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**CAPITAL PUNISHMENT : THE USA IN WORLD PERSPECTIVE**

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# **CAPITAL PUNISHMENT : THE USA IN WORLD PERSPECTIVE**

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### *Abstract*

This paper traces the history of the death penalty's progressive abolition and outlines future opportunities. The author argues that after two hundred years of slow progress, the past two decades have seen a "new wave" of abolition. In this new wave the pace at which new countries have abolished the death penalty has increased dramatically. In addition, these countries have usually achieved abolition swiftly, within a few years, often without moving deliberately through each of the stages of reform that had previously tended to precede abolition. The author analyzes the factors that have produced this new wave, pointing to capital punishment's transformation from a criminal justice policy issue to a fundamental human rights issue and the key role played by political leadership — rather than major shifts in popular opinion. The author concludes with an analysis of the possibilities for abolition in the remaining retentionist countries. He points especially to the persistence of capital punishment in the United States as one of the greatest obstacles to universal acceptance of the view that the death penalty inherently abuses human rights and outline strategies that may overcome this persistence.

## **Capital Punishment: The USA in World Perspective**

Roger Hood

Hoffinger Symposium  
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### **Introduction**

In this talk I want to cover five themes in trying to provide an overview of where the USA stands in relation to other countries in the use of capital punishment.

- First to inform you of the situation worldwide as regards the extent to which nations have abandoned the use of capital punishment. It will become apparent that there has been an enormous change in the rate at which countries have embraced abolition in recent years. So much so that I think we can talk of a 'new wave' of abolition, distinct in several ways from the movement that preceded it.
- Secondly to say something about the extent to which those countries that have retained the death penalty use it in practice, especially as reflected in the number of judicial executions.
- Thirdly to identify those factors that appear to have been most influential in bringing about change in the resort to capital punishment
- Fourth to discuss some of the impediments that remain in persuading countries to restrict their use of and eventually abandon the death penalty.
- And finally to speculate, as an outsider, on what the prospects are that capital punishment will, within a reasonable period of time, be eliminated throughout the USA.

### **Slow beginnings**

If one takes the beginning of the modern movement to abolish the death penalty to be the publication of Beccaria's famous book *On Crimes and punishments*, in 1764, one can certainly say that progress towards that objective was gradual, indeed rather slow and uncertain, over the next two hundred years. But it is worth recalling in the context that I shall outline that it was here in the USA that the most progress was initially made. Leaving aside the short periods of abolition in Tuscany and Austria, it was as many of you will know, the state of Pennsylvania that was the first to restrict capital punishment to only the most serious types of murder – felonious murder in the first degree – in 1764, soon followed by two other states. As Stuart Banner points out, in the northern states capital punishment was restricted to murder by the 1840s and in 1846 Michigan became the first modern state to abolish the death penalty for murder, soon followed by Rhode Island and Wisconsin. As early as 1867 Illinois abandoned the mandatory imposition of

capital punishment for first degree murder. Venezuela became the first nation state to abolish the death penalty for all crimes in 1863 and in Europe abolition of capital punishment for murder began in Portugal in 1867, spreading to Italy, the Netherlands and the Scandinavian countries by early in the twentieth century.

Nevertheless, the plain fact is that by 1957 - the year according to William Schabas that the text of article 6 of the International Covenant on Civil and Political Rights was completed – there were still only 10 countries that had abolished capital punishment for all crimes in all circumstances: seven of them being in South America, with (West) Germany (which did not become a member state of the UN until 1973) being the only large European State that had done so. In addition a further nine western European countries had abolished capital punishment for murder and other ‘ordinary’ crimes in peacetime: 19 countries in all, less than a fifth of the UN member states. By 1966, the year that the ICCPR was approved by the United Nations General Assembly, there were still only 26 abolitionist countries, several of them very small states.<sup>1</sup> The majority of them had abolished the death penalty for murder but not for crimes against the state or in time of war. West Germany was the only large European country that was completely abolitionist. It was to be another 11 years before the last execution took place in Western Europe in France in 1977 and not until 1984 that Turkey abandoned capital punishment in practice.

Had there been a pattern and how far could abolition go?

Marc Ancel spelled out the typical, although he was wise enough to say, not the inevitable, sequence of events:

“the process of abolition has usually taken a long time and followed a distinctive pattern; first the reduction of the number of crimes legally punishable by death until only murder (and sometimes) treason are left, then systematic use of commutation, leading to de facto abolition, and eventual abolition *de jure*.”

Yet he still believed that capital punishment might be necessary in certain circumstances. He stated, as if it were not to be doubted, just forty-three years ago:

“Even the most convinced abolitionists realise that there may be special circumstances, or particularly troublous times, which justify the introduction of the death penalty for a limited period.”<sup>2</sup>

### **A transformation**

Over the next twenty years the pace of abolition was steady: roughly one nation state a year abandoned capital punishment. Then things began to change dramatically. Indeed, there has been a transformation in the status of capital punishment.

