, where Robbie turned himself in and gave a full confession.

Even though Robbie had never before been convicted of a crime, the district attorney decided to seek the death penalty. Robbie is black, and the victim was white-and prosecutors in the United States seek the death penalty with much greater frequency in such cases[3]. With a jury comprised only of white men and women, it was easy for the prosecution to obtain a death sentence. Robbie's own lawyer provided less than stellar representation: he fell asleep during the trial.

Robbie was illiterate when he arrived on death row. Since then, he has learned to read and now writes poetry. He is also a gifted artist. Over the years, he has had plenty of time to reflect on his life. He has the wisdom of a philosopher, and if you met him in a bar, or sitting on a bus, you would never imagine that he was capable of committing a violent crime.

Robbie is now 52 years old. He has been on death row for 34 years.

Robbie's story reveals much of what is wrong with the death penalty, not only in the United States but around the world. It reveals that all too often, the criminal justice system singles out for harsher punishment individuals who are marginalized in our society because of their race, ethnicity, or poverty. This is not a feature unique to the U.S. criminal justice system. Poverty is the one factor that unites death row prisoners in Saudi Arabia, Nigeria, Guyana, and Thailand.

Robbie's case also exemplifies the extraordinary cruelty associated with capital punishment. Prisoners on death row must often endure a slow and agonizing wait for their executions to be carried out. Minute by minute, hour by hour, day by day, year by year, decade by decade, they suffer overwhelming fear, anxiety, and dread,

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3 *See, e.g.*, Amnesty International, *United States of America: Death by Discrimination – The Continuing Role of Race in Capital Cases*, AMR 51/046/2003 (2003).

alternating with what Camus called the "torture of hope"[4]. In Japan, prisoners are not told when they will die until the executioner stops at the cell door and escorts them to the gallows. There are prisoners on death row in Japan who have endured these conditions for over forty years. One of my own clients, Stan Faulder, was subjected to ten appointments with the executioner until the state finally killed him. Ten times, he was forced to write out his last will and testament to divide up his meager possessions. Ten times, he was placed on a special 24-hour watch that is reserved for individuals facing imminent execution. Ten times, he watched and waited as his date with death approached. On his penultimate execution date, he came within ten minutes of execution before receiving a last-minute stay from the United States Supreme Court. For the next several hours, he could not stop vomiting. I later argued that the state should not be permitted to execute Stan since they had already subjected him to psychological torture and cruel, inhuman and degrading treatment. Not one judge found this argument convincing, and on June 17, 1998, I watched as the state killed him.

To understand the U.S. death penalty in context, it's helpful to take a step back and examine the death penalty from a global perspective.

According to Amnesty International, Robbie is one of at least 17,118 men and women who have been sentenced to death around the globe[5]. Ninety-three states retain laws that authorize the imposition of the death penalty for ordinary crimes[6], although this number is highly misleading. Forty-seven of these 93 states are considered abolitionist in practice, since they have not carried out an execution in at least 10 years[7]. The vast majority of the remaining countries that still apply the death penalty are loath to carry out executions. Only 18 states carried out executions in the last year. The world's

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4 Albert Camus, *Reflections on the Guillotine,* in Resistance, Rebellion and Death 200 (1960).

5 Amnesty International, Death Sentences and Executions in 2009 (2010).

6 *See id.* at 28.

7 Economic and Social Council, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the secretary general,* E/2010/10 (2010), at 64.

leading executioners in 2009 were China, Iran, Iraq, Saudi Arabia, and the United States. China executed thousands – we can't know for sure how many because it's a state secret. Not including China, the total number of executions was 714. In all of Africa, only two countries (Botswana and Sudan) carried out executions last year. In all of the Americas, the United States was the only country to execute. Every year, new countries join the abolitionist fold: the last countries to abolish the death penalty were Burundi and Togo in 2009, and the list keeps growing.

These statistics make clear that the death penalty is an increasingly arcane punishment, used only rarely even in the handful of countries that retain it. The death penalty's waning popularity is undoubtedly due to a number of factors that have been well documented by scholars. The European Union has prioritized abolition of the death penalty in its human rights agenda, and as a result Europe is largely an execution-free zone (with the notable exception of Belarus). The Catholic church's staunch opposition to the death penalty has undoubtedly been a factor in its abolition in Latin America. In countries such as South Africa and others that have transitioned to democratic rule after years of dictatorial repression, abolition of the death penalty is seen as a measure of their commitment to progressive ideals founded on human rights and the rule of law. Even in the United States, where two-thirds of the population supports the death penalty, juries are imposing fewer death sentences and states appear increasingly reluctant to carry out executions. In 2009, the United States executed 52 individuals, down from a high of 98 executions in 1999.

Part of this trend toward fewer executions –at least in the United States—stems from the revelation that an unconscionably high number of innocent men and women have been condemned to death. In the last three decades, 138 prisoners in the United States have been exonerated after being convicted and sentenced to death. And if this is the case in one of the wealthiest countries in the world, a nation that devotes more resources to indigent defense than the vast majority of retentionist states, it is reasonable to assume that thousands of innocent men and women have been condemned to death around the world in the last decade alone.

But despite the trend toward abolition, and despite all of the well-founded arguments in support of abolition, the death penalty persists in a sizable number of states. And in the remainder of this essay, I will address two questions. First, why does the death penalty seemingly have such a tenacious hold in the United States, Japan, the Middle East, and parts of Asia? And second, why should we care?

In my view, the death penalty persists because it is fueled by enduring myths that are nurtured by opportunistic politicians and accepted –and endorsed– by an ignorant public. First, there is the deterrence myth. In response to the public's complaints about violent crime, political leaders tout capital punishment as a necessary measure to deter would-be criminals and to punish violent offenders. They conveniently ignore the reams of studies that demonstrate the fallacy of the deterrence myth. Criminologists and sociologists –individuals who have studied the effect of penal sanctions on criminal behavior– overwhelmingly agree that there is no proof the death penalty deters[8].

Political leaders also see the death penalty as a way to demonstrate their tough-on-crime credentials with voters who have little patience for complicated explanations about the causes of violent crime. The media gives voice to the anger of victims and intensifies the sense of outrage over particularly heinous crimes – an emotion that populist leaders in the United States, Peru, Mexico, and elsewhere are eager to exploit. In a world where news is increasingly delivered in sound-bites, policymakers do not take the time to educate themselves or the public about the web of factors that contributes to violent crime, including poverty, abuse, mental illness, brain damage, trauma, alienation, abandonment, isolation, and drug and alcohol addiction. I am not suggesting that victims should be ignored. Those who commit violent crimes need to be punished, and punished severely. It is simply not necessary, however, to kill them.

Proponents of the death penalty view people not in shades of gray, but in stark black and white. A person is good or evil. I call

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8 Michael L. Radelet and Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of the Leading Criminologists,* J. Law & Criminology 489 (2009).

this the myth of the bad seed. People of all political stripes and across cultures ascribe to this belief, and it is what allows much of the world to remain untroubled by executions. We think of death row prisoners as less than human, as "others". We don't really empathize with the Japanese death row prisoner because we hold on to stereotypes that Asians are stoic and lack emotion. When we read about an execution in the United States, we imagine a serial killer, a pathological, unfeeling beast. And because executions are largely removed from the public eye, it allows even those of us who are intellectually opposed to the death penalty to maintain an emotional distance. Arthur Koestler describes this phenomenon in his extraordinary novel, Darkness at Noon. Rubashov, who as a leader of the communist party had condemned others to die, only comprehends the depravity of the death penalty when he is himself a prisoner and experiences the horror of witnessing another's execution.

Finally, there is the myth of just desserts. Retentionist governments proclaim that only those who are truly deserving of the most severe punishment –the worst of the worst— are sentenced to die. But this, too, is belied by the data. People end up on death row for a host of arbitrary reasons, including the race of the victim, the political beliefs of the prosecutor, and the prejudices of judges and juries. Bryan Stevenson, a death penalty lawyer in the United States, often says that you're more likely to be sentenced to death if you're innocent and poor, than if you're guilty and rich. But even when the accused is guilty —like Robbie Johnson— he is often condemned to death not because he is the "worst of the worst", the most depraved and despicable killer, but because he is poor, because he is mentally ill, because he is the wrong race, or because he is a foreigner. Saudi Arabia executes a disproportionate number of foreign guest workers because they cannot afford to pay the victims the so-called "blood money" that under Islamic law could lead to a pardon. Around the world, poor people don't get quality legal representation, and this factor more than any other determines who ends up on death row in many nations. In Malawi, not one of the men currently on death row ever met with a lawyer before the day his trial started. In Pakistan, defense lawyers rarely conduct any investigation into the prosecution's case. In the United States, we have had court-appointed law-

yers —like Robbie's— fall asleep during their clients' capital murder trials.

Let me turn to the next question. Why should we care about the death penalty? And in particular, why should individuals living in abolitionist states care? Many of us already suffer from what is now called "compassion fatigue", and there are countless problems in the world that seem more worthy of our attention. Women are being raped by the tens of thousands in the Congo. Children are being sold into slavery in parts of South India and West Africa. The AIDS epidemic is claiming millions of lives. In comparison to these tragedies, the continued application of the death penalty seems almost inconsequential.

But there is something about capital punishment that sets it apart from other human rights violations. Unlike torture, unlike rape, unlike slavery, unlike human trafficking, unlike health epidemics caused by governmental negligence and mismanagement, the death penalty is the result of an intentional, deliberate, and premeditated government policy to deprive human beings of their most cherished and fundamental right: the right to life. It is the ultimate expression of governmental control and repression. It provides the state with lawful justification to inject a healthy man with lethal poisons, to drop him from a gallows in such a manner that his neck snaps from the strain, to force him to kneel so that a government employee can put a bullet in his brain, to place him blindfolded in a public square before crowds of spectators while the executioner swings a sword and chops his head off. It authorizes the government to commit premeditated murder. It confers the most awesome power of all, absolute power to take human life. We should all be deeply afraid of any government that has the arrogance to believe that it can determine, to an utter certainty, whether a human being deserves to live or die.

There is another aspect of the death penalty that is equally pernicious. It is the belief that some individuals are so incapable of redemption that they should be exterminated from the human race. As New York Law School Professor Robert Blecker recently said, "[S]ome people deserve to die, and we have an obligation to kill

them"[9]. This view has a profoundly corrosive effect not only on our criminal justice system, but on society as a whole. It is the opposite of hope. It is the antithesis of faith. It annihilates compassion. It is cynical to the extreme. It is pessimistic and nihilistic. It is the negation of humanity.

Setting aside for a moment the question of innocence –because I think it can distract us from the more fundamental question of whether it's right to execute the guilty– I have never met a man on death row who was utterly devoid of humanity, who didn't struggle to come to grips with the misdeeds of his past, who didn't hope for deliverance, who didn't strive to overcome the burdens of mental illness or addiction or a lifetime of abuse, who didn't make a supreme effort to die with dignity.

We all shuddered with revulsion when we heard about the stoning deaths of the young lovers in Afghanistan last week. It is easy to decry a practice that is so clearly barbaric and anachronistic. But in the state of Texas, where I have defended individuals facing the death penalty for the last 20 years, the execution of men and women by lethal injection has a clinical and calculated air that is equally chilling. Texas has executed so many individuals —463 since 1977– that executions have become almost banal.

I have witnessed two executions in my career. Shortly before each execution, I was permitted one final visit with my client, although I was never permitted to touch him. The prison then forced me to sit through an "orientation" where the prison chaplain explained exactly what would happen when they injected my client with poison. I was then guided to a seating area with other witnesses, and at the appointed hour –after the Texas governor denied clemency—we were guided into the execution chamber. There, I stood by a window facing a small room where my client lay strapped to a gurney, crucifixion-style, with his arms spread out wide. He is strapped down across his chest, pelvis, legs and arms so he cannot move. The execution chamber looks like a hospital room. A microphone is suspended over his mouth so that he can make a last statement. He

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9 CBS News, *The Slow Death of the Death Penalty?*, June 13, 2010.

can see us, we can see him, but we are not permitted to speak. The victim's family and friends may watch from a second room. After he makes a final statement, you do not know when the lethal toxins begin to flow, since you cannot see the executioners. They are hidden and anonymous. My only clue that my client was about to die was when he gave a deep, guttural cough. The wait is agonizing. No one speaks, and reporters are in the room to transcribe every detail of their reactions. Everyone simply watches him die. After several minutes, a medical technician checks to see if he still has a pulse. If there is none, a sheet is pulled over his head and the time of death is announced. It is absolutely terrifying to watch. It is nothing more, and nothing less, than violent murder cloaked in an aura of clinical efficiency.

What many people did not realize until a few years ago is that lethal injection may lead to an excruciatingly painful death. The "lethal injection" used in most states is actually a combination of three drugs. The first is sodium pentothal, a short-acting barbiturate, the second is pancuronium bromide, a paralytic agent, and the third is potassium chloride, which stops the human heart. The problem is, doctors do not participate in executions for ethical reasons, and so the individuals measuring the doses of drugs are not trained anesthesiologists. The greatest risk is that the barbiturate is insufficient to cause unconsciousness. The witnesses cannot tell whether the man lying on the table is unconscious, because the pancuronium bromide has paralyzed him. He cannot move or indicate in any way that he is not unconscious. There is no medical purpose for the paralytic agent – it's only purpose is to shield the witnesses from the unsightly spectacle of the prisoner convulsing on the table as the third drug kills him. Yet pundits routinely describe our execution method as "humane", and most executions receive only a bare mention in the newspapers. The reporter who covers Texas executions for the Associated Press, a man by the name of Michael Grazcyk, likes to boast that although he has witnessed hundreds of executions, he is never bothered by them. That is hard for me to fathom. For me, witnessing my clients' executions was easily the most traumatic experience of my life.

The arguments I make today are not original. Many have expressed the same views before, and with far greater eloquence. Albert Camus, Arthur Koestler, and Jean Paul Sartre, among others, fervently opposed the death penalty.

I rarely discuss my work with other people. It tends to make them uncomfortable. Death is an unpleasant topic. But I find my work oddly uplifting. My clients have taught me that there are no evil people in this world. We all have the capacity to do good, and we all have the capacity to cause harm. Camus argued that "no one among us can pose as an absolute judge and pronounce the definitive elimination of the worst among the guilty, because no one of us can lay claim to absolute innocence"[10]. This is really another way of restating a maxim ascribed to Jesus Christ, who may have been one of the earliest recorded abolitionists. When confronted by a group of Pharisees and scribes who were preparing to stone a woman for adultery in accordance with the Old Testament, Jesus reportedly said: "He that is without sin among you, let him first cast a stone at her". Camus and Christ alike, it seems to me, were trying to say that none of us can be defined merely by the worst thing we have ever done. And although I am not a person of religious faith, this strikes me as a principle to which we should all aspire.

