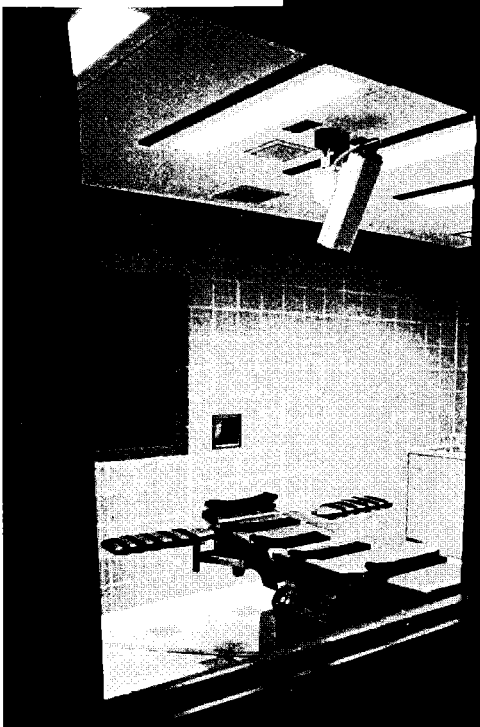
The Death Penalty:

Condemned



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The Death Penalty: Condemned

The present publication contains extended versions of papers presented by some of the experts during a roundtable entitled "The Death Penalty: Some Key Questions" organised by the International Commission of Jurists on 12 April 1999, in parallel to the yearly session of the United Nations Human Rights Commission, held in Geneva. The event was sponsored by the European Union and the Council of Europe.

Cover photos: Keystone Press

Page 1: This March 22, 1995, file photo shows the view of the interior of the execution chamber from the media and public viewing area at the U.S. Penitentiary in Terre Haute, Ind. The $300,000 chamber has not yet been used for an execution. (Photo/Chuck Robinson).

Page 2: View into the gas chamber at Arizona State Prison in Florence, Alabama, seen on February 18, 1999. (Photo/Mesa Tribune, Toru Kawana).

Cover design by Nicolas Bovay

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As these lines were being written, Gary Graham was lethally injected in Texas for allegedly killing a 53-year-old man outside a grocery store. Mr. Graham who had consistently proclaimed his innocence was found guilty on the uncorroborated testimony of a single eyewitness. African-American and poor, Mr Graham received inadequate legal representation during his trial. Serious doubts about the quality of his conviction sparked international calls for a stay of execution. These were unheeded.

At the time of the alleged offence, Mr. Graham was a minor - under 18-years of age. His execution was contrary to customary international human rights law which precludes the execution of juvenile offenders. That law is binding on all countries, notwithstanding US attempts to argue an exception (the US and the Democratic Republic of Congo are the only two countries in the world that have executed minors in 2000). Similarly, the execution of offenders suffering a mental disorder or intellectual impairment is contrary to international law and yet continues in some countries, including the United States.

Mr Graham's case fanned public debate on the death penalty and, in particular, its selective application and the attendant miscarriages of justice. It prompted renewed calls for a moratorium on executions and stoked the political debate in the lead up to the Presidential election.

But concerns regarding the application of the death penalty are not unique to the United States. This publication attests to the commonality of this experience across a range of legal traditions (civil, common and Islamic law). More than half of the states throughout the world - 108 - have now renounced the death penalty either in law or in practice - the latest being East Timor, Turkmenistan, Latvia and Ukraine. It is imperative that retentionist countries are persuaded to observe an immediate moratorium on all executions.

The ICJ Position on the Death Penalty

The ICJ stands for the abolition of the death penalty everywhere and supports all efforts to achieve this goal.

The ICJ considers state sanctioned killing an affront to the rule of law and humanity. It is not satisfied that there is conclusive objective evidence to support the assertion that the death penalty is an effective deterrent. In practice, retentionist support is sourced largely in base retribution. The death penalty offends two essential elements of natural justice: consistency and proportionality.[1] It is an extreme and irreversible form of cruel, inhuman and degrading treatment and a violation of the most basic Right to Life, as proclaimed in the Universal Declaration of Human Rights and article (6) of the International Covenant on Civil and Political Rights.

The ICJ is an active campaigner against the death penalty all over the world. It has routinely addressed the issue in various countries (eg Botswana, India, Liberia and Pakistan) and through interventions in various UN and regional fora. In 1996, the ICJ published *The Administration of the Death Penalty in the United States*, the result of a fact-finding mission to the US that same year. The report reveals, *inter alia*, that public pressure and the views of victims' families are often determinant in the exercise of the prosecutor's discretion to seek the death penalty. The weight of such subjective influences in the judicial process increases the likelihood of a miscarriage of justice.

UN Commission on Human Rights: Death Penalty Resolutions

In its efforts to secure abolition of the death penalty, the ICJ organised a roundtable on 12 April 1999, during the UN Human Rights Commission. The event was sponsored by the European Union and the Council of Europe (both of which support abolition) and gathered 110 participants, including State delegates, IGOs and NGOs. The main purpose of the roundtable was to promote the debate around the resolution on the death penalty tabled by Germany on behalf of the EU (see annex A).

1 See Peter Hodgkinson, page 38.

The adoption of the resolution was a positive outcome for the abolitionist cause. A similar resolution was first adopted in 1997. In successive years, the texts have been strengthened and attracted growing support. The 1999 resolution reiterated a call on governments to establish a moratorium on executions with a view to completely abolishing the death penalty. It was also significant in that it called on governments to:

- preclude extradition where the requesting State is unable or unwilling to provide the assurance that capital punishment will not be carried out;
- preclude capital punishment for non-violent financial or non-violent religious practices or expression of conscience and reserve its application only for the "most serious crimes" strictly defined as intentional crimes with lethal or extremely grave consequences;
- preclude capital punishment where the offender suffers any form of mental disorder;
- preclude the execution of any person as long as any related legal procedure at international or at national level is pending;
- preclude any new reservations under article (6) of the International Covenant on Civil and Political Rights which may be contrary to the object and purposes of the Covenant and to withdraw any such existing reservations, given that article (6) of the Covenant enshrines the minimum rules for the protection of the right to life and the general accepted standards in this area.

The resolution was sponsored by 72 States (7 more than in 1998), and adopted by 30 votes for, 11 against, with 12 abstentions. A near identical text was adopted in 2000 but with a slightly diminished margin of support. Sustained efforts to promote the abolitionist cause are thus required.

During its 52nd session held in August 2000, the Sub-Commission on Human Rights (composed of independent experts acting in their personal capacity) endorsed the ICJ position that the execution of juvenile offenders was in breach of customary international law. It is hoped that this view will be affirmed by the UN Commission on Human Rights during its next session to be held in Spring 2001.

Summary of roundtable proceedings

The present publication contains extended versions of some of the papers presented by the experts during the seminar.

The experts were: Jeroen Schokkenbroek (Netherlands), Head of the Human Rights Section of the Directorate of Human Rights of the Council of Europe, who served as chair of the roundtable; Bertrand G. Ramcharan (Guyana), UN Deputy High Commissioner for Human Rights; Adama Dieng (Senegal), the then Secretary-General of the International Commission of Jurists, who served as panel moderator; Peter Hodgkinson (United Kingdom), Director of the Centre for Capital Punishment Studies of the University of Westminster, London, UK; Cherif Bassiouni (Egypt), Professor of Law and President of the International Human Rights Law Institute, DePaul University, USA; Asma Jahangir (Pakistan), Head of the Human Rights Commission of Pakistan and UN Special Rapporteur on extrajudicial, summary or arbitrary executions; Anatoli Pristavkin (Russian Federation), Chair of the Commission for Pardons, Moscow; Frank Solomon S.C. (Trinidad and Tobago), Barrister and Attorney at Law; Bryan Stevenson (USA), Professor of Law, Attorney at Law and Director of the Equal Justice Initiative of Alabama, Montgomery, USA; Ambassador Walter Lewalter, Permanent Representative of the Federal Republic of Germany to the United Nations, who made the closing remarks.

Some of the principal points emerging from the discussion were:

- ratification of the second Optional Protocol to the International Covenant on Civil and Political Rights [which is aimed at eliminating capital punishment] constitutes a landmark in the evolution of human rights. The abolition of the death penalty is now an established international legal norm;

- political expediency often results in calls for base retribution. Spiralling criminality due to poor socio-economic conditions (eg in Russia) leads to a populist approach to criminal justice which, in turn, threatens guarantees of due process;

- it is imperative that abolitionist arguments also address the interests and rights of victims and their families. Emphasis should be placed on victim support schemes in lieu of retribution or victim-driven justice. Decision-makers have a social responsibility to inform the

- it is imperative that abolitionist arguments also address the interests and rights of victims and their families. Emphasis should be placed on victim support schemes in lieu of retribution or victim-driven justice. Decision-makers have a social responsibility to inform the public about alternatives (eg life without parole). An informed public leads to a decrease in support for death penalty;

- there are disturbing inconsistencies in the application of capital punishment. U.S. participants spoke at length of the racial and economic bias inherent in its administration and the broader systemic issues of poor access to the criminal justice system including the appointment of (in)competent defence counsel; African-American or Hispanic defendants accused of killing whites are disproportionately represented on death row. Similar concerns existed in Pakistan where religious minorities and women accused of killing their abusive husbands (sometimes in self-defence) were especially vulnerable;

- moves to sanitise the execution process to ensure more "humane" modes of killing (eg lethal injection vs electric chair) threaten to mitigate those objections to the death penalty based on it being a cruel or degrading punishment. The abolitionist campaign must meet this challenge;

- not all legal traditions (eg civil, common and Islamic law) have the same approach to death penalty. The Shari'a establishes high evidential thresholds and rigid procedural process for its administration. The Qu'ran places pardon, clemency and forgiveness over and above retribution.

The ICJ is very grateful for the generous financial support of the Governments of Germany and the United Kingdom, which allowed the roundtable to take place and the present compilation to be published. It is hoped that the papers will contribute to an informed international debate on the death penalty with a view to its eventual abolition.

ICJ
International Secretariat
Geneva, July 2000

The Death Penalty: Some Key Questions

Roundtable

organised by the

International Commission of Jurists

with the support of the

European Union and the Council of Europe

Geneva, 12 April 1999

Opening Remarks by the Chairperson

Jeroen Schokkenbroek [1]

It is a great pleasure for me to welcome you all at this roundtable and I thank you for being so numerous in participating in this event. I would also like to convey to you the best wishes of the Secretary-General of the Council of Europe.

I welcome in particular Dr Bertrand Ramcharan, UN Deputy High Commissioner for Human Rights and the experts behind this table who have kindly agreed to come to Geneva - from far away in some cases - to share with us their knowledge and experience of some key issues surrounding the death penalty.

Allow me to say a few words about the background and purpose of this roundtable. The initiative for this event was taken a few weeks ago by the Presidency of the European Union, which proposed to the Council of Europe to join forces with a view to promoting, on the margins of the 55th Session of the Commission on Human Rights, an expert debate on some key questions relating to the death penalty. We in Strasbourg fully supported this excellent idea and both the European Union and the Council of Europe were very pleased with the instant readiness of the International Commission of Jurists to organise this meeting.

As you may know, the Council of Europe has for many years now been instrumental in promoting abolition of the death penalty in Europe. It is no exaggeration to say that the abolitionist trend in Europe has gained enormous momentum, thanks also to the firm position taken by the European Union. Protocol No. 6 to the European Convention on Human Rights of 1983, which provides for abolition in peacetime, has

1. Head of the Human Rights Section, Directorate of Human Rights, Council of Europe.

to date been ratified by 30 of our 40 member States. In recent years, no country has been admitted to the Council of Europe without having either abolished the death penalty or promised to do so in the near future, with a commitment to uphold a strict moratorium in the meantime. The result is that, in the past 18 months, no death sentences have been carried out in the 40 States that are currently Members of the Council of Europe. This is a first in European history.

This momentum in favour of abolition of capital punishment is not limited to Europe. I recall the resolutions adopted by the Commission on Human Rights and the slow but steady increase in the number of abolitionist States worldwide signalled in the UN Secretary General's annual reports. Even in certain States which have a long tradition of application of the death penalty, we witness a growing debate over the merits of maintaining this form of punishment.

Application of a moratorium on executions, abolition of capital punishment and ratification of Protocol 6 to the ECHR. It is true that these measures have now become almost self-evident in Europe, our firm position being that in today's penal systems, there is no more place for the death penalty and that this penalty contradicts human rights. None the less, it would be wrong to think that abolition is an easy process. It is a fact that death sentences are still being pronounced in some member countries. We know all too well that a lot of work needs to be done to arrive at a situation in which abolition will indeed have become self-evident in all societies. Some important obstacles are the attitudes of politicans who are faced with the need to respond to serious and organised crime and the way the death penalty is sometimes perceived in public opinion. These issues are very real and, in our experience, it is of no use to pretend that they do not exist.

A basic factor here is not of a political or legal kind. What I have in mind is information about the death penalty and a clearer understanding in society of the issues surrounding it. Very often, opinion leaders and public opinion are simply not informed about them: informed about whether the death penalty has any effects or not on crime rates, informed about the risks inherent in executing this irreversible penalty, informed about the flaws in the legal procedures concerning the application of the death penalty, informed about the detention conditions of people sentenced to death, and so on.

Bringing about an informed debate on such issues is not always easy, not least because the death penalty is often discussed in rather emotional terms, with heated debates between abolitionists and retentionists. While I must stress that this is entirely legitimate, it may also stand in the way of exchanging knowledge about certain facts and problems surrounding the death penalty. What we hope to achieve today is to contribute to a more dispassionate discussion, based on expert contributions from our speakers and from the floor. It is also hoped that, thanks to the variety of backgrounds of speakers and participants, our discussions today will also make clear that the key questions to be addressed at this roundtable are not geographically restricted to one region or another. On the contrary, these are issues which concern all countries and societies which still resort to the death penalty or are in the process of abolishing this type of punishment.

It is my firm belief, and I am sure the partner organisations involved in this roundtable would agree, that an informed debate is a better debate and that the fundamental issue of capital punishment merits no less.

Beyond Capital Punishment: Respecting the Needs of Victims and Establishing Effective Alternatives to the Death Penalty

*Peter Hodgkinson**

This paper begins by reviewing the debate about deterrence and public opinion and concludes by focusing on the issues of effective and proportionate alternatives to the death penalty and the needs and rights of victims of homicide and those that survive them.

Is Capital Punishment a Deterrent?

There is a common-sense view that the threat of death must deter some people from committing crime. The problem is that the research thus far has not been able to identify with any certainty, which people and under what circumstances. What evidence there is for deterrence in this debate is provided in the main by Ehrlich[1] and more recently Layson[2] in the USA though both researchers have attracted criticism for their methodology and others, most significantly Bowers and Pierce[3] and Passell,[4] who have tried to replicate their work have been unable to reach the same conclusions.

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* Director, Centre for Capital Punishment Studies, School of Law, University of Westminster, London, UK.

1 Ehrlich, Isaac, «The Deterrent Effect of Capital Punishment: A Question of Life and Death", *American Economic Review*, 65, (1975).

2 Layson, Stephen A., "Homicide and Deterrence: A Re-Examination of the United States Time-Series Evidence", *Southern Economic Journal*, 52, (1985).

3 Bowers,W.L and Pierce,G.L., «The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment", *Yale Law Journal*, 85, (1975).

4 Passell, P., "The Deterrent Effect of the Death Penalty: A Statistical Test", *Stanford Law Review*, 28, (1975).

It is vital that the claims of those who identify a deterrent effect are taken seriously and their research subjected to rigorous scrutiny as their findings are relied upon by some decision-makers to justify their retentionist stance on the death penalty. It is important too to examine the research that demonstrates that alternative sentences of lengthy imprisonment have at least an equal claim to deterring homicide and other violent crime and that neither on their own can be relied upon as the sole remedy to rising violent crime. It is a grave mistake indeed to causally link the abolition or retention of the death penalty with raising or stemming the rate or volume of violent crime. What is agreed by all those engaged in the research in this area is that certainty of detection and certainty of punishment (not severity) is inextricably linked with deterrence. It is interesting to note that little or no reputable academic research on deterrence has been undertaken about the death penalty in the USA for the best part of a decade and that the main justification for the death penalty in the USA and elsewhere is retribution.

There are some very interesting "happenings" in relation to crime rates taking place currently in the USA, which invite some examination. The State of New York is experiencing an unparalleled decline in the rate and volume of all crimes but especially homicide and other violent crimes with evidence that homicide has dropped by some 50% over the past decade. A partial explanation for this dramatic decrease is attributed to the policy of "Zero Tolerance" instigated by the former New York Chief of Police Bratton and not to the fact that New York State reinstated the death penalty in 1994 after two decades of abolition. 1997 saw the first sentence of death passed in New York in this era. So even the most enthusiastic supporters of the death penalty are not claiming that capital punishment is responsible for this remarkable decline in violent crime! Similar reductions in serious crime are reported in several of the States of the USA where in addition to zero tolerance, where it is applied, lengthy imprisonment policy, change in drug of preference and reduction in population of crime prone males are offered by way of explanation. Certainly the explosion of the prison population both in numbers and length of sentence has contributed to the decline, not however for reasons of deterrence but of incapacitation.

An analysis of homicide rates, State by State, continues to show that States that have and use the death penalty have higher rates of homicide than States who have it but have not used it, who in turn have higher rates than those States that do not have death penalty statutes at all.