Over the twelve years 1988 to the end of the century on average more than three

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<sup>1</sup> Plus nine states in the USA, two in Australia and 24 of the Mexican states.

<sup>2</sup> Quoted in Roger Hood, *The Death Penalty. A Worldwide Perspective*, Oxford University Press, 3<sup>rd</sup>. ed. 2002, p.24

countries a year abolished it. The pace has slackened a little since then but shows no sign, as some had predicted, of coming to a halt.

As can be seen in Table 1 which compares 1988 with the beginning of 2005 (and various intervening periods years) in just 16 years, between the beginning of 1988 and the end of 2004, the proportion of retentionist countries in which at least one execution had been carried out within the last 10 years and which had not within this period declared a moratorium on executions, had fallen from 56 to 31 per cent.

**Table 1**  
**Status of the death penalty at the end of 1988, 1998, 2003 and March 2005**

	Completely abolitionist	Abolitionist for ordinary crimes	Retentionist but ADF	Actively retentionist
31 December 1988 (180 countries)	35 (19%)	17 (9%)	27 (15%)	101 (56%)
31 December 1998 (194 countries)	70 (36%)	11 (6%)	34 (17.5%)	79 (41%)
31 December 2003 (195 countries)	80 (41%)	12 (6%)	41 (21%)	62 (32%)
31 March 2005 (195 countries)	86 (44%)	10 (5%)	38 (20%)	61 (31%)

The proportion of states that are abolitionist increased from 28 per cent to 49 per cent of all UN member states. Also to be observed, especially in relation to Ancel’s reservations in 1962, was the enormous increase in the number of countries that had become abolitionist for all crimes in all circumstances, in peacetime as well as wartime, in civilian and military law. In 1988 they numbered 35 (67 per cent of the 52 abolitionist states) but, by March 2005, 86 (90 per cent of the 96 abolitionist countries).

Noticeable also is the much larger number of retentionist countries in which executions have not been carried out for at least 10 years or which had declared a moratorium on executions, such as Russia. Of course, not all of the 38 are committed to moving towards abolition. Those in the Commonwealth Caribbean, for example, have been thwarted in their desire to proceed with executions by the sterling work of human rights lawyers in bringing their cases before the Judicial Committee of the Privy Council in London. Some others, after long periods of abstention, may, as did Tennessee after 40 years and the USA Federal Government after 38 years (periods that would have astonished Ancel), renew executions in response to a particularly egregious or notorious murder.

Nevertheless, 24, well over half, of these 38 countries are regarded by Amnesty International as truly abolitionist in spirit and intention.

As many of you will know abolition has spread across all of Europe to include all members of the Council of Europe<sup>3</sup> and of the European Union, which seeks 'European integration'. But it has also spread to states in south central Asia: to Turkmenistan and most recently, in February 2005, to Tajikistan. Neighbouring Kazakhstan and Kyrgyzstan have imposed moratoria with a view to abolition as has Russia since 1996. When the first edition of my book was published in 1988 I could record no abolitionist country in the African region. Now there are 11 and a further 21 where no judicial executions have been carried out for a decade. Abolition may come soon to Kenya, Sierra Leone and possibly Ghana.

What is striking about this development is that abolition has usually been achieved swiftly within a few years, often without a country going through all the stages over a period of time, as previously identified by Ancel.

Although in over 30 countries that have the death penalty on their statute books capital punishment can be imposed for certain dangerous drugs offences, and in about the same number for sexual offences and in about a dozen countries for non-violent serious property or economic offences, several countries have restricted the scope of capital punishment in recent years. For example, in Uzbekistan, the death penalty is now available for only two crimes – murder with aggravated circumstances and terrorism – compared with 13 as recently as 1998. The new Belarus Criminal Code of 1999 appointed the death penalty for 15 fewer offences (in 14 rather than 29 Articles) than had the Code of 1960, and can now only be imposed 'when it is dictated by special aggravating circumstances as well as an exceptional danger posed by the offender'. In 2001, the Human Rights Committee, on receiving the report from the Democratic People's Republic of Korea (North Korea) welcomed the reduction of capital offences from 33 to 5 "as well as the readiness ... confirmed by the delegation, further to review the issue of capital punishment with a view to its abolition". In China, there has yet to be any reduction in the wide range of offences – 68 in all – for which the death penalty may be imposed: but the matter of abolishing the death penalty for all economic crimes is now being openly debated and a book of essays entitled "The Road to Abolition", as a signifier of the final goal, was published by the People's Security University Press in 2004. Similar consideration of restricting the scope of capital punishment has also been raised recently in Vietnam.

