

Chapter 1

Introduction

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Against the Death Penalty: International Initiatives and Implications appears just as the movement to abolish the death penalty worldwide has entered a new and challenging phase. It was marked, as William Schabas points out, by the resolution passed in favour of a world-wide moratorium on executions pending abolition of capital punishment at the plenary session of the United Nations General Assembly in December 2007. A large majority of countries (104) voted in favour, 29 abstained and only 54 stood out against it. This success was, of course, a reflection of the great strides made in persuading countries to abandon the death penalty over the past 20 years. At the end of December 1988, 35 countries had abolished the death penalty completely and a further 17 for all ‘ordinary’ crimes in peacetime: 28 per cent of the 180 countries recognised by the UN. One hundred and one countries (56%) were ‘actively’ retentionist, in that they had carried out at least one judicial execution within the past 10 years. Yet on the 1st January 2008 – a day marked by the complete abolition of capital punishment in Uzbekistan – only 50 of 195 countries were ‘actively retentionist’: just over a quarter of independent nations of the world. Furthermore, 102 of 112 countries that had abolished capital punishment had done so for all crimes, in all circumstances, in peacetime, under threat of war or during military conflict. A further 44 had not executed anyone for at least 10 years or had declared a moratorium. Of these, Amnesty International declares 33 to be truly ‘abolitionist in practice’: the death penalty remaining on their statute books but with no intention of it ever leading to an execution. Put simply, the vote at the UN was a foregone conclusion if all abolitionist and non-executing countries pulled together.

However, before abolitionist euphoria takes hold, some realism and caution is in order. On the positive side: only one abolitionist country (Solomon Islands) voted against the resolution at the plenary meeting, and only three abstained (Bhutan, Djibouti and Liberia). The ‘yes’ votes included Uzbekistan, which was on the cusp of abolition, Burundi, a country on the brink of becoming abolitionist *de facto* (the last execution occurred in 1997) and 11 other abolitionist *de facto* countries. Furthermore, nine of the 50 ‘actively retentionist’ countries abstained: Cuba, Equatorial Guinea, Guinea, Lebanon, Sierra Leone, and perhaps most significantly Belarus, United Arab Emirates and Vietnam.

On the other hand, of the 33 countries listed by Amnesty International as abolitionist in practice, only 10 voted for the resolution,¹ 14 abstained and 8 voted against. Among another 11 countries that had not executed anyone for at least 10 years or had declared a moratorium, only one (Tajikistan) voted in favour, 8 voted against and 2 abstained. Thus, 16 (36%) of the 44 countries classified by the UN as abolitionist *de facto* voted against the resolution. It is clear, therefore, that if the object is to secure a *commitment* to abolition there still remains a substantial number of countries to influence. Altogether 83 of the 187 countries that voted (44%) did not support the call for a ‘moratorium on executions with a view to abolishing the death penalty’.

One of the most persistent arguments put forward during previous attempts to get a moratorium resolution endorsed at the United Nations was again brought up in 2007 by several retentionist countries. Namely, that it was a matter for the sovereignty of each independent country, that there was no international consensus that capital punishment is a human rights violation, and that attempts by (largely) western powers to press this agenda on other countries amounted to a sort of cultural imperialism – indeed, a lack of respect for the history and culture of other regions and nations.² The challenge, which this valuable book identifies, is how to overcome the final hurdle to achieve abolition everywhere, a goal first promulgated by the United Nations in 1971. Several essays identify the ‘sovereignty problem’ as a fundamental and perpetual issue that must be confronted. This vital question is addressed in a scholarly paper by the book’s editor Jon Yorke. He describes how the original signatories to Protocol No 6 to the European Convention on Human Rights had, in reality, voluntarily *suspended* their sovereign right to carry out capital punishment. He thus warns against complacently assuming that, because countries have entered into an international covenant to abolish the death penalty, there could never be any conditions under which they might reintroduce it. Indeed, he reminds readers of the recent pressures to reinstate it in Poland. Thus the human rights arguments against it need to be constantly bolstered and re-affirmed. Indeed, Jon Yorke argues that ‘the key to maintaining the European moral sentimentality against the punishment is to ensure that the scholarship on the punishment does not disappear when the punishment disappears’.

