THE DEATH PENALTY

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1. The death penalty, history and means of execution

The death penalty results in the loss of life of a human being and is imposed by an authority as a consequence of the commission of a crime. Its existence has accompanied the history of all humanity like a dark shroud up until very recent times. Its existence is accredited in the first etchings of human history such as the rupestrian paintings of the Neolithic Mediterranean, six thousand years ago, whose representations include capital executions, alongside scenes of hunting and daily life[1]. But Henri Donnedieu de Vabres said that the history of the death penalty is the history of its abolition. A good part of humanity has had enough of the harshness of original capital punishments and has successively sought less inhumane forms of execution. They have replaced the old punishments for more modern ones, passing from public executions as a communicative act of justiciary vengeance to circumspect execution within the prison, even reaching a time at which the same loss of life of a human being is rejected.

The repertory of the means of execution of the death penalty is surprisingly broad and varied. Asphyxia by immersion was originally a punishment for women, as it was believed that those who spilt blood brought with them disgrace. The most characteristic form of these executions was the Roman punishment of the sack (*poena culleum*): especially indicated for parricides, at the time a far wider concept than the murder of parents. The convict was bundled into a leather sack together with a dog, a chicken, a serpent and a monkey. The sack could be replaced by a barrel[2]. It persisted until the middle of the first

[1] Marino Barbero Santos, *Pena de Muerte. El ocaso de un mito*. (Depalma Buenos Aires 1985); Esther Lopez-Montalvo, 'Violence et mort dans l'art rupestre du Levant : groupes humains et territoires' in Luc Baray (Ed) *L'armement et l'image du guerrier dans les sociétés anciennes: de l'objet à la tombe* (Sens 2011) 19-42

[2] Hans von Hentig, *La pen*a (Espasa-Calpe S.A.) 33 and ff and Theodor Momsen, *Römisches Strafrecht* (Dunker & Humblot, Leipzig 1899) 921

millennium, thus German citizens had special places to execute the punishment on which documental evidence from 1752 is still conserved in Basel, Dresden, Frankfurt and Ulm. The ducking stool on the Great Bridge of Cambridge is also documented. In maritime territories, drowning by exposure to tidal waves was frequent, such the seawater submerged the convicts up to three times.

Fire as a means of causing pain and cremation were instruments of justice and purification[3]. Since the days of Rome, the way that offenders were put to death has been documented, nailed or tied to a post that was then raised upon bundles of firewood piled up to the feet. The Germans also did so and before them the Assyrians, but not the Persians nor the ancient Egyptians. The punishment of being burnt alive is mentioned in the Bible in three crimes against honesty and in the crime of spoils of war. Fire was the preferred form of capital punishment in the Middle Ages for crimes against religion and against honesty. Not only the Inquisition of that time in France, Italy and Spain, but the persecution of the Reformed Church, as happened in 1553 with the burning of Miguel Servet by Calvin in Geneva. Fanatical persecution of witches in the German states extended to various thousands with fire as the means of execution, terrifying women in central Europe from the 15th to the 17th century[4].

Falling from a cliff face was foreseen as an execution in Rome from the rock of Tarpeya, on the Capitoline Hill. It was applied to slaves who committed theft and for those who gave false testimony. It appears that it was practiced in those cities that had some similar geographic features. Thus, a rock or similar at the centre of Spain, at Toledo, carries the same Roman name. The punishment of quartering consisted of opening the body of the convict for the extraction of bodily organs and the division of the body into parts that were exposed at different places in the city as a sign of the severity of the punishment and as general intimidation. Foreseen in numerous orders, *e.g.*, in the *Constitutio Criminalis Carolina*, 1532, art. 124. A special form of quartering was done with the help of four horses whose last appearance was the execution of Robert-François Damiens,

[3] Hans von Hentig, cit 344-364
[4] Marino Barbero Santos, 'La represión de la brujería en Alemania en los siglos XVI y XVII', in *Memorias de la Real Academia de Extremadura* (Trujillo 1992)

who had attempted to kill King Louis XV (1757), as narrated by Gian Domenico Casanova in his memoires and reproduced by Michel Foucault in his work *Surveiller et punir*. But a lighter form of quartering was also known, post mortem, exposing legs, arms and head in public places of the city, as in Mexico[5].

Quartering could take place on a wheel. After breaking the body with it, the body was bound upon the wheel that was raised up on a post and the convicts were left in full sight to the horror of the public and the pitiless flight of the birds of prey. The paintings and etchings of Caillot and Brügel show the point to which these punishments formed part of the daily life of the cities of Europe up until the 18th century[6].

Lapidation or stoning to death now appears in the penultimate place in the Eumenides of Aeschylus where the different acts were enounced which took place in the execution yards ending the lives of those convicted: decapitation, emasculation, quartering, lapidation and impalement[7]. Ancient Mosaic law foresaw the death penalty for heresy and blasphemy, whose principal accusatorial witness had to throw the first stone, but it also extended to cases of desecration of the Sabbath, female adultery, homosexuality and bestiality. The same punishment has been detected in Norway, Sweden, Iceland and Germanic countries[8]. It passed from Mosaic Law into Muslim culture, supported in a disputed *Hadith* of the prophet. Its persistence is notable and it has been detected in some countries in recent times. It resurfaced in Iran in 2008, until the rulers excluded lapidation from the list of punishments in response to international protests. Its practice perhaps continues in places far from State control, as Amnesty International has reported in Mali, Sudan, Somalia and even in ordinary criminal process in the North of Nigeria where *Shari'a* Law prevails, the punishment meted out for adultery and homosexual practices.

[5] Luis Arroyo Zapatero, '*De los delitos y las penas entre México y España*' Miguel Angel Porrua (Ed), (Mexico City 2016) 58

[6] Pieter Brühgel The Elder, '*The Triumph of Death*' The Prado Museum <www.museodelprado.es/en/the-collection/art-work/the-triumph-of-death/d3d82b0b-9bf2-4082-ab04-66ed53196ccc>

[7] Von Hentig 393 and Aeschylus, *The Eumenides*, 185-190.

