

DEATH PENALTY: AN ABOLITIONIST PERSPECTIVE

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1. Introduction

What do the following people have in common? Socrates, Spartacus, Jesus Christ, Joan of Arc, Danton, Robespierre, John Brown, Sacco and Vanzetti, Julius and Ethel Rosenberg, Ken Saro-Wiwa.¹ They were all executed. The first on the list, in the time of the Greeks and the last, a couple of years ago. The list is testimony to the enduring recourse to the death penalty over human history. There is some evidence that cavemen practised capital punishment² and its existence can certainly be found in the Bible and in the *lex talionis* of the Code of Hammurabi in 1750 BC.³ But the antiquity of an institution is not a justification for recourse to the death penalty in modern times. Otherwise we might still be practising other forms of community sanctioned murder such as ceremonial human sacrifice and cannibalism.

This paper will argue in favour of the abolition of capital punishment and will attempt to do so from a legal and human rights perspective. Issues of ethics and natural justice will also arise. The superpower of capital punishment is undoubtedly China with a reported 1,876 executions in 1997.⁴ But on a per capita basis, Iran (143) and Saudi Arabia (122) would match China.⁵ These countries are influenced by *chari'a* law, a subject I will touch on later. The United States comes next in line with 74 executions in 1997⁶. By examining the Chinese and American situations we are able to look at the salient aspects of the problem.

The paper will then examine the most compelling argument against capital punishment, which, in my view, is the problem of executing innocent people. It will then examine the position from the perspective of international law and conclude by weighing whether recent trends point to a universal movement against capital punishment. In that process, particular attention will be paid to Asian countries.

2. America and China

In many ways, China and the USA share a political commitment to capital punishment. The authorities in both countries claim to be responding to the people's choice. Capital punishment forms a strong part of candidates' political platforms in many States of the USA. Since the 1976 Supreme Court decision in *Gregg v Georgia*⁷ allowing the death penalty to resume where State laws were not drafted or applied in such a way as to make the sentence a cruel and unusual punishment contrary to the 8th and 14th Amendments, there have been well over 5,000 death sentences imposed and over 500 people executed in 26 States.⁸ Many politicians consider it a means to achieving election. In China, executions are conducted in public often before large audiences thus purporting to assert the popular nature of this penalty.

In both countries there are serious problems associated with the application of the death penalty. I wish to deal with some of these problems which lead me to the view that they all point to the untenable nature of the punishment rather than to occasional difficulties in its application. Whereas in one of the countries there is a culture of litigiousness, in the other there is limited acceptance of the strict applicability of the rule of law. Whereas in one country the length of time on death row allowing for the appeal process to run its course has itself been seen as a form of cruel and unusual punishment, in the other prisoners can be executed virtually immediately after the sentence is handed down. And although in one country the legal system is elaborate while in the other it is rudimentary, those convicted of capital offences often share the same fate of having had inadequate defence. America and China thus approach the problem from either end of the political and legal spectrum and provide strong case studies to assess the worth of the death penalty.

A. DEATH PENALTY IN THE UNITED STATES

There are many problems associated with capital punishment in the United States. It has been criticised because of its unfairness, its failure as a deterrent, its inhumanity and the inevitability of error. There are strong arguments to be made on each of these points, the last of which I will deal with in greater depth below.

1. *Unfairness and Racism*

Racial discrimination was one of the grounds relied on by the Supreme Court in its 1972 ruling against the application of the death penalty.⁹ Between 1930 and 1990, 4,016 persons were executed in the United States of whom 2,129 were black¹⁰, which comes to 53% while African Americans make up 12% of the total population. The figures become even more stark for certain crimes generating strong emotions. Between 1930 and 1976 455 men were executed for rape, of whom 405 (90%) were black.¹¹ And over half the prisoners currently on death row are black.¹² The race of the accused is a relevant factor but it is open to the counter argument that social and urban factors may be the true determinants of criminal behaviour and the criminal justice system is thus simply dealing with the criminals as it finds them. According to this argument race may not be a decisive factor in the determination of who is executed and who is not.

But there is another way to factor in race in the examination of the death penalty in America and that is to look at the race of the victim. In the twenty years since the Supreme Court's 1976 decision reinstating the death penalty 84 black defendants have been executed for the murder of a white victim and only 4 white defendants have been executed for the murder of a black victim.¹³ In a study of sentencing patterns in Georgia, one of the American States most enthusiastic for the death penalty, the conclusion drawn, after controlling for 230 non-racial factors, was that a person accused of killing a white was 4.3 times more likely to be sentenced to death than a person accused of killing a black.¹⁴ Similar patterns of sentencing disparity based on the race of the victim were

found in Arkansas, Florida, Illinois, Mississippi, North Carolina, Oklahoma and Virginia.¹⁵