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[10] Camus, *supra* n. 3, at 222.

THE DEATH PENALTY IN JUDICIAL PHILOSOPHY AND IN MILITARY AND INTERNATIONAL CRIMINAL LAW

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1. Carmignani could not have put it better when he described the death penalty as the *great and lugubrious argument* of penal debate. It is not, of course, the only cardinal problem in Criminal Law. Nevertheless, the immense bibliography dedicated to the death penalty is indicative of the magnitude of the matter and its transcendence. Even by the mid nineteenth century, it was nigh impossible to take in all the literature, when the debate surrounding it had hardly gone on for more than one hundred years, and it continues to go on even in countries that have abolished this punishment in their criminal systems. Furthermore, there is the significant point that these controversies surpass the strictly legal field and attract the interest of philosophers, theologians, psychologists, sociologists, writers and artists among others; a plethora of experts and thinkers, and it is not unfamiliar to lay people or even to those with a rudimentary education or none at all[1].

The above would suggest that there is still a remnant of that historical past locked away within the death penalty in which systems of social guarantees were all very similar, when the Law did not stand firm with well-defined profiles, in its desire for cultural improvement and the rationalisation of collective life, as against religious and moral postulates. It is no surprise that the burden of irra-

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1 *"En la pena de muerte hay muchos problemas: un problema moral, un problema psicológico, un problema criminológico, un problema penal, un problema político y un problema histórico* [There are many problems with the death penalty: a psychological problem, a criminological problem, a political problem and an historic problem]". Ruiz Funes, *Actualidad de la Venganza.* (Tres ensayos de Criminología). Losada, Buenos Aires, 1943, p. 99.

tionality that capital punishment carries with it, its magic-religious core, bound up with the most atavistic and radical human fear —the fear of annihilation, spurred on by the rich, proteiform drive for self-preservation— find an outlet to express themselves in the heated tones that the debate usually engenders. Neither is it a surprise that this debate re-emerges as vigorously as ever from time to time under propitious circumstances. Hence, if the scope of this issue is highlighted by the undoubtable implications of the death penalty with regard to the problematic end-purpose of all penalties, and the justification and limits of *ius puniendi*, it is also weighed down by a formidable reactive-affective tension which hampers and delays the triumph of the cause of reason, which rejects considering the sacrifice of a human being as the possible content of that civil institution known as 'punishment'. Hence, in short, whoever investigates the history, phenomenology and controversy surrounding the 'ultimate penalty' will be overcome by a sombre, funereal feeling. The argument is therefore not only serious but also lugubrious; it takes from death its defining trait: a profound sadness[2].

However, various factors conspire against the need to deal with the subject in this article. The twentieth century, with its vocation for war, servitude and subjugation, produced veritable human catastrophes. It held over half the globe subjected to misery, hunger and sickness, in sharp contrast to a privileged minority who continue to enjoy opulence and appear to ignore the suffering and weaknesses of their neighbours. The numbers of victims of mistaken social and economic, if not legally perverse policies add to the terrible reality of extra-judicial executions, which claim far more lives than those taken by the official executioner. All of this may merely appear to be an exercise in leisure, *diversion* for the erudite, concerning themselves with the legally-ordered destruction of a single individual[3].

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2 "One profound and suggestive tragicomic moment in the study of the life of the criminal man, is the death sentence and execution of the penalty". Ferri, who attended a double execution in Paris, on 17th August, 1889, to experience the terrible reality of its imposition at close quarters, was assaulted to the end of his days by the harrowing memory of the convicts' agony.

3 On this, Jiménez de Asúa, *La pena de muerte*, in *El criminalista*, 2nd edition, Victor P. de Zavalía (Ed.), Buenos Aires, 1966, vol. VII (XVII in the collection),

Penal doctrine can do little in the face of those searing facts, which extend far beyond their narrow objective. Reduced, therefore, to *its* lugubrious argument, it has been studied and discussed *ad nauseam*. The positions towards it are well defined; the proposals for and against, exception made for nuances, are always the same which tinges them with a certain monotony that borders on the routine. The generalized rescission of this penalty in the panorama of comparative and international law, accompanied by the repulsion that prevails among scholars, is the new pole star for the efforts of legal doctrine; more concerned today with its legal subrogates and factual events, with the required conditions of legitimacy for the former and the way in which the latter may be forestalled. Nevertheless the death penalty continues to cast its ancient, deplorable spectre over these events, especially in the legal orders which give it credence. A worrying presence the considered effects of which corrupt a myriad of judicial institutions —as long as it remains in force in just one part of the world (and unfortunately there are more than a few)— and awakens a compelling duty in the penal expert to confront the Lernean Hydra and drown it in its own poison as many times as it rears its head. "In order that the death penalty be eliminated from the states which still accept it, and so that it is not restored in countries that have abolished it, the jurist has to remain vigilant [...] Only in this way may we ensure that there will be a day on which humanity can push to the back of its mind a punishment which consists in killing[4]". Until this occurs it will remain a permanently contemporary problem.

Nevertheless, my contribution attempts to outline the state and the problems posed by capital punishment in military and international penal codes; in other words, the last refuge after the spreading and ostensible defeat of the death penalty in ordinary criminal law applicable in countries and to civilians. If capital punishment is now being withdrawn in both fields, which may be a precursor to

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pp (1979-183) 179, and Bobbio, *Il dibattito attuale sulla pena di morte*, in *La pena di morte nel mondo*. Convenga internazionale di Bologna (28-30 ottobre 1982). Marietti, Casale Monferrato, 1983, pp (15-32) 15.

4 Barbero Santos, *Pena de muerte*. (El ocaso de un mito). Depalma, Buenos Aires, 1985, pp. 260-261.

its complete disappearance in such redoubts, rather than excusing us, it obliges us to concern ourselves with certain terms in its controversial doctrine. They will help us find the solution as to whether its use is licit in the exceptional case of war, as well as for the most serious crimes against human rights, such as genocide and crimes against humanity.

Indeed, the wealth of aspects, arguments and counter-arguments comprising the whole death penalty controversy means it advisable to examine them in the light of their respective and disparate. Setting out the motives that its supporters invoke for its justification, contrasting them with reasons put forward to achieve its suppression —a habitual procedure in the doctrine—, conceals the true depth of the questions at stake and is a source of serious misunderstanding; for example, that the death penalty could, in principle, be compatible with any political organisation, that it should be rejected in general, yet accepted in certain cases —such as for war crimes or other such international offences— or that the debate surrounding it has more of a sentimental than a rational nature. A mere sequence of examples will not do justice to the extremes that need to be organised into a hierarchy. In order to avoid false directions in the debate and precipitous conclusions, one has to analyse the theoretical problem by following its inflections, determined in turn by the body of judicial knowledge regarding the subject. The first and most important, due to its fundamental role in the science of law, concerns the Philosophy of Law. It is a question of the justification or lack of capital punishment *tout court*, in other words, contemplating the subject in unconditional terms without losing sight of the absolute suppositions of Law. On the contrary, the reasons, empirical evidence and proposals arising from criminal Policy and criminology, which solely concern the advisability or inutility of the death penalty, and not its political and juridical justification, are only of passing interest to us.

2. Similarly, in the case of military and international criminal law, the first challenge facing the Philosophy of Law resides in determining whether the content of the death penalty is comparable with those of punishments in general —i.e. deciding whether it consti-

tutes a true "penalty". The observation, full of suggestive thoughts, that "in the death penalty there is something abnormal and exceptional with respect to all others", made by Carnevale[5], in some ways foresaw the response to a problem on which juridical speculation would later fix its sights at the beginning of the twentieth century.

The penalty, as a type of judicial sanction, and, at the same time, a fundamental concept of Law, has to be provided with a content that the legal order considers unfavourable, which put in a dogmatic language implies a loss or limitation of certain legal rights. The "evil" of the penalty —accepting that any moral connotation that the word may have can be removed— has to be conceived objectively and impersonally, as what is decided is not the justifiable opinion of one person or another, but the superior viewpoint of the legal order. Similarly, given that the Law is a practical way of regulating individual behaviour, and not a theoretical criteria with its accompanying teachings, predictions and oracles concerning the world's most obscure mysteries, this "evil" will, in principle, be incapable of overcoming both our own cognoscitive possibilities and the essential historicity of man and the rules that govern his behaviour towards others. No penalty can represent "an extemporaneous departure from the limits of *time* and *place* in which human coexistence elapses"[6]. Whatever is on the fringes of these assumptions is not within the scope of *ius puniendi*; it would therefore be an absurd and indeed laughable legislator who threatened a term of imprisonment as a penalty longer than the lifespan of a human being.

However, the opinion prevails among penal experts that the death penalty would satisfy such requirements, as it wishes the "evil" that ensues to be the loss of life, the greatest prize that a person possesses, as Manuel de Lardizábal wrote in the eighteenth century[7]. The argument against this, it is affirmed, is that there are

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5 *La cuestión de la pena de muerte.* La España Moderna, Madrid, 1890, p. 249.

6 Del Rosal, *4 Penas de muerte, 4.* Teoría. Publicaciones del Instituto de Criminología de la Universidad Complutense de Madrid, Madrid, 1973, p. 161.

7 *Discurso sobre las penas contrahido á las leyes criminales de España, para facilitar su reforma.* Preliminary Study (*Manuel de Lardizábal o el pensamiento ilustrado en Derecho penal*) by Manuel de Rivacoba y Rivacoba. Ararteko, Vitoria-Gasteiz, 2001, cf. pp. 170 and 178.

individuals who commit suicide[8], who prefer to die rather than to continue living, is ineffective, because these are exceptional events which legislators may choose to ignore. Any legal right whose loss is imposed upon convicted persons, their lives included, could constitute, therefore, the suffering of modern punishment[9].

It is worth noting that the response to this extended manner of thinking came from a psychiatrist, Alfred Hoche, probably because only doctors acquire direct familiarity with the subject[10]. Apart from the chemical destruction of the body, we have no real knowledge of what death consists of, and therefore can have no idea of what it means when an executioner concludes his work. Death lends itself somewhat better to being considered the ultimate existential situation or else an unfathomable mystery —nobody has ever returned from the mansion of Hades to provide us with the information that reveals all— rather than being treated as one of the possible themes of the sanctions dictated by law[11]. It may therefore be asked how we can condemn a prisoner to something of which we know nothing. The only thing that can be stated with any certainty, says Hoche, is that capital punishment ends at precisely the moment at which it begins.

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8 Which, said in passing, are abundant among murderers, precisely the criminal category over whom the threat of capital punishment looms large. An oft-repeated lesson is that many murderers give themselves up or commit suicide, facts upheld by systematic observation, which indicates their scant interest in remaining alive and the unconscious death wish that drives them toward the gallows. "Suicide for these types is the last eruption proceeding from the narrow confines of a wasted life. It is the last of their adventures, in which as always their life is at stake and it finishes with great tranquillity." - Von Hentig, *Estudios de psicología criminal, V. El gángster*. Spanish translation and Notes by José María Rodríguez Devesa. Espasa-Calpe. Madrid, 1980, p. 143.

9 Thus, Engisch, *Todesstrafe-Ja oder nein?*, in *Pena de morte*. Coloquio internacional comemorativo do centenário da abolição da pena de morte em Portugal. 4 vols. Coimbra, 1968, vol. II, cf. pp. (273-308) 288.

10 *Die Todesstrafe ist keine Strafe*, en *Monatsschrift für Kriminalpsychologie*, vol. 23, 1932, pp. 553 ff.

11 "Birth and death are mysteries whose nature prevents them from being considered among the categories of good and evil." Dreher, *Für und wider die Todesstrafe*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, De Gruyter, Berlin-New York, vol. 70, 1958, pp. (543-565) 552.

This apparent paradox conceals a deeper question. The real content of the death penalty resides in the *fear of dying*, the clothing in which it truly appears before us, an attack on the instinct for self-preservation, something which may not be graduated and, in any case, is inadmissible through the prism of the Rule of Law[12]. Certainly, the fear of waiting for the day of their execution for those sentenced to death, which is often prolonged for years, is a psychological torment which is worse than death itself, and its devastating effects are susceptible to experimental confirmation[13]. The history of the gallows corroborates this theory. Among the superstitions that were linked to the image of the executioner are the broken rope, a quavering blow with the sword, or the defective guillotine which were enough to obtain the pardon of the condemned man at death's door: "so common is the intuition that feeling it [death] is more terrible than death itself and whoever has experienced this feeling has been purged of all guilt"[14]. Contemporary reflection draws out the

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12 Similarly, Schaffstein, *Die Todesstrafe in Deutschland in Vergangenheit und Gegenwart*, in *Pena de morte*, cit, vol. I, pp. 213-232, cf. p. 222: "The evil of this penalty is not death, but dying".
(That this discovery is recent should not surprise us. Little used to be known of the psychology of the fear of death, and its history shows us that, like sensitivity to pain, it has increased with the spread of civilisation. See Radbruch, *Ars Morenci* in his book *Elegantiae Juris Criminalis*. Verlag für Recht und Gesellschaft AG, Basel, 2nd ed, 1950, pp. (141-173) 163. This is particularly true in modern society, which does everything it can to leave death and its entourage (funeral ceremonies, burials etc.) devoid of their inherent emotional gravitas, so that they remain unseen.

13 "Man is destroyed by the wait for death long before he really dies. Two deaths are inflicted, of which the first is worse than the second, although he only killed once. Compared to this torture, *lex talionis* —an eye for an eye— still appears a civilised law. This at least would never require that two eyes be removed from the man who left his brother with one." Camus, *Reflexiones sobre la guillotina*, in Camus and Koestler, *La pena de muerte*. Spanish translation by Manuel Peyrou and Introduction by Jean Bloch-Michel. Emecé Editores, Buenos Aires, 1960, p. 140.