[8] Von Hentig, cit 396 and f

The pillory (picota pranger, pelouhrinño) is a stone or wooden pillar to which a person can be bound and left exposed to public shaming. These were also places of execution, such as the Ravenstone of Basel, the Black one of Worms, and the Red one of Rodenstein. On occasions, a large barrel of wood was used on which the convicts were exposed[9].

Its link with the execution of capital punishment is worth noting. At times, decapitation took placed alongside the pillory and the head and other members were hung from the irons that usually crowned the pillory, like curled tresses[10]. Other wooden instruments were used as variants of the "*sedia stercolarie*"[11]. Daniel Defoe was sentenced to the pillory in 1703 for seditious libel, at a pillory in Fleet Street by Temple Bar in London[12]. On occasions, the role of public exposure was presented alongside the place of execution, because the pillory was a place where hanging was permitted, in other words, because they were pillory-gallows. The most notable case was in the city of Mexico, in whose main square the pillory was surrounded by four posts that functioned as gallows. A variant of the pillory were the cages in which the convict was enclosed, because the body was hung from some posts or from the castle wall and, whether dead or alive, was left exposed for months (torture cages)[13].

There are three more extended modern forms of execution, after the executioner's axe or sword, the gallows, the garrot and the guillotine. The gallows has always been a rapid and simple method of execution, but it entailed a death by physiological shocks that converts the act of justice into a denigrating spectacle for the offender, the family and the very onlookers of the spectacle. Moreover, a rapid death requires techniques that were not always available to the executioner. A safer and less denigrating method was sought, even through a public competition for ideas as happened in France with the appearance of the guillotine. In Spain and in the territories of the Americas, the garrotte was consecrated, a mechanical instrument with which a competent executioner is

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[9] Von Hentig, *Der Pranger* (Jos. Weibel'sche Verlag Freiburg i. Br. 1935)
[10] Von Hentig 449
[11] Von Hentig 442
[12] He had composed for the occasion *A Hymn to the Pillory*, <www.britannica.com/biography/Daniel-Defoe>
[13] Von Hentig 453

capable of producing the death of the convict within hardly 30 seconds. Although it is well documented that the skills of the executioners left a lot to be desired and executions that required over 30 minutes of suffering did indeed take place.

2. Current situation of the death penalty in the world.

The situation of the death penalty in the world is characterized by its complete abolition in the European Union, the total moratorium in all member countries of the Council of Europe, in other words, the territory of Europe that ranges from Lisbon to Vladivostok, with the sole exception of Belarus. The penalty has been expressly abolished throughout America with the exception of the United States and some Caribbean islands. The persistence of capital punishment is above all in Asia, with the leading role of China, which appears to order more capital executions than anywhere else in the world. Vietnam also offers a similar panorama in proportion. On the contrary, abolition has been introduced in Mongolia and in India, even though there have been retrograde movements in the latter country as a consequence of the reaction to terrible acts of mass terrorism, gang rapes and the murder of women[14].

In Africa, an abolitionist process of very relevant dimensions is underway, both through moratoriums and total abolition, as in the case of South Africa when its Constitutional Court declared that capital punishment was a cruel and inhuman punishment in 1995. In turn, three great countries to the north of the continent, Morocco, Tunisia and Algeria became *de facto* abolitionists over 30 years ago, with the special meaning that their Muslim inspiration gives to all three, particularly the first of the three whose maximum religious authority is its king. In all of sub-Saharan Africa, continuous conflict has been happening with terrorism as the protagonist, but abolition constitutes the predominant line in the more stable countries, which number 21. From among the retentionist countries, only Somalia (11), South Sudan (2), and Botswana (3) have executed capital

[14] Tasakhia Ebegdorj, Abolishing Death Penalty in Mongolia, en The Death Penalty. Justice or Revenge? ed Ioanna Kukuradi (Lit Zurich 2020) 67; Arup Serendranath, Death Penalty India Report, 2 v (National Law University, Delhi 2016).

punishment[15]. The north of Africa, Libya and Egypt present similar characteristics to Middle Eastern countries, Syria, Iraq, Iran and Saudi Arabia, together with other lesser countries such as Yemen, Oman and Bahrein. The first cited are the ones that executed most death sentences in 2020: Egypt 107; Saudi Arabia 27; Iraq 45; Iran 246. Libya, Lebanon, Palestine and Israel have seen no executions in the year of the pandemic.

In Asia, abolition encounters severe resistance[16]. The most significant country is China where information on executions is still a state secret. The same informative opacity is a feature of the Democratic People's Republic of Korea and Vietnam (UN doc E 2020/63. 15). The contrary example is Singapore, which adopted an Asian Charter on Human Rights in 1998, in which it is declared that all States must abolish the death penalty and that there where it exists, it must only be imposed for the more serious crimes. In spite of it all, 90% of the world's executions take place in Asia that is home to 60% of the global population.

Although the number of countries that abolish or retain the death penalty is relevant, the rate of executions per million habitants is even more so, which puts everyone in their place. The countries that execute most head the list: Iran with 6.5 per million inhabitants. Saudi Arabia follows on with 3.69, Iraq, Somalia and Singapore with 1.78, 1.17 and 1.7, respectively, followed by Pakistan (0.45), Egypt (0.31), Bangladesh and Yemen (0.24), Sudan (0.14), Afghanistan (0.11), United States (.08) and Japan (0.04). The data from China, North Korea and Vietnam are secret, as has been mentioned (UN Doc E 2020/63. Figures 3 and 4, p. 16 and 17).