These and other studies of the racial basis of the application of the death penalty in the United States were the subject of a review by the General Accounting Office (GAO). In 1990 the GAO reported to Congress its finding of “a pattern of evidence indicating racial disparities in the charging sentencing and imposition of the death penalty...Race of victims was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods and analytical techniques.”¹⁶ The same conclusion was expressed by Justice Harry Blackmun of the Supreme Court. Although he had decided in favour of the death penalty in the seminal cases of 1972 and 1976, by 1994 he had changed his opinion and in a dissenting opinion concluded that “even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.”¹⁷

The unfairness issue also includes imposing the death penalty on juveniles. The United States ratified the International Covenant on Civil and Political Rights in 1992. In doing so it made a reservation in respect to Article 6 of the Covenant dealing with the right to life, paragraph 5 of which contains an absolute prohibition on the execution of persons who were under 18 years of age at the time of the offence and on pregnant women. The United States reserved the right to execute ‘any person (other than a pregnant woman)...including for crimes committed by persons below the age of eighteen.’¹⁸ Eleven parties to the Covenant objected to the United States reservation as being incompatible with the object and purpose of the Covenant.¹⁹ Article 37(a) of the Convention on the Rights of the Child also contains a prohibition on the execution of children under the age of 18 at the time of the offence. It is likely that should the United States move to ratification, it will set down a reservation on this obligation. The United States is thus in the position of internationally condoning the execution of children, the insane and the severely mentally handicapped.²⁰ This is not a theoretical exercise in maintaining legal options. The United States carries out such executions. As of October 1998, 74 persons were on death row under death sentences received for juvenile crimes.²¹ And according to the Death Penalty Information Centre some 34 offenders with mental retardation have been executed in the United States.²² Earlier this year, the UN High Commissioner for Human Rights was moved to appeal in a case in Oklahoma for a stay of execution of Sean Sellers who was sixteen years old and suffering for various mental disorders at the time he committed the offence.²³

2. *Deterrence*

There has been a considerable number of criminology studies on the issue of punishment and deterrence and rarely have they come to unequivocal conclusions. While there may be an intuitive view that the death penalty would be a good deterrent, further reflection tends to negate that initial view. I am not objecting to the need to punish criminals, but I do not accept that the death penalty is a particularly effective deterrent. Crimes of

passion and other non-premeditated capital crimes are by definition impervious to deterrence as there is no contemplation of consequences. So that leaves the field of premeditated crime. The deterrence argument would thus run that criminals would be prepared to risk life imprisonment for their actions but not the death penalty. This strikes me as a most doubtful proposition. A more acceptable proposition is that criminals engaging in capital crimes, whether political terrorists, gangland murderers or even violent rapists, believe that they are going to get away with it and thus punishment as deterrence does not arise in their minds.

We can also gain some assistance from the statistical studies in this field. Bedau reports that during the 1980s, death penalty states averaged an annual rate of 7.5 criminal homicides per 100,000 population while abolition states averaged 7.4.²⁴ A similar result applies when comparing neighbouring states, one with capital punishment the other without. The homicide rate in Michigan was as low or lower than that of Indiana, which restored the death penalty in 1973.²⁵ These studies strike me as compelling but there would no doubt be proponents of capital punishment who would reach different conclusions. The least one can say is that the deterrence argument is insufficient to justify the death penalty. Yet it has a certain plausibility that allows it to be used in political discourse in a way that the argument based on revenge cannot. I don't believe this plausibility is matched by the evidence and I am pleased to defer to a survey of experts from the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association that showed that the overwhelming majority of its members did not believe that the death penalty is a proven deterrent to homicide. Over 80% believe the existing research fails to support a deterrence justification for the death penalty. Similarly, over 75% of those polled do not believe that increasing the number of executions, or decreasing the time spent on death row before execution, would produce a general deterrent effect.²⁶

3. *Inhumanity*

The noted Italian criminologist, Cesare Beccaria, said it all in 1764 when he wrote, "the death penalty cannot be useful, because of the example of barbarity it gives men."²⁷ All methods of execution fall within Beccaria's description and those that appear to some to be humane in their day will come to be seen as uncivilised in the future. Dr Joseph-Ignace Guillotin devised a humane form of execution to meet the pressing needs of the French revolution but no one subscribes to that method today.

There was a time when the electric chair was seen to be bringing the great advances of modern science to the task of capital punishment. But the famous description in the Boston Globe of the execution of John Evans in Alabama in 1983 put paid to the idea that the electric chair was a quick and humane method of execution as it took Mr Evans 14 agonising minutes to die.²⁸ Hanging is popular in countries with a British heritage and is still available in some American states. But the gallows must be efficiently operated with the correct knot and the right drop lest the prisoner die a slow and agonising death by strangulation. The gas chamber was popular for a time but this method of execution can be as botched as any other, as noted by Supreme Court Justice John Paul Stevens.²⁹

Dr Guillotin's successors have now devised the lethal injection method of execution. We don't rely on the infallibility of medicine in situations of disease and nor should we in situations of capital punishment. The U.S. Court of Appeals found that there is "substantial and uncontroverted evidence that execution by lethal injection poses a serious risk of cruel, protracted death. Even a slight error in dosage or administration can leave a prisoner conscious but paralysed while dying, a sentient witness of his or her own asphyxiation."³⁰

The problem is not the means of execution, it is the sentence itself. There is no humane way of killing a person. This is a contradiction in terms.