14 Paolo Rossi, *La pena di morte*. Scetticismo e dogmatica. Pan, Milano, 1978, p. 251. A wealth of archaic beliefs and strange customs used to accompany the executioner and his work: the condemned man's last meal (known in Spanish as "*la comida del verdugo*" - the executioner's meal"), the serving of alcohol until drunkeness, reprieves to mark religious festivals or if a prostitute offers to marry the prisoner etc, etc. These practices should not be overlooked as "in

ultimate consequences of the argument to make evident the double inhumanity of capital punishment: its unhealthy pretension to go beyond the terrain of what can be known and measured and because it destroys the only indisputable form of solidarity, that which unites all people in a common cause against death[15]. It is therefore reasonable to conclude that the so-called death penalty is not a penalty as such, nor is it a security measure, but a *factum*, a mere act of belligerence[16].

3. A further iusphilosophical question is the link between the death penalty and political organisation. This is decisive in determining whether the body of the state, based on the doctrine that governs its constitution, has the legitimacy to impose capital punishment. This particular moot point arises from the abolitionist movement, with arguments of profound significance, something which is perfectly understandable, as it is one of the most important facets of the relationship between the state and the individual[17].

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the majority of cases they have been historically useful". Von Hentig, *La pena*. 2 vols. Spanish translation and notes by José María Rodríguez Devesa. Espasa-Calpe, Madrid, vol. I (*Formas primitivas y conexiones histórico-culturales*), 1968, p. 92.

15 Similarly "(...only a truth or principle that is placed above men may legitimise it"). Camus, op. cit, p.154. We think that not even a religious Philosophy of Law, and therefore a superlative consideration of values, could hand us that truth, but rather another: the fact that death, regardless of its ultimate metaphysical significance, is man's oldest enemy.

16 "A war of the nation with a citizen", in the words of Beccaria. *Dei delitti e delle pene*. Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'Europa del Settecento. A cura di Franco Venturi. Einaudi, Torino, 3rd ed, 1973, p. 62. In his book *El problema de la pena*, translation by Santiago Sentís Melendo, Rodamillans, Buenos Aires, 1999, pp. 40-42, Carnelutti states that killing a prisoner may be a security measure, as it responds to its preventive ends, but never a punishment. This argument is not convincing, it leaves the problem intact and only treats it in terms of measures.

17 "An affirmative or negative response to the death penalty always includes the confession of a specific and fundamental view of the relationship between the individual with the State and the Law". Engisch, op. cit, p. 274; also, Würtemberger, *Das Problem der Todesstrafe*, in *Universitas*. Zeitschrift für Wissenschaft, Kunst und Literatur, Volume 10, October 1961, cf. pp. (1,091-1,104) p. 1,096.

It is nonetheless important to clear up an error of interpretation. The continued existence of the death penalty in some democratic countries would have us believe that it is compatible with any political doctrine. For Frosali, for example, "the death penalty is not an absolute antithesis of the spirit of any political system, but is merely the product of a juridical concept", such that it would not necessarily be an "illiberal sign" of the legal order that accepts it[18]. Bettiol too, working on the principle that the death penalty has coexisted with all manner of political systems, maintained that it would be unproductive to search in a source of liberal thought for convincing arguments against capital punishment, although he acknowledges, as does Frosali, that this is precisely where there would be greater resistance to its acceptance, whereas authoritarian states will accept it more readily, and in totalitarian regimes it constitutes a normal part of punitive law[19]. Exception should be taken to all of this, in that if the realities of political and legal facts enter into conflict with the system of principles that should cement them and serve to guide them, that in no way alters the essence of the political *doctrine* that inspires the regimes in question; it is within *its* theoretical structure where the speculative guide has to be found that allows the proposed problem to be resolved.

Invoking to that effect the word 'democracy' is not appropriate. Democracy is only a concept that concerns the origin and exercise of sovereignty and it may not be deduced from its central premise, condensed in the popular will as the foundation of public authority and in the equality of all members of the community, that a democratic regime should find the death penalty repugnant, because a democracy can be guided in a supra-individual sense and can demand, in consequence, the execution of an individual to safeguard the existence of the people[20]. Rousseau and Beccaria's ideological counterpoint is wisely instructive on this. On the premise of a social

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18 Voz *Morte (pena di)*. *Diritto penale comune*, in *Novissimo Digesto Italiano*, Unione Tipografico-Editrice Torinese, Torino, vol. X, 1964, p. (941-943) 941.

19 Cf. *Diritto penale*. Parte generale. 12th ed, covered by Luciano Petoello Manitoban. Cedar, Pad ova, 1986, p. 836, and *Sullen massive pene: morte ed ergastolo,* in his *Scritti giuridici*. 2 vols. Cedam, Padova, 1966, vol. II, p. (884-892) 888.

20 Engisch, op. cit, cf. p. 291.

contract as the foundation of civil society and political power, the Milanese philosopher refuted the legitimacy of the death penalty, because in the renouncement of these small portions of freedom that formed the well of freedom that guarantees freedom for all, nobody took this to mean the sacrifice of their own life. Because life is unrenounceable and suicide somewhat reprehensible, whilst the citizen of Geneva considered the social contract as valid on this point, arguing that it was not contrary to someone being subjected to death in order to conserve life, as if the aim of the contract was to ensure the preservation of those who contracted it, then "...*c'est pour n'être pas victime d'un assassin que l'on consent à mourir si on le devient.*"[it is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins]"[21]. With his proverbial insight, Redbrick states that this difference depends on the different understanding held by Rousseau and Beccaria of the social contract, which for the former is complete alienation from the fundamental rights of man and for the latter partial alienation[22]; a discrepancy which says a lot in short about the individualistic or even trans-personalistic vocation of democracy. Neither does it get very far to refer to the concept of the republic as the definitive parapet against the death penalty, unlike events in the monarchic systems. It is a question of two forms of government which can be replete with matters that are also different; however, as those living under the crown are construed as a set of subjects, and not a plexus of citizens such as the sons and daughters of a republican regime, monarchies are more likely to keep the gallows in place[23].

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21 Livre II, Chapitre V, Du Contrat Social ou principes du droit politique, Jean-Jacques Rousseau Meta Libri 2007 http://www.ibiblio.org/ml/libri/r/RousseauJJ_ContratSocial_p.pdf English translation: *The Social Contract*, Book II, Chapter 5 (*The Right to Life and Death*) - http://www.constitution.org/jjr/socon.htm Translated by G. D. H. Cole, public domain Rendered into HTML and text by Jon Roland of the Constitution Society.

22 *The Isaak Inseln über Cesare Beccaria,* in *Elegantiae Juris Criminalis,* ed. cit., cf. p. 186. Also see Mario Cattaneo's lucid observations, *Morale e politica nel dibbattito dell'Illuminismo,* in *La pena di morte nel mondo,* cit, pp. (107-133) 119 ff.

23 In Bismarck's speech before the Reichstag during the debate over what would be the 1871 German Criminal Code, he stated that the death penalty is the only dividing line that separates the principal of constitutional monarchy from that of a republic. Ruiz Funes, op. cit, cf. p. 137. This has nothing to do with the

The crux of the question appears clear when attention is paid to the substance demanded by these forms. The death penalty is completely and incurably contradictory to the individualistic concept of society and the state in which the person is the fulcrum of collective relationships and is acknowledged to have eminent dignity. This concept may neither be shackled to the intentions of the whole nor to those of any one particular person, in which an evaluated relativism prevails that shows respect for the essence of personality as its ultimate boundary. Carnevale rightly points out that individualism is the only fertile terrain for an aversion to the death penalty to germinate, which is borne out by the stages of its decadence. The political materialization of such an axiological system is liberalism, an essential setting in which to form grand convictions and to develop the idea and feeling of the law[24]. Modern democracy, which situates human dignity and value at the core of its constitutions, and the resulting individualistic legal orders are for that reason incompatible with the gallows. In contrast, only a supra-individualistic concept which subordinates the values of personality to something which is beyond the person, to the entire social order, can recognise in the State an absolute right over life and approve of death as a form of punishment. The political version of such an axiological system is authoritarianism and, in its extreme forms (trans-personal and substantialist), totalitarianism. These are characterised by the vision of man as a simple part of a more or less organic whole, and legal orders based on the principle that Law should be that which is of use to the people[25]. This is the basis of the argument advanced by Thomas Aquinas —the subordination of man, the imperfect being, to

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fact that many monarchic countries in Europe today have abolished capital punishment.

24 Despotism, on the other hand, produces nothing. Guizot, *De la pena de muerte en materia política*. Translation by José Ferrater Mora. Cruz del Sur, Santiago de Chile, 1943, cf. p. 68. "Only the liberal forces are ideologically opposed to the death penalty; other forces may be in favour today and oppose it tomorrow, depending on the changing tides of political opportunity" observed Nuvolone in *Le probleme de la peine de mort en Italie*, in *Pena de morte*, cit, vol. I, pp. (188-196) 195.

25 The stated opinion of the minister in Hitler's regime, Hans Frank. Cf. Düsing, *Die Geschichte der Abschaffung der Todesstrafe*. Druck- und Verlagshaus Hermann Kuhn, Schwenningen/Nekar, 1952, p. 187.

the perfect being— so often repeated throughout history, which diminishes the individual, in the end, to a means at the service of the collective[26]. For this reason the death penalty is always a measure of the collective view that emerges from a legal order[27]. The fact that this is still present in democratic countries is a factual concession to defensive positions and primitive drives, and a lamentable caveat to the demands of human dignity. The exception is that tyrannical regimes turn it into a general principle using death as a punishment and, on a larger scale, as an extrajudicial measure[28].

4. Closely related to the former point is a third problem that is open to juridico-philosophical consideration. The link that was envisaged between capital punishment and political organisation now decidedly makes its entrance. It is a question of knowing whether this form of punishment is reconcilable with Criminal Law, a subject

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26 This argument can be found in Alfonso de Castro, Montesquieu, Lardizábal, etc. As is well-known, in *Summa Theologica*, II, 2, *quaestio* 64, Doctor Angélico maintains the need to preserve the common good when faced with dangerous individuals, who might corrupt society and whose elimination could be considered to be "laudable and salutary", in much the same way as the amputation of a putrid member which imperils the health of the human body. Norberto Bobbio, op. cit, cf. p. 17, ties it into Aristotle's and Seneca's organic concept of the State, based on Stageira; cf. *Sobre la ira*, Book I, chapters XV and XVI, in *Tratados filosóficos, tragedias, epístolas morales*. Prologue by José María Pemán and translated by J. Azagra. Edaf, Madrid, 1964, pp. 358-360. It should be said that the State is not an organism or ensemble in which individuals represent nothing more than constituent parts, a concept that almost overnight seeks to invert the relationship between person and state body, building it instead on a single set of goals which culminate in totalitarianism.

27 As Rivacoba highlights in *El espectro de la pena de muerte y la actualidad política argentina (1960)*, in *Revista de Ciencias Jurídicas y Sociales*, published by the Universidad Nacional del Litoral, Santa Fe, Year XXIII, 3rd Period, 1961, Numbers 107-108, pp. (257-290) 261.

28 In other words, political assassination, the simplicity of which makes it preferable to the death penalty strictly speaking in regimes based on terror. Zaffaroni, *Tratado de Derecho penal*. General Section. 5 vols. Ediar, Buenos Aires, 1987-1988, vol. V, cf. p. 99. The thousands of death penalties carried out during Nazi oppression, of an enormous figure, nonetheless pale into insignificance compared to the millions of individuals who were murdered in concentration camps, hospitals etc.

matter that "may not be independent of the solution that is given to the preliminary problem on the rational genesis of the right to punish"[29].

Observe, nonetheless, that a sector of the doctrine rejects this line of inquiry from the outset, in so much as it considers that determining whether the State has the right to apply the death penalty would be an irrational *quid*, a question of faith more than knowledge, to which an exact answer cannot be given in strictly judicial terms. The presence or absence of this penalty in positive law would be more or less dictated by the cultural setting, in the same way as this translates its demands at a specific moment in the history of the respective community. Merkel wrote that "The ethical justification of this penalty, as is the case with other penalties, depends on the moral concepts that have value to a people" and its use "as with the formation and determination of the whole criminal system, it is a problem of culture"[30]. In the same speculative line, Bettiol maintained that if today we consider it inhumane, it is because it contradicts the cultural demands of our age[31]. In summary: the survival of capital punishment would be an option entrusted to criminal policy.

Although it has to be acknowledged that affective considerations have an influence on this controversy that should not be underestimated, it would be going too far to reduce it to a confrontation of standpoints the ultimate sustenance of which is submerged in the fathomless depths of the irrational. Given that all penalties have to be grounded in the justification of the right to punish, and that in the justification of the Law as a whole, with regard to the judgment on the death penalty, the *raison d'être* of *ius puniendi* is decided at the

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29 Carrara, *Programma del corso di diritto penale*. Del delitto, della pena. Il Mulino, Bologna, 1993, p. 436.

30 *Derecho penal*. 2 vols. Translation by Pedro Dorado Montero. La España Moderna, Madrid, s/f, vol. I, pp. 303-304.

31 *Sulla pena di morte*, in *Scritti giuridici 1966-1980*. Cedam, Padova, 1980, pp. (16-27) 24. In a text written some years earlier, Bettiol was of the opinion that the death penalty would not contradict human dignity in absolute terms, provided that it is applied to serious crimes, established through objective jurisdictional guarantees, and carried out in such a way that avoids unnecessary suffering for the condemned prisoner. *Sulle massime pene: morte ed ergastolo*, cit, cf. p. 890.

same time as part of the powers of coercion of the organised community with respect to the accused parties. This is not an affective dispute, but an intellectual problem[32]. It may be summarised in the following terms: regarding the common predicament of safeguarding the fundamental conditions of subsistence and the most valuable interests of the organised community —which is the infeudation of the ultimate reason of punitive Law—, the positions diverge around the way in which to understand the community, as either a totality endowed with an independent existence and a superior value, or as a free association of individuals in which the immanent value of each gives meaning and boundaries to the group.

The first position corresponds to supra-individualistic conceptions and, in general, to those who construct from the State a type of hypostasis, a personification which might require the death penalty, were it necessary, as a means of salvation. Hegel, a good example of a similar temperament, denied that the essence of the state community was the unconditional defence and guarantee of life and the property of individuals as people, because the State is "the highest level to which that life and that property also aspire and it requires their sacrifice]"[33]. Whether the state identifies with a personification of morality (as in Hegel), an organisation (as in Aristotle) or the envoy of God on Earth, the result does not vary: the justification of criminal Law is obtained by moving from the top downwards and, by so doing, the legitimacy of capital punishment remains undeniable.