In addition, there has been progress in eliminating mandatory capital statutes, most notably in the countries of the Commonwealth Caribbean.

Another useful index is whether countries that had abolished the death penalty reintroduced it. This has not happened since the Philippines did so in 1993 (although no

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<sup>3</sup> The political organization set up in 1949, now with 46 member states, "to defend human rights, parliamentary democracy and the rule of law and promote awareness of a European identity based on shared values and standardized social and legal practices."

executions have been carried out since 2000) and the American States of Kansas and New York in 1994 and 1995 respectively, in neither of which have there been any executions. It is also highly significant that the death penalty was excluded as a punishment by the UN Security Council when it established the International Criminal Tribunal to deal with atrocities in the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994. Nor, as you probably know, is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998.

As regards the implementation of the death penalty, even among the 61 countries that have carried out an execution within the past decade, no more than 43 had executed anyone within the five years 1999-2003. And, as far as can be ascertained, some 16 of these countries executed no more than 10 people (an average of no more than two a year).

According to the figures published by Amnesty International – and one must read them with a severe ‘health warning’ as many are merely estimates – only 18 countries are known to have carried out 20 or more judicial executions within this period, and, as can be seen from Table 2, only eight are known to have executed at least a 100, an average of 20 or more persons a year: China, Democratic Republic of the Congo, Iran, Saudi Arabia, Singapore, USA, Vietnam and Yemen.

**Table 2**  
**Judicial executions recorded by Amnesty International 1999-2003**

Country	Total known executions 1999-2003	Annual average number per million population
China	6,687	1.04
Democratic Republic of Congo	350	1.30
Iran	604	1.83
Saudi Arabia	403	3.66
Singapore	138	6.9
USA	385	0.27
<i>Texas</i>	<i>149</i>	<i>1.35</i>
<i>Oklahoma</i>	<i>56</i>	<i>3.2</i>
Viet Nam	128	0.32
Yemen	144	1.51

Furthermore, there is there is evidence to suggest that where the abolitionist movement has not persuaded retentionist countries to abandon capital punishment it may have been responsible in many of them for modifying the frequency with which they have had recourse to executions. Comparing the five years 1994-1998 with 1999 to 2003, it appears that there were very substantial falls in the number of executions in several countries, most notably Nigeria down from 248 to 4, Belarus from 168 to around 50, Singapore, from 242 to 138 and Egypt from 132 to 59. And within the last five years, executions have continued to fall. To take some examples: the number of executions in Belarus fell from 29 in 1999 to five in 2002 and one in 2003. Forty-one executions were carried out in the province of Taiwan in 1999 and 2000, but only 7 in 2003. The figures for Singapore (the country that had made by far the greatest use of capital punishment in

relation to the size of its population) show a similar trend – 43 in 1999 to 19 in 2003 and 6 in 2004. For 2004, Amnesty International received reports of executions in only 25 countries and, apart from China where it is impossible to get any reliable figures – they vary from under 800 to 3,400 or even more – only one other country was known to have executed more than 100 people (Iran). Leaving these two countries aside Amnesty recorded news of ‘only’ 238 judicial executions worldwide in 2004, 59 of them – or one quarter – in the USA. I recognize of course that extra-judicial, summary and arbitrary executions are sometimes carried out on a large, even occasionally on a genocidal scale, both in countries with and without judicially imposed capital punishment.

### **Factors generating the ‘new wave’**

In trying to explain why some countries have abolished the death penalty one has to recognize that the dependant variable that one is trying to explain is an ever moving target. I shan’t therefore try to do what David Greenberg has been doing, namely to look at the correlation between socio-economic and political variables and use of the death penalty. Rather, I shall paint in broad brush strokes.

Foremost among the factors that have promoted this new wave of abolition, as Franklin Zimring has recently brought to the attention of American readers,<sup>4</sup> has been the movement to transform consideration of capital punishment from an issue to be decided solely or mainly as an aspect of national criminal justice policy and socio-political values to the status of a fundamental violation of human rights: not only the right to life but the right to be free of excessive, repressive and tortuous punishments. But such a conception would not have had political force had it not been taken up and insisted upon by powerful political entities: first the Council of Europe and then the European Union. And this also might not have had an impact, had not the emergence of countries from totalitarian imperialism and colonialism created a climate in which the sought for democracy and freedom readily embraced the notion of the protection of citizens from the power of the state and the tyranny of the opinions of the masses. And it needed political leadership willing to accept the premises that the execution of citizens, whatever crimes they had committed, was a fundamental denial of their humanity and right to existence.