B. DEATH PENALTY IN CHINA

Based on a review of Chinese press accounts, Amnesty International (AI) reported that in 1997 China sentenced more than 3,152 convicts to death (compared with 6,100 in 1996 in the midst of the anticrime "Strike Hard" campaign) and carried out 1,876 executions (compared to 4,367 in 1996). AI believes that actual figures may be higher because not all death penalties or executions are reported, and the authorities can manipulate such information.³¹ According to the US State Department "the lack of due process is particularly egregious in death penalty cases. The number of capital offences has increased from 26 to 65 as amendments were added to the 1979 Criminal Law. They include financial crimes such as counterfeiting currency. In May 1997, Zhao Binyi was executed in Tianjin after being convicted of seven counts of fraud involving approximately \$6,000 (49,671 rmb). A higher court nominally reviews all death sentences, but the time between arrest and execution is often days and sometimes less, and reviews consistently have resulted in the confirmation of sentences. Minors and pregnant women are expressly exempt from the death sentence, and only those theft cases involving banks or museums warrant capital punishment."³² The State Department goes on to note that Chinese officials have said that new safeguards placed on sentencing and execution have reduced the number of death penalty cases.³³ It is a curious world we live in when the United States criticises China on issues concerning the death penalty but it is not criticism concerning the sentence itself but rather aspects of its application. And it must be said that there is room for criticism. I wish to focus on two specific issues, the lack of due process and the sale of executed prisoners' organs.

1. *Lack of Due Process*

China has been remarkably open in the last few years in terms of criticising its own legal processes. A decision has been taken requiring all trials to be held in public (though there remain a few troubling qualifications). In 1998 some 5,000 judges and prosecutors were disciplined. Courts reportedly corrected 8,110 misjudged cases. A revised Criminal Procedure Law was adopted, designed to correct many of the previous inadequacies. China's first law to facilitate the practice of law was passed in 1996 and according to 1997 figures China now has 114,000 lawyers.³⁴

Admirable though these steps are, two obvious observations are open. The first observation is that the previous system under which thousands of convicted prisoners were executed was manifestly unfair as implicitly admitted by the Chinese authorities in their campaign to reform it. The second observation is that such a manifestly unfair system is not going to right itself quickly. To establish and inculcate a culture of rule of law is a long term proposition. Yet thousands of convicted prisoners will continue to be executed. An irrevocable punishment is being meted out to prisoners some of whom may not have committed a crime of violence, some of whom may not have had adequate or indeed any legal representation at their trial and virtually none of whom have been able effectively to appeal their sentences.

All legal systems are imperfect. But some are more imperfect than others. Where there is a legal system that has for decades been subservient to political interests and decision-making, that is in the hands of poorly trained legal workers and that has no tradition of defending the independence of the judiciary, one would plead that prudence should dictate that such a legal system not carry out irrevocable punishments. This is an argument for doing away with the death penalty in all legal systems but it has particular resonance in the case of China.

2. *The Sale of Executed Prisoners' Organs*

That China uses the organs of executed prisoners has been conceded. In criticising a BBC documentary on the subject, the Chinese Ambassador to the United Kingdom wrote to *The Times* 'the corpses, or organs of prisoners on death row are used for transplants only in rare instances in China.'³⁵ The Provisional regulations of the Supreme People's Court on the Use of Dead Bodies or Organs from Condemned Criminals purports to regulate the process by requiring a regime of consent for such uses.³⁶ So from the Chinese perspective there is an occasional use of organs from executed prisoners who (or whose families on their behalf) have consented to the process. I am not against the practice of organ transplants in non-criminal circumstances given the 'waste' nature of the organs and the pressing needs of the sick. There may even be circumstances when ethicists would condone the use of prisoners' organs but it is difficult to condone the practices being carried out in China.