In view of the whole world, the gravest difficulties for abolition are found in three countries or within a group of countries. In the first place, in China, a country where the political leaders in their communications to the international sphere express themselves in favour of the abolitionist process, the same leaders who maintain the need to change

[15] Amnesty International, 'Amnesty International Global Report' (2019/20) 47–54. <ACT5018472020ENGLISH.PDF (amnesty.org)>

[16] For Japan v Shigemitsu Dando, see *Toward the Abolition of the Death Penalty* (72 Indiana L. J. 7 1996); Kanako Takayama, 'Public Opinion in Japan' in Luis Arroyo Zapatero, William Schabas, Kanako Takayama, *Death Penalty: A cruel and inhuman Punishment* (UCLM Tirant lo Blanch, Valencia 2013) 57

slowly, considering that the fervour over the death penalty belongs to the heart of Chinese culture. In reality, the starting point had a similar legislation to the "*bloody code*" of England in the 18th century, with innumerable criminal figures of very different severity punished with the death penalty. Successive reforms of the Penal Code since 2004, especially since 2011, have been suppressing the death penalty for numerous crimes, but 55 capital crimes persist and most of them are far from the voluntary crimes against life to which the clause of the International Pact on the most serious crimes is reduced, as they are crimes relating to economics and corruption. The authorities justify their attitude in the so-called traditional public opinion favourable towards the maximum punishment, as well as reminders of the collective spirit of Confucianism that might appear to be less concerned over the individual and more so with the community. The specialists consider that there is no greater public opinion within China in favour of the death sentence than in some parts like France at the time of its abolition[17]. Moreover, Confucianism is more concerned with grace and pardon than *Lex Talionis* to which the legislative reality of China corresponds. What is certain is that the greatest and most decisive factor for the generation of culture and public opinion is the Chinese government and no policy commitment whatsoever can be appreciated in its interior policy towards the progress of popular awareness that is favourable of abolition. Moreover, in the history and culture of China there is a greater tradition of mercy than in any other country. In addition, despite the committed work of numerous Chinese academics[18], the handling of executions and their media broadcasting, it appears that the punishment is employed as yet another factor for the management of political and criminal-political decisions rather than for any other reason[19]. The limited research on public opinion proves that more changes are coming about in Chinese society than in their governing committees and that the limited presence of social networks has brought to light the most powerful factor in favour of abolition: the cases of innocent victims of executions[20].

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[17] Borge Bakken, 'The Norms of Death: on Attitudes to Capital Punishment in China' in Lill Scherdin (ed), *Capital Punishment. A Hazard to a Sustainable Criminal Justice System?* (Ashgate 2014)
[18] Zhao Bingzhi (ed.), *Chinese Practice of Death Penalty Reform* (China Legal Publishing House, 2010)
[19] Roger Hood, and Caroline Hoyle, *The Death Penalty. A worldwide perspective* (5th edn, Oxford University Press 2015) 117 118
[20] D Oberwittler, *Public Opinion on the Death Penalty in China*. (Freiburg i. Br. edition iuscrim 2009)

Islam has a body of oral and written doctrine that originated in the 6th century with the Koran and with the proclamation of the doctrine of the Prophet a century later and it maintains the pretension of validity today as it did then in all countries within its sphere of influence. Its legislative content is known as *Shari'a* Law and it contains normative prescriptions that call for the imposition of the death penalty in very divergent circumstances. Although it might surprise today, it involves nothing else other than what was in force in Europe from the 16th to the 18th century, in which the heretic, the apostate, the homosexual and the adulterer, but also robbers, violent or otherwise, were put to death in punishment. The problem of that conception of society and criminal system is that it sought to maintain its validity in the contemporary world. But this conceptualization must not obscure the most valuable elements of Islam, such as the principles of mercy and compassion that are precisely the qualities that crown the head of Allah. What is of relevance here is that in the present state of evolution of humanity, well defined by International Law, there are manifestations of that Islamic legislation that are prohibited and are unlikely to be maintained against those international laws present in art. 6 of the International Covenant on Civil and Political Rights (*ICCPR)* and the so-called "safeguards", in the terms that will be seen further on. Their violation should give rise to international responsibility. In any case, it must be taken into account, as previously pointed out, that three countries of predominantly Islamic faith, which are Morocco, Algeria and Tunisia are *de facto* abolitionist countries, which for over 20 years have not applied capital punishment. It makes one see that the death penalty in the referenced countries is in reality more of a political option than an ideological or religious one.

Independent North America never took a decision that might overcome the hateful gallows until much later on when at the suggestion of the young electricity company of Thomas Edison in ferocious competition with Westinghouse, with its engineer Nikola Tesla, proposed electrocution in an electric chair. So successfully too, that it was converted into the most innovative method of execution in the USA, until it could no longer be hidden from the incipient public opinion that the chair produced death amidst terrible pains, burns and fire even came out of the head of the convicted offenders. The search for less inhumane methods continued and surprisingly gas was used in the

chamber, especially designed with that effect in mind, which was unable to produce the intended death rapidly and painlessly, to arrive as from 1977 at the lethal injection. But numerous cases could not be concealed from public opinion, by then well informed in the new century, in which death was inflicted amid deep and prolonged pain, even with continued and repeated attempts to supply the lethal injection, such that the "*botched executions*[21]" were qualified as torture. It led non-governmental organizations to call on multinational firms to abstain from producing and commercializing the products used to manufacture the lethal injection[22]. But the executioner countries, before renouncing the death penalty had preferred to resort to animal health care products with no possibility of identifying their origin or of recovering the firing squad peculiar to military justice and the countries without special resources. The interest that the means of execution provokes is such that the transparency with which it is applied today lets us highlight that there are no means or systems that are not inhumane and equivalent to torture. The North American history of the means of execution is a history of human cruelty. Finally, it is certainly ground-breaking that the Catholic church, which is also of great influence in the Americas, decided in its general doctrinal teachings in the Catechism to abolish all exceptions to the prohibition of the death sentence, converting it into a radically abolitionist moral doctrine[23].