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32 In fact the cultural argument is yielded by reason, although the highly astute sentence that sums it up, that just and fair penalties are those and only those that are adjusted to the state of the national culture (Max Ernst Mayer, *Der allgemeine Teil des deutschen Strafrechts*. Lehrbuch. Keip Verlag, Goldbach, 1997 [facsimile reproduction of the Heidelberg edition, Carl Winters Universitätsbuchhandlung, 1923], cf. p. 435) leaves the question open as to whether, beyond the artificial datum of its concrete cultural existence it radically possesses the legal power to kill one of its members. Given this deficiency, this type of reasoning has been used both to oppose (Pellegrino Rossi, Mayer himself, Bettiol etc.) and to defend (Romagnosi and other writers from the past) such authority.

33 *Filosofía del Derecho*. Introduction by Karl Marx. Translation by Angélica Mendoza de Montero. Editorial Claridad, Buenos Aires, 1937, § 100, pp. 107-108.

In contrast, from its origins, the abolitionist movement raised its desires on the understanding that the right to punish comes by following the inverse trajectory; in other words, from the individual to the State. The prevailing doctrine of the social contract at that time fixed *ethos* and *pathos* in the discussion. Today it seems clear that the value of this doctrine is, above all, methodological - or, if one prefers, discursive. The State and criminal Law acquire justification when they can be considered a product, in each case, of an agreement that puts them at the service of the members of the community, according to their rational essence. But, from this, moreover, the political significance of the doctrine may be inferred, which situates the individual at the centre of social relations and protects the individual from the State that would otherwise be omnipotent. Were it possible to imagine the agreement "also at the very moment the murderer puts his head on the block", then one would have to repudiate the hypothesis that is basic in this theory, according to which it is not feasible to respect the personality without respecting the life of the person concerned; or as Radbruch explains, it may never be demonstrated that "the death penalty may be at the service of the criminal's own interests, for the simple reason that it destroys the object of that interest"[34].

The oft-repeated objection that the above might be valid under the normal or ordinary conditions of the community, but could undergo change in exceptional situations, such as wars, political revolutions and other serious subversion of social order, is less convincing than it might appear. Beccaria himself, in the well-known passage in which he accepts capital punishment "when a nation is on the verge of recovering or losing its liberty, or in times of absolute anarchy, when the disorders themselves hold the place of laws"[35], is not saying it would then be legitimised, but that "it could be believed to be fair and necessary", as neither did he allude to death as a form of punishment in the juridical sense, but rather to an act of necessity or defence which needs to be undertaken in the absence of

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34 *Filosofía del Derecho*. Translation by José Medina Echevarría. Editorial Revista de Derecho Privado, Madrid, 3ª ed, 1952, pp. 224 and 226.

35 *Deidelittiedellepene*,ed.cit,p.62.[Englishtranslationhttp://www.constitution.org/cb/crim_pun28.htm]

genuine legal safeguards. We may likewise understand the *Speeches* of the abolitionist Robespierre, in favour of the execution of Louis XVI, whom he accused of having breached the social contract and whose execution was necessary as an extreme case of public salvation, not as punishment[36].

By which, I do not mean, of course, that the first abolitionism may have been entirely coherent with its initial premises, but that it made manifest the pathology of the contractualist discourse depicted in these corollaries. The legal inclusion of the State's means of defence which *apertis verbis* implies the destruction of an individual is something that exceeds and denaturalises the original rights of necessity. The counter argument is provided by Filangieri and Romagnosi, who if they pronounced themselves in favour of capital punishment, did so precisely because they confused in this the right to individual defence with the social right to punish[37]. Furthermore, these "exceptional" legal measures are highly dangerous. Even a fully committed abolitionist such as Radbruch, the same man that refuted the parallelism of deriving the death penalty from situations of necessity through the convincing argument that actions undertaken either in legitimate defence or in a state of necessity are directed at warding off an attack or annihilation of an aggressive nature, but not the inexorable destruction of a life, succumbed to the temptation of "reasons of State". In 1922, when acting as Minister of Justice (and with the furore over the assassination of ministers Matthias Erzberger and Walther Rathenau by right-wing fanatics still in the air), he backed a Protection of the Weimar Republic Act which

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36 Cattaneo, op. cit, cf. p. 130, and Rivacoba, in his *Estudio preliminar* in *Discurso sobre las penas*, by Lardizábal, ed. cit, cf. p. C.

37 "By the same principle and right as that of defensive war, the right to punish by death can be rigorously demonstrated". Romagnosi, *Memoria Sobre las penas capitales*, in their *Génesis del Derecho penal*. Translation by Carmelo González Cortina and Jorge Guerrero. Temis, Bogotá, 1956, pp. (589-601) 594. For Filangieri, *Ciencia de la legislación*. Translation by Juan Ribera. 2nd ed, revised and corrected, Bordeaux, vol. III, 1823, p. 337, "the right of the Sovereign, whether to impose the death penalty or any other punishment, is not dependent on the cession of rights that each person has over himself [in the natural state that Filangieri and Romagnosi reject], but on the cession of rights that each individual has regarding others".

contemplated the death penalty in cases of serious involvement in the crime of high treason[38]. By making a virtue out of necessity, the criteria of exceptions inverts the individualist premises from which it once began, gives way to the fraud of etiquette and opens the door to all manner of abuse, starting with the worst: the State abandoning its role of protector of the individual in order solely to defend itself. No social upheaval, no unaccustomed escalation of serious crimes warrants death as a penalty, because such a faculty would imply undue change to the Constitution in the community, in ostensible abuse of its personalistic foundation. Nor do international and civil wars serve as sufficient justification. War cannot hold the privilege of a legally empty space; quite the contrary, it is subject to judicial limits and to that end too, the ruling principle is that safeguarding rather than manipulating the individual is fundamental under the pretext of conserving the whole. Note that the status of the soldier resides in the notion that the State that he defends will not send him to a certain death on the battle front, as "the exposure and risking of life itself is requested in the interest of the same people who risk it and perhaps survive all danger"[39]. For all these reasons, Pietro Ellero was right to state that "under no social circumstances can the death penalty be necessary [...] Even in the case that the legislator were to believe the death of a man to be necessary, it may not be applied, as nobody has the right to make use a free being, even if guilty, as the expiatory victim for the sake of the social good"[40]. To summarise: the death penalty once again reveals itself as an extreme situation, an unconditional or "either/or" argued over with generalities. One is either absolutely against it, or one approves of it in equal terms. This is also valid when assessing the position adopted

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38 Schaffstein, op. cit, cf. p. 218. This was not the only time that politics had disaffirmed science: after the fall of the Nazi regime, Radbruch supported capital punishment for the most prominent war criminals. Lange, *Die Todesstrafe im deutschen Strafrecht*, in *Pena de morte*, cit, vol. I, pp. 161-171, cf. p. 164.

39 Radbruch, *Filosofía del Derecho*, ed. cit, p. 226.

40 *Sobre la pena de muerte*. Prologue by José Canalejas and translated by Antonio Gómez Tortosa. Madrid, 1907, pp. 143 y 144.

under positive Law. It is enough to accept it in one case to call it mortiferous[41].

5. Finally there is the question of how the death penalty responds to the question on the final purpose of punishment in general. This will allow us to consider the problem of its use in military and international criminal law.

The harmonisation of capital punishment with absolutist or relative ist theories depends on the image of the man in which these are sustained. Whilst the former, and mainly retributive as it is understood today, take man to be a conscious being with free will, capable of proposing objectives and making these a specific motive for his conduct, the doctrine of prevention considers the individual to be an entity that may be led or decided by forces that are extrinsic to the same entity[42]. The function of the death penalty does not escape these coordinates. What is a problem of moral legitimacy for retributive theory is only a problem of political opportunity, for theories of prevention. In fact, the abolitionist movement, which began its journey by employing preventative considerations, had to accept that in exceptional situations the death penalty might be considered necessary. Via that route it is impossible to give a definitive answer to the matter and, on the contrary, it is left to the changing demands of time and power. This takes us into the terrain of utility, which can demand that the individual be sacrificed in favour of the well-being of the majority. The only thing here is that the death penalty

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41 "Once the death penalty has been accepted for a single crime, let us say treason in times of war or genocide, it has to be understood, in our judgment, that it [the country] is part of the tendency that accepts capital punishment". This observation by Novoa Monreal, *Curso de Derecho penal chileno*. General Section. 2 vols. Ediar-ConoSur, Santiago de Chile, 1985, Vol. II, p. 535, is echoed by Radbruch: "The death penalty cannot be approved for certain crimes and, at the same time, effectively defend, for the immense majority of punishable acts, the great ideas of re-socialisation, correction, education through the sentence". *Das Ende der Todesstrafe*, in *Gesamtausgabe*, Complete works edited by Arthur Kaufmann. 20 vols, C.F. Müller, Heidelberg, vol. IX (*Strafrechtsreform*), 1992, pp. (339-341) 340.

42 Rivacoba, *Función y aplicación de la pena*. Depalma, Buenos Aires, 1993, cf. pp. 44-45.

becomes a hygienic act, a social prophylaxis - the elimination of the delinquent as if a malignant creature, or else an element of mere instruction. "How is it" —inquired Nietzsche— "that every execution offends us more than a murder? It is the coldness of the judges, the scrupulous preparation, the idea that in such circumstances a human being is used as a means of frightening others"[43]. Adhesion to concepts of social defence, either for general or special prevention, inevitably leads to the justification of the destruction of subjects labelled as dangerous and unreformable and, in any case with increasing exactness, punitive terrorism. When put in those terms, it is patent that the culpability of the harmful being lacks importance —except as a pretext to conclude the matter— and no more so his ethical individuality. The death penalty, in so far as it is a "penalty", is not there to be discussed in terms of criteria of defence or utility, resistant as they are to moral and humanitarian demands. "He who denies the idea of culpability as an essential foundation of state punishment, would not be able to find an ethical justification for the death penalty or for the punishment as such"[44].

In contrast, the problem of guilt assumes crucial transcendence within the framework of retributive thought, which Bettiol described as the only one able to offer a rational and ethical justification of that penalty which consists in killing[45]. It certainly did so in the past. Up until and even later than the eighteenth century, voices emerged from among the large chorus of defenders of retribution speaking out in favour of the gallows, due to their having confused retribution with revenge, retaliation or expiation, which are all quite different[46]. Graduated public disapproval of the crimes, expressed

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43 *Humano demasiado humano (Human All Too Human)*, in Nietzsche's *Obras inmortales*. 4 Vols. Translated by Enrique Eidesltein, Miguel Ángel Garrido and Carlos Palazón. Edicomunicación, Barcelona, 2003, vol. IV, p. 1,543.

44 Würtemberger, op. cit, p. 1.101.

45 *Sulla pena di morte*, cit, cf. p. 24.

46 In his *Metafísica de las costumbres*. Preliminary study by Adela Cortina Orts. Translation and Notes by Adela Cortina Orts and Jesús Cornil Sancho. Tecnos, Madrid, 1989, cf. pp. 167-169, Kant developed a theory of moral retribution, which he then set out in specific declarations through the medium of punishment, which he considered to be the only equivalent capable of satisfying justice. Through this he justifies the death penalty for crimes of murder. However,

through retributive punishment, has nothing to with irrational impulses, mathematical efforts for equalisation or desire for catharsis or religious pleas. Purged of such excrescence and firmly anchored in values that inspire a positive legal order, judicial retribution of offences is founded on two fundamental premises. Firstly, the individual is the only reason of State, the grounding as well as the pinnacle of Law. Repulsion at using the condemned man as the instrument to bear witness to intimidation, social cohesion or the majestic triumph of the Law that is imposed, complies with the end-purpose of the Law for the retributive idea; this exists for man, and not the reverse. For this reason now, the death penalty should be considered alien to retributive theory, conceptually speaking, the effects of which only apply to living subjects; killing the person destined to receive the punishment equates to leaving the devaluation that his act deserves suspended in a vacuum.

Furthermore, punishment also demands culpability, a precipitated judicial element denoting man's rational nature. Nevertheless, the process of perfecting our understanding of human nature proves that responsibility for our actions is never absolute. Man is not a timeless being, nor is the community a set of translucent beings. Man is only such because he lives in society, which with its accidents, friction, grandeur and misery models everybody's personality. The priority fell to Moritz Liepmann to point out that, in the same way as numerous individual and social sources of production each crime acknowledges, so too in the most serious is there coculpability of society; "shared guilt requires a divisible penalty"[47]. The death penalty does not meet this requirement, and may only

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Cattaneo, op. cit, cf. p. 132, has shown the contradiction inherent in Kant's position in his formulation of the categorical imperative (the principal of the dignity of man), claiming that the battle against the death penalty should be fought with Kantian weapons. "*La lucha contra aquella doctrina de Kant es, en realidad, una lucha por Kant, en conformidad con los mejores principios de su filosofía*" - "The fight against that doctrine set forth by Kant is, in reality, a fight for Kant, in line with the finest principles of his philosophy".

47 *Die Todesstrafe*. Ein Gutachten. Guttentag, Berlin, 1912, page 24 is most interesting and instructive, combining talent with juridico-philosophical and criminological aspects. The above phrase is also quoted by Liepmann in *Moralstatistik und Todesstrafe*, by Georg Jellinek, who, we might mention in passing, first took

be justified by the presence of an absolute guilt by the author of the evil deed, established within a trial against his entire personality[48]. Humanity, however, abandoned the illusion of total indeterminism long ago, and the rough means of the penal process do not allow evidence to be obtained of unconditional culpability, assuming that it exists as such[49]. If the dilemma between the freedom to want and determination is, as Arthur Koestler thought, the essence of the human condition, then the law should consider the infinite nuances that mediate between the horns of the dilemma. "The only exception, excluding all possibility of reasonable compromise, is precisely the case in which the question of the death penalty is in play. This is unsustainable on a logical plane, and censurable on a moral plane"[50].

6. In the case of military criminal law, however, it is not exactly retributive arguments that are wielded to defend the substance of capital punishment.

Martial law, along with other forms of punitive Law that govern the armed forces, is determined by the severity that prevails within them; greater than common Law and characterised by the special requirements of military obedience and barrack discipline[51]. Thus, the death penalty abolition process encounters considerable resistance and has moved more slowly in this field. Hence, convinced

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up the fight as a publicist in the field of the Philosophy of Law and Criminal Law.