According to China's critics and in particular one of its leading dissidents, Dr Harry Wu, the reality is far more grizzly as demonstrated by the following well substantiated allegations he makes.³⁷ Rather than being an occasional practice, the estimate of the number of kidneys transplanted from executed prisoners in 1992 range from 1,400 to 1,700. Wu argues that Chinese people have a strong preference for burial intact and that consent for organ removal is rare and its granting is really a fiction in the Chinese prison system. The choice of method of execution is partly determined by the need to keep the organs intact and fresh. There are allegations of organs being removed from live prisoners before their execution. The price received by the institutions of the Chinese criminal justice system for the organs sold outside China for a kidney transplant is around \$30,000. In February 1998, two Chinese nationals were charged in a Western country with trying to sell human organs allegedly taken from the bodies of executed prisoners.³⁸

At this point, the ethicists would have little trouble pointing to the dilemma the Chinese system is facing. The State has a pecuniary interest in the death of its prisoners. It is therefore in breach of one of the most fundamental rules of natural justice; that the judge have no interest in the case. The judges, the prosecutors and the prisons are all part of the State, with no effective doctrine of separation of powers to divide the various roles. The State derives a considerable income from the export of organs for transplant. Every death penalty carried out represents a possible source of income to the State, every commutation of a death penalty sentence represents a loss of income to the State. These are the sort of ethical and legal problems that occur when there is resort to the death penalty. One conclusion we should draw is that taking human life by the State is untenable and leads to untenable results.

It is not China and the United States that I wish to criticise. It is their recourse to capital punishment. Even though they come from opposite ends of the political and legal spectrum they both run into insoluble dilemmas in their management of the system. It matters not whether one has a strict application of the doctrine of the separation of powers and the other does not, both run into ethical dilemmas ranging from the impact of racism on capital punishment to the financial interest in speedy and numerous executions. Surely the conclusion to be drawn is that no system can make the death penalty work in a fair and ethical way.

3. Capital Punishment and Innocence

I was intrigued by a newspaper article I read earlier this year³⁹ reporting that a journalism professor at Medill School of Journalism had set his students the task of investigating the case of a death row inmate. The students studied the case and re-enacted the crime and became convinced that the key witness could not have seen the crime as he testified. They confronted him and he soon confessed that police had pressured him into embellishing his evidence. When they spoke to another witness they were astounded when she told them her then husband was in fact the killer. The death row inmate, Anthony Porter, was released from prison 48 hours before his date of execution and 16 years after his conviction.

What astounded me about this case was not just Mr Porter's deliverance but a related fact. Professor Proffess set his students such a problem each year and this was in fact the second time they had proven a death row inmate's innocence. The investigation of the class of 1996 led to the double murder convictions against four men, two of whom had been sentenced to death, being thrown out 18 years after they were put on death row. So lightning does strike twice.

In fact, lightning has struck 75 times since capital punishment was reintroduced in the United States in 1976. Anthony Porter was the 75th death row prisoner to be released since 1976. Seventy-five cases allow for some statistical data to be retrieved and perhaps for some conclusions to be drawn. In the cases of wrongly convicted prisoners on death row up to 1973, the average time between conviction and eventual release was six and a

half years. In the cases since 1973 the average time has gone to seven years. Currently, the average time between sentencing and execution is eight years.⁴⁰ So on the law of averages, some innocent people are sure to be executed in the United States.

The political processes at work in the United States are compounding this problem. Allow me simply to list several salient factors; politicians continue to push the death penalty as a response to law and order issues; legal aid resources are under pressure and the accused are not receiving skilled representation; jury selection leads to juries who necessarily accept the death penalty as a form of punishment; the heinousness of the crime puts pressure on prosecutors to obtain convictions; and changes in appeal rights may well lead to a shortening of the average time between conviction and execution.⁴¹

All these factors increase the possibility of the execution of innocent people in the United States. Indeed we have all been reminded recently about this phenomenon in the Harrison Ford film “The Fugitive” which is based on the 1954 case of Dr Sam Sheppard who was wrongly convicted of killing his wife and for which the prosecution had sought the death penalty. ‘New DNA evidence taken from the exhumed body of Dr Sheppard provides the most compelling evidence that he was wrongly convicted’.⁴² The evidence tends to incriminate Richard Eberling a window washer at the Sheppard home who is now serving a prison sentence for another murder.⁴³

At this point the facts get a bit more difficult to interpret. We know that 75 people were released from death row over the last couple of decades but we do not know how many innocent people were executed. No doubt some supporters of capital punishment would argue that this has never happened but had the Medill students not looked into Anthony Porter’s case, he would have been one of those in that category. Surely there have been others. Professors Bedua and Radelet have looked at executions in the United States and have argued that at least 23 innocent people have been executed in the United States this century.⁴⁴

Legal systems around the world tend understandably to focus on the rights of the living. So after the execution has taken place there is no criminal justice procedure to test the guilt or innocence of the executed prisoner. But the list at the beginning of this paper should leave no doubt that the phenomenon of executing the innocent exists.

This brings us to the argument whether the burden of proof in criminal matters, requiring guilt beyond a reasonable doubt, is sufficient in capital cases. The American Law Institute’s Model Penal Code posits a different degree of proof in death penalty cases. To eliminate mistaken executions it calls for the death penalty not to be imposed if the evidence ‘does not foreclose all doubt respecting the defendant’s guilt.’⁴⁵ This would create a ‘no doubt’ evidentiary requirement. No state in the United States has adopted this recommendation.⁴⁶ And so the United States criminal justice system will continue occasionally to execute the innocent.