The uneven evolution of Europe and the United States with regard to the death sentence has been well documented[24]. Maintenance of the death sentence in the USA is the principal argument of the countries that refuse abolition and that present it as a question

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[21] Michael L. Radelet, *'Some Examples of Post-Furman Botched Executions*' (2010) <www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions>
M Borg and M Radelet, 'On botched executions' in P. Hodgkinson & W. Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge University Press 2004) 143-168

[22] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment; Christian Behrmann & Jon Yorke, The European Union and the Abolition of the Death Penalty, 4 Pace Int'l L. Rev. Online Companion 1 (2013), 2 ff.http://digitalcommons.pace.edu/pilronline/39/[7.1.21]

[23] Luis Arroyo Zapatero, 'La pena de muerte es inadmisible para la Iglesia Católica: La reforma del Catecismo del Papa Francisco y sus consecuencias' in *Libro Homenaje a Diego Luzon*, v. 2 1271; 'Pope Francis' Reform of the Catechism. The Death Penalty is Inadmissible for the Catholic Church' in <blog.uclm.es/luisarroyozapatero/2019/03/25/pope-francis-reform-of-the-catechism/>

[24] J Whitman *Harsh Justice. Criminal Punishment and the Widening Divide between America and Europe* (Oxford OPU 2005)

of European culture and not as a question of civilization. But the question in the USA is highly debated: faced with the horrors that the States offered in their specific legislations, the Supreme Court (Furman v Georgia, 1972) suspended executions, beyond the previsions in federal legislation. But in 1977, the executions began again, although after numerous legal reforms in each State, and the number of executions increased notably in subsequent years up until the new Millennium, always at around 250 until the year 2000, since when they have diminished each year since to less than 50 in 2018 (Death Penalty Information Centre, deathpenaltyinfo.org/ History of the Death Penalty [29 June, 2021]). But with the very sudden availability of DNA analysis for criminal tests, a very high number of innocents were found on death row, having been sentenced to capital punishment, which turned out to be frightening with the systematic discovery of new cases. It is not difficult to imagine what might occur when there was no available technique for such analyses and the criminal processes lacked sufficient legislative guarantees before the sentence of the Supreme Court. The "innocence frame" was turned into the trigger factor of studies and legislative decisions on moratoriums and abolition in numerous states[25]. Up until the present, 185 people who were placed on death row have been exonerated (Deathpenaltyinfo.org/policy-issues/inocence).

It is very notable that the president of the USA, who lost his re-election in 2020, ordered the execution of 13 convicts on death row under federal jurisdiction in the last few weeks of his term in office after a moratorium of 16 years. At its core, the division of a society weighed down with an extraordinary lack of mercy and compassion, inspired not only in politics, but in religious practices of a sort of Christianism more suited to business than to uphold solidarity. The historic differences between the North and the South, the weight of racism arising from the times of slavery, religious beliefs hardly disposed towards pardon and lack of empathy with the poor and with those failing in life, as well as the policy factors of the federal system, the corresponding segmentation of criminal legislation, and the persistence of judicial authorities chosen by popular election are

[25] Sister Helen Prejean, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (Random House New York 2005)

factors as David Garland has explained very well, which turn the death penalty into a "peculiar institution"[26].

The new American government of President Biden has expressed a commitment to that effect with the declaration of a moratorium on Federal convictions (Merryk Garland, Attorney General Memorandum 1. 7. 21, https://www.justice.gov/opa/page/file/1408636/download) that is accompanied by new abolitions of the death penalty in the United States in 2021, very significatively in the southern State of Virginia. Thus, 26 of the States of Union have abolished or declared a moratorium on the death penalty, 10 no longer execute capital punishment and of the 16 that employ capital punishment, the majority of executions take place in only 5 states: Texas, with half of all executions, and Virginia, Florida and Missouri that have recently adopted abolition. The numbers of executions have been falling since the highest point in 1999 with 98, to 46 in 2010 and only 17 in 2020[27]. The opinion surveys that years ago offered results of over 80% now show levels of 55% in support of the death penalty[28].

3. The process of abolition of the death penalty. From the Universal Declaration of Human Rights to the 2007 Resolution on the Moratorium on Capital Punishment.

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 Charter of San Francisco. Peace, international order, the sovereignty of the people and human rights are fundamental values in the international political landscape. These values reflect an overwhelming reaction to the causes and the 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

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[26] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (OUP/Harvard University Press 2010)
[27] DPIC, '*Executions by the state since 1976*' (2021) <Executions by State and Region Since 1976 | Death Penalty Information Center>
[28] Editorial Board, 'Stop the Executions President Biden' *New York Times* (NYT 26 March 2021) <Opinion | Stop the Executions, President Biden - The New York Times (nytimes.com)>

not avoid the so-called "Cold War", which started immediately 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. No such mechanism was created at that time. It was only established, albeit with numerous limitations, after the approval of the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR).

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. However, the proposal of the Soviet Union to include full abolition of the death penalty during peacetime did not prosper[29].

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, in 1967. These were followed by the all-important reports of Roger Hood and William Schabas, who completed his most recent

[29] William Schabas, 'The Abolition of the Death Penalty in International Law' (3rd edn, Cambridge 2002) 23 and f

and last report in 2020[30]. Thus in 1971 the Secretary General of the U.N. presented a global report, which was followed by a draft resolution that referred to the continuous process of reducing 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 (within the Economic and Social Council), in 1977 (at the UN General Assembly) and in 1980 (at the Crime Prevention Congress and at the UN General Assembly). It is worth mentioning the Congress on Crime Prevention held in Caracas 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" directed at countries that still maintained this form of punishment. It is well known that the 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 have been exhausted; and, finally, it stated that, if inevitable, the execution of the prisoner should be carried out in a way that causes the minimum possible suffering. The definitive text was agreed in 1989 (ESC. Res. 1989/64).

[30] Marc Ancel, *The Death Penalty Part I: Evolution until 1960 and Part II: Evolution from 1961 to 1965* (UN Department of Economic and Social Affairs 1968)

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 (ICCPR), in 1989, that aimed to abolish the death penalty directly. As pointed out by William Schabas, the vote reflected the optimistic atmosphere surrounding the demise of the former Eastern bloc (military) 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, has universalized the prohibition on the use of the death penalty to punish crimes committed by children under the age of 18[31].

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"[32]. Mass-membership and grass-roots NGOs working in the field of human rights, whose strength and influence has grown unceasingly, 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 too 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 1994, the Italian Government had launched an initiative at the General Assembly in support of a universal moratorium that was soon accompanied by an international organization: *Hands Off Cain*. Three representatives of the retentionist movement 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 brandished 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

[31] William Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge 2002) 187 and 192

[32] Amnesty International, *When the State Kills. The Death Penalty v Human Rights* (Amnesty International 1989)

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[33].