48 Or rather, against an *a priori* subject, free of all empirical hindrance. Torío López, *La conception kantienne de la peine capitale. Un problème d'interpretation*, in *Revue Internationale de Droit pénal*, 58e Année-Nouvelle Série, 3e et 4e trimestres 1987 (*La peine de mort*), pp. 609-612, cf. pp. 611-612, ventures that here lies the foundation to Kant's approval of capital punishment. Given that he saw man in metaphysical terms, and society as a pure kingdom of ends, he was also able to speak of absolute guilt as well as absolute punishment.

49 Cf. Stratenwerth, *Juristische Erwägungen zur Todesstrafe*, in the collective volume *Nein zur Todesstrafe*. Ein Podium von Amnesty International. Friedrich Reinhardt Verlag, Basel, 1978, page (37-53) 47.

50 *Reflexiones sobre la horca*, in Camus and Koestler, *La pena de muerte*, cit, page 98.

51 Jiménez de Asúa, *Tratado de Derecho penal*. 7 vols published. Losada, Buenos Aires, 5ª ed, updated 1992, vol. II (*Filosofía y ley penal*), cf. pp. 1,361-1,362.

abolitionists as well as others accept capital punishment as justifiable in cases of military crimes committed in war time, above all, desertion. The threat of the firing squad is —it is argued— the only way to prevent a soldier from abandoning his post.

In 1931, when the draft law on the Constitution of the Spanish Republic was debated, article 27 of which repealed the death penalty, except for the possibility of it being used in war time under military jurisdiction, Jiménez de Asúa, the president of the Parliamentary Committee responsible for drafting it, opposed the motion on its total abolition. His arguments summarise tradition over the particular; namely: the purpose of military punishment is intimidation, and not correction as pursued under common law; the unbending discipline demanded by the military command, which is slackened in an army at war, the reestablishment of which may only be achieved through a more certain threat of a death than that of the trenches, and because its abolishment would clearly imply its illicit application. The officers, in order to reduce the mortal fear of the troops in the face of the enemy, would impose it arbitrarily and with greater frequency if they had to subject their decisions to court martial[52]. It is therefore a question of need, on the one hand, and intimidation, on the other. In the words, this time, of Eduard Dreher, the problem of the death penalty would undergo a transformation in times of war. The argument of legitimate self defence, which in normal times is not accepted as sufficient grounds, acquires relevance when it is felt that the security of the State is under threat. To deprive deserters and traitors of their freedom of movement, even permanently, would be a weak and unworkable measure to safeguard the people in danger[53].

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52 Cf. *La Constitución política de la democracia española*. Ediciones Ercilla, Santiago de Chile, 1942, pp. 38-39; also, Ruiz Funes, *Progresión histórica de la pena de muerte en España*. Editorial Revista de Derecho Privado, Madrid, 1934, pp. 88-100, and Barbero Santos, *La pena de muerte en los penalistas españoles de la generación intermedia*, in *Francesco Carrara nel primo centenario della morte*. Presentazione degli Atti del Convegno internazionale Francesco Carrara nel primo centenario della morte. Maria Pacini Fazzi Editore, Lucca, 1994, pp. (90-104) 92-93.

53 Op. cit, cf. pp. 564-565.

It should be acknowledged that the theoretical objections to this point of view, except for a few exceptions —such as Uruguay, which abolished the death penalty in its military legislation in 1907—, were not exploited until the end of the Second World War. Until that time, it was of little use to argue that war is neither a situation beyond the Law, nor subrogated to the specific rights of necessity; if the troops lack the fighting spirit, the threat of the executioner will not give it to them; were an army's morale to depend on the threat of capital punishment, it would be defeated even before it set foot on the battlefield; the military itself knows that they cannot lead companies and divisions solely on the basis of the fear of court martials; it is not possible to apply the death penalty to certain offences and, at the same time, defend sentences which rest on the idea of safeguarding the human figure of the convicted person for the vast majority of punishable offences[54]. It was the events, the stark facts of European totalitarianism, which led to a new approach to military statutes and gave way to the possibility of abolishing capital punishment. Its inclusion in the Soviet criminal code did not prevent special units in the Red Army from machine gunning their own comrades if they fled in the face of the invader during the sieges of Moscow and Stalingrad. During the oppression of national socialism, 16,000 death sentences were issued, many by military courts, with the acquiescence of Freisler, the president of the *Volksgerichtshof* —the People's Court— for whom the essence of the death penalty, of which he was the fiercest defender, resided in the prisoner being truly executed[55]. Such brutality left its mark on Germany, whose fundamental law prohibited the death penalty in absolute terms in 1949. *De iure* abolition, without exceptions, has increased since that time: Austria (1968), Denmark (1978), Finland (1972), Norway (1979), Portugal (1976), Sweden (1973) etc. Even in the case of Italy and Spain, whose Constitutions made an exception for the interdiction of the death penalty under military law in wartime, total abolition of capital punishment finally came thanks to legal reforms in 1994 and 1995, respectively.

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54 Cf. Barbero Santos, *Pena de muerte*, cit, pp. 202-203.

55 Cf. Düsing, op. cit, pp. 188 and 208.

In the Latin American context, Brazil's military code continues to include the death penalty for a large number of military crimes perpetrated in times of war. It is therefore categorised along conservative lines in these disputes. Fortunately, the Federal Constitution, in Articles 5 and 84, only permits it in the case of war with a foreign power, for aggression by another country and always on the condition that there has been a formal declaration of hostilities. This wise limitation takes into account that war is not a factual, but a judicial concept, but also that the wars between States authorise military jurisdiction over the death penalty. In Chile, a country that was far from belonging to the abolitionist tendency, it was foreseeable that another one would not occur. Act Nº 19.734, of June 5, 2001, repealed the death penalty in common law, leaving it in place only for crimes committed in times of war, yet without formulating a proviso of armed conflict of a non-international nature, the inappropriately named "civil war" in other words[56]. The Chilean Military Criminal Code includes an authentic contextual interpretation of what, for its purposes, may be considered as a state of war or war time. The clause indicates that it is understood that these circumstances arise, not only when war has been officially declared, in compliance with the respective laws, but also where mobilization for war exists or has been decreed, even in the absence of a formal declaration (Article 418)[57]. The slow progress of Chilean military criminal law, and, by extension, the country's political institutions is evident. So much so, it appears that death sentences applied by court martial during the weeks that followed the *coup d'état* in September 1973, when civil war had been "declared" *ex post facto* (fitting a glove of iron, clenching its thin veneer of apparent legality, to the military judicature, as its contribution to the annihilation of the adversaries of the

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56 Cf. Politoff Lifschitz y Matus Acuña, "De las penas", in *Texto y comentario del Código penal chileno*, a piece of work directed by Sergio Politoff Lifschitz and Luis Ortiz Quiroga, and coordinated by Jean Pierre Matus Acuña. Published in 1 vol. Editorial Jurídica de Chile, Santiago de Chile, 2002, p. 275.

57 For further information on this matter see our contribution *Persecución penal nacional de crímenes internacionales en Chile*, in *Persecución penal nacional de crímenes internacionales en América latina y España*. Prologue by Albin Eser and Helmut Kreicker. Edition Kai Ambos and Ezequiel Malarino, Konrad-Adenauer-Stiftung, Montevideo, 2003, pp. (163-200) 173.

power that had been won thanks to sedition), did not provide sufficient teaching to the legislator of the re-conquered democracy[58]. Besides this, there is a further demonstration that the death penalty ends up by poisoning all democratic practice.

7. As it is, the panorama is more promising in the field of International Law, and very especially so in criminal law.

Although the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms does not reject the death penalty *expressis verbis*, the subsequent normative activities and output of the United Nations, the Council of Europe and the Organisation of American States points decidedly towards its abolition from national statutes. The United Nations has concerned itself with the problem at least since 1959, the year in which both the Council and the General Assembly declared that "the abolition of the death penalty is desirable". The International Covenant on Civil and Political Rights (1966) states that none of its provisions may be invoked by countries in order to delay or suppress the abolition of capital punishment. The United Nations General Assembly Resolution number 2857, of 1971, declares itself once again in favour of repealing the death penalty in all countries, through the progressive reduction of the crimes to which it might be applied. In 1983, an Additional Protocol to the European Convention prohibited the death penalty in times of peace from establishing the right of the individual not to be subjected to capital punishment in the countries that signed it, which limited the scope of the corresponding clause of the 1950 text[59]. The 1969 American Convention on Human Rights adopted the formula of progressive derogation, with the aim of making it impossible to apply capital punishment to offences for which it was not applicable

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58 For more on these death "penalties" and the circumstances surrounding their application, cf. Matus Acuña, *La pena de muerte en el ordenamiento jurídico chileno*, in the collective work *Homenaje al Dr. Marino Barbero Santos. «In Memoriam»*. 2 vols. Ediciones de las Universidades de Castilla-La Mancha y de Salamanca, Cuenca, 2001, vol. I, pp. (353-366) 354-357.

59 Cf. Barbero Santos, *Pena de muerte*, cit, pp. 249 ff, especially pp. 253-254.

at the time of ratification, or to reintroduce it for offences for which it had been abolished. The Protocol relating to the Pact of San José, Costa Rica, stated that the tendency in American countries is favourable with regard to the abolition of the death penalty, thus establishing the obligation not to apply that penalty within their borders. It does, however, admit the exception that it may be invoked *"in war time in accordance with international law, for extremely serious crimes of a military nature"*[60].

The most significant rejection, though, has been brought about in international criminal law. Conventions relating to genocide, war crimes and crimes against humanity were more concerned with outlining the corresponding infractions and declaring their imprescribable nature rather than setting out penalties. The memory of Article 27 of the Statute of the court responsible for passing death sentences on the most prominent criminals of the Nazi regime at the Nuremberg trials was still a recent memory. The efforts of the community of nations in order finally to establish a genuine international criminal court, culminating in the Statute signed in Rome on the night of the 17th of July, 1998, ensured the exclusion of the death penalty as a sanction for the most serious crimes from the competency of the new International Criminal Court. Genocide, war crimes, crimes against humanity and crimes of aggression are mentioned as punishable in the Rome Statute (Article 77) with the punishment established as life imprisonment or for a period of up to thirty years.

Some of the delegations that negotiated the treaty (such as the representatives of Trinidad and Tobago and many Arab countries) sought harsher punishment, and were not satisfied with the renouncement of the death penalty due to the fear of the repercussions it would have in their internal order[61]. One of the Statute's provi-

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60 Art. 2°. The text of the Protocol is included in the volume *Prevención del delito, justicia penal y derechos humanos: instrumentos internacionales*, prepared by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. San José de Costa Rica, 2003, page 263.

61 Cf. Ambos, *Sobre el fundamento jurídico de la Corte penal internacional*, in *Revista de Derecho penal y Criminología*, Madrid, 2ª Period, Number 5, 2000, pp. (127-169) 166-167.

sions resolved this situation. It is possible that the renouncement might also merit objections with regard to the rest of International Law, which is yet to arrive at a complete and radical condemnation of the death penalty. Nevertheless, it should be remembered that the cases entrusted to the jurisdiction of the International Criminal Court cover the most heinous crimes against humanity. A profound sentence by Kelsen, in his famous book dealing with the problem of justice, expresses the idea that democracy should not be defended by renouncing it[62]. We should therefore ask ourselves if indeed humanity can be defended through measures which imply the negation of humanity[63].

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62 *¿Qué es la justicia?* Translation by Leonor Calvera. Editorial Leviatán, Buenos Aires, 1981, cf. page 116.

63 The question should indeed be extended to cover life imprisonment as outlined by the Statute of Rome, and even to the 30-year duration of the penalty. In truth, in relation to the traditional alternatives to the death penalty, its pernicious spectre and its corruptive power over legal institutions is highlighted once again, as it is not a question of replacing an inhumane form of punishment with others of a similar sort. For more on life imprisonment as a dubious substitute to capital punishment, see Barbero Santos, *La Pena de Muerte Problema Actual*, in her book entitled *Estudios de Criminología y Derecho Penal*. Secretariado de Publicaciones de la Universidad de Valladolid, Valladolid, 1972, pp. (141-174) 167-169.

EPILOGUE

TOWARDS GLOBAL ABOLITION OF THE DEATH PENALTY: PROGRESS AND PROSPECTS[1]

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I. INTRODUCTION

In this lecture I shall try to provide an up-to-date survey and analysis of the extent to which and reasons why more and more countries have in recent years embraced the goal laid down by a resolution of the United Nations General Assembly in 1971, which stated: "in order to fully guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries". It will also speculate on the possibility that world wide abolition will be achieved within the foreseeable future[2].

This survey will reveal that over the last 20 years or so a "new dynamic' has been at work: one which has sought to move the de-

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1 A Lecture delivered at the invitation of The Death Penalty Project in the Hall of The Inner Temple, London, on January 21, 2010

2 Acknowledgement: This lecture draws in part on and updates work previously published jointly with my colleague Dr Carolyn Hoyle. See Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-wide Perspective,* 4th ed., 2008, Oxford University Press and "Abolishing the Death Penalty Worldwide; the Impact of a "New Dynamic"', in M. Tonry (ed.), *Crime and Justice: A Review of Research,* vol. 38, 2009, Chicago University Press, 1-63.

bate about capital punishment beyond the view that each nation has the sovereign right to retain the death penalty as a repressive tool of its criminal justice system on the grounds of its purported utility or cultural expectations of its citizens, and instead to ban its use on the grounds that the punishment of death inevitably, and however administered, violates universally accepted human rights: namely, the right to life and the right not to be subjected to a cruel, inhuman or degrading treatment or punishment. There remain challenges ahead to get this view accepted by all countries, but I believe that the movement to abolish the death penalty worldwide now looks irresistible. I shall conclude with the optimistic assessment that those states that still retain it in law and use it in practice will become more and more isolated. They will come under increasing pressure to protect the human rights of all their citizens, even the worst behaved among them, and to accept an international human rights norm that rejects completely an outmoded, cruel and dehumanising punishment.