We do not have the same degree of academic investigation into the individual cases of execution in China. Surely, however, we can conclude that the defects in the legal

system in China and the political campaigns that led to the criminalisation of certain activities would mean that this phenomenon exists in China as well.

While this section of the paper has focused on the United States because there is so much material to work with, the issue applies equally to China and is indeed universal. This was eloquently argued recently by an Australian judge who listed a number of cases of heinous crimes that raised public outrage in Australia, Canada and the United Kingdom. He makes the point that had there been a death penalty in such cases the convicted prisoners could well have been executed. But in the cases Ernst Pohl, Lindy Chamberlain and Timothy Anderson in Australia, the case of David Milgaard in Canada and the cases of the Birmingham Six, the Guildford Four and the Maguire Seven in the United Kingdom, all the convicted murderers were subsequently found to be not guilty. Justice Ken Crispin concluded that were there is a death penalty ‘innocent people would also die.’⁴⁷

Perhaps the Marquis de Lafayette put it most succinctly when he said ‘I shall ask for the abolition of the death penalty until I have the infallibility of human judgement demonstrated to me.’⁴⁸

4. Capital Punishment in International Human Rights Law

Introducing this year’s Amnesty International Annual Report that focuses on the death penalty, Secretary-General Pierre Sarré argued that ‘deliberately killing someone violates the most basic of all human rights – the right to life – and has no place in today’s world.’⁴⁹ I accept the sentiment behind the statement but I must enter something of a quibble from the perspective of international law. UN High Commissioner for Human Rights Mary Robinson uses a more careful formulation when she speaks of ‘the international community’s expressed desire for the abolition of the death penalty’ but goes on to note that ‘although not absolutely proscribed in international human rights law, the International Covenant on Civil and Political Rights as well as American and European Conventions on Human Rights all have additional protocols providing for the abolition of capital punishment.’⁵⁰

Article 3 of the Universal Declaration of Human Rights speaks of the ‘right to life’ and provides for no explicit exceptions. I believe we can take this to be an aspiration towards which the international community should move. But we cannot take it to be black letter law. The International Covenant on Civil and Political Rights was intended to provide the legal formulation to achieve the objectives in the Universal Declaration and it has a more detailed articulation of the of what it calls ‘the inherent right to life’. Article 6 of the Covenant makes clear that ‘no one shall be arbitrarily deprived of his life.’ The Article goes on to deal specifically with the death penalty but rather than proscribe its use, it limits its use in a number of ways. The most ardent abolitionist must therefore begin from the proposition that international human rights law does not have an outright prohibition against capital punishment. Indeed, in my view, those who argue that it does are doing a disservice to international human rights law.

The outlawing of capital punishment in international law can only come through the agreement of States to be bound by treaties that preclude resort to its use. There are several such treaties. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty was adopted and proclaimed by UN General Assembly Resolution 44/128 of 15 December 1989 and entered into force in July 1991. It contains an outright prohibition to executions with the only exception permitted being the application of the death penalty in time of war for crimes of a military nature and that exception is only permitted if made as a reservation at the time of ratification. It currently has 36 parties with three further States having signed.

In Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty entered into force on 1 March 1985. It abolishes the death penalty in peacetime and allows for no derogations or reservations. It has been ratified by 32 European countries and signed by a further six. Albania, Belarus Turkey, Russia and Ukraine are the only European countries to maintain capital punishment in peacetime as part of their law.⁵¹

In the Americas, the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty entered into force on 6 October 1993 and currently has six parties with one further State having signed. It provides for the total abolition of the death penalty in peacetime. It continues a strong abolitionist tradition in that several Latin American States abolished the death penalty a century ago.⁵²

This is the manner through which international human rights law will abolish the death penalty. It flows from the normal application of treaty law and the observance of the basic rule of treaty law 'pacta sunt servanda.' The one aspect of these treaties I wish to examine is their permanent nature because this is essential to the ultimate objective of abolishing the death penalty throughout the world for all time. It is one aspect of these instruments that may not be widely understood.

Australia has been a party to the Second Optional Protocol since 1990.⁵³ Yet whenever a politician is looking for a cheap newspaper headline, a common canard is to call for the reintroduction of the death penalty.⁵⁴ These politicians may not realise that they no longer have the power to reintroduce capital punishment in Australia. The Second Optional Protocol is a bar for all time in that regard. The Human Rights Committee established under the Civil and Political Rights Covenant authoritatively considered the issue in December 1997.⁵⁵ The Committee examined, at the request of the High Commissioner for Human Rights, the purported withdrawal of the Democratic People's Republic of Korea from the Covenant.