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 that it was "convinced 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 "hard-line retentionists", which expressed its 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 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 "hard-line 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 is a matter for criminal justice and is not a human rights issue. However, 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

[33] Nadia Bernaz, *Le droit international et la peine de mort* (La Documentation Française Paris 2008)

Ensemble that have organized a World Congress every four years since 2001; a truly international movement of social actors. Congresses have taken at Strasbourg in 2001, Montreal in 2004, Paris 2007, Geneva 2010, Madrid 2013, Oslo 2016 and at Brussels in 2019. Very intense activity was developed there among regional and local NGOs that enjoy widespread support, but fundamentally from 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 and on the situation in the Great Lakes region of Africa and with Arab countries that have resulted in the Declarations of Alexandria (2008), 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. During the Second Regional Conference on the death penalty, organized in 2010 in Cotonou, Benin, by the African Commission on Human and People's Rights, the drafting of a Protocol to the African Charter on Human and People's Rights on the abolition of the Death Penalty in Africa was proposed, to fill in the gaps and to expand the provisions of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)[34].

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. Likewise, the High Commissioner for Human Rights, a position that ceaselessly since it was assumed by Mary Robinson, has resolutely opposed capital punishment, criticized executions and called for a moratorium on the death sentence and its abolition.

[34] Lilian Chenwi, *Towards the abolition of the death penalty in Africa, a human right perspective* (Pretoria University Law Press 2007); Aimé Muyoboke Karimunda, *The Death Penalty in Africa* (Ashgate, Surrey 2014); Continental Conference on the Death Penalty 2-4 July 2014, Cotonou, Benin, Manifesto for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa https://www.fidh.org/IMG/pdf/manifesto_deathpenalty_africa.pdf [7.1.21]

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 18 December 2007 by 104 votes in favour, 54 against and 29 abstentions. On 20 November 2008, it was ratified again indicating some slight progress with respect to the idea of definitive abolition. In that Resolution, a global tendency towards the abolition of the death sentence may be noted with a considerable increase in its supporters for the abolition of such punishments; it was adopted with 109 votes in favour, 41 against, and 35 abstentions. The last quinquennial report from the Secretary General was presented in last May 2020 and was the responsibility of the academic William Schabas, as it had been on the three earlier occasions. In December 20201, the UN General Assembly (AGUN) (UN doc A/73/260, July 27 2018) approved the Resolution on the Moratorium on Executions with a view to full abolition of the death penalty with 123 States in favour.

This is the eighth time since 2007 that the United Nations General Assembly has adopted a Resolution that calls for a moratorium on executions, with a view to the abolition of the death penalty. The number of States that have voted in favour of these resolutions has increased from 104 in 2007, to 121 in 2018 and 123 in 2020. Djibouti, Jordan, the Lebanon and South Korea also voted in favour of the resolution for the first time. The Democratic Republic of the Congo, Guinea, the Republic of Nauru and the Philippines, which abstained or voted against the 2018 Resolution, also supported the call this time, while the Yemen and Zimbabwe moved from opposition to abstention. On the opposite side of the fence, 38 voted against, 24 abstained and 8 never participated in the vote. The acceleration of the rate of abandonment of the death penalty among the States in comparison with the number of retentionist States may be appreciated. One of the most significative facts is found in the advances of the Asian world, due to positive changes within some of its countries that changed the reasoning behind their votes. In the Arab world, things have remained very similar to their response to the Resolution of 2008,

while in African territories, the countries of Congo, Rwanda, Togo, Burundi, Benin, Gabon, Gambia and Guinea have all suppressed capital punishment in their legal orders in recent years.

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, a majority of which still 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 offer greater resistance by applying capital punishment and retaining it on their statute books. However, 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 on December 2009 in Madrid at the inauguration of the Congress that launched the Academic Network against Capital Punishment and a little later the *International Commission against the Death Penalty*[35]. There are fundamentally four matters that will continue to be debated in the abolition process. The executioner countries will continue to argue that the question of the death penalty be treated as a criminal legislative matter rather than as a human rights question. However, it is not considered in this way in the United Nations, as although the question was originally approached in the United Nations Office on Drugs and Crime, it is systematically reviewed in the Council of Human Rights. The second question relates to the irreversible nature of capital punishment in the face of judicial error with respect to which the frightening empirical knowledge that continues to be developed has been mentioned. The third matter is the arbitrary nature of the application of the death sentence that is conditioned by racism and poverty, as may be seen with great clarity in the United States. The last matter concerns the retentionists that cling to the essential

[35] https://icomdp.org/wpcontent/uploads/2020/10/Statement_of_constitution_of_ICDP_2010.pdf. The presentation of tasks and objectives of the Commission by the founder President Federico Mayor Zaragoza, 'The abolition of the death penalty: a question of respect for human rights' in L. Arroyo and J. Bordes (eds) *Francisco de Goya. Contra la crueldad de la pena de muerte/Against the cruelty of capital punishment* (Universidad de Castilla-La Mancha and Real Academia de Bellas Artes, Madrid 2013) <https://www.academicsforabolition.net/material/francisco-de-goya-contra-la-crueldad-de-la-pena-de-muerte>

character of capital punishment for the prevention of serious crimes against life, *i.e.*, its effect as a deterrent.

But the studies that in statistical and comparative terms are more to the point make it clear that this idea is the consequence of a visceral reaction lacking all reason. The most thoughtful statistical studies of comparative criminality and its evolution in the processes of abolition and in the countries that both support and maintain capital punishment and the developing definitions of the most serious crimes highlight that there is no solid relation between the execution of capital punishment and deterrence nor *vice-versa*. It may be clearly seen in that laboratory of capital punishment that the United States represents where it has been clearly pointed out that the rates of serious crimes against life in the respective States maintain no relation with the survival of capital punishment neither in their laws nor in practice. Quite on the contrary, the crime rates of homicide have neither risen in Western Europe that abolished the death sentence in the 1980s, nor in the countries of Eastern Europe that abolished it towards the end of the 1990s. Neither has an increase in serious criminality been observed in countries such as Hong Kong and Singapore. On this question, the precise commentary of the two first rapporteurs of the United Nations, Marc Ancel and Norval Morris, are all explained in great detail by Roger Hood and Caroline Hoyle[36].