However there are so many variables that influence crime rates that it would be simplistic of me to rely on the above observations without further analysis. Population, age, gender ratio, poverty, unemployment, education, social class, ethnicity, rural-v-urban are all factors that have some bearing on the propensity to commit crime. Probably the most defensible statement that can be made about the issue of deterrence is that there is no evidence that demonstrates that the death penalty acts as a deterrent over and above that of lengthy prison sentences - it is not a unique deterrent.

For further detailed analysis of the deterrent debate see Professor Roger Hood's work.[5]

Validity of public opinion surveys?

This is another of the topics that "informs" the death penalty debate and one that also needs to be approached with some caution. It tells us of the importance of regular and objective soundings of public opinion and the folly of shaping policy on the tenuous findings of many, if not most, public opinion surveys. Shortcomings are inherent in the bulk of such surveys as they are usually conducted by the media, usually the popular press, following a very emotive report of a particularly heinous crime when little or no thought is given to the rigorous methodology that characterises reliable survey research. The opinion of the public sought and found is a very crude indicator, as it invariably requires little more than a "yes" or "no" response.

One turns to the USA for the most authoritative research on public opinion and the death penalty because the overwhelming majority of death penalty scholarship continues to be conducted there. The research in the United States is helpful not only in understanding the status of public opinion in that country but perhaps more importantly it offers a critique of the methodology of the surveys that have been undertaken.

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5 Hood, R., *The Death Penalty: A World-Wide Perspective*, Oxford: Clarendon Press 1996 at Chapter 6; see also Hood, R, *Capital Punishment, Deterrence and Crime Rates*, Council of Europe AS/Jur (1996) 70.

William Bowers has been researching on the death penalty since the early 1970s and his current research focuses on the opinions of those who have served as jurors in death penalty trials (in most States jurors are responsible for determining the sentence in capital trials).[6] What his earlier survey research confirmed was that it was crucial to the outcome what questions one asked of the respondents. In his New York study he found that 71% of respondents supported capital punishment but this reduced to 19% if offered the alternative of life without parole plus restitution to the victim's family. This finding was repeated in Nebraska where 84% of respondents also believed the death penalty to be arbitrarily applied. Perhaps more importantly these surveys revealed that "the public" placed greater emphasis on issues of restoration and compensation than retributive punishment. Bowers indicates that,

> [e]arlier studies have revealed the 'symbolic' nature of death penalty attitudes, the fact that expressed support is abstract, ideological, irrational and non-empirical, that it erodes when confronted with the particulars of crimes and defendants, with responsibility for its application, and with information about the realities of capital punishment.[7]

The research on death penalty jurors, in the States of California, Florida, and South Carolina found that 76, 83 and 86 per cent, respectively of those who actually decided whether the defendant should live or die felt: "The death penalty is too arbitrary because some people are executed while others go to prison for the same crime".

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6 *Gregg-v-Georgia*, 428 US 153 (1976). This case affirmed the constitutionality of the "Guided discretion" in the new statutes governing the capital litigation process part of which was the bifurcated trial, which separated the guilt from the sentencing phase. Unusual for jurisdictions with an English Common Law heritage jurors in capital cases (and for many other crimes) in most States have responsibility for deciding the sentence.

7 Bowers, W., "Popular Support for the Death Penalty: Mistaken Beliefs" in *The Machinery of Death*, Amnesty International USA, 1995.

The final authority to which I refer is the definitive study conducted by Robert Bohm in which he critically examined American death penalty opinion polls over a fifty year period, 1936-86.[8] He began his report with the observation:

> An understanding of American death penalty opinion is important, even though most countries that have abolished the death penalty have done so despite relatively strong public support for retention. Apart from a heuristic interest in public opinion generally, an understanding of American death penalty opinion is important for a variety of reasons, but especially because greater understanding could very well help to bring an end to the current practice of capital punishment in the United States.

Bohm's analysis supports the findings of the above research and underlines the importance of the wording of the questions asked. He found that the pollsters did not distinguish between some or all convicted of murder be they juveniles, the mentally ill or retarded or between "aggravated" or "non-aggravated" murders. He raised, too, the issue of the level of ignorance about the death penalty that is characteristic of the respondents to such surveys and whilst acknowledging that nothing requires that public opinion be informed, stresses its importance given that some research shows that the more informed people are about the death penalty the less likely they are to support its retention or restoration. The symbolic nature of the death penalty combined with the relative ignorance of the respondents leaves a question mark over the validity of some of the responses in such surveys.[9]

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8 Bohm, R.M., "American Death Penalty opinion, 1936-86: A Critical examination of the Gallup polls" in *The Death Penalty in America: Current Research*, (Ed) Robert Bohm. Anderson Publishing (1991).

9 See Amsterdam, A.G. (1982) "Capital Punishment" in H.A. Bedau (Ed) *The Death Penalty in America*, 3rd edition, 346-358. New York, Oxford University Press; Ellsworth, P.C. and Ross, L. (1983) "Public opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists", in *Crime and Delinquency*, 29:116-169.

Review of Public Opinion Surveys and their Effect

The most recent scientific samplings of public opinion in the United Kingdom were conducted by NOP[10] in 1983 and 1990, Gallup[11] in 1992 and MORI[12] in 1990 and 1994, all of which showed ambivalent results. The most recent survey (1995) indicated that 60% supported restoration.[13]

The Gallup poll in 1992 showed for the first time since the 1950s that a majority, albeit narrow, was opposed to restoration of the death penalty for murder - 42% for and 44% against with 14% undecided. This survey included for the first time a question about life imprisonment without parole and was conducted at a time when faith in the British legal system had been seriously undermined following a number of high profile miscarriages of justice - *The Guildford Four*, *The Birmingham Six*, Judy Ward and others.

The decision of the Constitutional Court of South Africa in *The State-v-Makwanyane and Mchunu* (1995), that capital punishment for murder was unconstitutional, provoked a mixed reaction. The decision was criticised by the pro-hanging Capital Punishment Campaign who maintained that it went against majority opinion, a sentiment supported by the former ruling National Party. This strength of feeling persists and was prominent in the run up to the recent elections though the President-in-waiting Thabo Mbeki made it clear that there was no chance that the decision of the Constitutional Court would be overturned or modified. A point of disagreement that the South African example illustrates is the tension between Parliament and the Constitutional Court over who should take responsibility for the abolition of the death penalty. In general politicians would prefer to pass this poisoned chalice over to the judges allowing them to maintain a populist position so that they can complain about the anti-democratic posture of the Supreme Court/Constitutional Court and continue to elicit the

10 NOP 9492 (1983) and NOP 6564 (1990). The latter survey was commissioned by *The Sun* newspaper.

11 Gallup. Report 381 (1992) and report 403 (1994).

12 MORI/4798. (1990) and MORI Crime JN/8300 (1994).

13 *British Social Attitudes - The 12th Report* (1995) at 194.

support of their electorate. The Court in *Makwanyane and Mchunu* considered a number of points but,

> [t]he two issues, which were addressed in particular, were: the present State of public opinion; and the issue of proportionality. As regards the first, the court was prepared to assume that the overwhelming majority of the public was in favour of retaining the death penalty but Chaskalson P[resident] pointed out that public opinion was no substitute for the duty vested in the courts to uphold constitutional provisions without fear or favour.[14]

Despite the evidence of the shortcomings of most surveys of public opinion there is little doubt that these findings influence politicians and policy-makers. There is also evidence that despite the majority of such polls strongly supporting the death penalty most countries that have abolished it have done so in the teeth of such opposition with no obvious ill-effects, either to the rate of crime or to those who took the decisions.[15] The different perspectives of the source and role of authority determine the extent to which governments are influenced by popular opinion. Representative democracies such as the UK believe that it is the responsibility of parliamentarians to exercise their judgment and conscience when passing legislation, whereas a populist delegate democracy such as the USA seems to act as a conduit for popular opinion and arguing that "it is the will of the people". The people's will is furthermore enshrined in criteria that the U.S. Supreme Court consider when judging what they term "evolving standards of decency". This measure which has become known as the *Marshall Hypothesis* was crucial to the landmark abolition and restoration decisions in *Furman* and *Gregg* respectively[16] and is the strongest possible proof of the power of public opinion in the USA. The irony is that the two standards of "quality and

14 Hatchard,J and Coldham,S. "Commonwealth Africa" (at 171) in *Capital Punishment; Global Issues and Prospects* (Eds) Peter Hodgkinson and Andrew Rutherford (Waterside Press:Winchester 1996).

15 Zimring,F.E. and Hawkins, G. (1986) *Capital Punishment and the American Agenda*, Cambridge, Cambridge University Press.

16 Sarat,A. and Vidmar,N (1976) "Public Opinion, and the Eighth Amendment: Testing the Marshall Hypothesis", *Wisconsin Law Review*, 171:177-183, 194-197.

reliability" that Justice Marshall deemed essential to validate public opinion have been shown by most research not to have been demonstrated. Populist opinion pervades all levels of that democracy in that most judges, prosecutors, police and prison managers are elected to these positions and are consequently very sensitive to public opinion.

In analysing what it is about the death penalty that attracts such strong support it is important to note that there is a distinction between support for the death penalty and support for executions and this distinction is one that is exploited by governments ambivalent about abolition. The other issue, which is too rarely addressed in such surveys, is the purpose of the death penalty and how this is misunderstood by the public and exploited by politicians.

It is important here to mention recent examples of abolition in Estonia, Latvia, Lithuania and the UK to see if there is anything to be learnt about the anxiety of politicians and public opinion. At a Council of Europe conference in Lithuania in July of 1997, attended by representatives of all three Baltic States, I was struck by the strength of opinion opposed to abolition expressed by all - this vocal opposition was repeated at a conference in Estonia in October 1997. The justification being offered on both occasions was the relationship between crime reduction and the death penalty and, more significantly, the strength of public opinion. All three countries have now moved to *de jure* abolition status and my information is that whilst there was fairly strong public criticism of this in the immediate aftermath there has not been a general breakdown in law and order nor has the fabric of civil society disintegrated.

What is of interest is that an attempt in early 1998 in the Latvian Parliament to abolish the death penalty resulted in a rejection of the amendment to ratify the 6th Protocol [on the abolition of the death penalty] to the European Convention on Human Rights (ECHR) and it is reported that reference was made during that debate to the fact that the UK (a founding member of the Council of Europe) had not ratified this protocol so why should they?

There have been a number of remarkable and somewhat unexpected developments in the UK this past year. The first was the decision taken in the House of Lords to abolish the residual legislation permitting capital punishment for Treason and Piracy with Violence; the second was

the decision of the UK government to act as co-sponsor to the Italian draft resolution at the United Nations Commission on Human Rights in 1998 (this was the first occasion that the UK had not abstained); the third was that the House of Commons passed an amendment to the Human Rights Bill to ratify the 6th Protocol to the ECHR despite government opposition to this amendment; fourth was that the Joint Chiefs of Staff decided to recommend that the military codes remove capital punishment from the statutes pre-empting parliament's decision to review these issues in 2001. The UK has ratified the 6th Protocol to the ECHR and signed the 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Little or nothing of these developments was reported in the media suggesting perhaps that the government's opposition was unnecessary and misjudged. I was especially surprised at the complete absence of any comment, adverse or otherwise, following the decision to sign the 6th Protocol to the ECHR and the 2nd Optional Protocol to the ICCPR given the sensitivity there is in the UK to issues of sovereignty and its reputation for being somewhat europhobic.

Changing Public Opinion - Alternatives to Capital Punishment

How important therefore is public opinion? I doubt that many would disagree that public opinion is very fickle, unsure why it is supporting the death penalty, for what crimes, for what purpose, and for which criminals.

If it is important to change public opinion in favour of abolition what strategies should one adopt. There are those who argue that simply being better informed about the capital punishment process erodes support[17] for it and Fox, Radelet and Bonsteel argue that,

> [r]ecent studies clearly indicate that public awareness of viable, that is, sufficiently punitive and secure, alternatives to the death penalty can do more to influence opinion than education concerning deterrence, costs, or discrimination.

17 Haas,K. and Inciardi, J. "Lingering Doubts about Capital Punishment", *in Challenging Capital Punishment* (Eds.) Hass and Inciardi (1988).

> Thus, for the purpose of changing public opinion, abolitionists would be advised to spend less of their limited resources trying to convince the voting public of the ineffectiveness of the death penalty, and instead to focus on educating Americans about the working of our criminal justice system, specifically regarding parole eligibility and other sentencing alternatives.[18]

Others point to evidence that support is so entrenched that only modest gains can be made by adopting this strategy.[19] Some believe that draconian punitive alternatives to the death penalty allay public fears and therefore erode support for the death penalty. The U.S. experience of this is that despite the alternative of life imprisonment without parole (LWOP) judges and jurors have continued to sentence people to death though there is some recent evidence to suggest that where LWOP is available less sentences of death are being imposed. However the legacy of a policy of LWOP will not be evident for perhaps a generation when the prisons will be bulging with an ageing population with implications for medical care. The Government of Ireland eventually abolished the death penalty for those who kill police officers but imposed a high price for it - 40-year minimum sentence. In Belgium *de jure* abolition was delayed until 1997 because the government preferred to have the death penalty (applied and commuted) than trade off its abolition for a draconian sentence. In the UK recent moves in response to public opinion indicate that LWOP by the executive discretion of the Home Secretary is on the increase - whilst life imprisonment in the UK is mandatory for murder, it is also reviewable and on average 14 years of a life sentence are served before parole, for life, is granted. Some argue that it is more fruitful to confront the public with the brutality of capital punishment,[20] its cost[21] or its irrevocability (miscarriages of justice).[22]

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18 Fox,J.A, Radelet,M.L AND Bonsteel, J.L., "Death Penalty Opinion in the Post-Furman years", *NYU Review of Law and Social Change*, Vol. XV111:499 (1990-91).

19 Bohm,R. and Vogel,R.E. "A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions", *Journal of Criminal Justice*, 22, (1994), 124-43.

20 Sr. Helen Prejean, author of *Dead Man Walking*, Harper Collins (1996) supports the idea of televising executions as a way of confronting the American public with its brutality in the belief that this will reduce their support for the death penalty.

The research evidence from the UK and the USA indicates that the reviewable life sentence is a very effective penal measure with recidivism rates for those released under supervision to the community being lower by far than any other penal measure. Clearly the adoption of such a policy has significant resource implications and relies on modern penal institutions, effective prison regimes and a well-trained community supervision agency. The evidence in the USA and Western Europe is that, once established, this approach is much less expensive than the process of capital punishment and as "effective" in crime reduction as the death penalty - achieving this without the irrevocable nature of that penalty and the prospect of wrongful convictions and executions. Those promoting moves towards alternatives to capital punishment have to address the inevitable structural and economic implications that such a strategy will raise. To be blunt, the cost of the only realistic alternative, life imprisonment, is one that is beyond the existing means of those countries currently being targeted by the Council of Europe. Adoption of such a policy would almost certainly attract wholesale opposition from all sections of society as the costs per head of prisoner could exceed the average income of that society.

Public support for the death penalty does not justify delaying moves to abolition and is invoked more as an excuse for inaction especially when one considers that little or no attempt has generally been made by governments that rely on such arguments to employ thorough public information campaigns. Governments should lead, not follow or hide behind, public opinion, especially as they have the advantage of being advised by reliable authorities and research, all of which point to the inexorable conclusion that, "[t]he death penalty is an illusory solution to a pressing social problem".[23] Pierce and Radelet are helped in this realisation by the statistics of the rate of attrition in identifying which murders and

21 Dieter, R. "Millions Misspent: What Politicians Don't Say about the High Costs of the Death Penalty", Washington D.C.. Death Penalty Information Center, 1994, Rev. Ed. Radelet,M.L., Bedau,H.A. and Putnam, C (1995) *In Spite of Innocence: Erroneous Convictions in Capital Cases.*, Northeastern University Press, Boston.

22 See 25 In Spite of Innocence: Erroneous Convictions in Capital Cases.

23 Pierce,G.L. and Radelet,M.L. "The Role and Consequences of the Death Penalty in American Politics", *Review of Law and Social Change*, Vol. XVIII:711, 1990-91.

which murderers attract the death penalty. In the fourteen years between 1977 and 1991 there were 270,000 murders in the USA of which number only 143 were eventually executed making one execution for every 1900 murders. Even if you add those sentenced to death during that period it still only amounted to less than 1% (1 in 106) of all homicides in the USA that attracted the death penalty.

In the UK a countervailing force to public opinion is that most legal and criminal justice personnel are opposed to restoration, with the exception of the police (Police Federation) and possibly some members of the lower ranks of the prison service, but even there support is lukewarm. The Police Federation view is one that has influenced parliamentarians who table restoration amendments as most such amendments are specifically for those who murder police officers. Those close to the Executive of the Police Federation confirm that support for restoration is slim and that their real debating point is to achieve LWOP for killers of police officers. Neither the Bar nor the Law Society, who represent barristers and solicitors respectively, has a collective view on capital punishment. Similarly little is known about the judges' views on the death penalty, although a spate of miscarriages of justice has probably weakened any residual support. If anything senior judicial opinion is moving in the opposite direction with judges leading the way in opposition to mandatory life sentences for murder.