In the long process, lasting from 1948 until 1966, when the ICCPR was adopted by the UN General Assembly (it did not come into force until 10 years later), the question of capital punishment in relation to the right to life was keenly debated. What emerged, quite early on, was a compromise. Article 6(1) stated: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” and Article 6(2): “In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...”. Far from this indicating that those countries that had not abolished the death penalty could proceed under the protection of article 6(2) as several countries have subsequently argued, the Chairman of the Working Party on the drafting of Article 6 stated: “it is interesting to note that the expression: ‘in countries which have not abolished the death penalty’ was

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<sup>4</sup> Franklin E. Zimring, *The Contradictions of American Capital Punishment*, New York: Oxford University Press, 2003, pp. 16-41.

intended to show *the direction* in which the drafters of the Covenant hoped that the situation would develop,” as was the addition of Article 6(6), namely that “Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present Covenant”.<sup>5</sup>

In 1971 and again in 1977 this message, this aspiration, was reinforced by the UN General Assembly in Resolutions which stated that the main objective of the UN, in accordance with article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights, that ‘every human being has an inherent right to life’ is to:

“progressively restrict the number of offences for which capital punishment might be imposed, *with a view to its eventual abolition*”.

The first move to put this into treaty form so as to ensure that countries that abolished the death penalty did not renege and to emphasise that the issue was embraced by the ‘right to life’, came when the countries of the Council of Europe through the Parliamentary Assembly resolved to establish Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which opened for signature in 1983 and came into effect in 1984. Note the date, 7-8 years after the Gregg decision had affirmed the new capital punishment statutes in the USA. Six years later in 1989, just over 15 years ago – that’s how recent it is – the UN General Assembly adopted the second optional protocol to the ICCPR, Article 1 of which stated that no one within the jurisdiction of a State Party ... shall be executed. Clause 2 of the article established the important principle that “The death penalty shall not be re-established in States that have abolished it. Only a handful of those countries that have ratified the protocol have made a reservation allowing for the death penalty to be imposed in time of war on conviction of a most serious crime of a military nature. A year later in 1990, the General Assembly of the Organisation of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. In November 1999, the African Commission on Human and People’s Rights, meeting in Kingali “urged states to envisage a moratorium on the death penalty” and the Asian Human Rights Charter adopted in 1998 (under Article 3.7 ‘Right to Life’) declares “all states must abolish the death penalty.”

Of particular significance was the adoption, in Vilnius on 3rd May 2002 of Protocol No 13 to the ECHR. The member states of the Council of Europe resolved “to take the final step to abolish the death penalty in all circumstances, including acts committed in time of war or the imminent threat of war”. By February 2005, 30 countries had ratified the protocol and a further 13 had signed it. The only States so far not to have acceded to this treaty are Armenia, Azerbaijan and Russia. Altogether, by the end of 2004, 74 countries had ratified one or other of the international treaties or conventions which bars the imposition of capital punishment.

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<sup>5</sup> See William A. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge University Press, 3<sup>rd</sup> ed. 2002, n. 2 p. 68.

It is of course true that one reason why so many countries have ratified these treaties is because of the political and economic pressure put upon some of them by the European political machinery. In 1994 the Council of Europe, and four years later in 1998 the EU, made it a condition of entry that a prospective member state should place a moratorium on executions and abolish the death penalty within a short period, interpreted as three years. But there is more to it than a response to bribery. First, it should be noted that several East European countries, beginning with the German Democratic Republic in 1987, followed by Romania and Slovenia in 1989, and Hungary and the Czech and Slovak Republic in 1990 had all abolished the death penalty before such action became a condition of entry. Second, it is evident that the message being conveyed by the European confederacy of nations is strongly moralistic in tone. Both the Council of Europe and the European Union have declared that “The death penalty has no legitimate place in the penal systems of modern civilized societies, and its application may well be compared with torture and be seen as inhuman and degrading punishment ... abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights”. The language is uncompromising. The Council of Europe will not accept the argument that capital punishment can be defended on relativistic grounds of religion or culture, or as a matter which sovereign powers ought to be left to decide simply for themselves. They wish abolition to have the status of a universal human rights norm in the same way that slavery, for instance, is defined. This is reflected in the Charter of Fundamental Rights, adopted by the EU in Nice in December 2000, Article 2 of which states that “everyone has the right to life” and “No one shall be condemned to the death penalty or executed”, and also prohibits the extradition of persons on charges which might carry the death penalty unless there is a firm guarantee that the penalty will not be imposed. This policy of non-co-operation has also influenced both the South African Constitutional Court and the Canadian Supreme Court, which stated in the case of *United States v Burns* in 2001:

“While the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada has adopted internally, namely the abolition of capital punishment ... It also shows that the rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada’s principled advocacy on the international level, but is also consistent with the practice of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions of the United States”.<sup>6</sup>