II. THE MOVEMENT FOR REFORM: HOW FAR AND HOW FAST HAD IT PROGRESSED?

If one takes the beginning of the movement to abolish the death penalty to be the publication in 1764 of Cesare Beccaria's famous book *On Crimes and Punishments,* one can certainly say that over the next 200 years progress towards that objective was gradual, indeed slow and uncertain. By the time that the Universal Declaration of Human Rights was promulgated in 1948, there were still only eight independent states that had abolished the death penalty for all crimes in all circumstances, the majority in South America, the only one in continental Europe being the tiny Italian city state of San Marino. Six other European countries had abolished it for murder and other crimes, but retained it for treason and certain crimes committed in time of war. Three of these (Denmark, Netherlands and Norway) executed collaborators and others guilty of war crimes after the Second World War. Fourteen countries hardly constituted a pressure group. So no wonder that there was no mention at that time of the death penalty in relation to article 3 of the Universal Dec-

laration of Human Rights (that "every human being has an inherent right to life") and that it was explicitly made an exception to the right to life when the European Convention on Human Rights was established in 1950. By 1966, the year that the International Covenant on Civil and Political Rights (ICCPR) was approved by the United Nations General Assembly (it came into effect 10 years later), there were still only 26 abolitionist countries, several of them very small states[3], and only 12 had abolished it for all crimes, in peacetime and wartime, in civil and military law – West Germany being the only large European country among them. Again, especially when it is noted that the text of Article 6 of the ICCPR, which guarantees an inherent right to life had been drafted in 1957, it is not surprising that it did not ban the death penalty. All that could be achieved (in Article 6(2)) was to attempt to restrict the scope of the death penalty in countries that retained it, to "the most serious crimes", an exceptionally vague and potentially elastic concept. Nevertheless, the direction that policy ought to take was indicated by Article 6(6)) which stated that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the …Covenant". And this was emphatically endorsed, as I mentioned earlier, by the UN Resolution of 1971. There was, however, not much optimism about whether and when total abolition could be achieved.

Firstly, as the renowned French jurist Professor Marc Ancel had spelled out in 1962 in a report on the death penalty in European countries, the typical sequence of events leading to abolition had until then:

> "*usually taken a long time* (my emphasis) and followed a distinctive pattern; first the reduction of the number of crimes legally punishable by death until only murder (and sometimes) treason are left, then systematic use of commutation, leading to *de facto* abolition, and *eventual* abolition *de jure*".

Secondly, it was a sequence which, Ancel believed, did not necessarily envisage the complete and final abolition of capital punish-

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3 Plus nine states in the USA, two in Australia and 24 of the Mexican states.

ment whatever the circumstances might be in the future. He put it thus:

> "Even the most convinced abolitionists realise that there may be special circumstances, or particularly troublous times, which justify the introduction of the death penalty for a limited period"[4].

So while countries might abolish it for ordinary crimes, including murder, they typically wanted to hang on to it for possible use for crimes that threatened the state and in the circumstances of war, especially for offences against military discipline.

Pessimism was evident as recently as 1986, when the distinguished German criminologist, Professor Günther Kaiser, writing in the United Nations *Crime Prevention and Criminal Justice Newsletter*, at a time when some 130 countries still retained the death penalty in law, concluded:

> "Today there appears to be little hope that international bodies, whether private or official, will be able to achieve unanimity [among] the majority of countries concerning the restriction or abolition of capital punishment. Efforts aiming at world-wide abolition therefore have to be regarded as a means of keeping the international discussion going".

His pessimism was shared within the United Nations: for the Introduction to the *Newsletter*, written by UN staff, had concluded with the words "it would appear that the goal of the abolition of capital punishment throughout the world remains remote"[5].

We should recall that although it is 40 years ago, in December 1969, that Parliament voted to confirm the Murder (Abolition of Death Penalty) Act of 1965, it is only 15 years since the last Parliamentary debate took place in 1994, after 13 previous occasions, on whether the death penalty for some types of murder should be re-instated. And it has only been just over 11 years, in 1998, since the death penalty was finally expunged altogether from the civil criminal law when it was abolished for piracy and treason and sub-

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4 Cited in Hood and Hoyle, 4th ed. 2008, at 12.

5 G. Kaiser, "Capital Punishment in a Criminological Perspective' *United Nations Crime Prevention and Criminal Justice Newsletter,* 12 and 13 (1986),10-18 at 16 and Introduction, at 4.

sequently in the same year from military law. This country finally ratified in 1999 Protocol No 6 to the European Convention on Human Rights (which had come into effect 13 years earlier in 1983), and Protocol No 2 to the International Covenant on Civil and Political Rights, adopted 10 years earlier in 1989, both banning the use of the death penalty in peacetime.

I have begun with these remarks because they illustrate how very different the situation and the prognosis were with regard to the abolition of the death penalty less than a quarter of a century ago than they are today.

III. THE MOVEMENT FOR REFORM: HOW FAR AND HOW FAST HAS IT PROGRESSED IN THE LAST QUARTER OF A CENTURY?

At the end of 1988, the abolitionist movement, still encompassed only 52 (29%) of the then 180 member states of the United Nations, only 35 of whom —less than one fifth of all nations— had eliminated it altogether from their penal and military codes —the remaining 17 reserving it for crimes against the state and under military law in time of war. Since then the number of abolitionist nations has doubled to 103 of the 196 member states. But now the vast majority, 95 of them, has abolished it for all crimes in all circumstances. In the USA, the states of New Jersey and New Mexico recently abolished capital punishment and the death penalty has not been reinstated in New York State after the state Supreme Court had found it to be unconstitutional; bringing the number of abolitionist states to 15, plus the District of Columbia. Among the 93 countries that retain the death penalty in law only 45[6] have executed anyone within the past 10 years— less than a quarter of all nations. Of the remaining 48, Amnesty International regards 36 of them as truly "abolitionist in practice", because they have announced or implied that they have a settled policy not to carry out executions. Thus, when these

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6 In 2010 it will be 10 years since executions were carried out in Trinidad and Tobago, Sierra Leone and the Bahamas.

36 are added to the countries that are abolitionist in law, 71 per cent (139/196) of states no longer inflict or intend to inflict the ultimate penalty. And at the United Nations in December 2008, 106 countries voted in favour of a resolution calling for a world-wide moratorium on death sentences and executions, 34 abstained and only 46 countries voted against. A new dynamic, producing a new pattern of abolition, has been responsible for this extraordinary change.

IV. EVIDENCE OF A "NEW DYNAMIC"

What new characteristics have been observed over the past two decades?

First: The abolitionist movement has been embraced across the globe by many different political systems, peoples and cultures.

- It has now spread far beyond its cradle in Europe and South America. It has been embraced almost entirely in the former Soviet Empire, where only Belarus now retains and uses capital punishment. Russia, pending abolition remains staunchly abolitionist in practice. The fact that Belarus abstained on the moratorium resolution at the UN in 2008, that it has aspirations to join the Council of Europe, and that plans are afoot to introduce its own moratorium on executions, indicate that it will probably not be long before capital punishment, already much restricted, is abandoned altogether. In South and Central America only three small countries (Belize, Guyana and Suriname) hang on to it, although none have carried out an execution for at least 10 years. There have been no executions in Cuba since 2003 and Cuba abstained on the recent moratorium resolution at the UN.
- At the end of 1988 in the African region only Seychelles (1979) and Cape Verde (1981) had abolished capital punishment[7], whereas 15 countries are now completely abolitionist (the

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[7] The African Union member states that still retain the death penalty and have carried out executions within the past 10 years are: Botswana; Chad; Congo

most recent being Burundi and Togo)[8] and another 22 have not carried out an execution for at least 10 years (all but four being truly "abolitionist in practice", according to Amnesty International)[9], Amnesty International reported judicial executions in only two countries in Africa South of the Sahara in 2008 (Botswana and Sudan) and in November 2008 a resolution calling for a moratorium on all executions in African countries was adopted by the African Commission on Human and People's Rights.

- Although countries in the Middle East and North Africa where Islam is the dominant religion retain the death penalty, several of them —Tunisia, Algeria and Morocco— have not carried out any judicial executions for over 10 years, nor have executions occurred frequently in most of the Gulf States. Abolition is being considered in Jordan, Morocco and Lebanon (all of which abstained in the moratorium vote at the United Nations in December 2008 along with five other Muslim countries, while Algeria and Somalia voted in favour). It is notable that several secular states with large Muslim majorities have already joined the abolitionist movement: such as Albania, Azerbaijan, Bosnia-Herzegovina, Kyrgystan, Turkey, Turkmenistan and Senegal. They may soon be joined by the Maldives. In fact, only five —a handful— of retentionist Muslim countries make regular and large scale use of capital punishment as a crime control measure: Iran, Saudi Arabia, Pakistan, Iraq and Yemen. According to Arab human rights scholars, whether and at what speed retentionist Islamic states will move towards abolition will depend on whether their legal

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(Democratic Republic); Egypt; Equatorial Guinea; Ethiopia; Guinea; Libya; Nigeria; Somalia; Sudan; Uganda and Zimbabwe.

8 Angola, Burundi, Cape Verde, Côte d'Ivoire, Djibouti, Guinea Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa and Togo.

9 Benin, Burkina Faso, *Cameroon*, Central African Republic, *Comoros*, Congo (Brazzaville), Eritrea, Gabon, Gambia, Ghana, Kenya, Liberia, *Lesotho*, Madagascar, Malawi, Mali, Mauritania, Niger, *Sierra Leone,* Swaziland, Tanzania, Zambia. Those not regarded by Amnesty International as truly abolitionist in practice are in italics.

systems remain dominated by fundamentalist interpretations of Islam, or whether these states move towards secular democratic government, which will allow for a more modern, "scientific", less authoritarian and more merciful interpretation of the Sharia[10]. Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may imagine.

- While only four Asian states (Nepal, Bhutan, Cambodia and Philippines) have so far completely abolished the death penalty, six others are now abolitionist *de facto,* including most recently South Korea[11]. In Taiwan where there have been no executions since the end of 2005, the Ministry of Justice has issued a policy statement favouring abolition in the future, and following the recent embodiment of the ICCPR into national legislation it looks likely that abolition will be achieved within two or three years. Just one week ago (January 14, 2010), it was reported that President Elbegdorj of Mongolia had called on the Mongolian Parliament to follow the path of the majority of the world's countries and abolish the death penalty. In announcing that he would commute the death sentences for all those on death row, he declared: "The road a democratic Mongolia has to take ought to be clean and bloodless". In India —with the second largest population in the world— the death penalty is in principle to be imposed in only the "rarest of rare" cases. Death sentences are imposed but the last execution took place in 2004, the first since 1997.Executions are purely symbolic: a few carried out now and then cannot be regarded as a tool of criminal justice in such a populous country. In Japan, a recent surge in the annual number of execution —15 in 2008— looks like coming to an end with the appointment by the newly elected Democratic Party last autumn of a Minister of Justice, Keiko Chiba, who has been a vigorous

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10 See, for example, M. Cherif Bassiouni "'Death as a penalty in the *Shari'ā'* in Peter Hodgkinson (also reprinted in this volume) and William A. Schabas (Eds.), *Capital Punishment, Strategies for Abolition,* Cambridge University Press, 2004, 169-185.

11 Brunei Darussalam, Laos, Maldives, Myanmar, South Korea and Sri Lanka..

opponent of capital punishment and so unlikely to sanction executions. Vietnam, like China, has entered into dialogues with the European Union, on the scope of capital punishment. Furthermore, Vietnam chose to abstain at the United Nations on the moratorium resolution in December 2008. It is indicative of a more open mind on the issue in China, that despite the secrecy which surrounds data on executions, and the recent execution of a British citizen, Mr Akmal Shaikh, for the importation of heroin, that nearly three years ago the representative of the PRC at the UN Human Rights Council, Mr La Yifan, stated that "The death penalty"s scope of application was to be reviewed shortly, and it was expected that this scope would be reduced, with the final aim of abolishment". I shall have more to say about China later.

- Only five nations which abolished capital punishment since 1961, reintroduced it[12], but only one of them —the Philippines— resumed executions (7 in 1999 and 2000). Then, after a moratorium, the death penalty was abolished again in June 2006 by overwhelming majorities of both the Senate and Congress with the full support of the President.

Second: The steps to abolition have changed.

- Fifty-one (94%) of the 54 nations that abolished the death penalty for the first time since the end of 1988 had, by the end of 2009, abolished it for all crimes completely. Only three countries had abolished it solely for murder and other ordinary crimes (Chile, Kazakhstan, and Latvia). Forty-three of the 51 had gone straight from being retentionist to complete abolition, without first abolishing it for "ordinary" crimes only. In other words 84 per cent moved straight from retention of the death penalty for murder and sometimes other "ordinary" and military crimes to complete abolition. A quite different pattern from that observed in the past.

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12 Nepal (1985), the Philippines (1987), Gambia (1991), Papua New Guinea (1995), and Liberia (for kidnapping and murder in 2008, despite having ratified Protocol No 2 to the ICCPR abolishing the death penalty). It was abolished again in Nepal for ordinary crimes in 1990 and for all crimes in 1997.

- Over half of the countries that have joined the abolitionist movement and abolished capital punishment completely since 1988 have also ensured through their own constitutions, or through interpretation of the Constitution by the Courts, as for example in Hungary, South Africa and the Ukraine, that the death penalty cannot be reintroduced.

Third: The gap between the last execution and total abolition has become much shorter.

- Only a minority, 21 of the 54 countries that first abolished the death penalty since 1988, had been through a 10-year abolitionist *de facto* stage. The majority moved much faster. For example, Turkmenistan abolished capital punishment in 1999, just two years after the last execution; South Africa in 1995 just four years after. Thus, the pattern of a long drawn-out process leading to abolition was not observed in *well over half* of those countries that have embraced abolition in the last 20 years.

Fourth: Where abolition has not yet been achieved:

- There has been a movement, in line with article 6(2) of the ICCPR, to restrict the number of crimes for which the penalty is death, examples are Belarus and Vietnam. And where the death penalty has been restricted to murder, it has almost everywhere been made discretionary rather than mandatory (the latest country in the process of doing so being Barbados). Here the Death Penalty Project has played a major role.
- Also, the number of countries that carry out executions *regularly* is now very small. In 2008 only 25 countries were known to Amnesty International to have carried out a judicial execution, compared with 38 in 1998. And between 2004 and 2008 only 13 countries carried out at least one execution every year. With a few exception, such as Iran, the number of executions annually recorded appears to be falling almost everywhere. Even, Singapore, which in the 1990s had the world's highest execution rate per head of population, has reined in executions. They have fallen from 76 in 1994 to only two in 2007 and probably one in 2008.