The advice of the medical profession, as represented by the British Medical Association[24] and the General Medical Council, is unequivocally opposed to participation in any aspects of the death penalty. Apart from any moral revulsion felt by doctors, psychiatrists would find it difficult if not impossible to deal with such issues as: predicting future dangerousness; determining fitness to stand trial; advising on diminished responsibility and issues of competence that may arise between sentence and execution; treating someone's return to competence, and therefore to execution, or leaving them with the despair of their illness. Doctors would be reluctant or more likely would refuse to play a role in developing execution technology or being involved in determining or certifying death at the execution. This issue is currently very relevant in

24 British Medical Association, *Medicine Betrayed: The Participation of Doctors in Human Rights Abuses.* Zed Books: London, 1992.

the USA where the American Medical Association continues to fail to give a lead in this area.[25]

The Needs and Rights of Victims of Crime and their Families and Friends

This section reviews some of the issues raised when the debate about homicide victims and their friends and families needs is engaged and is taken from a chapter that I have written for a Council of Europe publication.[26] I am continuing research on the topic and a fuller account will be published in another forthcoming book *The Death Penalty: A Collection of Essays on Strategies for Abolition*, edited by Prof. William Schabas and myself.

It is my belief that victims represent a major omission from the rhetoric of the abolitionist community. Few, if any, such groups make a conscious effort to express explicit concern for the victims of crime assuming their concern is taken as read. Sadly, nothing could be further from the truth as even a cursory examination of victims and those groups, which provide support for victims, will bear witness. I believe that most victim groups see the "penal reform" industry as being wholly on the side of the offender and therefore by implication indifferent to the needs and rights of victims. It is for this reason that in the USA there has been an almost exponential rise in victims groups whose primary objective seems to be the pursuit of harsh penalties rather than their more traditional role of providing emotional and practical support for victims. The accent seems too to be on rights rather than needs though necessarily some needs should be met as a matter of right.

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25 For further information see: Radelet, M "Physician Participation" Chapter 10 in *Capital Punishment: Global Issues and Prospects*, (Eds.) Peter Hodgkinson and Andrew Rutherford, Waterside Press: Winchester 1996; Dr. Rob Ferris and Peter Hodgkinson in *Psychiatric Bulletin*, December 1997; correspondence and editorial in the *Journal of Criminal Behaviour and Mental Health*, Vol.6 Nos. 2 and 3; *Capital Punishment in the United States of America: A Review of the Issues*, Peter Hodgkinson, Hugo Bedau, Michael Radelet, Gaynor Dunmall and Kim Massey, United Kingdom Parliamentary Human Rights Group 1996.

26 Hodgkinson, Peter "Victims of Crime and the Death Penalty" Chapter 3 in *The Death Penalty: Abolition in Europe*, Council of Europe Publishing 1999.

The UK too has experienced a sea change in the victims' movement with a multiplicity of groups competing with Victim Support the founding victim group in the UK[27], competing not just for funds but for public and government support of their ideologies. Victim Support for its part has always taken the line not to campaign in the area of punishment, in fact its constitution bars it from so doing save in the area of compensation. In contrast, some of the new organisations, aping their U.S. counterparts, have very aggressive campaigns for stiffer penalties and the establishment of procedural rights for victims. Rights, such as Victim Impact Statements; active participation in the sentencing process; involvement in any decision making forum where early release is being considered, and finally the right to know when "their" offender is being released from prison and where s/he is living. A far cry from the days when the needs of victims were provided by local volunteers who helped with such "mundane" activities as providing a sympathetic ear, contacting builders to repair damage to property, helping to allay fear of re-victimisation, contacting friends and relatives, and finding temporary accommodation.[28] Victims support concentrates its energies lobbying on behalf of traditional victim needs and supporting and initiating schemes directed at making the criminal justice system less frightening and more accessible to victims. Projects such as witnesses at Court, victim relations with the prosecuting authorities, separate facilities for victims and their families at Court.[29] It has also promoted research into victim needs and effective measures to meet those needs. For example, special projects have been established to respond to families of murdered children and to the victims of rape. Once these pilot schemes are up and running and evaluated the statutory and voluntary

27 The National Association of Victim Support Schemes (NAVSS - now Victim Support) had its origins in the initiative prompted by the National Association for the Care and Resettlement of Offenders (NACRO) which founded The Bristol Victim-Offenders Group in 1969. This group developed strategies to work with the victims of personal crime referred to them by the police. They established a multi-disciplinary team of professionals who trained volunteers. This group eventually formed into the Bristol Victim Support Scheme in 1974. Similar groups began to form countrywide and the NAVSS was formed in 1979.

28 Holtom,C., and Raynor,P, (1988) "Origins of Victim Support: Philosophy and Practice", in M.Maguire and J.Pointing, Eds. *Victims of Crime: A New Deal?* Milton Keynes.

29 Rock, Paul, (1991) "The Victim in Court Project at the Crown Court at Wood Green", *Howard Journal*, 30/4: 301-310.

sector is invited to assume responsibility for their continuation and expansion nationwide. On the whole Victim Support has been successful in meeting its objectives over the last 25 years without needing to engage in aggressive political campaigns demanding "rights" for victims.[30]

Many decades of research have improved our knowledge of the experiences and needs of victims.[31] From von Hentig's[32] work in the 1940s, which raised the notion of victim precipitation, arguing that there were characteristics inherent to some who became victims which lead to their victimisation - subsequent research in this area suggested that victims were in some way to "blame" for their predicament. The 1960s saw the arrival of "victim survey"[33] research in the U.S. and the UK, which, in turn, spawned the British Crime Surveys,[34] which have in recent years provided valuable information about the perceptions victims have of the criminal justice process. The core issues identified from this research, of importance to victims are fear of crime, anger and frustration, loss of confidence and at the extremes there are victims whose suffering is so severe that it results in a clinical condition.

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30 Rock, Paul, (1990) *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales.* Oxford.

31 Shapland,J., Willmore,J., and Duff,P. (1985), *Victims and the Criminal Justice System*, Aldershot, Gower and Maguire, M and Corbett, C, (1987). *The Effects of Crime and the Work of Victim Support Schemes*, Aldershot, Gower.

32 Von Hentig,H. (1948) *The Criminal and his Victim.* New York.

33 Sparks,R., Genn,H and Dodd,D (1977) *Victims and the Criminal Justice System.* Wiley Press, Chichester.

34 The first British Crime Survey was published in 1983 and has been repeated six times since (1985,1989,1992,1994,1996 and 1998). The original conception was an attempt to provide an alternative and hopefully more accurate picture of the nature and volume of crime than that provided by the official statistics collected by the police forces. Over the years it has evolved and in addition to refining its statistical accuracy it has established an agenda of data collection and research which highlights the experiences and perceptions of victims which has lead to initiatives which attempt to meet the identified needs of victims. This model has also been used in discreet local areas where its results have directly influenced crime prevention and victims' needs policies.

For a full description of these issues and a general review of the victim debate see "Victims of Crime" a briefing paper prepared by the Howard League for Penal Reform in 1997. 708, Holloway Road, London N19 3NL, Tel: +44.(0)171.281.7722.

The abolitionist community might attract some sympathy for their agenda if they promoted policies that helped establish a climate where respect for victims and their families is at least of equal importance as ensuring the legal and civil rights of the accused and the condemned.

Paul Rock in his recent defining work *After Homicide*[35] explains what brought him to undertake his analysis:

> Work on this book was prompted by a general and long-standing interest in policy-making for victims of crime, on the one hand, and, on the other, by a more specific awareness that things seemed to be stirring in the politics of victims of homicide and violence in the mid-1990s.

He went on to say,

> [i]t [his research] looks at victims' organisations striving to re-assert meaning and control in a world that has been turned upside down. There are distinctive symbolic procedures at work, which must be understood before the politics and practices of these groups become transparent. Without such a grasp, it would be all too simple to dismiss many of the people as marginal, unreasonable, unnecessary, and aggressive; to despatch them, in the manner of a number of established institutions in the criminal justice system, as mere "angry victims"; or to talk, as one article[36] put it, of the "increasingly strident demands of fringe organisations like Justice for Victims".

Whilst Rock's work focuses on the UK it is obvious to see the influence that the victim movement in the USA has had and continues to have on the debate within the movement in the UK. At the risk of over-simplifying the debate it seems to me that the principal thrust of many new groups is concern for severe punishment and more procedural rights for victims to influence the outcome of actions against offenders. This approach has struck a rich vein of approval amongst the public, the tabloid press and politicians on the Right (and some on the Left), and furthermore there is evidence that it is having an impact shaping policy on the ground locally and centrally through legislation.

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35 Rock, Paul *After Homicide* Clarendon Oxford Press (1998).

36 Casey,S, "Victims' Rights", *Oxford Today*, Hilary 1995, (Vol.7, No.2),24.

Potential for developing very restrictive legislation is provided by the current public concern about sexual offenders. Whilst adequate safeguards are essential to ensure public safety, a balance has to be struck between the needs and rights of potential future victims, and the needs and rights of offenders. Public disclosure of such offenders will have the effect of driving them underground where they will escape any supervision. This particular victims' "right" has been influenced by developments in the USA and[37] there is little doubt that the former Home Secretary's decision[38], in principle and in practice, to consign a number of life sentenced prisoners to a natural life sentence was in direct response to the lobbying of certain victim groups. In the view of some, the rise in retributive punishment is directly the responsibility of the modern victims movement, an outcome mirroring the developments in the USA. Pat Carlen - for one - believes that:

> [t]he final strand in the new punitiveness is the rise and rise of the crime victim. Since the mid-1970s there has been a growing emphasis on the neglect and invisibility of the victim of crime in the administration of justice. The trumpeting of crime victim wrongs has been useful to anyone wishing to make an electoral appeal on law and order issues. Although at a common-sense level one might have thought that it is because crimes do have victims that anyone ever cared about crime in the first place, the 1970s rediscovery of the victim has certainly fed into the 1990s punitiveness - and with a vengeance! The results?

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37 Megan's Law is legislation named after Megan Kanka, the 7 year old who was raped and killed by Jesse Timmendequas. On 29 July 1994, Timmendequas lured Megan into his house across the street from her to see his puppy where he killed her. The next day he led police to the body in a nearby park. It was disclosed after the murder to her parents and neighbours that he had two previous sex convictions against children and had been moved into that area after being released from prison. Her parents campaigned for laws to require that neighbours be notified when sex offenders move into an area. New Jersey passed legislation, which came into effect on 31 October 1994, followed by most other States. President Clinton enacted a federal law in 1996. CNN Plus website.

38 Michael Howard, MP, was the former British Conservative Home Secretary who identified 17 life sentenced prisoners for whom he would not exercise his discretion for early release implying that they would serve whole life sentences. He also increased the tariff from 8 to 15 years for the two 10 year olds convicted of the murder of 2 1/2 years old Jamie Bulger. This decision has been successfully challenged in the domestic and European courts.

and given the populist nature of American politics are well placed to influence penal policy at the ballot box. This "power" is significant given that the main players in the legal system are elected officials and many victim groups have representatives located in offices adjacent to Attorneys General and District Attorneys whose confidence and support they enjoy. They are, in a word, very influential in shaping some aspects of penal policy. Their power rests not only in influencing particular pieces of legislation, but more insidiously in dictating the agenda and the rhetoric about capital punishment, shamelessly exploiting their status as relatives of murder victims - a very strong emotional appeal indeed.

Unlike other types of victims homicide victims have no further involvement in the process of criminal justice. This function is assumed by the State and occasionally by their nearest and dearest.

The rights won by these victims' groups are considerable and include the following - the right:

- to economic and emotional support
- to be informed about the progress of the police investigation
- to be present at trial
- to provide information at the sentencing phase (Victim Impact Statement),
- to receive compensation from the State and/or from the condemned
- to be consulted about the sentence - life in prison or death
- to be consulted at clemency and parole hearings
- to be present at the execution.

A significant counter to the pro-punishment, pro-revenge victim lobby is provided by the organisations, Murder Victims' Families for Reconciliation[42] and the Journey of Hope. Both organisations share

42 Marie Deans, following the murder of her mother-in-law, founded Murder Victims Families for Reconciliation (MVFR) in Virginia. MFVR was founded to provide a national forum for murder victims' family members, including family members of those executed by the State, who are opposed to the death penalty. Later with the help of Marietta Jaeger, whose daughter was murdered, MFVR expanded its movement throughout the States. In Indiana in 1993 the first "Journey of Hope" was staged and this has been followed with marches throughout a variety of States every year since.

similar beliefs and constituents, the latter having evolved from the former, as all are families or friends of victims of homicide and passionately opposed to the death penalty.

An inherent contradiction and injustice in a victim driven criminal justice system is illustrated by the two approaches reflected above with respect to those convicted of capital murder. If all victims' wishes are to be respected, then prosecutions for capital murder would be even more inconsistent than at present - one simply cannot have a prosecution policy based on the wishes of the families and friends of homicide victims, where some are for and some against capital punishment. There is evidence that prosecutors do take the wishes of victims' families into account, though it appears that the majority of such families and such wishes are pro death penalty.[43] There is evidence too that, irrespective of their individual inclinations, the agenda of such groups, actively supported by the prosecution industry, is pro-punishment and pro-revenge - they feed on anger and hate. This practice of a victim driven prosecution and sentencing policy is evident in many other parts of the world none more so than in those countries where *Shar'ia* law applies. Depending on local variations in interpretation and practice, victims' families have the right to determine whether the condemned is sentenced to death; choose the mode of execution (beheading or stoning - though in some jurisdictions the mode is determined by the offence); demand financial compensation as an alternative to choosing death. In some Islamic States the victim's family has the right to be, or choose, the executioner. Neither the USA nor the Islamic approach meet two essential elements of natural justice - namely, consistency and proportionality. Another potential flaw in this process, and one that bears on the importance of status, is that all these negotiations are undertaken on behalf of the victim by the State and by the families and friends, begging

43 *Houston Chronicle*, 8 June 1998. Letter from Charles A. Sage whose sister Marilyn was murdered in 1993. He reflects on the meeting with prosecutors and family members before the trial when he suggested that acceptance of a life sentence for a defendant already dying of AIDS was the sensible choice. "My view was dismissed by the prosecutors (part of the cottage industry of the death penalty) and by most, but certainly not all, members of the family. The entire process focuses attention on those survivors who favour the death penalty and dismisses opponents. Sanctimonious victim's rights groups court only supporters of the death penalty and ensure that theirs is the only viewpoint quoted by the press". What this letter also highlights is which view and which family member should represent the views of the deceased. Is there a hierarchy of family members and their influence?

the question as to whether the procedure of the "living will" should carry weight at the prosecution and the sentencing phase. There are individuals in the USA who have notarised declarations stating that in the event that they are murdered the State should not seek the death penalty - should prosecutors respect that wish or should the State or for that matter the family have the right to override that wish?[44] If the move is towards a victim driven system then it follows that the victim's view should be more influential than either that of the State or the families and friends of the victim.

Victim Impact evidence was first raised in 1987 in *Booth-v-Maryland*[45] when information, showing the pain and loss suffered by surviving relatives and friends of a murder victim, offered in support of the prosecution's argument for a death sentence was declared inadmissible by the U.S. Supreme Court. This judgment was overturned by *Payne-v-Tennessee* (1991)[46] when the Supreme Court ruled that the prosecution might now introduce evidence to show the victim in a favourable light. Inevitably, this process is raw with emotion; antagonistic to the defendant - explicitly a demand for the death penalty - and not subject to cross-examination by the defence. Hardly the ideal environment to tease fact from fiction, relevance from irrelevance, or to ensure objectivity in sentencing, especially when the prosecutor and the judge are likely to be elected officials and when in most States juries decide the sentence. Hugo Bedau, critical of this development remarked:

> Criminal desert is supposed to be measured by the offender's culpability and the harm caused by the crime. While in theory the harm caused in crimes such as arson or robbery will vary with the value of the property destroyed or

44 *Boston Globe*, 7 July 1998. Mario Cuomo, who was for three terms Governor of New York State, has attached such a notarised codicil to his Will. It reads, "I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I have suffered". The campaign in New York was started by Sister Camille D'Arienzo in 1994 during the governor's election when it seemed certain that the death penalty would be returning to NY after an absence of some 30 years. She says that at least 10,000 people across the country have signed Statements like Cuomo's.

45 *Booth-v-Maryland*, 482 U.S. 496 (1987).

46 *Payne-v-Tennessee*, 501 U.S. 808 (1991).

> money stolen, the harm caused in criminal homicide is deemed uniform in all cases, on the tacit ground that all human lives are of equal worth. Now, however, it will be up to each capital trial jury to decide for itself whether the murder of which the defendant has been found guilty is deserving of a death penalty because of some special features about the victim, features not defined by any statute, possibly not evident to the defendant at the time of the crime, and not specifiable by the trial court or in any uniform manner from case to case"[47]

The balance that has to be achieved is to give recognition to the victim in a respectful and dignified manner while still maintaining objectivity in the legal process. The trial is not the place to consider the very legitimate needs and rights of the families and friends of the victim; there should in effect be a separate Victim Justice System.[48]

The last topic to be addressed in this paper is that of the burgeoning practice of permitting the families and friends of homicide victims to witness the execution of "their" murderer. The decision to extend this 'right' to those who survive the victim was arrived at after vigorous campaigning by the victims' lobby and is justified on the grounds that this "privilege" is permitted for those chosen by the condemned and provides an invaluable opportunity to the families and friends of victims for "closure".

Thirteen States have provision for victims' families to witness executions[49] with each State having different regulations governing numbers, status, age and dress code. In all States the victims' witnesses are

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47 Bedau, Hugo Adam (1994) "American Populism and the Death Penalty: Witnesses at an execution", *Howard Journal of Criminal Justice*, 33 (November): 289-303.

48 See Howard League proposals in their briefing paper *Victims of Crime* available from the League's offices 708 Holloway Road, London N19 3NL.