Thus the approach in Europe does not seek to attack the death penalty solely on grounds of the faults in its administration or in its applications, such as conditions on death row. It is concerned about these matters especially the latter – witness the famous *Soering* decision of the European Court of Human Rights in 1989 – but the objection is fundamental and principled and goes to the heart of attacking what is described as “inhuman or degrading treatment or punishment” in article 3 of the ECHR or “cruel and unusual punishment” in the eighth amendment of the US Constitution. Several European

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<sup>6</sup> 2001 SCC7 File No 26129.

scholars have suggested that, notwithstanding article 6 of the ICCPR, the time has come to recognize that article 7, which states categorically that “no one shall be subject to torture or cruel, inhuman or degrading punishment” should be interpreted to ban capital punishment. And indeed, in the case of *Öcalan v Turkey* in March 2003, the European Court of Human Rights did endorse the view that capital punishment is “an unacceptable form of punishment ... which can no longer be seen as having any legitimate place in a democratic society.”

Several countries of Eastern Europe abolished the death penalty, just as Italy and the Federal Republic of Germany did after the Second World War, as a mark of their rejection of totalitarianism and the cruelty and injustices associated with it. This was the motivation behind the Czech and Slovak Republic’s decision in 1990, of the Romanian government that replaced Ceausescu at the end of 1989, and of the Hungarian Constitutional Court in 1990 which declared capital punishment unconstitutional on the main ground that it violated the fundamental right to life and human dignity. In Lithuania for example, where abolition took somewhat longer to achieve, it wasn’t simply that parliamentarians in 1998 chose “national interests in strategically important international policy” (meaning the possibility of joining the Council of Europe and the EU) over their constituent’s preference for capital punishment, but as the Lithuanian lawyer Aleksandras Dobryninas has put it: “The attitude to the death penalty in Lithuanian society became a test of the maturity of its democratic outlook and of citizens’ willingness to rid themselves of the former totalitarian and inhumane system.”<sup>7</sup>

The Council of Europe, for which abolition of the death penalty is “a central objective and a core value of the organization”, and especially the EU have become active in international human rights dialogues to influence so-called ‘third countries’ to abandon capital punishment. There are regular Human Rights Dialogues, Seminars and other meetings with China, Belarus, Russia, and more recently with Vietnam. It has also been active in lobbying (especially, but not only, State Governors in the USA) through diplomatic *démarches* whenever death sentences are likely to be put into effect. In October 2003 the Parliamentary Assembly of the Council of Europe found the USA and Japan (who have observer status at the Assembly) “in violation of their fundamental obligation to respect human rights due to their continued application of the death penalty”. There is a further political dimension. The EU resolution on “The Death Penalty in the World” issued in July 2001, calling for a world-wide moratorium on executions, stated that this was “an essential element in relations between the European Union and third countries and one that should be taken into account, “in concluding agreements with third countries”. Both European political entities have of course been supported by Amnesty International, and it should be noted that new pressure groups have emerged such as the World Coalition against the Death Penalty, and ‘Together Against the Death Penalty’ which has so far organised two international congresses, first in Strasbourg France and last year in Montreal.

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<sup>7</sup> A. Dobryninas, ‘The experience of Lithuania’s journey to abolition’, in Peter Hodgkinson and William A. Schabas eds. *Capital Punishment. Strategies for Abolition*. Cambridge University Press, 2004, pp. 233-252 at p. 234.

How was abolition achieved? It was, in all cases that I can think of, abolished through political leadership aided in some countries by the activities of pressure groups, just as it had been in Western Europe, such as the case of France in 1981 where Francois Mitterand, ahead of an election and polls favouring retention, pledged himself to abolish capital punishment – was then elected and re-elected. Political leadership, rather than popular opinion, has also been the hallmark of abolition in Eastern Europe, either through the leadership of the presidents, as in Georgia, Azerbaijan, Turkmenistan and Tajikistan or through that given by Constitutional Courts, as in Hungary and the Ukraine. And, as you will be aware this was the course taken in South Africa when the matter was referred by the new post-apartheid government to the newly constituted Constitutional Court in 1995. The judgment of Justice Arthur Chakalson, president of the Court, rejected ‘public opinion’ as the yardstick for deciding the issue of the death penalty and instead emphasised the need to create in the country a ‘human rights culture’. In a remarkable passage he stated:

“Public opinion may have some relevance to the enquiry, but in itself is no substitute for the duty invested in the courts to interpret the Constitution and uphold its provisions without fear or favour ... The very reason for investing the power of judicial review in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people in our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can secure that our own rights will be protected”.<sup>8</sup>