4. International Humanitarian Law. The death penalty and the safeguards.

Awaiting further progress on abolition, United Nations bodies must prepare the groundwork, ensuring that all States comply with the obligatory norms on compliance for all, which are articles 6 and 7 of the International Covenant on Civil and Political Rights and the “safeguards” of rights established by the UN bodies and Regional Human Rights organizations that the death penalty contradicts. Even so, it is true that there is no

[36] Roger Hood and Caroline Hoyle, *The Death Penalty. A worldwide perspective* (5th ed Oxford University Press 2015) chap 9, 389-425. Likewise, Hans Joerg Albrecht, ‘The Death Penalty, Deterrence and Policy Making’ in Luis Arroyo, William Schabas, Kanako Takayama (eds) Marta Muñoz (dir), *Death Penalty: A Cruel and Inhuman Punishment* (UCLM Tirant lo Blanch, Valencia 2013) 29; Sagmin Bae, When the States no longer Kills, International Human Rights Norms and Abolition of Capital Punishment (State University of New York Press 2007)

effective and universal international sanctioning body that could serve as an effective means of enforcement.

The safeguards were established by the Economic and Social Council of the United Nations in its Resolution 1984/50, of 25 May 1984, slightly enlarged in its interpretation by Resolutions 1989/64 and 1996/15 of the Economic and Social Council. Their content and application are presented here, in the same order and as a summary of what has been established in the last Report of the Secretary General: "Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty", E/2020/53, numbering between parentheses the relevant paragraphs from the report[37].

A prerequisite to it all is that once abolished the States that have ratified the Covenants cannot reintroduce the death penalty. As much is stated in both the Human Rights Council and the Inter-American Court of Human Rights. All the more so, if the States are signatories to the Second Facultative Protocol, which is case of the Philippines.

a) The first and the principal safeguard is that countries, which at the time of the approval of the Covenants had not abolished the death penalty, can solely and exclusively apply it to the most serious crimes. The Council of Human Rights in its General Observation 36 of 2018 declared that such crimes should be exclusively understood as intentional crimes against life such as homicide and murder and concurrent modes of killing (59). This circumstance implies that the death sentence envisaged as the sole (*mandatory*) punishment in which the specific punishment cannot be correlated with culpability is contrary to the convention. Thus, cases have been raised with Bangladesh and in such countries as Kenya and its unconstitutionality has been declared in some island states subject to the jurisdiction of the British *Privy Council* (61). The Council declared as non-conventional the supposition that other less serious crimes could be considered among *the "most serious crimes"*. Moreover, in some circumstances, it is not only a matter of

[37] Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. Report of the Secretary-General. 17 April 2020. E/2020/53. The numbered references refer to the paragraphs of the Report.

the less serious crimes, but also the exercise of basic fundamental rights, such as equality, privacy, freedom of expression and beliefs. The incrimination of adultery, homosexuality, sodomy, apostasy and blasphemy are all relevant cases in point (63). The legislation of some countries criminalizes some offences with capital punishment that in a valuative and comparative order cannot be considered as serious as the "most serious crimes", such as homicide. The imposition of the death penalty for crimes of corruption, drug trafficking, espionage, the financing of terrorism, human trafficking and food adulteration is therefore not legitimate (64 and 65)[38]. b) Capital punishment may never be imposed for a crime that was not sanctioned with that punishment at the time of the commission of the crime. But nothing should prevent any reform favourable to criminals from being applied and therefore abolition should not only prevent subsequent sentences, but also the execution of former offenders who were on death row. c) The death penalty may not be imposed on children and pregnant women. The prohibition on imposing capital punishment on children is foreseen in various international conventions and likewise excludes lengthy periods spent waiting for their execution over the years. This punishment may be not imposed in case of the slightest uncertainty over age (70). It was a prohibition that was violated in the USA up until the decision of the Supreme Court in 2015 in connection with Roper v Simons March, 2005. The rule is still violated in some countries under Islamic Law for crimes defined as *hudud,* which range from homicide to sodomy, such as in Saudi Arabia and Iran and it is debatably still so in Pakistan (73 and 74). The death penalty is also rejected for senior citizens, aged 70 to 75 years or more. It is also excluded for people with psychosocial and intellectual incapacities. Its application in these cases, in practice very numerous, might constitute a breach of article 7, because it is an arbitrary punishment, be it death or any other serious punishment (81). d) The fourth, fifth, sixth and seventh safeguards include the right to due judicial process in a trial with clear and convincing evidence of guilt. The text of Safeguard 4 reads "leaving no room for an alternative explanation of the facts". Problems of this sort are raised when the burden of proof is inverted, which can happen in hastily introduced reforms, due to the commission of some very serious crime such as the violation of children in India in

[38] Luis Arroyo Zapatero, Abolition of Death Penalty for Drugs Crime, in Luis Arroyo William Schabas, Kanako Takayama (eds) Marta Muñoz (dir) *Death Penalty: A Cruel and Inhuman Punishment* (UCLM Tirant lo Blanch 2013) 45

2012 (86). It is considered that the presumption of innocence has been violated when the accused have been subjected to shameful treatment, such as an accused person enclosed in a metal cage (88).

A fair trial requires that arbitrary and discriminatory treatment with racial and religious prejudice is prevented, but the problem has a wide scope of application. For example, the composition of juries in multi-racial societies (90 and 91) can also affect discrimination against foreigners, including non-compliance by the jurisdiction with the clause on consular information foreseen in the Vienna Convention on the Law of Treaties and proclaimed by the International Court of Justice. The right to an interpreter is also proclaimed. All fair trials are affected by the assistance of counsel that the State might not guarantee and that is ineffective, for example, when it appoints mere students of law to act as lawyers (95 and 96). Likewise, at the heart of a fair trial is the right of appeal to a higher court (99 and 100), as well as the possibility of pleading for a pardon or commutation of the sentence. It is a clause of such importance that the renouncement of such powers by the head of the State of Guatemala blocked the application of death sentences in the aforementioned country, because without the serious possibility of a pardon, compliance with both the International Covenant and the American Convention of Human Rights was no longer possible. The precept requires that the system should offer a serious possibility, rendering invalid a formal system in which all pleas are turned down (103). The execution of death sentences has to be suspended while there are as yet unresolved appeals (107 and 108). e) The ninth and last safeguard is the one that states that the mode of execution must inflict the least possible suffering. It should neither be executed in public nor in any other degrading manner, with special prevention of the use of especially cruel systems of execution such as lapidation (110). The last safeguard focuses the debate within both the Council of Human Rights and the Committee against Torture on the method of execution and accordingly lapidation and the use of gas, hanging, the electric chair, burning by fire, burial alive, decapitation, and lethal injection under certain circumstances have all been repudiated by the special Rapporteur (112). The Council of Human Rights has also repudiated public executions, especially in the presence of children (114 and 115). Likewise, executions without prior warning to the offender and their family members, as happened in Belarus and in Japan