49 Oklahoma and Washington guarantee families the right to watch. In addition, California, Florida, Illinois, Louisiana, Montana, North Carolina, Ohio, Pennsylvania, Texas, Utah and Virginia, hold hearings to determine access. Numbers permitted access varies from State to State as does the family status of witnesses. Illinois allows families to watch only through closed-circuit television. It seems that not all States have the same minimum age for witnesses - Missouri does not permit those under the age of 21. Ironic really that one is not old enough to witness an execution at 21 but old enough at 16 to be executed.

segregated from the witnesses for the condemned and practice is very varied between States as to the preparation and support, before, during and after, for all witnesses. Why the remaining 25 States do not currently have provision for victims' families to witness, or why some States do not permit the family of the condemned to witness executions, is unclear though hopefully will be made more clear when the author has completed his research into witnesses to execution. Permitting, even encouraging, already pained and vulnerable people to watch, while someone is put to death by hanging, lethal injection, lethal gas, firing squad or electrocution, is a measure that should not have been implemented without extensive research into the reasons for and the effects of such an experience. I am not aware that there has been much authoritative research conducted and can only conclude that this "right" is a cynical expedience to provide a particular kind of victims' group with another "trophy" to demonstrate its effectiveness.

The general question about how this experience affects all witnesses is also poorly researched. However, the anecdotal evidence and the testimony of numbers of prison personnel such as the former Warden of Parchman penitentiary in Mississippi, Don Cabana,[50] and abolitionists such as Sister Helen Prejean,[51] would suggest that significant ill effects are experienced by many of those who have exposure to the raft of procedures involved in the process of capital punishment. Research conducted involving the media witnesses at the execution of Robert Alton Harris in California in 1992 indicated a range of psychological ill effects experienced by some of those witnesses. The researchers concluded that, "[t]he experience of being an eyewitness to an execution was associated with the development of dissociative symptoms in several journalists".[52]

A number of commentators - I was one - raised some concerns when this "right" was extended to victims' family and friends in Texas and it is heartening to note that many of those concerns have been addressed. My major difficulty with this initiative, notwithstanding the rights or

50 Cabana, Donald A, (1996) *Death at Midnight: The Confession of an Executioner*, Northeastern University Press: Boston.

51 Prejean, Sister Helen, (1993) *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*, New York, Random House.

52 Freinkel,A., Koopman,C., and Spiegel, D. "Dissociative Symptoms in Media Eyewitnesses of an Execution", *Am J Psychiatry* 1994, 151: 1335-1339.

wrongs in principle, is that such individuals should be protected from further suffering at the hands of the State and whilst I am satisfied that they have in place certain structural checks, I remain deeply sceptical as to the need for this provision, which I view as further political exploitation of a very vulnerable constituency - all this for the tenuous objective of "closure". The entire context of the debate is so contaminated by the politics of revenge that I believe it is almost impossible to gain a rational assessment of what the positive outcomes are for victim witnesses. It seems to me that by complying with this demand the State hopes to be in a position to divest itself of further responsibility having surrendered any remnants of political courage in their dealings with the pro-punishment victims lobby.

Another project overseen by the Victim Services Division is the Victim Offender Mediation/Dialogue (VOM/D) whose objectives are:[53]

- To provide victims of violent crime the opportunity to have a structured face-to-face meeting with their offenders in a secure, safe environment, in order to facilitate a healing recovery process.
- To provide victims with the opportunity for personal insight, empowerment, and structure for their grieving and healing.
- For offenders to express remorse, admit guilt, and take responsibility for the full impact of their behaviour upon the victims, their families and their communities.
- To provide a process for developing mutual agreements, insights or projects that could serve to benefit other victims and offenders in similar circumstances; such as mutual commitment to crime prevention, assurance of personal safety, victim advocacy, service to/within the community, criminal justice reform, victim impact panels.

The important principle to be remembered here is that this scheme is essentially for the victims unlike some earlier projects which brought together victims with their offenders where victims were clearly being "used" as part of the offender's therapy programme. Quite how the

53 Victim Offender Mediation/Dialogue, Texas Department of Criminal Justice, Victim Services Division7800 Shoal Creek Blvd., Suite 230-S, Austin, Texas 78757. Tel: (512) 406-5620.

principles of this project which are about healing and conciliation, perhaps even forgiveness and reconciliation, lie with the somewhat vengeful aims of the execution witness programme is difficult to imagine. Does the therapeutic environment of the former lead to "closure" more effectively and for greater duration than the medieval approach of the latter, where instant but transient benefits are on offer? I look forward to seeing an independent evaluation of the benefits of both schemes.

Conclusions

The intellectual argument about the purpose and the effect of the death penalty has long been favourable to those opposed to capital punishment. The moral argument so far as international human rights treaties and the mainstream religious groups - save Islam and the Mormon Church - is also on the side of the abolitionist. The emotional argument however, about the needs and rights of victims and their families and friends, is definitely with the pro-punishment lobby. The emotional appeal is very compelling and even more compelling when it appears even to neutral observers that abolitionists and other penal reform groups are only concerned about the needs and rights of offenders. It is for this reason that reform organisations need to review their aims and objectives. Positive Statements need to be made reflecting concern for the needs and rights of crime victims.

There is little doubt that that the pro-punishment victim movement attracts significant public and political support in the USA which crosses party lines, contrasted with the UK where the public support for punishment is arguably as strong as in the USA but crucially without the same support from mainstream political and victim groups. Death penalty abolitionists have a steep hill to climb if they hope to influence this emotionally charged debate and the ground they have to make up is largely of their own creation - crucial to their future strategy has to be an explicit recognition of the needs and rights of victims. I am not suggesting a cynical adoption of a victim friendly strategy but the acceptance that homicide victims and those that survive them have inherent rights and that these should be recognised. The failure to do so has driven many moderate, perhaps anti-death penalty victims' families, reluctantly into the arms of the pro-lobby who can and do offer succour and "solutions" to the hurt, anger and frustration experienced by such

families. The menu of "rights" referred to earlier represent the incline of the hill that has to be climbed and could form the basis for discussion - had the debate been engaged earlier, then I suspect that many of the items would not be on the menu.

This very full menu of rights that the bereaved have sought and won is an indication of how such families and friends can and have influenced the very philosophy that the State pursues in capital cases. For example, two issues that have always been on the periphery of this debate - the mode of execution and live broadcasts of executions - are beginning to gain more attention from the "populist" victim lobby and First Amendment challenges to the U.S. Constitution are again being made by media groups. The demands are to allow media witnesses to view the entire execution process and to permit recorded and/or live broadcasts. Constitutional issues aside, these proposals have divided the abolitionist community as some believe that live broadcasts will aid the abolitionist agenda while others view the prospect as pandering to gratuitous needs which have no social utility. The mode of execution debate goes to the heart of the modern purpose of the death penalty - retribution. The move towards the more sanitised and clinical lethal injection represents an interesting dilemma - on the one hand it is an attempt to make the execution process more civilised and therefore more acceptable, whilst on the other it represents a dilution of the retributive justification. Those States that maintain the electric chair do so because they believe the process has to appear to be painful but not that painful as to violate the Eighth Amendment to the Constitution.

Reform groups have to counter the advances made and it is not enough for them to rely on the intellectual and academic evidence that the death penalty serves no useful purpose and that it is a vehicle for a multitude of abuses of due process and human rights. Whilst all this is correct it fails to address the needs of even the moderate victim lobby and it is this failure historically that has lead to the birth of the angry, frustrated and pro-punishment victims groups in the USA. The dominant debate on victims' needs and rights is provided by those victim groups that focus on influencing penal policy rather than, and some would say, at the expense of the more traditional needs of crime victims - the crime victim movement has become a political movement typified by the vocabulary, rhetoric and aggressive tactics of the Pro-Life movement.

Abolition of the death penalty and penal reform in general is not to be gained at the expense of the inherent needs and rights of crime victims. The simple analysis provided by some politicians that money spent on offenders is money denied to victim services is a fallacy. Victims' needs and rights should not be met at the expense of humane, effective and proportional responses to offenders and their needs should not be confused with or influence the treatment of offenders.

Capital Punishment in the United States of America

Bryan Stevenson[1]

In Christian theology, there is a biblical injunction which dictates that "to whom much is given, much is required; to whom much more is given, much more will be required."[2] This moral construct comes to mind when one examines violations of human rights in a nation as wealthy and influential as the United States. Despite the fact that the U.S. frequently pursues vigorous and aggressive policies relating to human rights violations in other countries, it remains one of world's biggest human rights offenders in relation to capital punishment.[3] There are few places in the world where the enthusiasm for executions is more pronounced, where questions of unfairness, race and economic discrimination in capital sentencing are more persistent, and where the lack of compliance with international law and standards is more vexing.

Since the death penalty was resurrected in 1976,[4] there have been over 550 executions in the United States. Most of these executions have

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1 Bryan Stevenson is an Assistant Professor of Law at New York University School of Law in New York City, and the Executive Director of the Equal Justice Initiative in Montgomery, Alabama.

2 *Holy Bible*, Gospel of St. Luke, 12:48.

3 Amnesty International recently named the U.S. to its list of the top six human-rights violators. Each year Amnesty targets a short-list of the worst violators and advocates UN censure of those countries. *See, The New York Times,* "Good Friends Join Enemies to Criticize U.S. on Rights", Elizabeth Olson, (1999).

4 The death penalty in the U.S. was temporarily ended in 1972 after the United States Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972), held that capital punishment was arbitrary, unpredictable and too capricious to meet American constitutional requirements. While the Court could have permanently ended the death penalty by declaring that it violates the U.S. constitutional prohibition against punishments that are "excessive", or "cruel and unusual", the Court declined to take this approach. Interestingly, unlike other Courts that have recently struck down the death penalty, *see e.g., State v. Makwanye and M Mchunu,* Constitutional Court of South Africa (1995), the U.S. Supreme Court conducted no analysis of international law or "evolving standards of decency" as defined by international practice in its 1972 review.

taken place in the last ten years when support for capital punishment has generated greater political resonance and federal courts have retreated from the kind of oversight and review of death cases that existed in the early 1980s.[5] In the last year of the 20th century, the world's "leading democracy" will probably execute close to 100 of its residents. Almost all of them will be poor, a disproportionately high number will belong to racial minorities with crime victims who are white, many of the executed will be mentally ill, some will have been juveniles at the time their crimes occurred, and there is no meaningful assurance that all of the executed will be guilty of the crimes for which they have been convicted.

The American Death Penalty in Context

Despite a worldwide trend toward abolition of the death penalty, most of the American states have without apology increased use of capital punishment in the last two decades. This embrace of capital punishment should be seen as part of a larger movement to impose harsh sentences on violent and non-violent offenders across the United States. Over the last 25 years, the U.S. has imposed dramatically harsher penalties for men, women and children convicted of crime. The tougher sentencing practices in the U.S. have resulted in an unprecedented increase in incarceration rates and cost billions of dollars in increased spending related to prisons.[6] The U.S. locks up its citizens at a rate 5-10 times

5 A number of "reforms" have been instituted to eliminate review of death sentences by federal courts who were very active in capital litigation during the late 1970s and early 1980s. "From 1976 to 1991, the Court found constitutional error in almost 46% of the federal *habeas corpus* proceedings. The total rate of reversal for capital cases at all stages of review was about 60% or more". James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure,* Third Edition, 1998. This has changed dramatically in the last several years. Now federal courts are enjoined by federal law from conducting the kind of careful review and scrutiny that took place in the early days of the modern death penalty. See e.g., *The Anti-Terrorism and Effective Death Penalty Act (1995);* see also *The Nation,* "The Hanging Judges", Stevenson (1997).

6 The U.S. spent close to 32 billion dollars on prisons and custodial management of people under the control of the criminal justice system in 1997. "Three strikes and you're out", a policy where people convicted of a third felony offense receive extremely harsh, mandatory sentences - including life imprisonment without parole, has required a tremendous increase in the number of prison facilities, correctional guards and associated costs.

greater than that of most industrialized nations. The American prison population has increased from 200,000 in 1972 to 1.8 million in 1998.[7] In the last ten years alone the prison population in the United States has tripled. With the exception of the Russian Federation, the U.S. now has the highest per capita rate of incarceration in the world.

Despite this strategy of harsher penalties for persons convicted of criminal offenses, the total crime rate in the U.S. has risen substantially over the last 25 years. Even with the very recent decreases in some violent crime categories, crime has increased 33% during this era of harsher punishments.[8] More importantly, the perception that crime and violence is worse than ever continues to flourish. There is a sense amongst many Americans that U.S. society is violent and extremely dangerous. While that "sense" is often exaggerated, frequently manipulated by the media and radio talkshow commentators, it is not a total fiction. There were close to 20,000 homicides in the U.S. last year.

The harsh punishments many state legislatures have authorized in response to rampant crime have created a culture where the death penalty is seen by many as necessary. After all, if some states sentence non-violent offenders to life imprisonment without parole for stealing a bicycle under habitual offender statutes,[9] what's to be done with the person who commits a heinous murder? The popularity of state crime policies which are justified as retribution or vengeance for the victims of violent crime have also created an atmosphere where enthusiastic political support for the death penalty is never questioned or confronted.[10]

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7 U.S. Department of Justice, *Bureau of Justice Statistics Bulletin*, "Prison and Jail Inmates at Midyear 1998", (1998).

8 U.S. Bureau of Justice Statistics.

9 I currently represent Jerald Sanders. He is one of thousands of non-violent offenders in the U.S. who has been sentenced to life imprisonment without parole. Mr. Sanders is an indigent black man who has never committed a violent crime. Mr. Sanders was sentenced under Alabama's habitual offender statute after he was convicted of stealing a bicycle from a porch in Mobile, Alabama.

10 The reader should bear in mind that crime and punishment in the U.S. is largely governed at the state level by state legislatures. Only 38 of the 50 American states have the death penalty. While the U.S. Congress, executive branch and judiciary have enormous power to control and regulate state crime policies, the "American experience" on these issues is not completely uniform.

There have been tremendous costs to this approach. The indifference of many American policymakers to the demands of international standards has damaged the reputation of the U.S. on human rights issues. American foreign policy has and will continue to be effected by the retention of capital punishment in the U.S. unless there is reform.[11] Additionally, disturbing questions of fairness and discrimination in the application of capital punishment in the U.S. have created other human rights problems with the retentionist position of the 39 American jurisdictions that permit the death penalty.

The Poor and the Death Penalty

It is frequently said that in the United States, "capital punishment means them without the capital gets the punishment." Critics of the American system of justice have long maintained that the U.S. system works much better for the rich and guilty, than the poor and innocent. There is a great deal of anecdotal evidence to support this view. There is no question that the problems of indigent capital defendants and death row prisoners in obtaining adequate legal assistance are among the most troublesome aspects of capital punishment in the U.S. A great deal has been written about capital trials in the U.S. where the defense attorneys were asleep, intoxicated, publicly stating a personal desire that the accused be convicted and executed, directing racial slurs at the accused, or otherwise providing ineffective assistance of counsel. In many of these cases, courts permitted the accused to be executed despite evidence of inadequate defense assistance.[12]

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11 Following the executions of foreign nationals from Honduras and Paraguay, protesters gathered outside the U.S. embassies in those countries. Relations with Mexico have also been affected by the execution of Mexican nationals in 1998. Following these executions the State Department was concerned that violations on the part of the U.S. would bring retaliation against Americans in those countries. See, e.g. *New York Times*, "U.S. Executions Draw Scorn from Abroad", David Stout, (April 26, 1998). Following the execution of the Paraguayan national, the U.S. State Department issued a statement acknowledging that it had violated the Vienna Convention and issued an apology to Paraguay. See, U.S. Department of State Office of the Spokesman, *Press Statement,* (Statement released in Asuncion, Paraguay), November 4, 1998.

12 See e.g.,"Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer", *The Yale Law Journal,* Volume 103, Number 7, Stephen Bright (May 1994).

The inadequate legal assistance many capital defendants receive is partly a function of the low priority representation of the accused is given in the American capital punishment system. Lawyers who are forced to handle these cases are frequently overwhelmed, underpaid and grossly unprepared to make an effective case for life. Many of these lawyers are unmotivated, inexperienced and unable to invest the time and money necessary for an adequate defense.[13] In some jurisdictions, lawyers who handled capital cases at trial have been disbarred or disciplined at the shocking rate of three to 46 times the normal rates for those jurisdictions.[14] The problem of adequate representation for capital defendants and death row prisoners has led the American Bar Association, the largest national bar association in the country, to call for a moratorium on executions in the U.S. The American Bar Association has observed that despite guidelines issued by the Association, "grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients." In addition, "[j]urisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require."[15]

The problem of adequate representation is even more severe for those who have already been sentenced to death. There are hundreds of death row prisoners in the U.S. who currently have no legal representation and dim prospects of finding counsel. With no constitutional right to counsel, unaided condemned prisoners can not effectively pursue collateral appeals which have frequently proved vital in demonstrating innocence or establishing illegal convictions and sentences. Consequently, it is clear that the American death penalty is heavily shaped by class and wealth.

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13 See "Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing", *Alabama Law Review*, Volume 44, Number 1, Stevenson and Ruth E. Friedman, (Fall 1992).

14 "Trial and Error in the Nation's Death Belt: Fatal Defense", *The National Law Journal*, Marcia Coyle, Fred Strasser, and Marianne Lavell, (June 11,1990).

15 Report accompanying the American Bar Association Resolution calling for a moratorium on executions. (1997) (The resolution was approved by the ABA House of Delegates on February 3, 1997.)