It is true, of course, as Peter Hodgkinson, Seema Kandelina and Lina Gyllensten emphasise in their wide-ranging contribution, that abolitionists cannot be satisfied with moratoria on executions, for far too many countries and states in the United States have resumed executions after long periods of abstention. Jon Yorke is absolutely right to point out, as does Lilian Chenwi in her revealing essay on the situation facing the African Commission on Human Rights, and Peter Hodgkinson

1 Algeria, Benin, Burkina Faso, Congo (Brazzaville), Gabon, Madagascar, Mali, Nauru, Russian Federation and Sri Lanka.

2 See General Assembly GA/10678, 18 December 2007, ‘General Assembly Adopts landmark Text Calling for Moratorium on Death Penalty’ <<http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>>. Also, Hood and Hoyle, 2008, 32–35.

and colleagues, as well as Quincy Whitaker in relation to the Commonwealth Caribbean, that many states see international law, as regards the death penalty, as a threat to their sovereignty over law enforcement polices, and therefore to be resisted. It is for this reason that Lilian Chenwi calls for the adoption of an African Protocol banning the death penalty, because ‘African States believe that international human rights instruments do not always address the unique problems of the continent’. It may well be true that African states will sign-up more readily to a home-inspired protocol, but it is not clear in what ways the wording of a protocol for Africa to abolish capital punishment could differ significantly from the wording of the internationally agreed Protocol No. 2 to the International Covenant on Civil and Political Rights (ICCPR). Thus, while Sangmin Bae notes that the Bangkok Declaration on Human Rights of 1993 insisted on the ‘significance of national and regional peculiarities and various historical, cultural and religious backgrounds’ because ‘the universalist perspective of human rights does not properly acknowledge and respect cultural variation’, she tells a different story in describing the abolitionist movement in South Korea (which has just become abolitionist *de facto*) and Taiwan (where executions have declined to zero). The ‘two most prominent rationale’ for abolition in both South Korea and Taiwan, she writes, have been the universal principle of the right to life and the desire of these states ‘driven by both moral and political considerations, to comply with international human rights standards so that they can become “beacon[s] of human rights throughout the region”’.

The world wide abolition of capital punishment will not be achieved until states recognise that, whatever sovereign powers they hold over citizens, the right to kill their criminal captives is not, and can never be, one of them. The fact that since the 1960s only four countries (Gambia, Nepal, Papua New Guinea and Philippines) have reinstated capital punishment and that the only one of them to carry out executions (the Philippines) subsequently abolished it again, as did Nepal, gives grounds for optimism. The ceding of sovereignty on this matter by so many countries, embodied by nearly all of them in international treatise and/or their constitutions, is really a recognition that abolition is intended to be permanent. Indeed, experience shows that, as time passes by, the demand for its return withers away as it becomes no longer a culturally acceptable punishment – a relic of less civilised times.

One path along which abolition can proceed, as William Schabas emphasises in his illuminating account of the role of the United Nations, is through development of the *Safeguards guaranteeing the rights of those facing the death penalty*, first promulgated in 1984 and subsequently expanded in 1989 and 1996 following UN surveys of the use of capital punishment. These have had the effect not only of drawing attention to the procedural safeguards embodied in the ICCPR but have identified categories of offender for whom capital punishment has been deemed an inappropriate penalty in all circumstances, notably juveniles and those with learning difficulties (encapsulated in the now old-fashioned and stigmatic term ‘mentally retarded or extremely limited mental competence’). The report on the

UN Seventh Quinquennial Survey in 2004 suggested that persons suffering from any kind of mental illness should be added to this list. If international agreement could be reached on this, and procedures and trained personnel made available to enforce it, the number of persons executed worldwide would undoubtedly decline steeply and capital punishment would be further marginalised.

Several contributors discuss how far, through legal challenges and legislative processes, the death penalty can be whittled away, notably Julian Killingley, in his lively essay on how far the abolitionist movement can be taken in the United States through 'imaginative application' of the Eighth Amendment to the Constitution, rather than hoping for 'outright *de jure* prescription'. Jane Marriott focuses on the question of how likely it is that this can be achieved through attacking the 'death row phenomenon'. The Safeguards already lay down that capital punishment where it exists shall be carried out 'so as to inflict the minimum possible suffering' and that the Standard Minimum Rules for the Treatment of Prisoners' should be applied so as 'to keep to a minimum the suffering of prisoners under sentence of death and to avoid an exacerbation of such suffering'. Readers will recall the eloquence of Lord Griffiths in giving judgment in 1993 to limit the time between conviction and execution to five years in *Pratt and Morgan v Attorney General for Jamaica*: 'There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years ... we regard it as an inhuman act to keep a man facing the agony of execution over a long period of time'.