### **Prospects for further change**

It has to be accepted that for the time being capital punishment appears to be embedded across Asia and, with the exception of Israel, throughout the Middle East. Cambodia (following the fall of Pol Pot and the institution of a new constitution), Nepal and Bhutan are the only Asian countries so far to have abolished it. But in many other countries executions have become rare events, indeed in India they are reserved for the “rarest of rare cases.” And in South Korea, where there have been no executions since 1998, a bill to abolish the death penalty has been presented before Parliament and the National Human Rights Committee has recently pronounced in favour of abolition. In Taiwan too, the Minister of Justice has publicly declared that he wishes to see an end to executions within a few years and in Japan the Federation of Bar Associations has begun a vigorous assault on the death penalty. Even in the Middle East executions are rare events in several countries, such as the Gulf States, and also in North Africa, including Tunisia and Morocco, neither of which have carried out a judicial execution for at least 10 years.

On the other hand, it cannot be denied that the attempts of the abolitionist nations at United Nations Congresses, in the General Assembly and at the Commission on Human Rights to press forward for a resolution calling for a moratorium of death sentences and executions so that the effects can be studied, has been met with hostility from many of the retentionist nations, on the grounds that the death penalty is not an issue of universal

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<sup>8</sup> *State v. Makwanyane* (1995) (3) SA 391 at para 88.

human rights and that every country should be free to determine its own legal measures and penalties to combat crime. While there were 76 co-sponsors of the resolution for a moratorium at the UN Commission on Human Rights in 2004, 64 countries issued a joint statement, introduced by Saudi Arabia, dissociating themselves on the grounds that “there is no international consensus that capital punishment should be abolished.” Indeed, several of these countries at different times have characterized such resolutions as a form of cultural imperialism, dictating a particular set of values. Amongst these countries are those Muslim states that base their criminal justice system on Islamic law. However a scholar with a deep knowledge of the Muslim faith, the distinguished human rights criminal lawyer M. Cherif Bassiouni, has recently argued that there is nothing in the Koran or the Sunna that requires the death penalty, save perhaps for the crime of brigandage when a death occurs: for all other crimes it is optional not mandatory. Bassiouni’s view is that the interpretation of the Koran has been dominated by traditionalists and fundamentalists, whereas secular reformists and forward-thinking traditionalists would emphasize the need to interpret scripture in the light of scientific knowledge and the Islamic emphasis on mercy in order to create a just and humane society.<sup>9</sup> In this regard it is interesting to note that several secular states with large Muslim majorities have joined the abolitionist movement: Bosnia-Herzegovina, Turkey, Turkmenistan and Senegal to name just some of them.

Although the United States has not aligned itself with those at the UN Human Rights Commission that have stigmatized the abolitionist movement as cultural imperialism neither has it embraced the aspiration embodied in Article 6 of the ICCPR and UN Resolutions to abolish the death penalty in due course. The persistence of capital punishment in the United States is, in my opinion, one of the greatest obstacles to the acceptance of the view that this ultimate penalty is inherently and inevitably involves the abuse of human rights. Wherever I have been – in China, the Philippines, the Caribbean – proponents of capital punishment have pointed to the United States to emphasize that capital punishment is not inconsistent with democratic values and political freedom.

What prospects are there that the USA might join those nations with which it shares a cultural and political heritage in abandoning capital punishment?

The United States Government has made its position clear in its response to a UN survey in 2000, and on several other occasions since then, stating that “We recognise that many countries have abolished the death penalty under their domestic laws and that a number of countries have accepted treaty obligations to that effect and we respect their decision to do so. However we believe that in democratic societies the criminal justice system – including the punishment prescribed for the most serious and aggravated crimes – should reflect the will of the people freely expressed and appropriately implements through their elected representatives.”<sup>10</sup> There is nothing different here from the British model except that in the USA the impact of populist sentiment and powerful interest groups on these representatives as well as on key players in the justice system is so much more keenly

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<sup>9</sup> M. Cherif Bassiouni, ‘Death as a penalty in the Shari’a’, in Peter Hodgkinson and William A. Schabas eds. *Capital Punishment. Strategies for Abolition*. Cambridge University Press, 2004, pp. 169-185

<sup>10</sup> Quoted in Hood, *The Death Penalty. A Worldwide Perspective*. 3<sup>rd</sup> ed. 2002, p. 67.

felt, so that there is far less room to exercise freely one's individual judgement than in the UK. And, of course, we are all aware that at the state level there has been little or no appreciation of the import of international treaties and not much, if any concern, for the opinion of foreigners. As Stuart Banner has put it in his *History of the death penalty* "The state judges and prosecutors responsible for administering capital punishment were scarcely concerned that citizens of Paraguay and Germany might consider them a bloodthirsty lot" – he was referring to the cases of Angel Breard and Walter La Grand executed while their cases were still under consideration by the International Court of Justice in relation to the denial of their right to consular assistance under Article 36 of the Vienna Convention on Consular Relations.<sup>11</sup>