Racial Bias in the Administration of Capital Punishment

Racial bias in the imposition of the death penalty remains a serious problem in the U.S.[16] Of the 3,565 people currently on death row more than half are people of color. (NAACP, Spring 1999). Examining the statistics for some states reveals an even bleaker picture. In Pennsylvania, 83% of people sent to death row from its capital Philadelphia are African-Americans.[17]

The race of the victim also affects the likelihood than an accused will face a death sentence. Strikingly, of the 500 people executed between 1976 and the end of 1998, 81% were convicted for crimes involving white victims despite the fact that about half of U.S. murder victims are Black.[18] (Amnesty, May 1999) These figures are a stark indication of the insignificant value frequently assigned to the lives of African-Americans and other people of color in the U.S. criminal justice system. The composition of those executed and of current death rows in certain geographic locations also reveals a strong bias in the administration of capital punishment. In the southern states of Alabama, Georgia, and Mississippi, two-thirds of those executed have been black.[19]

In addition to the laws of the individual states permitting executions, the federal government also permits capital punishment for certain offenses in violation of federal law. Since 1988, the U.S. Attorney General has authorized 156 prosecutions in which the death penalty has

16 The U.S. ratified the International Convention on the Elimination of all Forms of Discrimination, 28 years after signing the treaty. The U.S. has not submitted any of the reports required of signatories describing its efforts to bring domestic law into compliance (Amnesty, May 1999).

17 D. Baldus, *et. al.*, "Race Discrimination and the Death Penalty in the Post Furman Era: An Empirical and Legal Overview, with Preliminary Findings from Philadelphia", *Cornell Law Review*, Volume 83, September 1998.

18 In Texas, the state with the highest rate of executions, 88% of those executed were convicted for the killing of a white victim, despite the fact that 58% of murder victims are ethnic minorities (Amnesty, April 1998).

19 In Alabama, for example, 12 of 18 executed have been black (*EJI info*). It is not surprising then that a poll conducted among Alabama residents found that 77% of whites and only 31% of Blacks polled supported the death penalty. "Poll: Races Differ on the Death Penalty", *Mobile Register*; Helms, Jean Lakeman and Janet House, June 30, 1996. (The poll was conducted on 400 residents of the state of Alabama by the USA Polling Group).

been sought. Seventy-four percent (74%) of the accused individuals prosecuted by the U.S. have been members of racial minority groups.[20] The U.S. federal government has expanded use of the death penalty although its own government study has found evidence of racial discrimination.[21]

The death penalty is not mandated in the U.S. for any crime. This introduces a large element of uncertainty and discretion into the selection of who will die. Prosecutors, guided by state statutes, determine in which murder cases to seek the death penalty. The discretion given to prosecutors results in the unconscious and conscious discriminatory prosecution of individuals. Racial discrimination also occurs in the selection of juries for capital cases. Prosecutors and defense attorneys are permitted discretionary strikes to exclude some people from serving on a particular jury. Despite a Supreme Court ruling forbidding it, prosecutors frequently utilize these strikes to exclude racial minorities.

Ramon Mata, on death row in Texas, was sentenced to death by an entirely white jury. Mata's own attorney agreed with the prosecutor to remove all non-white potential jurors. The case was appealed to a higher court, which found that Mata's right to a fair trial had not been violated[22] (Amnesty, May 1999). Racism is also evident throughout trials and remain unchecked by the presiding judge. During his trial Wilburn Dobbs, a black man in Georgia, was referred to in derogatory terms by the judge and even his own attorney.[23]

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20 The total is comprised of 83 African-Americans, 29 whites, 24 Hispanic, and 10 Asian/Indian. (Source: Federal Death Penalty Resource Counsel Project, 3/10/99).

21 In 1990, a U.S. agency reviewed 28 studies on death penalty sentencing and found that the studies consistently show "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty." The Agency also found that in 82% of the studies the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty (U.S. General Accounting Office, 1990).

22 In Alabama there have been at least 28 death penalty cases where courts have concluded that prosecutors illegally excluded black people from jury service in a racially discriminatory manner. "Racial Discrimination and Jury Selection", *EJI*, September, 1998.

23 *Dobbs v. Zant,* 720 F.Supp. 1566 (N.D. Ga. 1989).

In 1986, the case of *McCleskey v. Kemp* went before the Supreme Court of the United States, providing the Court with an opportunity to remedy these egregious racial disparities. It did not do so. William McCleskey, a black man, presented a study[24] that established that people accused of killing a white person were 4.3 times more likely to receive the death penalty than individuals accused of killing African-Americans. If the accused is African-American and the victim is white the probability of being sentenced to death increased. The Court accepted the disparities "as an *inevitable* part of our criminal justice system."[25] The Court concluded that the Baldus study did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process." In reaching its decision, the Court showed no regard for international treaties which prohibit racial differentiation.

The opinion of the Court in *McCleskey* also stated that the claims raised by McCleskey would be better addressed by the legislature. However, the legislature has failed to address these concerns. In 1988, the Fairness and Death Sentencing Act - also the Racial Justice Act - was proposed in the U.S. Congress. In short, the Racial Justice Act would have permitted individuals to do what the Supreme Court did not permit Walter McCleskey to do - use evidence of systemic racism in the administration of the death penalty as a basis for overturning their sentence of death. To date, despite reintroduction of the Act to the legislature on numerous occasions the Act has not become law. Only the state of Kentucky has passed a Racial Justice Act.

The *McCleskey* decision has effectively made racial bias an inevitable feature of the American death penalty. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), (Part I, Article I), defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent...

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24 The study conducted by Professors Baldus, Charles Pulaski, and George Woodworth - known as the "Baldus study" - is the most authoritative study conducted on the racial disparities in the administration of the death penalty. The Baldus study examined over 2000 murder cases that took place in the southern state of Georgia. The study involved analysis which took account of 230 factors that could have accounted for the gap between whites and blacks who are sentenced to death.

25 *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights . . . (emphasis added)." In Article 5, the Convention imposes an affirmative duty on countries to "eliminate racial discrimination." In his 1998 report, the United Nations' Special Rapporteur on extrajudicial summary or arbitrary executions, Bacre Waly Ndiaye, stated that "[d]oubts are raised by the compatibility of [the *McCleskey*] ruling with obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires State parties to take appropriate steps to eliminate both direct and indirect discrimination."[26] In 1996, the International Commission of Jurists (ICJ) issued a report, after sending a mission to the U.S., which also observed that death sentences have been imposed with "almost no regard . . . to accepted international norms, specifically the ICCPR [International Covenant on Civil and Political Rights] and the ICERD." [27]

Juveniles and the Death Penalty

Ten years ago, the highest Court in the U.S. decided that the Constitution permits the execution of juveniles as young as sixteen years old.[28] According to the Supreme Court, America's "evolving standards of decency" had not yet developed to the point at which most Americans would reject capital punishment for those with deficits in logical reasoning, impulse control and the ability to anticipate and appreciate consequences (Kamen, 1989; Berger, 1997). It is now clear that the evolution of "decency" in America has failed to keep pace with the development of international human rights norms that prohibit the

26 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* Mr. Bacre Waly Ndiaye: Mission to the U.S. (1998).

27 "Administration of the Death Penalty in the United States", International Commission of Jurists, (1996).

28 In *Stanford v. Kentucky,* (1989) five out of nine Justices voted that execution of offenders aged sixteen or seventeen at the time of their crimes did not violate the Eighth Amendment.

use of the death penalty against juveniles and the mentally disadvantaged.[29] Caught in the gap between America's steadfast adherence to capital punishment and a growing global consensus against the death penalty is the case of Robert Anthony Carter.

Robert was born into a poor family of six children. He grew up in a Houston, Texas, housing project where other children routinely beat him because his clothes were ragged and dirty. His mother and stepfather thrashed him with wooden sticks, belts and electric cords. At age five, he was hit in the head with a brick. His mother once smashed a dinner plate on his head. When he was ten years old, his brother beat him on the head with a baseball bat so hard the bat broke. None of these injuries was ever treated (Farely, 1998). Shortly before the murder for which he received a death sentence, Robert was shot in the head, the bullet lodging near his temple. He afterwards suffered seizures and fainting spells. His measured intelligence was substantially below average.

In 1981, Robert was arrested, held *incommunicado*, and confessed to the murder of a gas-station clerk after waiving his right to have a lawyer present. The prosecution took one day to present its entire case at trial; the defense offered no evidence in rebuttal. Robert, a seventeen year old African American, was convicted of capital murder. His lawyer presented no mitigating evidence at sentencing about Robert's age, the fact that he was mentally retarded, brain damaged and suffered brutal physical abuse, or that this was his first offence. The jury took ten minutes to decide that Robert should die. On May 18, 1998, Robert was taken to a

29 Article 6(5) of the International Covenant on Civil and Political Rights and the American Convention on Human Rights provide that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age. The U.S. signed both but reserved the right to execute any person except a pregnant woman (Hitchens, 1999). International agreements which prohibit the execution of juveniles include: United Nations (UN) Convention on the Rights of the Child, Fourth Geneva Convention, Protocol II of 1977 Additional to the Geneva Conventions of 1949, and UN Economic and Social Council resolution 1984/50 (Amnesty, 1997).

room, strapped down, and killed by the State of Texas[30] (Amnesty, Oct. 1998).

The U.S. leads the world in executing juvenile offenders (Farley, 1998). Of the six countries[31] known to have executed juvenile offenders since 1990, only the U.S. executed juvenile offenders last year (Amnesty, June 1999). Over seventy juvenile offenders are currently being held on death row in America (NAACP, 1999). Currently, thirty-eight states and the federal government have statutes authorizing the death penalty (Streib, 1998). Of those, four states have set the minimum age of eligibility for a death sentence at seventeen, and twenty states use age sixteen as the minimum age (Streib, 1998). In light of recent increases in violent juvenile crime, political leaders have proposed legislation under which children as young as eleven could be sentenced to death.[32]

More than 356 juvenile offenders have been executed in the U.S. since the first documented execution of a child in 1642 (Rosenberg, 1995). Discrimination on the basis of race is particularly egregious among juvenile offenders. Seventy-five percent of juvenile offenders executed were people of color, while nearly ninety percent of the victims were white (Strater, 1995). Of the nine girls executed in U.S. history, eight

30 Robert Carter was executed just weeks after the UN Special Rapporteur on extrajudicial, summary and arbitrary executions condemned the U.S.'s execution of juvenile offenders as a violation of international law. Although the U.S. ratified the International Covenant on Civil and Political Rights, it reserved the right to execute juveniles – a reservation that the Special Rapporteur and UN Human Rights Committee have decried as "incompatible with the object and purpose of the Covenant" (Amnesty, 1997). Since ratification, the U.S. has executed six juvenile offenders (Amnesty, Oct. 1998).

31 Iran, Yemen, Pakistan, Saudi Arabia, Nigeria, and the U.S. (Farley, 1998).

32 Some political leaders appear to be urging a return to the days when Arkansas law provided for the execution of James Arcene, a 10-year-old Cherokee, who was hanged in Arkansas in 1885 for participating in a robbery and murder (Strater, 1995). In mid-1998 a member of the Texas House of Representatives planned to introduce legislation under which 11-year-olds who commit murder could be sentenced to death (Amnesty, Oct. 1998). In 1996, Mississippi prosecutors sought the death penalty for juveniles as young as thirteen years of age (NCADP 3). Governor Gary Johnson of New Mexico has called for the execution of 13-year-olds (Farley, 1998). Pete Wilson, former governor of California, has suggested that 14 year olds be eligible for the death penalty (Hitchens, 1999).

were African American and one was Native American. Today, juvenile death sentences are given much more frequently to African Americans and Latinos than to whites (Amnesty, 1997). Of those sentenced to death for crimes committed as juveniles, nearly two-thirds are African American. The trend toward executing younger children in the U.S. seems to get worse each year. Last year in Alabama, nearly 50% of those sentenced to death were 19 years-old or younger.

The backgrounds of the vast majority of juvenile offenders on death row entail numerous mitigating circumstances that court-appointed attorneys or public defenders often fail to discover. Of the thirteen juvenile offenders executed since 1974 – ten of whom were put to death in this decade – most had backgrounds of serious emotional or material deprivation. A 1988 study of fourteen juvenile offenders sentenced to death revealed that all had suffered head injuries as children and had serious psychiatric problems.[33] All of these boys but two had been beaten, whipped, or otherwise physically abused, and five had been sodomized by older male relatives. Only two had IQ scores above ninety and three did not learn to read at all until they reached death row (Farley, 1998). Nine boys showed serious neurological abnormalities, including brain damage, seizures or unusual brain wave patterns. All suffered from mental illness – seven were psychotic, four had a history of severe mood disorder, and the other three had periodic paranoia - yet only five received any psychiatric evaluation before their trials (Colburn, 1988).

Executing the Mentally Ill

Histories of severe abuse, mental illness and retardation are not unique to juveniles on death row. Despite the Supreme Court's mandate that mental disorders may be presented to juries as mitigating factors,

33 Study by New York University psychiatrist Dorothy Lewis and Georgetown neurologist Dr. Jonathan Pincus published in *American Journal of Psychiatry*, May 1988. The fourteen inmates had each been sentenced to death for a murder committed before age eighteen. They included six African Americans, seven whites and one Latino. One was hit by a truck at age four, went into a coma and was in the hospital for eleven months. Another was hit by a car at age six and hospitalized for six months (Colburn, 1988).

thirty-four adults and juvenile offenders known to be mentally retarded have been executed in the U.S. to date (Amnesty, 1999; DPIC 1). The American public and twelve states have recently opposed capital punishment for the mentally retarded, but more than three hundred people known to be retarded currently await execution on death row.[34] In *Penry v. Lynaugh*, (1989) the Supreme Court held by a 5-4 vote that the Eight Amendment does not prohibit states from executing people with mental retardation. The Court acknowledged that the majority of citizens are against executing people with mental retardation but refused to make a broad ruling that all people with mental retardation should be excluded from the death penalty without a clear consensus supporting such a ruling from legislative action on the part of the states (Keyes, 1997).

Mental illness among those sentenced to death is prevalent but likewise tends to go undetected. A study of fifteen death row inmates revealed that all had histories of severe head injury.[35] Twelve had neurological problems and six had schizophreniform psychoses. "[M]any condemned individuals probably suffer unrecognized severe psychiatric, neurological and cognitive disorders relevant to considerations of mitigation" (DPIC 2). The Supreme Court held in 1986 that the insane cannot be executed, but this decision protects only "those who are unaware of the punishment they are about to suffer and why they are to suffer it" (Hudsmith, 1990). Mentally ill and retarded defendants who display

34 A 1993 national survey indicated that the American public is opposed to the death penalty for those with mental retardation by a margin of almost 2 to 1. In 1989 the American Bar Association adopted a resolution stating that no one with mental retardation should be sentenced to death or executed because to do so would violate contemporary standards of decency. Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, Tennessee, Washington and the federal government forbid the execution of the mentally retarded. Some estimate that 10% of death row inmates may be afflicted with mental retardation, which would mean there are more than 600 mentally disadvantaged inmates on death row nationwide (NCADP 6; Ross, 1997). UNESCO resolution 1989/64 recommends "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution" (Amnesty, 1989).

35 Inmates were selected for psychological examination because of their imminent execution dates, and not because of evident psychopathology or mental illness, for this 1986 study.

even fleeting or minimal comprehension are considered "death eligible"[36] (Keyes, 1997).

Executing the Innocent

Despite the elaborate review process surrounding capital cases in the U.S., there have been 80 documented cases of innocent people who have been wrongly sentenced to death for crimes they did not commit. Some of these innocent men and women came within hours of an execution.[37] Execution of the innocent remains a serious issue surrounding capital punishment in the U.S. For every seven people executed in the United States, an innocent person has been identified. This shockingly high rate of error has caused a few states to consider a moratorium on capital punishment,[38] but has left most proponents of the death penalty undeterred.

Recent advances in DNA testing have played a role in identifying some of the innocent on death rows across the U.S. However, police and prosecutorial misconduct, mistaken identifications, inadequate defense lawyering and other inherent problems in the politicized, wealth-dependent system of American justice may account for most of these

36 The United States Constitution mandates that states may execute only those persons whose culpability and moral blameworthiness are proportional to the punishment. "Culpability" refers to a defendant's capacity to distinguish between right and wrong. Today, courts determine that defendants are "death eligible" if there is at least a minimal showing of moral awareness and a basic comprehension that the criminal act was wrong (Keyes, 1997).

37 See e.g., Dieter, Richard C., "Innocence and the Death Penalty: The Increasing Dangers of Executing the Innocent", Death Penalty Information Center, (1997). For example, in 1996, Joseph Payne had his sentence commuted by the Governor of Virginia a mere few hours before his execution; See also, "Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions", Staff Report issued by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, One Hundred Third Congress, First Session, (1993).

38 *New York Times*, "Legislature of Nebraska Votes Pause in Executions", Dirk Johnson, May 21, 1999. The moratorium bill was vetoed by the Governor of Nebraska a week later.

unjust death sentences.[39] These problems do not lend themselves to quick or immediate solutions which is why the call for a moratorium may have greater resonance in years to come. The American Bar Association Resolution "calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with . . . American Bar Association policies to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . ." It remains to be seen to what extent states will respond to this call for reform.

Torturous Methods of Execution

Lethal injection, electrocution, hanging, firing squad, and lethal gas are the methods of execution permitted in the U.S. Despite the physical and psychological toll inflicted on those who are executed and await death, the Supreme Court has not found these methods in violation of the U.S. Constitution which prohibits "cruel and unusual punishment."