In its General Comment, the Committee noted that the Covenant does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Thus the matter is governed by the relevant provisions of customary international law which for this purpose is codified in Article 56 of the Vienna Convention on the Law of Treaties requiring that in such a case, the treaty is not subject to denunciation or withdrawal unless the parties 'intended to admit the possibility of denunciation or

withdrawal' or it 'may be implied by the nature of the treaty.' The Committee determined that the absence of a provision for denunciation could not have been an oversight because such a provision exists in respect of Article 41(2) of the Covenant concerning the withdrawal of the acceptance of the individual complaints mechanism as well as in the First Optional Protocol to the Covenant, which was negotiated contemporaneously, Article 12 of which contains a denunciation provision.

The Committee went on to note that the Covenant is not the type of treaty that by its nature would normally be subject to denunciation. As the codification of the principles in the Universal Declaration of Human Rights, it does not have a temporary character. Once a people have been afforded the protection of the Covenant, such protection devolves with the territory and continues to belong to them. The Committee then noted that the same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.

Similar reasoning would apply to Optional Protocol 6 to the European Convention and the Additional Protocol to the American Convention. The American Convention on Human Rights reinforces this point in Article 3 stating that "the death penalty shall not be reestablished in states that have abolished it."

I would argue that this concept of the absence of a right to reestablish the death penalty flows from the use of the term 'abolish'. This carries with it a notion of permanence and may be compared with other occasional calls for a moratorium or suspension of executions and even for their termination. Another example of the widespread and deliberate use of the term 'abolish' in a human rights campaign may be found in the movement for the abolition of slavery. No one would argue that the abolition of slavery could ever be regarded as a temporary phenomenon. It is abolition for all time and the campaign against the death penalty should be seen in the same light.

5. Universality

According to Amnesty International, a majority of the world's nations may in 1999 be placed in the abolitionist camp.⁵⁶ Amnesty claims 104 adherents to the camp comprising 67 countries who have abolished the death penalty for all crimes, 14 for all but exceptional (usually wartime) crimes and 23 who can be considered abolitionist de facto because while they retain the death penalty in the laws, they have not carried out an execution in more than 10 years. As against these 104, Amnesty lists 91 countries that have retained the death penalty. Drawing on these figures some argue that a majority in the world is now abolitionist and the trend is growing.⁵⁷ Can one therefore conclude that we are approaching universal acceptance of the abolitionist cause?

While I would be pleased to accept the argument put by Amnesty, it would be like declaring victory at the height of the battle. I believe we should put the number of abolitionist states at a much lower figure. The only states we should view as unequivocally abolitionist are those who have ratified one of the three binding instruments under which they have pledged to their fellow treaty parties and to their

citizens that they have abolished capital punishment (in peacetime at least) for all time. The three instruments in question carry 72 ratifications but a closer examination shows that some 28 countries have ratified both the relevant global and regional instruments. Thus the true number of abolitionist states is 44⁵⁸. Less than one quarter of the world's countries.

I submit that this is the only valid method of measuring the situation because abolition under domestic law is not necessarily definitive. The example of the Philippines is salutary. The Philippines, which was the first Asian country to abolish the death penalty for all crimes in 1987, reintroduced the death penalty in 1993⁵⁹. Since that time 400 people have been sentenced to death and the first execution in over a decade was carried out this year against the protests of many in the international community.⁶⁰ The Philippines case demonstrates how national laws and even national constitutions are subject to change. So the test of an abolitionist state should be far tighter than the Amnesty International definition.

Incidentally, the irrevocability of the death penalty was tragically demonstrated on 25 June 1999 in the Philippines' second execution since the reintroduction of the death penalty. Literally at the eleventh hour, Bishop Bacani managed to persuade President Estrada to exercise his right to grant clemency and commute the sentence. The President rang the prison to pass on his decision. But the line was giving a busy signal and the prisoner was executed.⁶¹ The system executed a man who it had been decided should be spared. This is a mistake that cannot be corrected.

We should also examine the diversity of the 44 abolitionist states. Europe accounts for 30, Latin America 7, Africa 3, Oceania 2 and Asia 2. It is clear that Europe is becoming an abolitionist continent. In May this year the Standing Committee of the Council of Europe Parliamentary Assembly called on all 41 members of the Council to abolish the death penalty and ratify Protocol 6. There was only one execution in Europe in 1998 (in Chechnya, Russia) and the Council of Europe hoped that Europe could begin the new millennium as fully abolitionist.⁶² And as noted above there is a strong abolitionist tradition in Latin America which somewhat balances the enthusiasm for capital punishment in some parts of the United States. Australia and New Zealand are also firmly in the abolitionist camp.