David Garland has argued that the reason why the United States, "the last nation in its peer group", has not abandoned capital punishment is not because of "long standing cultural differences" between it and other democratic western nations which have rejected capital punishment, but rather because of a series of "proximate causes" which have acted on the USA during the time when the divergence between it and European nations over the last twenty to thirty years occurred. He was here referring to "America's distinctive institutions of federalism, popular democracy and constitutional review" in the context of a conservative backlash against the *Furman* decision combined with punitive attitudes fuelled by fears of rising crime and violence". He concluded therefore that "America is the last Western nation to complete the abolition process not because of any peculiarly punitive attitudes or any deep-seated cultural commitment but because the political mechanisms for nation-wide abolition do not exist there in the form that they exist in other nations".<sup>12</sup> Thus the death penalty has more a symbolic meaning than any utilitarian justification.

But if this is so – and I am not completely convinced that there is not a cultural divide as regards the degree of punitiveness that is acceptable in Europe as compared with America (whether due to 'vigilante values' or not) – how might abolition be achieved?

Here are a few thoughts that I hope might spark some responses that will be of help to me in thinking further about this issue.

The negative attitude of the United States government towards international treaties, the refusal even to embrace abolition even as an ideal goal, and the hesitant approach of the Supreme Court towards claims based on international human rights norms have been significant factors in resisting change. The USA voted against the second optional protocol and, as many of you will know, when it ratified the ICCPR in 1992 entered reservations with regard to Article 6 which prohibited the imposition of capital punishment on a person who is under the age of 18 at the time of the commission of the offence and to article 7, concerning cruel or unusual treatment or punishment, which it declared it would only be bound by to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment

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<sup>11</sup> Stuart Banner, *The Death Penalty. An American History*, Harvard University Press, 2002, p. 303.

<sup>12</sup> In a review article of Zimring's *The Contradictions of American Capital Punishment*, to be published in *Punishment and Society*.

prohibited by the Fifth, Eight or Fourteenth Amendments to the Constitution of the United States, as interpreted by the US Supreme Court”.

To what extent may we expect the justices of the Supreme Court to take further notice of the international trends and development in international customary law in interpreting evolving standards of decency? We have of course witnessed changes in the court's attitude. First in 2002 in *Atkins v Virginia*, where the court cited the worldwide condemnation of the practice of executing the mentally retarded, as laid down in the UN safeguards for those facing the death penalty, among its reasons for deciding that it should now be regarded as ‘cruel and unusual punishment’. And then, only last month when it decided in *Simmons v Roper* that the execution of those who had committed offences as juveniles was unconstitutional, and declared that international norms and practice – it had been shown that the USA stood alone among nations in formally approving of the practice – had “provided respected and significant confirmation of the Court’s determination that the penalty is disproportionate punishment for offenders under 18.” This reliance on, or even recognition of, foreign law, has already given rise to political controversy.

An issue still to be decided –if it is ever decided – is whether the length of time that persons are kept on death row facing the prospect of execution in a system which inevitably produces lengthy delays amounts to cruel and unusual punishment’. Here too there is international precedent. In 1993, the Judicial Committee of the Privy Council in London in the case of *Pratt and Morgan v the Attorney General of Jamaica* held that it would be cruel and degrading punishment to execute a prisoner after a period of five years under sentence of death. Lord Griffiths, delivering the judgment said:

“There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over an extended period of time ...”<sup>13</sup>

And the Canadian Supreme Court in *United States v Burns*, when considering the death row issue declared that “we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time ... even those who regard its horrors as self-inflicted conceded that it is a relevant consideration”.<sup>14</sup>

As I said just now, the United States Supreme Court has yet to rule on this issue, although Justice Breyer in dissenting from the decision of the court not to hear an appeal from two death row inmates in 1999 (*Knight v Florida and Moore v Nebraska*) noted that “Both of these cases involve astonishing long delays ... The claim that time has rendered the execution inhuman is a particularly strong one”.<sup>15</sup> Surely a very good case can be made that such an outcome is a cruel and unusual aspect of the punishment, when one

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<sup>13</sup> *Pratt and Morgan v Attorney General of Jamaica* [1993] 4 ALL ER 769 and 783 (PC)

<sup>14</sup> *United States v Burns* 2001SCC 7 File No 26129

<sup>15</sup> See the discussion under Death Row on the website of the Death Penalty Information Center: [deathpenaltyinfo.org](http://deathpenaltyinfo.org)

appreciates the suffering of prisoners, kept often in very restricted circumstances for well over a decade and sometimes for two decades, and under conditions of uncertainty. However, one must admit that, given the composition of the present court and the political climate, it may be a long time before there are sufficient Supreme Court Justices who would be willing to find the death penalty *per se*, or at least as it is in reality put into practice, in breach of the US constitution. And of course action by the Supreme Court might produce a backlash unfavourable to the appeals process or other reforms, just as *Furman* did. This is why the UN Human Rights Committee has trodden so warily in relation to this issue, fearing that if they fix a time limit it will only provoke a speeding up of the execution process.