Four states retain the electric chair as the sole method of execution (Alabama, Florida, Georgia, and Nebraska). Electrocutions were described by the former U.S. Supreme Court Justice, William Brennan, Jr. in his dissenting opinion in *Glass v. Louisiana* (1985), "[t]he evidence suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the 'mere extinguishment of life.' Witnesses routinely report that, when the switch is thrown, the condemned prisoner 'cringes,' 'leaps,' and 'fights the straps with amazing strength.»[40] Echoing this sentiment, in October 1997, the justices, who wrote the dissenting opinion in the Florida Supreme Court decision that upheld execution by this method described it as: "a spectacle whose

39 Michael Radelet, *et. al. In Spite of Innocence*, Northeastern University Press (1992).

40 According to most doctors a person feels himself burning and suffocating. A 17 year old who survived an attempted electrocution in 1946 is said to have described the feeling in the following way: "My mouth tasted like cold peanut butter. I felt a burning in my head and my left leg, and I jumped against the straps." (Weisberg, 1991).

time is passed." The description of the justices does not adequately convey the horror of the method. In the May 1990 electrocution of Florida prisoner Jesse Joseph Tafero, flames erupted from his headpiece (Radelet, undated). It took three jolts of power to stop Mr. Tafero's breathing. In an affidavit submitted as part of an internal inquiry into what went wrong, one of the prison officials stated: "Apparently a synthetic sponge, soaked in brine, had been substituted for the natural one applied to Tafero's head. *This reduced the flow of electricity to as little as one hundred volts, and ended up torturing the prisoner to death*" (Weisberg, 1991).[41] In 1983, two physicians entered the chamber in which John Evans was being executed to find that Mr. Evans still had a heartbeat after the first surge of electricity was administered and sparks and flames emerged from the electrode attached to his leg. After another shock was delivered, doctors again found a heartbeat after which a third shock was administered.

Death by hanging, although declining is also still available. It was last used in 1996 by the state of Delaware in the execution of Billy Bailey. Hanging is not instantaneous as commonly believed. "In medical terms, the weight of the prisoner's death causes tearing of the cervical muscles, skin, and blood vessels. The upper cervical vertebrae are dislocated, and the spinal cord is separated from the brain, which causes death." (Dr. Cornelius Rosse, 1991). Two states, Utah and Idaho, continue to permit death by a firing squad. In 1996, five law enforcement officers volunteered to execute John Albert Taylor.

The majority of states, 34, have authorized lethal injection. In recent years, the majority of states have shifted away from other methods in a belief that lethal injection is a more "humane" method of execution. Despite the guise of a medical procedure, the method is believed to inflict psychological and physical pain. Lethal injections are often inserted by non-medical, inexperienced correctional personnel since doctors are prohibited from participating in executions except to announce death. In Texas, Stephen Morin, a former drug addict, was strapped down and prodded for forty-one minutes to find a usable vein

41 This is not the only time in which a prisoner's mask has burst into flames. In 1997, Florida executed Pedro Medina a Cuban refugee with a history of mental illness. The electric chair he was confined to malfunctioned. The black leather mask covering Pedro's face burst into flames. *New York Times,* "Condemned Man's Mask Bursts into Flame During Execution", March 26, 1997.

before the lethal dose was administered. In Arkansas, it took fifty minutes for a vein to be found in Rickey Ray Rector's arm; he even tried to assist the personnel. Mr. Rector suffered from severe brain damage (Radelet). Another man was held strapped to the table with a needle inserted in his arm for seventy minutes while his final appeal was before the court (Amnesty, 1998).

Awaiting death is also a form of psychological torture evidenced by the fact that mock executions, in which no physical pain is inflicted, are a common torture tactic. In 1997, Arkansas carried out a triple execution. The three individuals were taken from the prison they were housed to the death chamber located 35 miles away three days prior to their date of execution. Earl Denton was executed while Paul Ruiz and Kirt Wainwright awaited their turn to enter the death chamber located about 20 paces away (Kuntz, 1997).

Summary

The widespread use of capital punishment in the U.S. has created serious questions about the commitment of America to international human rights. Exacerbated by race and economic discrimination, politicized trials and review procedures, execution of juveniles and the mentally ill, and the serious risk of executing the innocent, the death penalty has isolated the U.S. from many of its allies in the international community.[42] The lack of self-examination and debate about U.S. noncompliance with international law and standards on this issue is particularly disconcerting for advocates of human rights. Ultimately, greater pressure from international bodies may be required to provoke the kind of reform that the U.S. is more frequently trying to accomplish with some other human rights offender.

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42 Another way that U.S. interests have been compromised by its use of capital punishment is in the area of extradition. Many countries which have abolished the death penalty have refused to extradite criminal suspects to the U.S. without some assurance that accused will not face a death sentence. In some cases, the refusal to extradite has created tension between the U.S. and some of its international allies. These problems are certain to continue as long as the U.S. clings to a strongly retentionist position on capital punishment.

The tremendous problems with capital punishment in the U.S. leaves America as an appropriate target for criticism and condemnation by human rights organizations and international agencies. As more countries join the ranks of those that have already abolished capital punishment, not even the U.S. will be able to avoid the growing opposition to its continuing executions without further compromising its status as a world leader for human rights.

Death as a Penalty in the Shari'a*

*M. Cherif Bassiouni***

I. The Sources of Islamic Law

The *Shari'a*, Islamic law, is based on two sources, the *Qu'ran*[1] and the *Sunna*[2] (sayings and deeds of the Prophet Muhammad). The *Qu'ran* is the principal source of the *Shari'a,* which is supplemented by the *Sunna.*

** Professor of Law, President, International Human Rights Law Institute, DePaul University; President, *Association internationale de droit pénal*; President, *Instituto Superiore Internazionale di Scienze Criminali.*

1 The *Qu'ran* contains the "words of Allah" (God) inspired upon the Prophet and uttered by him in the presence of others who memorized these utterances and wrote fragments of them at that time. There are many verses attesting to the divine origins of the *Qu'ran*, such as: 42:51, 26:192, 42:7, 16:102, 17:106, 41:11-12-99. The *Qu'ran* was definitively transcribed some 40 years after the death of Prophet Muhammad by the third Khalifa, Uthman ibn Affan. It was completed in 651 A.D. The work on that compilation commenced under the first Khalifa, Abu Bakr. Four copies were made in 651 A.D., some say seven, and the text was verified by the Prophet's surviving companions, the *Sahaba*. One copy was kept in Makkah [Mecca], one was sent to Damascus, another to Iraq, and the fourth to Yemen. These four master copies were called "Imam", and all subsequent books containing the *Qu'ran* were based on them. No one ever questioned the authenticity or accuracy of that original transcription. The *Qu'ran*, meaning readings, is arranged in 114 *Sura* or chapters of unequal length and numbered consecutively. Each *Sura* differs in the number of *Ayat* or verses, which range from 3 to 286 verses.

2 The complete record of the *Sunna* was compiled by Ishaq Ibn Yassar 136 years after the death of the Prophet in 11 A.H. (A.H. refers to *Anno Hejira)*, which is the beginning of the Islamic calendar. 1 A.H. corresponds to the year 622 A.D., which is the year of the Prophet's flight from Mecca to Medina. The most reliable sources of the *Sunna* are Imam Muhamad al- Bukhari, al-Sahih al-Bukhari (Imam al-Nawawi ed., 6 vols. 1924) which contains 7,275 confirmed *Hadith* and Imam Muslim Ibn Hagag, Al-Sahih Muslim (n.d.). Imam al-Bukhari and Imam Muslim were contemporary, they died respectively A.H. 257 and A.H. 261 and their works endured the passage of time.

While the *Qu'ran* is the controlling source, both constitute the primary sources of Islamic law.[3]

The prescriptions contained in these two primary sources of Islamic law, however, require interpretation. In fact, many of the Prophet's sayings or *Hadith* (which are part of the *Sunna*) interpret some of the *Qu'ran*'s verses. After the Prophet's death (11 A.H., 632 A.D.), the need for interpretation became more acute,[4] and this, in turn, led to the need for supplemental sources of law to apply whenever the two primary sources were inconsistent or silent on a given question. These sources of law include: *Urf* (custom), *Istihsan* and *Istihlas* (equity), *Maslaha* (public interest), *Ijtihad* (best reasoning).[5] Since the *Shari'a* is

Suite 2...

Al-Bukhari notes that there is agreement concerning the 7,275 *Hadith* contained in his *Sahih*, though, because of repetition and overlaps, there are actually only 2,762 separate *Hadith*. *Id.* At that time there were 200,000 alleged *Hadith* in circulation. The Bukhari work was translated into French in *Les traditions islamiques* (O. Hondas and W. Marçais trans., multi-volume work published between 1903-14). The debate over what *Hadith* is *Sahih*, meaning true, is as extensive as the one over the interpretation of each *Hadith*. The reconciliation of inconsistent and contradictory *Hadith* is another complex issue which is best addressed in Ibn Qutayba, *Ta'Wil Mukhtatafat al-Hadith* (*Interpretation of Differences in the Hadith*, 1936), translated as *Le traité des divergences du Hadith d'Ibn Qutayba* (G. Lecomte trans., 1962). For a contemporary work which however covers only 632 *Hadith*, see Mulana Muhammad Ali, *A Manual of Hadith* (1983).

3 This is based on the *Qu'ran*. See *Surat al-Nissa'a*, 4:59.

4 This was due to the fact that the number of alleged *Hadith* proliferated and reached 200,000, *supra* note 2. But also because several *Hadith* were inconsistent, and some were inconsistent with the *Qu'ran*. See Ibn Qutnayba, *supra* note 2. This required the development of a new technique to reconcile or explain away these divergences. See Ahmad Hassan, *The Early Development of Islamic Jurisprudence* (1991).

5 A mainstream approach in *ilm usul al-fiqh* lists these sources as follows:

Principal Sources

1. The *Qu'ran*
2. The *Sunna*
3. *Ijm'a*, consensus of opinion of the learned scholars, also of the learned judges
4. *Qiyas*, analogy

Supplemental Sources

5. *Istislah* or *Maslaha*, consideration of the public good
6. *Al-istihsan*, reasoning based on the best outcome, or equity
7. *Al-Urf*, custom and usage
8. The practices of the four first "wise" *Khalifa*, a form of authoritative precedent
9. The edicts of the *Khalifas* and local rulers
10. The jurisprudence of judges
11. Treaties and pacts
12. Contracts (The *Shari'a* considers a contract the binding law between the parties, so long as it does not violate the *Shari'a*).

God-given law to humankind,[6] it has to be integral; consequently, doctrinal concepts, legal approaches, techniques of interpretation, and judicial decisions cannot be conflicting or contradictory, but merely different as to one another.[7] All of this gave rise to *Fiqh* (the science of law)[8] and to the development of the science of interpretation of the *Shari'a - ilm usul al-fiqh*[9] (the science of the principles of interpretation of the law). Several schools of jurisprudence developed, known as

Suite 5...

13. *Ijtihad* (see *infra* note 25).

An early illustration of the ranking of the sources of the *Shari'a* and recognition of *ijtihad* is a dialogue, more like an interview, between the Prophet and Muadh Ibn-Jabal whom he appointed a judge in Yemen. The *Hadith* is essentially as follows:

The Prophet: "How wilt thou decide when a question arises?"

Muadh: "According to the Book of Allah" [the *Qu'ran*].

The Prophet: "And if thou findest naught therein?"

Muadh: "According to the *Sunna* of the messenger of Allah."

The Prophet: "And if thou findest naught therein?"

Muadh: "Then I shall apply my own reasoning." [Meaning *Ijtihad*]

The *Hadith* indicates the Prophet's agreement with this approach.

It should be noted however that not everyone is capable of *Ijtihad*. There are several conditions and qualifications concerning who may exercise that function. See also *infra* note 25.

6 See *supra* note 1.

7 For a contemporary perspective, see, e.g., Bernard G. Weiss, *The Spirit of Islamic Law* (1998).

8 *Al-fiqh* is the science or knowledge of the prescriptions of the *Shari'a* which derive from its specific sources. It includes all prescriptive norms, judgments, and learned opinions.

9 *Ilm usul al fiqh* developed in the second century of *Hejira* in part after Muslims from many different cultures whose language was not Arabic needed to be guided by certain rules of interpretation to avoid the confusion that different linguistic and cultural perspectives can bring to the interpretation of the *Shari'a*. Thus, it is the science of the rules through which to ascertain the prescriptions of the *Shari'a*. It includes the ranking of sources of law and sources of interpretation, rules of linguistic and as well other substantive rules of interpretation. For example: The *Qu'ran* has precedence over all other sources followed by the *Sunna*; for the *Qu'ran*, the latest in time verse controls, and the same goes for the *Hadith*; the specific verse or specific *Hadith* controls over the general verse or *Hadith*, etc. The first text on *ilm usual al fiqh* was compiled by Iman Mohammed ibn Idriss el-Shafe'i (d. 204 A.H) in his authoritative text *Al-Risala*. See *Risala-el-Shafe'i* (Majid Khadduri trans., 1961); see also Mahammad Abu Zahra, *Usul al-Fiqh* (1958); Abdel-Wahab Khallaf, *Ilm Usul al-Fiqh* (8th ed. 1947), Zakaria el-Berri, *Usul al-Fiqh al-Islami* (*The Principles of Islamic Law*) (1980).

Madhahib (plural of *Madhab)*.[10] The *Sunni* (now comprising some 90% of the world's estimated 1.2 billion Muslims) recognize four schools,[11] each one of them subsequently spawning one or more sub-schools.[12] The *Shi'à* also developed several schools and sub-schools.[13]

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10 See, e.g., Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (1991); Joseph Schacht, *An Introduction to Islamic Law* (1964); N.J. Coulson, *A History of Islamic Law* (1965). After the Fourth *Khalifa* Ali, who was the Prophet's nephew, a political dispute arose as to whether the *Khalifa* (ruler) would be elected from among the Muslims or chosen from the descendants of the Prophet. Proponents of the latter established the *Shi'à* movement.

11 They are as follows: Maliki, for Imam Abu Abdulla Malek Ibn Anas (deceased A.H. 179), Imam Malek was the first to have gathered all the *Fatawa* (plural of *Fatwa*) from the first *Khalifa*, Abou Bakr (11 A.H.) to approximately 170 A.H. This was done at the request of the then *Khalifa* el-Mansour. Abou Hanifa, for Imam Nu'man ben Thabit who was referred to as Abu-Hanifa (which means literally, father of the upright religion) (d. A.H. 150). Shafe'i, for Imam Muhammad bin Idriss al-Shafe'i, see *supra* note 7. Hanbali, for Imam Ahmad ibn Hanbal (d. A.H. 240). For a contemporary perspective on these schools, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (1997); Norman Calder, *Studies in Early Islamic Jurisprudence* (1993); Mohammad Kamali Hashim, *Principles of Islamic Jurisprudence* (1997); Joseph Schacht, *An Introduction to Islamic Law* (1964); and, N.J. Coulson, *A History of Islamic Law* (1965); see also, e.g., David A. Funk, "Traditional Islamic Jurisprudence: Justifying Islamic Law and Government", 20 *S.U. L. Rev.* 213 (1993); Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems", 26 *Am. J. Comp. L.* 187 (1974). For a different perspective, see George Makdisi, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court", 1 *Zeitschrift für Geschichte der Arabisch-Islamischen Wissenschaffen* 233 (1984). It should be noted that these four schools or *Madhahed* are not deemed contradictory to one another, but different in a way that is not inconsistent with the *Qu'ran* and the *Sunna.*

12 For example, the *Abu-Hanifa* school had two sub-schools founded by Abu Yusuf Ya'qub al-Ansari and Muhammad al-Shaybani. Al-Shaybani was the first scholar to compile Muslim teachings on international law. See Majid Khadduri, *Siyyar al-Shaybani: The Law of War and Peace in Islam* (1955). The *Hanbali* school, which is the most orthodox of the four, spawned the *Wahabi* school, named after its founder, Abdel Wahab, whose views are even stricter than those of Imam Ahmad Ibn Hanbal. That school is followed mainly in Saudi Arabia.

13 Iran is the only Muslim State that is almost entirely *Shi'à*, and it follows the school known as the *Ithna-Asharia*, or the twelfth, after the *Shi'à* twelfth recognized Imam, ruler, who, in their belief was "occulted" while in a cave, and who is expected to "reappear" at some time to lead the righteous to the right path. See *Shi'Ism: Doctrines, Thought and Spirituality* (Seyyed Hossein Nasr, *et. al.*, eds., 1988). The *Qu'ran* however specifies that only Jesus of Nazareth who has been elevated alive to the side of Allah is to return to earth before judgment day to lead the people of the world to the righteous path of Islam.

There were also other jurisprudential schools that came out of certain religious or political movements throughout the history of Islam.[14]

These *Madhahib* rank the secondary and tertiary sources of law differently, and pursue separate analytical approaches and methods to the *Shari'a*'s interpretation.[15] *Ilm usul al-fiqh* recognizes this diversity within a holistic framework.

One of the great doctrinal debates among all schools of jurisprudence, but more so between *Sunni* and *Shià'a,* is whether the *Qu'ran* and the *Sunna* are to be interpreted literally, or on the basis of the intent and purpose of the text, or both.[16] Whether one approach or the other is followed will determine if the unstated legislative policies of the many different aspects of the *Shari'a* shall be deemed relevant to the textual interpretation of the *Qu'ran* and the *Sunna.*[17] It is probably in that respect that there exists the greatest divergence of views between what I would consider the three broad categories of thinking and practice. The first is the "Traditionalists" who represent the prevailing religious

14 Among these are the *Mu'tazala*, the *Khawarij*, and the *Sufi* whose movement spawned several branches in different Muslim countries at different periods. See C. Glassé, *The Concise Encyclopedia of Islam* (1984).