- Although about 30 countries still retain the death penalty for certain dangerous drugs offences, about 28 for some sexual offences, and about 22 for various non-violent serious property or economic offences, and may impose death sentences for such crimes, it appears that the number of them that regularly carry out executions for crimes other than murder is now quite small, most notably China, Iran, Saudi Arabia, Vietnam, and North Korea, although Singapore, Malaysia, Indonesia and Thailand still do so at times for trading in narcotics. It can nevertheless be safely said that in most retentionist countries capital punishment is now an exceptional penalty, limited on a discretionary basis to murder.
- In the United States, the number of death sentences imposed annually fell from 328 in 1994 to only 111 in 2008. In 2009, 40 of the 51 US state jurisdictions had no executions: this meant that only 11, under a third of the states with the death penalty available, actually executed anyone. While in 1999, 98 persons were executed in the USA, 52 were in 2009, almost half of them (24) in Texas alone. In most death penalty states executions are sporadic Indeed, since 1976, 16 of the states with the death penalty have executed no more than six people —an average of less than one every five years. Eighty per cent of executions have been carried out in just nine States—all in the American south[13]. The impression often given, that in America there is enthusiasm everywhere for executions is now wide of the mark. I shall have more, in conclusion, to say about this.
- It is also highly significant, as many of you will be aware, that the death penalty was excluded as a punishment by the UN Security Council when it established the International Criminal Tribunals to deal with atrocities in the former Yugoslavia in 1993 and Rwanda in 1994, and later in Sierra Leone and Lebanon. Nor is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Stat-

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13 Texas, Virginia, Oklahoma, Missouri, North Carolina, South Carolina, Georgia, Alabama and Florida

ute of the International Criminal Court established in 1998. This has raised the inevitable question: If it is not available for these atrocious crimes why should it be the punishment for lesser crimes?

Taken together, these facts suggest that many, probably the majority, of retentionist countries are not wedded to, or reliant upon, executions to enforce the criminal law. Thus, the remaining retentionist states should not be regarded as a "rump" of states committed to continuing executions: many of them appear to be moving towards a minimal and marginal use of capital punishment where death sentences continue to be imposed for a symbolic purpose rather than their enforcement being regarded as a necessary element of penal practice. This portends a further increase in the number of abolitionist countries as they too come in the not too distant future to accept the ideology that has spurred so many countries within such a short space of time to abolish or severely curtail their use of capital punishment.

V. FACTORS GENERATING THE "NEW DYNAMIC"

So why has this movement towards universal abolition made such headway over the last 20 years? What has been the motivating ideological force and by what political processes has the goal been achieved?

There can be no doubt that the latest wave of abolition has been influenced greatly by the process of democratisation in Europe, including the former Soviet empire, and freedom from colonialism and post-colonial repression in Africa and several other parts of the world, including Cambodia in Asia. Foremost among these influences has been the development of international human rights law and international covenants and treaties to put them into effect (notably Protocol No. 2 to the ICCPR (1989) and Protocols Nos. 6 (1983) and 13 (2002) to the ECHR)[14], as well as new democrati-

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[14] Also, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990). See Hood and Hoyle, 4th ed, 22-24.

cally inspired Constitutions in many countries that specifically ban the death penalty under their right to life provisions. Altogether, 82 countries have ratified or signed one or other of the international treaties or conventions which bars the imposition and reintroduction of capital punishment.

The human rights approach to abolition rejects the most persistent of justifications for capital punishment: retribution and the need to denounce and expiate through execution those whose crimes shock society by their brutality. It also rejects the utilitarian justification that nothing less severe can act as a sufficient deterrent to those who contemplate committing capital crimes. This is not only because the social science evidence does not support the claim that capital punishment is necessary to deter murder, but because even if it could have a marginal deterrent effect, it could only be achieved by high rates of execution, mandatorily and speedily enforced. This, abolitionists assert, would increase the probability of innocent or wrongfully convicted persons being executed and also lead to the execution of people who, because of the mitigating circumstances in which their crimes were committed, do not deserve to die.

It has needed political leadership and judicial support, backed up by NGOs, especially but not only Amnesty International, to bring about abolition. Political will has been the key. The abolitionists believe that although public opinion is not to be ignored, the task is to inform and lead the general public to appreciate and then to accept the case for abolition. In many of the countries of Eastern Europe and former soviet Central Asia, as well as in Africa, Presidents have led the way in bringing about abolition, or the matter has been referred for determination to the Constitutional Court.

The main motor producing the political momentum behind the international movement has been the commitment of the Council of Europe since 1994 and then of the powerful European Union since 1998 to make abolition a condition of membership, not only to secure a "death penalty free" continent, but furthermore, through a diplomatic offensive, to work to convince "third countries" that "the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights". The premise of the anti-capital punishment movement, simply put,

is that the execution of *captive* citizens, whatever crimes they had committed and wherever they reside in the world, is a fundamental denial of their humanity and right to existence. Indeed countries of the EU and several others bar the extraditon of persons who might face the death penalty without a solid assurance from the requesting country that the person concerned will not, if convicted, be sentenced to death or executed.

The influence exerted by the weight of numbers as more countries have embraced abolition is illustrated by the change in the decisions reached regarding extradition of prisoners from Canada to the USA. Whereas in 1991 in the case of *Kindler v Canada*, both the Canadian Supreme Court and the United Nations Human Rights Committee held that there was no bar to extradition because there was no international consensus on the issue of capital punishment, 10 years later in *Burns v USA* (2001) and *Judge v Canada* (2003) both bodies held that it would be a violation of the defendant's right to life to extradite without assurances that he would not be executed. They did so because, as the Canadian Supreme Court put it, of the "significant movement towards acceptance internationally of a principle of fundamental justice … namely the abolition of capital punishment"[15]. In similar vein, in the case of *Öcalan v Turkey* in March, 2003, the European Court of Human Rights endorsed the view that capital punishment amounts to a form of inhuman treatment which can "no longer be seen as having any legitimate place in a democratic society"[16].

VI. INDICATORS FOR THE FUTURE

How strong is the resistance likely to be to the continuing pressure from abolitionist nations on retentionist countries to accept the view that capital punishment should be condemned worldwide? There is no doubt that some of the retentionist countries have regarded resolutions for a moratorium on all executions brought be-

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15 Cited in Hood and Hoyle, 4th ed. at 29-31.

16 *Ibid.* cited at p. 27.

fore the United Nations as "divisive" and an attempt to impose the will of the majority on the minority. The pressure from the abolitionists has even been stigmatized as a form of cultural imperialism: an attack on sovereignty.

Certainly the battle is not over, but one indicator of the way in which it is moving is the quite dramatic *decrease* in recent years in the number of countries which continue to oppose such resolutions when brought before United Nations bodies. As recently as 2005 at the UN Commission on Human Rights, 66 countries dissociated themselves from a resolution calling for a world-wide moratorium on executions. Yet, in December 2008 only 46 countries voted against a similar resolution when it came before the General Assembly.

Among the 48 countries that were "actively retentionist" in December 2008 (by which I mean they had executed at least one person in the past 10 years) and the 10 countries that had not executed anyone during that period, but were not regarded by Amnesty International as truly "abolitionist in practice" – a total of 58 nations, 19 (30%) did not oppose the UN moratorium resolution, indicating that they did not follow the hard "sovereign criminal justice" line. Of the 39 which did oppose the resolution, the largest group (17) consisted of countries with a majority Muslim population[17]. Their stance I have already briefly discussed. It is more surprising that the next largest group was 15 countries of the British Commonwealth (11 of them island states in the Caribbean, plus Botswana, India, Singapore and Uganda).

As far as the non-Muslim majority Commonwealth countries are concerned, resistance to abolition is most evident in Singapore and in the island states of the Anglophone Caribbean, nearly all of whom (the only exception being St Kitts and Nevis) may best be classified as "thwarted" executioners. They have been thwarted by the activities of The Death Penalty Project and other dedicated human rights lawyers who have challenged the constitutionality of the death penalty, particularly the mandatory death penalty, con-

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17 Afghanistan, Bangladesh, Egypt, Comoros (ADF). Indonesia, Iran, Iraq, Kuwait, Libya, Malaysia, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Yemen.

ditions and length of time on death row and many aspects of the procedures leading to conviction, sentence and beyond, including clemency. But so far, as in Jamaica last year, attempts to abolish capital punishment have been unsuccessful; largely because of the impact on opinion of the very high homicide rates that currently blight some of these countries. Nevertheless the death penalty is largely a symbolic sentence. Altogether, only a third of Commonwealth countries have abolished the death penalty in law, compared with 60 per cent of all other nations[18]. It seems to me extraordinary that the Commonwealth, which prides itself on its stance on human rights, should have been so slow to embrace abolition of the death penalty as one of its goals.

Of the remaining countries that opposed the UN resolution, five were in non-Muslim or non-Commonwealth Asia (China, Japan, North Korea, Mongolia and Thailand I have already noted new developments in Japan and Mongolia); one in Africa (Zimbabwe); and in Europe and the Americas only the USA.

Today I only have time to discuss the position as regards the movement towards abolition of two key countries. In the East, the People's Republic of China, and in the West, the United States of America.

I have had the good fortune to visit China frequently over the past nine years to take part in discussions and seminars on the subject of the death penalty, often in the company of Saul Lehrfreund and Parvais Jabbar. During this period I have witnessed a remarkable transformation in the debate and in the open-mindedness of our Chinese colleagues. They have moved from an entirely defensive posture to one which recognises that reform of China's capital laws are necessary and an acceptance that abolition is a goal that should be pursued, even if the Chinese authorities are not yet ready to go so far.

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[18] For a more detailed analysis, see Roger Hood, "Capital Punishment: The Commonwealth in World Perspective', *The Commonwealth Lawyer*, 17(3), 2008, pp. 30-35.

China has until very recently pursued a vigorous policy of using capital punishment in its "strike-hard" campaigns against a wide variety of capital crimes – there are 68 of them, including economic and sexual crimes as well as various offences against the state, although in practice always at the discretion of the court. During an EU-China Human Rights Seminar on the Death Penalty in which I took part in the spring of 2001, a strike hard campaign apparently accounted for at least 1,000 executions within one month! The reasons put forward both to explain and justify why the death penalty is regarded as still essential to the maintenance of order and stability in China have included the belief that retribution based on the notion of "a life for a life" is deeply embedded in Chinese culture; that it, therefore, has the overwhelming support of the population; that ignoring this support might cause social instability; and that given the present state of China's social, political and economic development and very large population it remains necessary as a deterrent. Nevertheless a vigorous debate on the "reform" of the scope of the death penalty is now underway in academic, higher judicial and administrative circles. According to a recently retired senior judge of the Supreme People's Court speaking at a conference last June at which Saul, Parvais and I were present, death penalty reform is now "at the top of the agenda".

The return of the review of all death penalty verdicts from the provincial High Courts to the Supreme People's Court at the beginning of 2007 has been of particular significance, for it signaled the introduction of measures, including the development of guidelines, aimed to ensure more consistency combined with greater parsimony in the types of crime actually punished by death and the number of persons who are in practice executed - in fact to replace previous practices with a policy which according to Chief Justice Xiao Yang, President of the Supreme People's Court, aims to impose the death penalty "strictly, cautiously and fairly …on a tiny number of serious criminal offenders". This is seen as part of the project of President Hu Jintao for "Constructing a Socialist Harmonious Society", the criminal policy of which is to "Combine Punishment with Leniency".

Unfortunately, despite the claims made that the new procedures have reduced the number of death sentences upheld and executions

carried out, by at least 20 per cent, it has not been possible to chart objectively the extent of the progress made due to the complete lack of any statistical data to show how many persons are sentenced to death each year in China, how many of them after appeal have been executed, and for which categories of offence. In the debate at the UN General Assembly in December 2007 on the resolution for a world-wide moratorium on death sentences and executions, China voted against the motion, stating that: "… in today's world, the issue was a matter of judicial process to decide on the use of or a moratorium on the death penalty, and not a matter of human rights. It was each country's right, on the basis of cultural background and other factors [to decide], when to use that punishment … without interference." In contrast, at the workshops we attended in Guangdong and Beijing last June, Professor Zhao Bingzhi of Beijing Normal University, a strong and influential advocate of death penalty reform, stated:

> "The fast headway of abolition in the globe is amazing and exciting. These latest changes present a clear signal to us: abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries … [abolition] is now an international obligation … Although such influence will not lead to any effect instantly, it facilitates the restriction of the scope of the death penalty … as much as possible and [leads to] executing a minimum number".

As I mentioned before, one of the major barriers to progress constantly brought up at discussions in China is the assumption that public opinion is very hostile to reform because the retributive concept of a "life for a life" is deeply embedded in Asian and Chinese culture.

Light has been shed on this issue by the recently completed EU-China project entitled "Moving the Debate on the Death Penalty Forward", led by the Great Britain China Centre in this country[19], which included a large scale public opinion survey of nearly 4,500

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[19] In partnership with Beijing Normal University and Wuhan University in China, the Max Planck Institute for Foreign and International Criminal Law in Freiburg, the Irish Centre for Human Rights in Galway, and The Death Penalty Project in London.

Chinese citizens (a 70% response rate) in three different provinces. It was, devised by Dietrich Oberwittler and Shenghui Qi of the Max Planck Institute for Foreign and International Criminal Law at Freiburg and conducted by the Research Center for Contemporary China at Peking University.

An outstanding finding from this recent survey[20] was the low level of interest and knowledge and the relatively high proportion of respondents who had no firm opinion on the subject of the death penalty. Less than three per cent said they were "very interested" and only 26 per cent were interested at all. When asked how much knowledge they had about the death penalty in China, only 1.3 per cent said they had a lot of knowledge and less than a third "some knowledge".

As regards being in favour or opposing the death penalty, 58 per cent were *definitely* in favour – by no means a very high proportion when compared with the experience of European countries when they abolished capital punishment. While only 14 per cent said they opposed capital punishment, as many as 28 percent were recorded as being "unsure". When asked whether China should speed up the process to abolish the death penalty, only 53 per cent were opposed to doing so and a further 33 per cent were "unsure". This can hardly be said to indicate a fervent desire for capital punishment of a kind that would make abolition politically impossible to achieve.

More evidence to suggest that attitudes were not hardened and inflexible on this subject came forth when respondents were asked whether they supported the death penalty for specific crimes. For only two crimes, well over half the respondents supported the use of capital punishment: for murder (77%) and intentional injury causing death (60%); and only just over a half supported it for drug dealing (54%) and sexual abuse of a girl under the age of 14 (52%). For no other category of offence for which the death penalty can presently be imposed was there a majority in favour of capital punishment, suggesting that the government would not have great opposition to expunging most of the 68 capital offences from the criminal code

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20 http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf I had the honour to be consultant to this project.

so as to comply, pending complete abolition, with the meaning and spirit of Article 6(2) of the ICCPR, which China has signed but has yet to ratify.