(116). Finally, abusive treatment while on death row is prohibited, prolonged periods awaiting execution that amount to 9 years in Japan and to 20 years in the USA, also considered as a form of torture by the European Court of Human Rights (as well as by the International Court of Human Rights (119-121)[39].

5. Perspectives for progress. The ius cogens nature of the safeguards that accompany articles 6 and 7 of the ICCPR.

The death penalty is not totally prohibited in the International Covenant on Civil and Political Rights (ICCPR), but it is severely restricted by article 6. Both articles 6 and 7 of the Covenant must be applied in accordance with their literal wording and their generally accepted interpretations that are incorporated in the Safeguards.

Recently, John Tasioulas[40] has projected the Kantian critique of the scandal of philosophy upon what he has called the "scandal of the internationalists", for still being without a precise system of identification of what is consuetudinary law or *ius cogens*. He called for *opinio iuris* and its principles to be given a fundamental role rather than the mere practice of a State. It will be necessary to define this question in relation with articles 6 and 7 of the ICCPR.

The safeguards[41] approved by the United Nations Economic and Social Council (ECOSOC) are the most authentic interpretation of article 6 and must be considered true *ius cogens* international. In particular, it is enough here to refer to the first and the principal one, by virtue of which the death penalty may only be imposed for the most serious crimes, those that as a minimum are understood as international homicides and murders. To recall the essential terms of the question, article 6.2. of the Covenant states that: "In countries which have not abolished the death penalty, sentence of death may be imposed only for

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[39] Adán Nieto Martín, 'Judicial cooperation in the EU as a means of combating the death penalty and expansion of human rights' in L. Arroyo, P. Biglino, W. Schabas, *Towards Universal Abolition of the Death Penalty* (Tirant lo Blanch Valencia 2010) 51

[40] John Tasioulas 'Custom, Jus Cogens, and Human Rights' in C. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 95-116

[41] Roger Hood and Caroline Hoyle, *The Death Penalty. A worldwide perspective* (5th ed OUP) p 148 ff; Penal Reform International, *Strengthening Death Penalty Standards* (PRI London 2015)

the most serious crimes" whereas the wording of safeguard num. 1 is as follows: "In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.", in the 1984 version, which is interpreted as at least voluntary homicide or murder. It excludes any other minor crimes, such as those related with drugs, adultery homosexuality, *etc*.

The reasons why those safeguards are consuetudinary law are because it is a question of norms that are assumed and applied by greater part of States, including those that execute capital punishment and that are subjected to periodic universal examinations in the Committee of Human Rights. Indeed, most countries have ratified the ICCPR and the safeguards are applied by various Human Rights bodies of the United Nations, by the rapporteurs of the High Commission, by the Council in its periodic national reports and the validity of the ICCPR is recognized in the majority of responses from countries to the questions for the preparation of the quinquennial reports to the General Secretary, the last two by William Schabas[42].

In turn, among or as well as the qualification of consuetudinary Law, there is what is called ius cogens or peremptory norms. Their existence has been affirmed since the approval of the Convention of Vienna of the Law of Treaties, art 53: an imperative norm of general international law is a law that is accepted by the international community of States as a whole and recognized as a norm against which no recourse is available and that can only be modified by a subsequent norm of general international law that is of the same effect. Thus the norms that prohibit or restrict the application of the death sentence have to be

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[42] William Schabas, *Customary International Law on Human Rights* (Oxford University Press Kindle ed. 2021) chap 4.2; Ulf Linderfalk, Understanding Jus Cogens in International Law and International Legal Discourse (Elgar International Law Series, Edward Elgar, Cheltenham 2020); International Law Commission, *Peremptory norms of general international law (Jus cogens)* (UN Doc A/CN.4/691 2016); Special Rapporteur Dire Tlad, *Fourth report on peremptory norms of general international law (jus cogens)* <A/CN.4/727 - E - A/CN.4/727 -Desktop (undocs.org)> ; Ana Manero, 'La pena de muerte y el derecho consuetudinario internacional', in Luis Arroyo Zapatero, Adan Nieto and Rafael Estrada *Metáfora de la crueldad. la pena capital del tiempo de Cesare Beccaria al tiempo actual* (UCLM Press, Cuenca 2016) 313 and with reference to the Inter-American Court, Florabel Quispe, *Las salvaguardias para proteger los derechos de las personas condenada a muerte* 319.

qualified: The reasons for this are: a) because the expression of the right to life and the dignity of people belongs to the hard core of fundamental rights, called basic and essential guarantees that are inherent to respect for human dignity in article 53 of the Convention of Vienna of 1969. b) Because even countries such as China that have not signed the protocol expressed their willingness to do so and are progressively accepting its legal practices for compliance with its precepts, which is clear from the legislative decisions on the reduction of crimes deserving capital punishment foreseen in the criminal code, the institutional reforms in its Supreme Court, *etc*. In turn, the principal Western country, the United States of America, which maintains capital punishment, has undergone a process of intense debate over the past 6 years that has involved abolition or a moratorium in 7 states over the past 10 years. c) Most countries declare their acceptance of the Safeguards when responding in a systematic way to reports and surveys administered for the preparation of the quinquennial reports of the Secretary General. Reports that have noted over the past 20 years that the first and main safeguard has been achieved in most countries, including a few thought to be among the "hard-core executioners", in the words of Hood and Schabas. It should be noted that the consensus of the States in strict compliance with the Safeguards, so that they may be considered *ius cogens*, must be general, but not unanimous. The noncompliance of various states with the Safeguards in no way detracts from their general validity. d) In addition, art. 4.2 of the ICCPR declares that no derogation of Safeguards 1, 2, 3 and 7 is possible. Likewise, the Committee of Human Rights acknowledges that Safeguards 4 and 9 may not be derogated in General Observation 29 and likewise, in both Safeguards 5 and 6, and in General Observation 32, under conclusion 8, the Committee proclaims that no derogation of the safeguards is possible.

a) The death penalty as a cruel and inhuman punishment.