There are other positive developments such as the prohibition of the death penalty in the international criminal courts established to date. The Statutes for the *ad hoc* International Criminal Tribunals for the former Yugoslavia⁶³ and for Rwanda⁶⁴ excludes recourse to the death penalty and so does the recently adopted Statute of the International Criminal Court.⁶⁵

But the African Charter on Human and Peoples' Rights adopted in 1981 makes no mention of the death penalty. Article 4 of the African Charter repeats the formulation in the Covenant that no person may be arbitrarily deprived of his life. Only three African states, Mozambique, Namibia and the Seychelles belong to the abolitionist camp as

tightly defined. But there has been a significant move in the judicial abolition of the death penalty in South Africa.⁶⁶

There is little support for the abolitionist position in Asia. Azerbaijan and Nepal are parties to the Second Optional Protocol. Kyrgyzstan and Turkmenistan have both declared moratoria on the death penalty and there are hopes that they will become abolitionists.⁶⁷ Many Asian states take an overtly retentionist position. Clearly China does. In the 53-member Commission on Human Rights the resolution on the question of the death penalty calling *inter alia* for a moratorium on executions, was adopted on 28 April 1999 by a vote of 30 in favour, 11 against with 12 abstentions. The 30 in favour included only one member of the Asian Group (Nepal), the 11 against included seven Asian Group countries and the remaining four Asian Group members of the Commission abstained.

The Arab Charter of Human Rights, adopted in September 1994 but not yet in force proclaims the right to life as in the Covenant. Three provisions recognise the legitimacy of the death penalty while placing certain limits on its use. Members of the Arab League argue in favour of the death penalty based on the strictures of the charter.⁶⁸ Nor could it be said that there is significant grass roots opposition to capital punishment in these countries.

One is left to conclude that while there may be a move towards abolition of capital punishment, it would be wrong to argue that such a move has a universal basis. There continues to be strong support for the death penalty in the United States, Asia, the Middle East, Africa and the Caribbean. The situation in Asia in particular must be characterised as one in which abolitionists are very much in the minority when one considers the number of countries who now carry out the death penalty. They include (with figures for executions in 1997 in brackets) China (1,876), Kazakhstan (35), Taiwan (29), South Korea (23), Singapore (14), Vietnam (9), Afghanistan (6), Pakistan (6), India (5), Japan (4), Bangladesh (2), Malaysia (2), Uzbekistan (2), Thailand (2) and of course now, the Philippines.⁶⁹ We can only guess with concern what the figure might be for the Democratic People's Republic of Korea.

It is my belief that the strength of human rights is in their universal acceptance. While some rights may be respected in the breach in some parts of the world, there is nevertheless a universal acceptance of what the basic rights are. They are articulated in the Universal Declaration of Human Rights and given legal effect in the two International Covenants. It weakens the whole fabric of human rights if the argument is put that rights outside this framework are part of the body of international human rights law that all countries must respect. The abolition of capital punishment must be seen as currently outside the body of human rights law. It is an aspiration that we must work towards.

So when state executions occur, I believe our human rights obligation is to examine whether that life was taken arbitrarily in which case it would be a clear breach of international human rights law. One should look to see if the sentence was imposed for only the most serious crimes, as required in the Covenant. One should examine whether

the state, and its prosecutors and judges, were disinterested as is required by the rules of natural justice. Common humanity dictates that one should look at the method of execution to determine whether it is cruel or unusual. One should look at the executed persons to see if they are minors, pregnant women or mentally retarded. And, of course, one should ensure that the execution was not part of a process of genocide. But one should try to refrain from accusing the state of being in breach of international human rights law because of the very fact that an execution has occurred.

Instead, I believe human rights activists should argue strongly for states to become parties to the global or regional instruments abolishing capital punishment for all time. The Second Optional Protocol to the International Covenant on Civil and Political Rights beckons and I urge all states not party to it to consider it carefully and sympathetically with a view to their acceding to it.

¹ The list is taken from Schabas *The Abolition of the Death Penalty in International Law* (2nd edn, 1997) Cambridge University Press, Dedication page.

² *Ibid*, p3.

³ *Ibid*.

⁴ Death Penalty Information Centre, *The Death Penalty: An International Perspective*, Washington DC, <http://www.essential.org/dpic/> (hereafter referred to as DPIC).

⁵ *Ibid*.

⁶ *Ibid*.

⁷ *Gregg v Georgia* (1976) 428 US 153 which ruled that “the punishment of death does not invariably violate the Constitution...(where State statutes contain) objective standards to guide, regularise, and make rationally reviewable the process for imposing the sentence of death.”

⁸ DPIC.

⁹ *Furman v Georgia* (1972) 408 US 238.

¹⁰ Bedau *The Case Against the Death Penalty* published on the American Civil Liberties Union home page <http://www.aclu.org/>. (hereafter referred to as ACLU).

¹¹ *Ibid*.

¹² *Ibid*.

¹³ Dieter *Twenty Years of Capital Punishment: a Re-evaluation*, DPIC.