15 For a classic authoritative Muslim approach using a historical analytical technique, see Ibn Khaldoun, *al-Muqaddima* (F. Rosenthal trans., 3 vols. 1958) and the multivolume work Ibn Khaldoun, *Kitab al-'Ibar* (History). For an analysis of Ibn Khaldoun's philosophy of history, see Muhsein Mahdi, *Ibn Khaldoun's Philosophy of History* (1971). Another leading Muslim historian is al-Tabari. See al-Tabari, *Kitâb Ikhtilâf al Fuqaha'a* (*The book on the Differences of Scholarly Interpretation*) (F. Kern ed. 1902). For a short contemporary analysis, see Joseph Schacht, "The Schools of Law and Later Developments", in *Law in the Middle East* (Majid Khadduri and Herbert Liebesny eds., 1955).

16 This debate is characterized by the great debate between *al-zaher*, the obvious or literal meaning, and *al-baten*, the hidden meaning or the purpose. The *Sunni* support the *al-zaher* approach unless the purpose or hidden meaning is evidenced in some aspect of the *Qu'ran* or *Sunna*. The *Shi'à* allow resort to the *al-baten* meaning for interpretation of the literal text. For a contemporary perspective, see Bernard G. Weiss, *The Spirit of Islamic Law* (1998).

17 That debate is characterized by whether the *Shari'a* is dynamic or static. For a contemporary "traditionalist" reformist approach, see Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (1986); see also Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (1951). For a "traditionalist" view, see M. Mawdudi, *Toward Understanding Islam* (A. Ghandi trans., 5th ed. 1954).

establishments, respectively in the *Sunni* and *Shi'à* worlds.[18] The influence of these two establishments is controlling - in part because of their dominant role in education. Their teachings at Islamic universities, like *al-Azhar* (which is the *Sunni*'s foremost academy) and *Najaf* and *Qum* (which are the *Shi'à*'s foremost academies), as well as in the schools throughout most of the Muslim world, make their views the most popularly diffused and accepted ones. *Sunni* "Traditionalists" are essentially literalists, but unexplainably their approach also includes the recognition that the Prophet and his four first successors, called the "wise ones", relied on the purposes of the *Shari'a* in their interpretations of the letter of the *Qu'ran.* The second category is the "fundamentalists" who are essentially dogmatic, intransigent, and literal. They seek the solutions of earlier times as a panacea for complex contemporary problems, some even turning to political activism and violence as ways of propagating their views.[19] The third is a category consisting of a few

18 The *Shi'à* have an established hierarchical religious structure that gives its clergy even more authority over their followers than the *Sunni*. This is due to the fact that the *Shi'à* clergy originated in Southern Iraq and in Iran where, particularly in Iran, the historical role of organized clergy in prior "religious" regimes was well entrenched. Suffice it to recall the Zoroastrian tradition and its dominant hierarchical clergy. For an early history of Iranian society, see J.M. Cook, *The Persian Empire* (1983); see also R. Frye, *Islamic Iran and Central Asia (7th- 12th Centuries)* (1979).

19 This was not, however, always the case. In fact, the term "Fundamentalist" has its origins in several reform movements which sprang out at different times and places over the last seven centuries. What these movements have in common is their search for a more ascetic, orthodox, and simpler way. The *Muwahhidun* was a fundamentalist movement in Morocco in the 12th century A.D., while a similar movement was developed by Ibn Taymiya in Syria (1263-1328 A.D.), and Ibn Khaldoun in Egypt (1332-1408). This gave rise to the *al-Salaf al-Salih* (*The Right Path*) movement in Egypt at the turn of the 20th century A.D. spurred by Sheikh Mohammad Abdou, *Mufti*, who was a disciple of Jamal el-din el-Afghani, a reformist of the mid-1800s. These however were reform movements grounded in established "Traditionalist" *Sunni* doctrine. Contemporary movements however are a reaction to, or a consequence of corruption, bad government, and poverty in different Muslim countries. As a result, they have also developed a political movement, and some groups believe in carrying out a *Jihad* or holy war by use of violent means. See, e.g., W. Montgomery Watt, *Islamic Fundamentalism and Modernity* (1988); John L. Esposito, *Islam and Politics* (2d. ed. 1987); Hassan Hanafi, "The Origin of Modern Conservatism and Islamic Fundamentalism", in *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Ernest Gellner ed., 1985); Martin S. Kramer, *Political Islam* (1980). See also M. Cherif Bassiouni, "A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States", in *The Islamic Impulse* 244 (Barbara Freyer Stowasser ed., 1987). That book also contains several contributions on various aspects of Islamic Fundamentalism.

secular reformists and a few forward thinking "traditionalists", which the mainstream "traditionalists" and "fundamentalists" refer to (in varying degrees of disapproval) as the *Ilmani*.[20] The *Ilmani* seek to achieve the legislative goals of the *Shari'a* by recognized jurisprudential techniques, including *Ijtihad*, in light of scientific knowledge.[21] The *Ilmani* also search for the purposes and policies of the *Shari'a* in order to address contemporary problems.

Writings by Muslim scholars will usually reflect the views represented by these three categories. Consequently, the reader, whether Muslim or non-Muslim, who is unfamiliar with these distinctions and with the complexities of the *Shari'a,* will face difficulties in understanding all these theories and their applications.[22]

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20 Which means those who use *Ilm* or knowledge. Those opposed to this approach argue that the use of scientific knowledge to re-examine the assumptions, interpretations, and applications of the *Shari'a* is either inappropriate, unacceptable, or anathema depending upon one's degree of intellectual closeness and religious fanaticism. But the *Ilmani* approach has been advocated by no lesser scholars than Ibn Taymia and Ibn Khaldoun, *supra* note 21. For two contemporary scholarly views, see Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (1986) and Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (1951). The Twentieth Century had such leading reformists from among the ranks of "Traditionalists" clergy, like Sheikh Mohammad Abdu of Egypt and, later in the 1940s, Sayed Qutb of Egypt who was the intellectual light of the Muslim Brotherhood. See Sayed Qutb, *Social Justice in Islam* (there are several translations that were published in several countries in different years). The present Rector of al-Azhar, Sheikh Hassan Tantawi, has become among the *Sunni* clergies a mild reformist. A few years ago, as Egypt's *Mufti*, he issued a statement that bank interests are not *Riba* (usury). This was the first time that such a statement was issued by a leading *Mufti*, since Imam Ahmad Abdou had ruled in the 1930s that postal savings passbooks could bear a "fixed profit". Since the 1970s, a new concept called "Islamic Banking" has developed to get around the problem of usury and banking interests. See M. Cherif Bassiouni and Gamal Badr, *Interests and Banking in Islam* 34 (1990). For a reformist view of Islamic criminal justice and contemporary standards of human rights, see M. Cherif Bassiouni, "Sources of Islamic Law and Protection of Human Rights in the Islamic Criminal Justice System", in *The Islamic Criminal Justice System* 3 (M. Cherif Bassiouni ed., 1982) [Hereinafter *Islamic Criminal Justice*]. It should be noted that *ilmani* is to be distinguished from *almani* which refers to agnostics.

21 See *infra* note 25.

22 For general works on Islam, see John L. Esposito, *Islam: The Straight Path* (1988); Gerhard Endress, *An Introduction to Islam* (1988); J. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (3 vols. 1973).

As Islam spread to regions with cultures different from the Arabic one where Islam was first rooted, the jurisprudence and doctrine of the *Shari'a* , which developed in these non-Arab societies differed.[23] But, since the *Qu'ran* is God-given and cannot be altered, these jurisprudential and doctrinal differences had to be reconciled and this gave rise to a great deal of sophistry and strained arguments. In time all of this became very complicated, and it limited knowledge of the *Fiqh* and *Ilm usul al-fiqh* to those who could devote many years to their study.[24] The knowledgeable became the elite, the advisers to the rulers, and the teachers to the masses. This may explain why the *Sunni* "traditionalist" clergy, in order to preserve their power, decided in the fifth century A.H. (twelfth A.D.) to foreclose resort to *Ijtihad,* or best reasoning, as a source of law and as a method of interpretation.[25] Since *Ijtihad* is the basic source of progressive development, its closure preserved the past and condemned the future to follow that past.[26] No Muslim country has

23 The problems that the *Shari'a* had to address in the simple bedouin desert society of the Arabian Peninsula offered few precedents for more complex societies in the Indian sub-continent and other societies. For a contemporary perspective, see Martin Gerber, *Islamic Law and Culture* (1999); Ira M. Lapidus, *A History of Islamic Societies* (1988); see also Laurence Rosen, *The Justice of Islam*, 154-186 (2000).

24 To become a graduate of the main *Sunni* Islamic university, al-Azhar, and receive the degree of *Islamia,* equivalent to a doctorate, requires twelve years of studies after high school. The *Shi'à,* for reasons stated above, see *supra* note 18, always had a hierarchical clergy from prior civilizations that kept a tight grip on their followers. This is true even today, and Iran is the prime example. The fact that the Iranian people's language is *Farsi* makes it even more difficult for ordinary Muslims to know Arabic and consult the *Qu'ran* in its original language. Thus, the Iranian clergy is the necessary intermediary between the faithful and the *Shari'a,* as well as its interpreter, which explains their power. This is also why the excesses committed by the Iranian revolution, particularly the legal and judicial abuses, all done with the approval of the religious-political leadership of the Ayatollahs, went mostly unchallenged. One example is the seizure of American diplomats in Teheran in 1979. See M. Cherif Bassiouni, "The Protection of Diplomats in Islamic Law", 74 *Am. J. Int'l. L.* 609 (1980) . There were also numerous other excesses by the Revolution which summarily executed many persons, and tortured and arbitrarily detained many others in complete violation of Islamic precepts of criminal justice. See Bassiouni, *The Protection of Human Rights in the Islamic Criminal Justice System, supra* note 20.

25 Muhammad T. Amini, *Fundamentals of Litihad* (1986); Fazlur Rahman, *Islam and Modernity; Transformation of an Intellectual Tradition* (1980); Hassan Hanafi, *The Origin of Modern Conservatism and Islamic Fundamentalism in Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Ernest Gellner ed. 1985).

26 But see, Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", 16 *International Journal of Middle East Studies* 3 (1984).

so far dared to officially re-open the door to *Ijtihad*, even though the need to resort to it in light of so many scientific and technological developments is obvious.

To understand the *Shari'a* in all its complexities requires knowledge of its jurisprudential and scholarly interpretations and applications not only over time - fifteen centuries - but also throughout the many regions of the Muslim world which are characterized by different cultures, customs and mores that influenced the way they interpret and apply the *Shari'a*.

II. Crimes and Penalties in the *Shari'a* [27]

The *Shari'a* contains three categories of crimes: *Hudud*,[28] *Qesas*,[29] and *Ta'àzir*.[30] Their sources of law vary, and frequently multiple sources of law have to be combined to complete the definition of a given crime, arrive at its elements, and establish its evidentiary requirements. The *Sunni* and *Shi'à* jurisprudential schools all differ as to some of the elements of the crimes contained in these three categories and their evidentiary requirements. It makes the study of these crimes more difficult.

27 See, M. Cherif Bassiouni, "l'Islam face à la déviance", in *Les différents aspects de la culture islamique* 303 (A. Bouhdiba and M. Ma'ruf al-Dawalibi eds., 1995); Muhammad Abu-Zahra, *Al-Jarima Wal-Uquba fil Islam* (1974) (*Crime and Punishment in Islam*).

28 Aly Aly Mansour, "Hudud Crimes", in *Islamic Criminal Justice System*, *supra* note 20, at 195.

29 M. Cherif Bassiouni, "Qesas Crimes", in *Islamic Criminal Justice*, *supra* note 20, at 203. See also M. Cherif Bassiouni, "Les crimes relevant du précepte de Qesas", 4 *Revue internationale de criminologie et de police technique* 485 (1989).

30 Ghauti Benmelha, "Ta'azir Crimes" in *Islamic Criminal Justice*, *supra* note 20, at 211; Abdul-Aziz Amer, *Al-Ta'azir fil Shari'a al-Islamia* (1969)(*Ta'azir in the Islamic Shari'a*).

1. *Hudud* Crimes

The *Hudud*[31] are established in the *Qu'ran* and they are supplemented by the *Sunna*. They consist of seven specific crimes:[32] one requires the penalty of death (*Haraba)*, three allow it as an option (*Ridda, Zena*, and *Baghi*), and three carry other corporal penalties. The legislative policy of these crimes is general deterrence, hence the severe penalties of death and corporal punishment. To evidence the intended general deterrence policy, as opposed to pure retributiveness, each crime has specific elements and stringent evidentiary requirements that must be proven to an extent that goes beyond a doubt.[33]

The policy goals of these crimes were developed in the days of the Prophet and the first four succeeding *Khulafa*[34] in their interpretation of these crimes' elements and their evidentiary requirements. Subsequently, however, these and other enlightened interpretive approaches were narrowed by rigid formalism that precluded progressive interpretation.

The following is a brief description of each of the seven *Hudud* crimes, their elements, evidentiary requirements, and penalties. They are not listed in any order of priority, in fact the various schools of jurisprudence list them in different order, and also differ as to whether they are seven or five. It must be emphasized that these crimes reflect policy goals that differ as to each crime, but all of them share the characteristics of the theory of general deterrence reflected in the severity of the penalty and the specificity of the evidentiary requirements.

a) *Ridda*

Ridda, or apostasy, is to renounce Islam. Whether *Ridda* should be deemed a *Had* is questionable because it is not specifically mentioned in

31 The word *Hudud* in Arabic means the limits, or the limits proscribed by Allah.

32 Muslim scholars disagree as to whether these crimes are 7 or only 5, by excluding the two crimes established in the *Sunna* and not specifically mentioned in the *Qu'ran.*

33 Muslim scholars however refer to evidentiary standard in different terms, but they all agree that, in case of doubt, the *Had* penalty shall not be applied. The Prophet in a *Hadith* admonished against doubtful evidence. See Ma'amoun Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", in *Islamic Criminal Justice, supra* note 20, at 109.

34 In Arabic, *khulafa* is the plural of *Khalifa.*

the *Qu'ran*.[35] *Ridda* means more than a change of heart about religious belief in Islam as most "Traditionalists" and all "Fundamentalists" believe.[36] Apostasy in the early days of Islam meant that the person left or was about to leave the realm of Islam to join the enemies of Islam. In

35 The verse of the *Qu'ran, Surat al-Baqarah*, II:127, which touches upon this subject refers to Abraham and is quite general. It does not specifically criminalize *Ridda*, which led some scholars to deem *Ridda* a *Sunna*-created crime that should be deemed part of *Ta'azir* and not part of *Hudud*. Thus, its penalty should not be deemed obligatory.

36 Some "Traditionalists" and the "Fundamentalists" mistakenly equate blasphemy to apostasy. One controversial case was when a Muslim author, a United Kingdom citizen of Indian origin, Salman Rushdie, was condemned by Iranian Mullahs for blasphemy because his book, *The Satanic Verses*, contained blasphemous statements. Some secular Muslims disagreed, as did some traditionalist *Ulama* (religious scholars). See M. Cherif Bassiouni, "Remarks", in *Proceedings of the American Society of International Law* 432 (1989). For a contrary view, see Alaa-El-Din Kharoofa, *Hukm Al-Islam Fi Jara'im Salman Roushdie* (*The Judgment of Islam on the Crimes of Salman Rushdie*) (1410 A.H., 1987 A.D.).
Another recent case occurred in Egypt, when an Associate Professor of Arabic Literature at the University of Cairo, Faculty of Arts, Dr. Nasr Hamad Abu Zeid, wrote a booklet entitled, *Naqd al-Khitab al-Dini* (1995)(*A critique of the Divine Language*)(published by Madbouli Press, Cairo, Egypt). The book, and others of his writings which dealt with the *Qu'ran* from a literary perspective, took the position that the divine discourse should not be taken literally. Instead, that it intended to convey an impression with words that evoke certain images in the minds of people. The approach falls within the category of those who do not view the *Qu'ran* as requiring, in all instances, a literal interpretation. This is contrary to the basic precepts of fundamentalism. Egypt has secular criminal code which does not contain *Ridda*. But Egypt's domestic relation laws apply the *Shari'a* to Muslims. So, a group of persons brought a civil action in domestic relations court to force a divorce of Abu Zeid from his wife, as non-Muslim men cannot marry Muslim women. The basis for the action was that Abu Zeid appealed first to the Appellate Court of Cairo, which surprisingly ruled against him and upheld the trial Court's judgment, in its Decision No. 287, dated 14 June 1995. Abu Zeid then appealed to the Egyptian Supreme Court, arguing that *Ridda* was a crime, and its elements are established in the *Shari'a*, that he never intended to reject Islam or to commit blasphemy and that the trial Court lacked the power to order his divorce (the enforcement of which was suspended). To everyone's surprise, the Supreme Court's Chamber on Civil, Commercial and Domestic Relations Matters, consisting of five judges, affirmed the Appellate Court's judgment in a decision dated 5 August 1996 (30 *Rabe'e Awal* 1417 A.H). The Supreme Court's judgment was deemed by many to be concerned with the politics of religion, as was the trial court's. See *al-Ahrar* (a Cairo daily opposition newspaper), 18 August 1996, at 3. But in January of 1997, the Giza Court of Appeals for Emergency Matters, held that the original trial Court judgment was not enforceable. So, the trial court judgment stands, but cannot be enforced. This meant that the Supreme Court's ruling did not have to be reversed by a judgment *en banc* of that Court. Thus, the couple remains married. But no one knows what that unenforced precedent means. See also David Forte, "Apostasy and Blasphemy in Pakistan", 10 *Conn. J. Int'l L.* 27 (1994).