Art. 7 ICCPR establishes that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and ever since then legislative, jurisprudential, and doctrinal decisions as well as resolutions from Human Rights organs have been consolidated, which argue that the ordinary application of the death penalty is contrary

to that prohibition[43]. The former special rapporteur for arbitrary detentions, Mads Andenaes, called an ancillary meeting in 2016 at the 13 International Congress against the Death Penalty in Oslo with the suggestive title "The prohibition of the death penalty: an emerging ius cogens norm"[44].

The death penalty in itself can constitute an inhuman or degrading treatment, all the more so when there is no complete international consensus over the negation of that possibility and international law is undergoing constant transformation and development. In this sense, the special rapporteurs on torture and other cruel, inhuman and degrading treatments and punishments explicitly qualify capital punishment as a form of cruel, inhuman and degrading punishment. In turn, both the Inter-American court of Human Rights (IACHR)[45] and the Constitutional Court of South Africa declared that the death sentence constitutes cruel and inhuman treatment.

Safeguard num. 9 provides that: Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. But historical experience shows that innovation in the means of execution of the death penalty is inspired by the continual search for a less inhumane means of execution. The recent failure of the lethal injection in the United States has placed the states in the terrible dilemma of returning to the electric chair or the firing squad, or rapidly walking towards abolition. The reports from the rapporteur on both torture and extrajudicial killings are also well known, on the conditions throughout the lengthy times awaiting execution on death row that can last many years, the mode and the specific manner of execution, *etc*. In practice, they turn the death penalty into a cruel and inhuman punishment.

b) Sanctions on violations of the fundamental norms of human rights by the States.

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[43] John D Bessler, *The Death Penalty as Torture. From the Dark Ages to Abolition* (Carolina Academic Press 2017)

[44] Manfred Nowak, UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2009 A/HRC/10/44 p 11

[45] Sergio García Ramírez, The Inter-American Court of Human Rights and the Death Penalty, Luis Arroyo Zapatero, Paloma Biglino and William Schabas (eds) Towards universal abolition of the death penalty (Tirant Lo Blanch 2010), 177 ff; about Supreme Court of South Africa *supra* note 32.

Following the project prepared by James Crawford and presented to governments and scrutinized at the General Assembly, in 2001, the responsibility of each State for the violation of the basic norms of the international community requires more political rather than juridical efforts[46]. However, while awaiting an international norm that lays out which sanctions and juridical consequences may be imposed on the State that violates an essential Human Rights norm, such as those contained in articles 6 and 7 of the ICCPR, it is worth imagining the adoption of some of the following measures by United Nations bodies and other regional organizations[47]:

a. By virtue of the principle of coherence with binding international provisions in matters of human rights, the organs and bodies of the United Nations with competence in such matters should exclude non-compliant states from membership of the relevant committees. It could be a criterion adopted by the majority groups of abolitionist states in each instance. b. In the cases of countries that fail to respect article 6 ICCPR, international political and judicial cooperation with those states should be suspended, including extradition for the offences that are punished in an illegitimate way with the death penalty. c. In the case of countries that impose the death penalty for crimes that are not the most serious, such as for example drug-related crimes, the support or technical international or regional assistance in such matters could be suspended, both of a financial and a law-enforcement nature, as well as of a judicial order.

Conclusion

Humanity has evolved its attitude towards the death penalty in a notable way and substantial changes have stirred the emotions that such facts provoke within human beings. From a history of dominance up until almost 2 centuries ago in which the death

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[46] James Crawford, *International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002)

[47] Report of the Special Rapporteur for extrajudicial, summary or arbitrary executions A/70304, conclusions, paras 116-120 < United Nations Official Document>: Manfred Nowak, UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2009 A/HRC/10/44 p 11; so before Philip Alston, Transparency and the imposition of the death penalty, E/CN.4/2006/53/Add.3; A/HRC/4/20, 29 January 2007

penalty was accepted as a punishment for the most varied crimes and with the means of execution that caused the greatest possible harm to the prisoner, a desperate search for "more humane" methods has ensued, in such a way that the infamous noose was substituted for the guillotine, the garrotte and the electric chair, up until the era of the lethal injection. At the end of that process, capital execution has since the start of the 20th c moved from the public event with crowds to confinement in prisons and other secluded places, because the act itself was considered so contrary to the sensitivity of the times, to feelings of pity and human compassion, inspiring emotions contrary to the former ones[48]. In many societies, the death penalty was suppressed, because it was considered an affront to the fundamental right to life and, in practice, because contemporary emotions could not tolerate the taking of a human life by the state in cold blood. Today, with the means of communication that transmit the reality of executions in great detail, the conviction has taken hold that all executions constitute cruel and inhuman treatment that is incompatible with the standards of decency that predominate in our societies. Naturally, there are moments of historical regression and there are fixations on the past in the evolution of certain societies, but the abolition of the death sentence constitutes together with the abolition of slavery, the radical prohibition of corporal punishments, torture and the mandate of equality of men and women, one of the key links in the process of civilization, whose theoretical home Norbert Elías constructed in the darkest period of the history of Europe. In the frontispiece of his book he placed a citation of the Franco-German philosopher Paul Henri Holbach from his Social System, 1774: "*Civilization … is not yet finished*" [49].

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[48] Pieter Spierenburg, *The spectacle of suffering: executions and the evolution of repression, from a preindustrial metropolis to the European experience* (Cambridge University Press 2008 183); Paul Friedland, Seeing Justice Done. *The Age of Spectacular Capital Punishment in France* (Oxford University Press 2012)

[49] Norbert Elias, *Über den Prozess der Zivilisation* (2 v, Suhrkamp, Baden Baden 1997)

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