¹⁴ American Civil Liberties Union *Double Justice: Race and the Death Penalty* ACLU.

¹⁵ *Ibid*.

¹⁶ General Accounting Office *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Feb 1990).

¹⁷ *Callins v Collins*, 114 S. Ct. 1127, p1135.

¹⁸ UN Doc. ST/LEG/SER.E/13 at p175.

¹⁹ Schabas, op cit, p83.

²⁰ *Ibid*, p85.

²¹ Streib *The Juvenile Death Penalty Today* (1998) DPIC.

²² DPIC.

²³ United Nations Press Release, HR/99/7 of 3 February 1999.

²⁴ Bedau, op cit, p4.

²⁵ *Ibid*.

²⁶ Radelet and Akers, *Deterrence and the Death Penalty: The Views of the Experts*, (1995) reported in DPIC.

²⁷ Beccaria *On Crimes and Punishment* (1764) trans Paolucci (1963) Bobbs-Merrill.

²⁸ 'At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of grayish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead. The electrode on the left leg was re-fastened. Mr. Evans was administered a second thirty second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. [They] reported that his heart was still beating, and that he was still alive. At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace, to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request was denied. At 8:40 p.m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes.' Boston globe, 24 April 1983, p24.

²⁹ 'When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes. At this point Don's body started convulsing violently. His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode. After about a minute Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched. After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth. Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete. Don Harding took ten minutes and thirty one seconds to die.'

(Dissenting Opinion in *Gomez v. U.S. District Court*, 112 S.Ct. 1652)

³⁰ *Chaney v. Heckler*, (1983) 718 F.2d 1174. A further problem has been found with the execution of intravenous drug users who have collapsed most of their accessible veins.

³¹ Quoted in United States Department of State *China Country Report on Human Rights Practices for 1998* (1999) s1 part e.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ The Times, 5 December 1994 p19.

³⁶ Laogai Research Foundation *Communist Charity: the Use of Executed Prisoners' Organs in China* (1995) <http://www.laogai.org/>

³⁷ Ibid.

³⁸ *China Country Report* op cit.

³⁹ Mark Riley *Class Project Saves Inmate 48 Hours Before Execution* Sydney Morning Herald 13 March 1999 p28.

⁴⁰ Dieter *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* DPIC

⁴¹ Ibid.

⁴² New York Times, 3 May 1998.

⁴³ DPIC, op cit.

⁴⁴ Bedua and Radelet *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992) Northeastern University Press.

⁴⁵ American Law Institute *Model Penal code (Proposed Official Draft)* (1962) quoted in Dieter, op cit.

⁴⁶ Ibid.

⁴⁷ Ken Crispin *Death Penalty is Murder by Another Name* Canberra Times 22 May 1999.

⁴⁸ Quoted in Dieter, op cit.

⁴⁹ Amnesty International News Release *Towards a World Without Executions* 16 June 1999.

⁵⁰ Message from Mary Robinson to the Conference organised by Hands off Cain on the Abolition of the Death Penalty, 23 March 1998, <http://www.unhchr/>

⁵¹ Council of Europe Press Release *Georgia Signs the Protocol which Outlaws the Death Penalty* 17 June 1999.

⁵² Venezuela (1863), Costa Rica (1877), Brazil (1882), Panama (1903), Ecuador (1906), Uruguay (1907) and Colombia (1910), Schabas, op cit, p261.

⁵³ UN Document E/CN.4/1998/50 p9.

⁵⁴ A recent example was the call by three Liberal MLAs in the Australian Capital Territory reported in the Canberra Times of 19 May 1999.

⁵⁵ UN Document CCPR/C/21/Rev.1/Add.8/Rev.1 of 8 December 1997.

⁵⁶ Amnesty International *Facts and Figures on the Death Penalty*, <http://www.amnesty.org/>

⁵⁷ Schabas, op cit, preface to Second Edition.

⁵⁸ The 44 countries that are parties to one or more of the three abolitionist instruments are Andorra, Australia, Austria, Azerbaijan, Belgium, Brazil, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Norway, Panama, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Uruguay and Venezuela.

⁵⁹ Republic Act 7659.

⁶⁰ Amnesty International *PHILIPPINES the Death Penalty: Criminality, Justice and Human Rights* 1997.

⁶¹ Philippine Daily Inquirer *Phone Snafu allows Execution of Rapist* 26 June 1999.

⁶² Council of Europe, Press Release 26 May 1999.

⁶³ Statute of the ICTFY, Art 24

⁶⁴ Statute of the ICTR, Art 23.

⁶⁵ Rome Statute of the International Criminal Court, Art

⁶⁶ Schabas, op cit, p16.

⁶⁷ Amnesty International *Death Penalty News* December 1998.

⁶⁸ Schabas, op cit, p18.

⁶⁹ Amnesty International *Facts and Figures on the Death Penalty* op cit.