Furthermore, there was evidence that the members of public surveyed, despite their general endorsement of the death penalty, would wish to see it imposed only in the most extreme cases of murder. This was evident when they were provided with "scenarios" of a crime with various aggravating and mitigating features: for instance, the death penalty was supported by less than 50 per cent of respondents even for a man who had served two previous prison sentences for robbery and who now had robbed a convenience store of 2,000 Yuan (about £200) and killed the store-owner by shooting him in the head.

The survey also showed that 60 per cent of the population endorsed the view that "Innocent people may be wrongly executed" and of those who supported the death penalty or were undecided, only 25 per cent said they would definitely favour the death penalty if it were proven that innocent people had been executed, while 44 per cent would definitely oppose it, with nearly a third being "unsure". About 70 per cent thought that the death penalty was "unequally or unfairly applied". When, as in surveys in the United States, respondents were asked whether they would support the death penalty if various alternatives were available, a substantially lower proportion supported retention. If the death penalty were replaced by life imprisonment with the possibility of parole, those who said they would still favour the death penalty accounted for only 41 per cent of the Chinese general population. If the alternative maximum sentence were to be raised to the very harsh penalty of life with no possibility of parole and an obligation to make restitution, only a quarter would remain in favour of the death penalty and half would definitely support abolition. Thus, the majority favoured alternative penalties that would give the public greater protection from the most dangerous offenders, not necessarily death - a "life for a life" itself.

The findings of this survey therefore suggest that public opinion is not likely to be so hostile to further restriction and abolition of the death penalty as has been supposed. Those who use the "Asian

values" or "Chinese culture" argument for retaining the death penalty should recognise that that there is strong evidence close to hand that Chinese people have been able to live contentedly under penal regimes where there is no capital punishment. The Special Administrative Regions of Hong Kong and Macau prove that amply. Indeed, although the majority of the Hong Kong population favoured capital punishment prior to the abolition of the death penalty by the colonial British regime in 1993, there have, as Johnson and Zimring have shown, been no serious calls or pressure there for its reintroduction and furthermore a continuing decline in the homicide rate[21].

Further progress in China will depend on the extent to which the academic and judicial elite can influence the political policy makers to accept that the question of whether a modern state should employ the death penalty has advanced to the point when it ought no longer to be conceived narrowly as an acceptable form of crime control governed entirely by national sovereignty. Ratification of the ICCPR would be a great step forward.

Let me now turn briefly to the United States whose position on this issue, given its general championing of human rights in other countries, seems to me to be crucial to achieving the goal of worldwide abolition. The United States has yet to embrace publicly, as China has done the aspiration to abolish the death penalty in due course. So what, briefly, are the prospects that the USA will abandon capital punishment?

In recent years there has been some recognition by the US Supreme Court of norms that have been established elsewhere in the world. The decisions to ban the execution of the so-called mentally retarded (*Atkins v Virginia*, 2002) and of juveniles convicted of murders committed before the age of 18 (*Roper v Simmons*, 2005), both cited worldwide condemnation of these practices as embodied in

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21 See David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia,* New York: Oxford University Press, 2009.

the ICCPR and the 1983 UN Safeguards for those facing the Death Penalty, albeit many years after their promulgation[22].

To what extent the Supreme Court will build on these judgments, as capital punishment comes under more and more critical scrutiny in the USA, remains to be seen. Last year, the influential American Law Institute, which had crafted the model for death sentencing accepted by the Supreme Court in 1976, concluded "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment" that it, would no longer retain a policy which supported the death penalty. Given the evidence of the low incidence of executions in all but a handful of states such that the death penalty has been described aptly by Carol Steiker and Jordan Steiker, as "A Tale of Two Nations";[23] given the concerns widely expressed about the wrongful convictions unearthed by "Innocence projects" and the certainty of innocence provided by DNA evidence; given the impossibility of extinguishing all arbitrariness and discrimination; given the excessive and costly delays in the administration of capital punishment such that the expense of continuing with a system that results in so few executions is now being questioned in many states; and given the cruelty inherent in the "death row" phenomenon and the administration of execution; it seems likely that many more states that retain the death penalty but rarely carry out executions will, in due course, follow the example of New York, New Jersey and New Mexico to abolish it. Indeed 11 state legislatures discussed the issue last year. Success would leave only a few "outliers" and maybe in the end only Texas as an executing state.

At that stage it would be possible, even likely, that the Supreme Court would declare that there really has been an evolution in "the evolving standards of decency that mark the progress of a maturing society"[24], at home as well as abroad, which deplores the use

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22 For further information on this, see Hood and Hoyle, 4th ed., 192-4 and 200-203.

23 Carol Steiker and Jordan Steiker, "A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States', *Texas Law Review,* vol. 84, 2006, 1869-1927. 2006.

24 To follow the standard set in *Trop v Dulles,* 356 US. 86. 101 (1958).

of capital punishment. Then it would be possible for the Federal Government to ratify the Second Optional Protocol to the ICCPR. If this comes to pass, countries which continue to claim that capital punishment is not inconsistent with respect for human dignity and human rights will receive a body blow.

VII. IN CONCLUSION

The emphasis on the "human rights" perspective on the death penalty has added greatly to the moral force propelling the abolitionist movement. Those who still favour capital punishment "in principle" have been faced with convincing evidence of the abuses, discrimination, mistakes, and inhumanity which inevitably accompany it in practice. In general it needs to be remembered that no countries have abolished the death penalty because of popular demand as reflected in opinion polls. Those who grew up with the expectation that death would be the punishment for murder are relatively slow to abandon this idea, but the next generation, growing to maturity with no such experience, is far more likely to regard capital punishment as a barbaric relic of the past, abandoned as civilization has progressed.

While the road is still rocky and the end is not yet in sight, abolitionists have reason to be confident that the final destination is approaching when all countries will have agreed that the killing of captive criminals should be outlawed for ever.

THE CONSTITUTION OF THE INTERNATIONAL COMMISSION. A GROUP OF LIKEMINDED STATES[1]

Rafael Valle Garagorri
Ambassador for Humanitarian and Social Affairs and National anti-Death Penalty Coordinator. Government of Spain

The abolition of the death penalty is a very sensitive subject to which Spain accords enormous importance. I am very glad to have this opportunity to inform you about the International Commission against the Death Penalty that we are currently in the process of establishing.

Spain is a country that is totally committed to abolition, a country that has already ratified all International Instruments on the abolition of the death penalty to which we can become a party. The creation of the International Commission against the Death Penalty is an initiative of the Spanish government that was established in the National Plan on Human Rights approved in December 2008, as one of the priorities of the Spanish foreign policy. Our President, José Luis Rodríguez Zapatero, mentioned it on several occasions, the last one being at the inaugural ceremony of the 4th World Congress against the Death Penalty held in Geneva, in February of this year.

Over the last few decades, there has been a clear trend towards the abolition of the death penalty in all regions of the world, thanks to the development of an international movement, although there are 58 countries that still retain the death penalty.

We also know that there are many actions carried out by International and Regional Organisations, NGOs, civil society and governmental representatives to promote the abolition of the death penalty.

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1 Closure Speech at the International Symposium on abolition of moratorium of the death penalty delivered in Istanbul, July 7th, 2010.

The International Commission against the Death Penalty will therefore have an additional mandate for the actions that are now carried out at an international level.

Firstly, its added value will be high visibility, because of the status of its members; secondly, its independence when taking decisions, and I underline the word independence; and finally its broad geographic representation, and this is very important, because it is the best way to approach some countries that criticize the idea of being receptive to lessons received from western countries

The International Commission will have a chairperson and will be formed of no more than 15 members of acknowledged moral authority, international standing and recognized expertise in human rights.

The International Commission will have three main objectives:

- To promote the establishment of an immediate moratorium on the use of the death penalty in all regions of the world, aiming to achieve the effective implementation of a universal moratorium on the horizon of 2015, prior to its complete abolition.
- To promote the abolition of the death penalty in the legislation of those countries, carefully considered, that apply *de facto* moratoria on the use of the death penalty.
- To take specific initiatives when executions violate minimum standards in the most vulnerable groups (in particular, minors, pregnant women, and the mentally ill).

In order to achieve these objectives, the Commission will maintain contact with representatives or personalities in certain countries, and representatives of International Organizations and NGOs; it will make appeals and statements on matters of concern; and, it will participate in conferences and seminars, and such like.

A Support Group will assist the Commission in carrying out its activities, which will be composed of approximately 20 governmental representatives from all regions of the world, with whom we have already initiated some contacts. Turkey is one of these countries that gives us great satisfaction. These will be countries that are

classified as abolitionist in law or in practice, and I think that is important because, in some cases, it could represent a national commitment towards the abolition of the death penalty. The Support Group will have observers from International and Regional Organisations working on human rights.

The funding of the International Commission will be established by a trust fund consisting of voluntary contributions from member countries of the Support Group, which may also finance specific activities of the International Commission, as well as funding from international institutions and other means of finance.

At the moment we are working on setting up the structure and mandate of the International Commission, the constitution of which will take place on October 7, to coincide with the World Day against the Death Penalty.

I wanted to inform you directly about the International Commission because we think it can contribute to the abolition of the death penalty, especially at this particular moment in time when there is a clear and growing trend towards its abolition all over the world. In order to achieve its objectives, the International Commission will stay in close contact with civil society, NGOs and the Academic Network against the death penalty, among other actors.

PRESENTATION OF THE INTERNATIONAL ACADEMIC NETWORK FOR THE ABOLITION OF CAPITAL PUNISHMENT

Simone Rozes
Honarary President of the International Society of Social Defence. Former First President of the Court of Cassation of France

It is a pleasure and an honour for me to present the *International Academic Network for the Abolition of Capital Punishment*, which accompanies the initiative of the President of the Government of Spain, José Luis Rodríguez Zapatero, to give fresh impetus to the international policy on abolition that has been underway for some time and that was reinforced during Spain's six-monthly Presidency of the European Union, in 2010. I represent here all the jurists from the Forum, the Magistracy and the University who are affiliated to the *International Academic Network for the Abolition of Capital Punishment*.

On the occasion of the Congress of the *International Penal and Penitentiary Foundation* at the University of Liege[1], in June 2009, Professor Luis Arroyo, President of the *International Society of Social Defence*, informed the scientific societies and their Presidents at that meeting of the initiative sponsored by the Government of Spain, to give fresh international impetus to the death penalty abolition process. This initiative had previously been launched by the Spanish President in Togo, specially invited for the vote on abolition passed by the Parliament of this African Republic. He proposed the constitution of this Academic Network and we all enthusiastically decided to support his initiative with academic resources and legal and criminological knowledge tempered by the study and the experience of Universities and the legal professions.

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1 2009 Congress of the International Penal and Penitentiary Foundation: 'The influence of scientific NGOS on National and International Crime Policy'.

Four large scientific associations constitute our Network: *the International Society of Social Defence*, followed by the *International Association of Penal Law*, its earlier version having been launched in 1889 by Franz von Liszt, Van Hamel y Prins. Today, it is chaired by a Spaniard, Jose Luis de la Cuesta, Professor of the University of the Basque Country, in San Sebastian. It has more than 4,000 criminologists from all over the world and it decided to join this initiative at its last congress in Istanbul, in September, 2009; the *International Criminal and Penitentiary Foundation* presided by George Kellens of Liege University, initially created as a specialized organ of the League of Nations and a prime instigator of United Nations action on crime prevention and the treatment of the criminal; and the *International Society for Criminology*, founded in 1938 and led by Tony Peters, at the University of Leuven, which is open to all criminologists in the world and whose most recent Conference, organized by the Ramón Lull University and the University of Barcelona, took place in Barcelona .

The network consists of 25 university institutes, research centres and schools of law from all over the world, notable among which are those of Beijing, Kyoto, Manila, Chicago, Mexico, São Paulo, Buenos Aires, Galway, Paris, Freiburg in Brisgovia, Milan, Naples, Castilla-La Mancha, Coimbra, Pretoria and Istanbul. A wide range of personalities from the legal world accompany these institutions, among whom for example, we may mention, the Brazilian Silvia Steiner Judge of the International Criminal Court, Sergio García Ramírez, a former President of the Inter-American Court of Human Rights, Cheriff Basiouni, President of the Institute of Human Rights of the DePaul University de Chicago and of ISIC of Syracuse, Peter Hodgkinson, President of the Centre for Capital Punishment Studies of Great Britain, Anabela Miranda, and Jorge Figuereido Dias Professors at the University of Coimbra, Portugal, Raul Pan-Galangan, Dean of the Faculty of Law at Manila and Shizhou Wang, Professor at the University of Beijing, Ulrich Sieber and Jorg Albrecht, Directors of the Max-Planck Institute of criminal Law and Criminology of Freiburg, Adam Sozuer, Deacon of the Faculty of Law at the University of Istanbul, Salomon Shecaira of the Brazilian Institute of Criminal Sciences at São Paulo, Mireille Delmas-Marty College of France; Francisco Muñoz Conde of the University of Seville,

Juan José Solozábal of the University of Madrid and Roger Hood of the University of Cambridge and William Schabas, President of the Institute of Human Rights in Galway, Ireland; the last two-named were responsible for the reports sent to the Secretary General of the United Nations.

The Network is already yielding its first fruits: it presented an initial book in Spanish at the Congress of the *World Coalition against the Death Penalty* in February, organized by *L'Ensemble contre la Peine Capital* in Geneva, Switzerland. It organized an *ancillary meeting* at the UNDOC *Crime Congress* in Salvador de Bahía, Brazil, in April; a congress in Istanbul in Julio 2009, where progress towards the world abolition of capital punishment was discussed; and a one-day conference in São Paulo in August where the focus was on extrajudicial killings and which gave rise to a firm Declaration of opposition to capital punishment and on the inherent link of this fight with respect for human rights. It has a website that contains the most relevant academic documents and reports, www.academicsforabolition.net thereby complementing the NGO web sites, which tend to take greater care of recent news.

The commitment we all share is to maximize academic, research and communicative activities in cooperation with NGOs that specialise in Human Rights and the Death Penalty and with governments that are committed to achieving a universal abolition of the death penalty and, at least, a moratorium before 2015, the year in which the Millennium Declaration Objectives will be reviewed.

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