As William Schabas notes, during the 1990s the UN Special Rapporteur on extra-judicial, summary or arbitrary executions (as did the Human Rights Committee) drew back from arguing that the 'death row phenomenon' is contrary to international norms governing the imposition of the death penalty for fear that it might be counterproductive, simply leading to the curtailment of other vital rights, namely the right to appeal to domestic and international courts and the exercise of clemency. This is the nub of the argument put forward by Jane Marriott for not going down this road as a means of attempting abolition by the 'back door'. Although I am not sympathetic to all her arguments, she has undoubtedly performed a valuable service in bringing this question so boldly to the fore. It surely deserves to be more thoroughly debated than it has been in the past. I am confident that at some point there will be universal recognition that it is impossible to avoid lengthy cruel and degrading suspension of execution in a system that lives up to the due process safeguards embodied in the ICCPR and wishes at all costs to avoid the execution of the innocent. As Richard Dieter points out, the 'innocence problem' is the issue most likely to undermine support for the death penalty in America, for 'an overwhelming 69 per cent of the public believes that [any possible] reforms will not eliminate all wrongful convictions'. The death row phenomenon is an inevitable consequence of the irresolvable tensions that accompany capital punishment and has become one of the worst human rights violations that it systematically perpetrates.

The question of what standards should apply – universal or local – in assessing whether there has been a breach of human rights emerges also in Quincy Whitaker's interesting critique of the role of Judicial Committee of the Privy Council (JCPC), as the court of final appeal, for countries in the Commonwealth Caribbean. She berates the Board for its failure all too often to interpret constitutional principles in the context of the development of human rights law. Among her other examples she roundly criticises the JCPC for accepting that the appalling conditions under which prisoners were held on death row in Trinidad could not, given the resources of that country, be expected to match the 'civilised' standards of first-world countries: 'The excusing of appalling conditions on the basis that they emanate from a third world country is ... an attitude which may bear the hallmarks of the first world imperialism that the Board was trying to avoid'. Thus, she argues persuasively for constitutional and human rights standards to be regarded as universal 'minima which regulate the lawfulness of state conduct irrespective of which country they operate in'.

Nicola Macbean discusses with great authority the 'growing rights consciousness and the development of a legal ideology' in China. Here the debate at present is mostly about the pace of change and centres on what China must do if it is to comply with the standards it must adopt in order to ratify the ICCPR. But here too, as she reports, 'there has recently been a high level of concern following news of coerced confessions and wrongful executions'. The return of the power to review death sentences to the Supreme People's Court resulted from a recognition that the probability of receiving an immediate death sentence varied enormously across the country and that some standards and guidelines were necessary both to control the rate of executions and to make the system more equitable in order to present 'an image of a state that executes only when absolutely necessary'. The message from China is that international dialogue does not have to be so confrontational that it produces a 'backlash' against abolition. Indeed, even though China voted against the resolution at the General Assembly in December 2007, there appears now to be no ideological opposition to abolition being the goal to strive for.

Should worldwide abolition be achieved, the question remains: What penalty or penalties should replace capital punishment? And here abolitionists are, and will increasingly be, forced to continue their struggle to protect human beings from cruel and degrading punishment or treatment. It is fitting therefore that this book should end with a bold essay on life imprisonment without the possibility of parole. As Rachael Stokes, reminds us, one in four life sentenced prisoners in the USA is ineligible for parole and certainly not all those serving such a sentence would have been executed. She rightly calls for the development of internationally agreed human rights standards as regards the nature of imprisonment so that 'those reprieved from death row are not fated to an alternative that is equivalent to or worse than their original sentence'. The penalty of a lifetime behind bars without, from the outset, any hope of earning release through redemption, must surely not be allowed to become the epitaph of the crusade against capital punishment.

References

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