What about the legislative approach? Is what has just happened in New York a straw in the wind? The substantial fall in the murder rate across the country in abolitionist and retentionist jurisdictions alike; the decline in the number of death sentence imposed and the fall in the number of executions from a high of 98 in 1999 to 59 in 2004; the fall in the proportion of the population saying that they favour the death penalty (down from around 80% a decade ago to around two-thirds, and even less than half when preference can be given to life imprisonment without parole); the concerns expressed in Illinois and other states that the death penalty cannot be made foolproof against conviction; the high cost involved in capital trials with relatively little success for the state; the patent flaws brought out so vividly in Professor Liebman's analysis of a "broken system"; and the strong feelings evoked by the incontrovertible evidence, gathered by Professor Scheck and colleagues in other Innocence projects through DNA, that truly innocent persons have been sentenced to death – and many believe executed – all indicate that a new situation is emerging which should be much more favourable to pressure groups seeking abolition.

Furthermore, executions are now confined to a relatively few states. Over the five years 1999 to 2003 just 25 of the 38 states with the death penalty carried out an execution and only 12 of them did so in 2004, only three of them being non-southern states (Ohio (7), Nevada (2) and Maryland (1)). Thus 26 states with the death penalty on their statute books did not execute anybody, and when the 12 wholly abolitionist states and DC are added to them, three quarters of US states had no executions in 2004. Another way of looking at this is to note that 15 of the 38 retentionist states have executed no more than six people since 1976 – at the most one every four to five years and for most of these states much longer in between. Indeed, 89 per cent of all executions have been in southern states; two-thirds in just five states (Texas, Virginia, Oklahoma, Missouri and Florida) and one third in Texas alone.

The common picture of the USA held by foreign observers of American jurisdictions as a whole strongly supporting capital punishment, is thus misleading. The truth is that in large parts of the country capital punishment has no more than symbolic retributive status, and certainly can have no utility as a measure of crime control. It may be that the use of the death penalty will simply whither away. Alternatively, concerted pressure in states where capital punishment only plays a very marginal role, assisted by the arguments referred to above, especially those of mistake and unfairness, may in time lead

to more states deciding that abolition is the best policy and the executing states becoming 'outliers'. Franklin Zimring has opined that "the end game in the effort to purge the United States of the death penalty has already been launched."<sup>16</sup> But, as he has stressed, an activist population of people capable of using the evidence to create a change in the climate of opinion will need to be mobilized in order to raise considerably the salience of the issue. And it is worth remembering that the European experience is that, in time, after abolition has occurred, opinions change as people's expectations change. Capital punishment becomes one of the icons of the past, a reminder of more brutal times. The new generation, growing up without it has no expectation and less desire for it. As we have witnessed in Britain recently, since the issue of the return of capital punishment was put to rest following the discovery a decade ago of a series of serious wrongful convictions that would have led to execution had it been available, even the parents of murdered children rarely express dissatisfaction when a convicted killer is sentenced to life imprisonment.

If the strategy of widening the number of abolitionist states were successful the Supreme Court might even be persuaded to declare that there really has been an evolution in 'standards of decency' at home as well as abroad which deplores the use of capital punishment. Then it would be possible for the Federal Government to shed what Harold Koh called its "Achilles heel in almost every multilateral human rights forum"<sup>17</sup> and ratify the Second Optional Protocol to the ICCPR. But this is just, as it has to be, speculation.

Nevertheless, I would like to think that Stephen Bright was right when he wrote:

"The American people will ultimately reach the same conclusion (as did the Constitutional Court of South Africa), deciding that, like slavery and segregation, the death penalty is a relic of another era, and that this society of such vast wealth is capable of more constructive approaches to crime. And the United States will join the rest of the civilized world in abandoning capital punishment".<sup>18</sup>

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<sup>16</sup> *The Contradictions of American Capital Punishment*, p.

<sup>17</sup> Harold Hongju Koh, 'Paying "Decent Respect" to World Opinion on the Death Penalty' *UC Davis Law Review*, 35 (2002) pp. 1085-1131 at 1105.

<sup>18</sup> Stephen B. Bright, 'Why the United States will join the Rest of the World in Abandoning Capital Punishment', in Hugo Bedau and Paul Cassell (eds.), *Debating the Death Penalty*, New York: Oxford University Press, pp 152-182 at 179.