contemporary terms, this is equivalent to high treason. Thus, the simplistic approach to apostasy by the "Fundamentalists" and among some of the "Traditionalists" is not in keeping with the legislative purpose of the *Shari'a*. A revealing indication of that is the fact that the four *Sunni* schools of jurisprudence differ as to when *Ridda* shall be deemed conclusive. Each school provides for different elements that need to be proven, and they also allow for different periods of time for the transgressor to change his/her mind about *Ridda*—which range from one to ten days. Thus, if it is a question of time, it has also to be reconciled with another overarching principle of Islam, namely, that there can be no compulsion in Islam.[37] Consequently, I submit that the natural lifetime of the transgressor is as good a criterion as the range of one to ten days.[38] Of greater relevance however to this interpretation is a *Hadith* which recounts that a person was brought before the Prophet for committing *Ridda*. The Prophet dealt with the question as follows: The Prophet asked what he had done, and was told that the transgressor had been found throwing his spear into the sky saying, "I want to kill you, God". The Prophet asked the transgressor why. The reply was to the effect that his loved one, which he was to marry, had died of a sudden illness and that he was angry at God for having taken her away from him. The Prophet looked at his companions and opined to the effect: "Is it not enough for you that he believes in God to want to kill him!" *Ridda* was found not to have been established, and thus no penalty was applied. The meaning imparted by this authoritative *Hadith* is self-evident, yet, surprisingly, that meaning has been lost on the "Fundamentalists" and other proponents of the simplistic, primitive, and atavistic response of killing those who disagree with their un-Islamic orthodoxy - and by the standards of these extremists, it probably includes this writer for some of the progressive views stated herein.

b) *Baghi*

Baghi, or transgression or uprising, is based on a verse of the *Qu'ran* which reveals that the proscribed conduct is in the nature of a rebellion because the word "aggression" is used in the relevant verse of the

37 No compulsion in religion is specifically stated in the *Qu'ran, Surat al-Baqara*, 2:256.

38 Bassiouni, *l'Islam face à la déviance, supra* note 27, at 315-316.

Qu'ran.[39] The *Qu'ran* does not provide a penalty for *Baghi.* The four *Sunni* schools differ as to the elements of that crime, but the consensus is that it is equivalent to an armed uprising against the legitimate ruler. The death penalty is optional, and a range of penalties other than death can be applied, including for example exile.

c) *Sariqa*

Sariqa, or theft, is punishable by cutting off the hand of the offender, which is prescribed in the *Qu'ran.*[40] But the elements of that crime are very stringent.[41] They require, *inter alia*: 1) a trespassory taking by breaking into a restricted or protected or private area; and 2) the taking must be of some value reaching the *Nissab*, or required level which differs in the four *Sunni* schools. The second *Khalifa*, Umar ibn el-Khattab,[42] in a period of drought that was called the year of famine, suspended the penalty and his ruling remains to-date a jurisprudential landmark. Yet, his decision was unilateral, unfounded on any precedent, and not based on the literal words of the *Qu'ran.* His rationale was that an unarticulated element of that crime is that the theft occurs in a just Islamic society. Thus, whenever a society cannot provide for the need of its people, or be just, then the penalty should not apply. This enlightened approach can only be characterized as predicated on the purposes of the *Shari'a* and not on the letter of the proscription. Consequently, enlightened contemporary legislation can follow the same approach, and many States have done so.[43]

d) *Haraba*

Haraba, or brigandage is referred to in the *Qu'ran* as those who wage war against Allah and the Prophet, and by extension against the legitimate rulers of Islamic societies. Such transgressors could be executed, or

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39 *Surat al-Hujurat*, 49:9.

40 *Surat al-Ma'ida*, 5:38.

41 See Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, *supra* note 33.

42 Fazal Ahmad, Umar: The Second Caliph of Islam (1965).

43 The States listed *infra* in note 54 have all eliminated the cutting off the hand for theft and have only a prison sentence of relatively short duration. Other States like Afghanistan, Iran, Pakistan, Saudi Arabia, and the Sudan have not done so.

have their hands and feet from the opposite side cut off, or be exiled.[44] Thus, there is no mandatory death penalty unless, according to scholars, the *Haraba* results in a homicide. In that case, they interpret the *Qu'ran*'s provision on *Haraba* as requiring the death penalty.

e) *Zena*

The penalty provided in the *Qu'ran* is flogging.[45] The Prophet, however, imposed the death penalty by stoning for the married transgressor, but that preceded the advent of the *Qu'ran*'s provision that provides for flogging.[46] This led some scholars to say that the Prophet's practice was overridden by the *Qu'ran*, while others distinguish between the married and the unmarried, holding that the *Qu'ran*'s verse applies to the latter, and the Prophet's *Summa* to the former.

The evidentiary requirements needed to prove this crime are very stringent. Specifically, four eyewitnesses must testify that a hypothetical thread could not pass between the two bodies - in other words, actual sexual penetration. The requirement of four eyewitnesses means that what is really proscribed is an act of sexual intercourse performed publicly (otherwise it is difficult to see how there could be four eyewitnesses). But in cases adjudicated by the Prophet, it was clear that the penalty should not be applied in cases of doubt and that the satisfaction of the evidentiary requirements made proof of that crime very difficult. In one of these cases a woman came to the Prophet to confess her adultery. The Prophet asked if there were witnesses, but there were none. She insisted that her confession be received, but the Prophet insisted that she return four times to have her reiterated confessions be the equivalent to four eyewitnesses. When she did that, he still insisted that she corroborate her confession with external evidence. She then confessed to being pregnant. The Prophet, clearly wanting to avoid applying the penalty, deferred it until she gave birth, otherwise the penalty would affect her unborn child. Eight months later she returned, but the Prophet again refused to apply the penalty because she had to breastfeed the child, and he asked her to return nine months later. When she

44 *Surat al-Ma'ida*, 5:33.

45 *Surat al-Nur*, 24:2.

46 The Prophet's imposition of this penalty raised questions with some scholars about whether the penalty for *Zena* for unmarried persons is not in the nature of *Ta'azir* instead of *Had*.

returned, he asked her if she wanted to recant her confession, but she confirmed it. He then felt that he had no choice but to order the penalty carried out. When his companions returned from the stoning, he asked them if they had heard her recant. They asked why and he said that, if she had, they should have stopped the stoning. This *Hadith* of the Prophet reveals the intended deterrence policy of the penalty, the stringent nature of its proof, and the lenient approach of the Prophet in the interpretation of the crime and in the application of the penalty.

f) *Badhf*

Badhf means slander, but it is essentially the defaming of the character and reputation of a chaste woman.[47] This crime is found in the *Qu'ran*, and its penalty is flogging.[48] It does not include the death penalty. Scholars disagree as to whether the defamation should be made in public or not since proof of the crime requires four witnesses.

g) *Shorb al-Khamra*

Shorb al-Khamra, or drinking alcohol, was referred to in the *Qu'ran* in three successive verses which were revealed in three stages over a nine-year period.[49] Only the last revelation stated a clear prohibition against the drinking of alcohol, but it did not include a penalty. This question has historically been debated by all schools of jurisprudence which discuss at length what substances constitute alcohol, whether fermented grain, fruit, and grapes fall into that category or not and at what point does fermentation become the type of alcohol that is prohibited. Since the *Qu'ran* does not provide a penalty, the Prophet declared that it would be flogging. The *Madhahib* disagree as to how many floggings and by what means they are to be administered, *i.e.*, caning or whipping

47 This verse of the *Qu'ran* was revealed after it was rumored during a caravan trip, that the Prophet's youngest wife, Aïcha, also many years younger than him, was attracted to a young warrior-leader among the Prophet's close followers.

48 *Surat al-Nour*, 24:4. That verse specifically requires 4 witnesses.

49 *Surat al-Baqarah*, 2:219, then *Surat al-Nissa'* 4:43, then *Surat al-Ma'ida*, 5:90-91. The Arab desert tribes drank the liquor of fermented dates. The habit was so prevalent that the *Qu'ran* gradually prescribed against drinking alcohol and praying and then admonishing against drinking alcohol, and then finally prohibiting the drinking of alcohol as something induced by the devil. It took several years between the first and the last pronouncement of the *Qu'ran* on this question. This gradualism is recognized as having its basis in the *Qu'ran*'s legislative policy which took into account customs and mores.

or whether another penalty could be designed to prevent future drinking of alcohol. Consequently, the penalty does not exclude rehabilitation for alcoholics. This aspect of the penalty is more akin to *Ta'azir* than to a *Had.*

2. *Qesas* Crimes

The *Qesas* are based on verses of the *Qu'ran* which establish certain principles to be applied whenever certain transgressions against the person occur.[50] These verses are more in the nature of principles because they do not contain the elements of the crimes which fall in that category or their evidentiary requirements.[51] The *Sunna* and other sources complement these provisions. *Qesas* crimes are essentially transgressions against the physical integrity of a person. They include homicide and infliction of physical injury. The verses in the *Qu'ran* that deal with this subject provide that the victim has the right to inflict or have inflicted upon the perpetrator the same harm as the victim suffered, and that may include death.[52] Alternatively however, it provides for *Diyya*

50 *Surat al-Baqarah,* 2:178-179. One of the meanings of the word *Qesas* is equivalence. Thus, he who has suffered a wrong is entitled to redress by its equivalence. Some have referred to it as *Talion* law. The *Madhaheb* have interpreted the crimes falling in the category of *Qesas,* as being different from those deemed to be subject to *Diyya.* See Ahmad Fathi el-Bahnassi, *Al-Diyya fil Shari'a al-Islamia* (*Diyya in the Islamic Shari'a*) (1967), and Ahmad Fathi el- Bahnassi, al-Qesas fil *Fiqh al-Islami* (*Qesas in the Fiqh of Islam*). It is the opinion of this writer that this is not the only interpretation of the *Qu'ran* which did not establish two categories of crime, but only one, for which the penalties range from the infliction of the same harm, or *Qesas* to *Diyya* to forgiveness. See *Surat al-Baqarah,* 2:178-179; *Surat al-Ma'ida,* 5:45; *Surat al-Nisaa,,* 4:92. See also Bassiouni, *Qesas Crimes, supra* note 29; Bassiouni, *Les Crimes relevant du précepte de Qesas, supra* note 29. The position of this writer is based on the verses of the *Qu'ran* cited above.

51 See *Surat al-Baqarah,* 2:178-179; *Surat al-Ma'ida,* 5:45; *Surat al-Nisaa,* 4:92. The right to request the death of the perpetrator who killed a victim is inherited by certain heirs of the victim.

52 The verses cited *supra* in notes 50-51 descended in response to the desert tribes' tradition to follow the customary law that called for: "an eye for an eye, and a tooth for a tooth". That law, known as *Talion* law is originally found in the *Torah.* The *Qu'ran* mentions it specifically in *Surat al-Ma'ida,* 5:45. But in pre-Islam Arab society, it led to a cycle of revenge that went on for generations. Thus, the purpose of the *Qu'ran* was to reduce the resort to such practices, and to induce victims to accept compensation instead of seeking revenge. How such a clear purpose of the *Qu'ran,* supported by the Prophet's *Hadith* and other commentaries, has been ignored for centuries attests to the primacy of human atavism over the express policy of the *Qu'ran* whose relevant verses lead to this writer's interpretation.

or victim compensation which the *Qu'ran* deems preferable to the first alternative. Lastly, these verses conclude with the preferred option, namely forgiveness by the victim, and of course the heirs of the victim. This reveals the enlightened legislative policy of victim compensation as an alternative to any penalty, and reconciliation between victim and transgressor.[53] Furthermore, the last portion of the verse exhorts the victim to forgive the transgressor and clearly states that it is the preferable choice over the two others, namely: infliction of equivalent harm as that which was wrongly perpetrated, or victim compensation. These verses speak for themselves, even though their historical interpretation has given greater emphasis to the first two alternatives, probably because this was the custom of the time for the Arab culture, as well as other cultures which accepted Islam.

In light of the purposes of *Qesas*, many countries, including those which declared in their constitutions to be subject to the *Shari'a* as their supreme source of law, have interpreted *Qesas* as permitting its codification in a way that allows the State to prosecute and punish these crimes *in lieu* of any of the *Qesas*'s alternatives, namely: *Diyya* and forgiveness. These States enacted criminal laws that provide for the death penalty in certain types of premeditated or intentional murders and imprisonment for other homicides and for physical injury.[54] Thus, these laws have curtailed the death penalty in some cases, where, under a strict interpretation of *Qesas*, this would have had to be subject to the victim's consent. Presumably States can eliminate the death penalty if they choose and impose instead alternative punishment. But in this case, it is the belief of this writer that victim compensation should be paid as a form of *Diyya* which is the *Shari'a*'s alternative to other sanctions against the perpetrator.

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53 See Muhammad Moheiddin Awad, *Bada'il al-Jaza'at al-Jina'ia fil Mojtama' al Islami* (*The Substitute Criminal Penalties in Islamic Societies*) (1411 A.H., 1991 A.D.).

54 These countries include: Algeria, Egypt, Iraq, Jordan, Lebanon, Morocco, Syria, and Tunisia. The late scholar (who was a leader of the Muslim Brotherhood organization), Abdel Qader Oda, in *Al-Tashri' al-Jina'i al-Islami* (2d ed. 1969), acknowledges the validity of secular legislation for *Qesas* and *Ta'azir* crimes, though he takes the position that *Qesas* in homicide carries the penalty of death if the victim's heir insists on it.

3. *Ta'azir* Crimes

Ta'azir crimes, also referred to as offenses instead of crimes insofar as they also represent lesser crimes. These crimes or offenses derive for conduct analogous to that which is prohibited by *Hudud* and *Qesas* crimes. *Ta'azir* offenses can also be established by secular legislation. Their penalties, according to several of the jurisprudential schools of the *Sunni* and *Shi'à* traditions, can be the same penalties as provided for *Hudud* and *Qesas* crimes.[55] However, since *Ta'azir* crimes can be legislated, they can be the subject of penalties other than death. It is entirely optional and nothing in the *Qu'ran* requires the application of the death penalty.[56] The penalty choices for these crimes reflect cultural perspectives and social policy choices.

In conclusion, the *Shari'a* mandates the death penalty for only two of the *Hudud* crimes, as discussed below, provided that the stringent elements of the crimes and their evidentiary requirements are met.[57] *Qesas* and *Ta'azir* do not have the same mandatory nature of penalties as for *Hudud* crimes, as described above.[58]

4. Repentance as a Bar to Punishment[59]

Repentance and forgiveness are two consistent themes throughout the *Qu'ran*. Since Islam is a holistic religion, repentance and forgiveness are not limited to the Hereafter, but apply also to this world. The *Qu'ran* specifically provides that an offender who has committed a crime may repent and, if the repentance is made and is genuine, that person should not be punished.[60] Repentance, as a bar to punishment, will vary

55 Ahmad Abdel Aziz al-Alfi, "Punishment in Islamic Criminal Law", in *Islamic Criminal Justice*, *supra* note 20, at 927.

56 Several Muslim States apply the death penalty to legislative crimes, or on the basis of *Ta'azir*. But that is their policy choice, it is not mandated by the *Shari'a*.

57 See Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, *supra* note 33.

58 See Mohammad S. el-Awa, *Punishment in Islamic Law: A Comparative Study* (1982).

59 See Ibn Rushd, *Bidayat al-Mogtabid* 488 (vol. 2 n.d.); Ibn Taymia, *Al-Fatawa al-Kobra* 200 (vol. 4 n.d.).

60 A trial should however be held to determine the positive and sincere nature of the repentance.

depending upon the crime, but it cannot be considered if it is the result of fear of apprehension or discovery. For example, in *Hudud* crimes: *Sariqa* (theft) requires repentance and restitution before discovery of the fact or apprehension; the *Had* of *Haraba* is specifically mentioned in the *Qu'ran*, as subject to repentance;[61] *Zena* (adultery), is also subject to non-applicability of the penalty in case of repentance;[62] for *Sariqa* (theft), the *Qu'ran* also specifically provides for repentance.[63] Repentance is surely grounds for remission of all penalties. Why repentance is not recognized and applied by contemporary Muslim legal systems, which apply the *Shari'a*, as part of contemporary theories of rehabilitation for crimes of offenders can only be attributed to their selective application of the letter of the law taken without regard for *Shari'a's* enlightened spirit.

Conclusion

In *Hudud* crimes the penalty of death is specifically required in the *Qu'ran*, for *Haraba*, (if a death occurs), but it is questionable whether for *Ridda*, and *Zena* the death penalty provided by the *Sunna* is mandatory. *Baghi* allows the death penalty as an option, but does not mandate it. These and other *Hudud* crimes must satisfy all evidentiary requirements, and doubt is always interpreted for the benefit of the accused. Where there is doubt, the penalty cannot be applied. Repentance under certain conditions is also a bar to the application of the penalty, or a basis for its mitigation.

There is no requirement of the death penalty in any *Ta'azir* offenses, but it is optional. The death penalty in *Qesas* is either conditional or optional.

Muslim States can, therefore, curtail the death penalty by legislation and remain consistent with the *Shari'a*.[64] The existence of the death

61 *Surat al-Ma'ida*, 5:34, where it is stated, "Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful". Muhammad Marmaduke Picktball, *The Glorious Qu'ran* 106 (1977). See also *Surat al-Imran*, 3:159.

62 See *Surat al-Nissa'a*, 4:16.

63 Among the many verses on this question, see *Surat al-Ma'ida*, 5:3; *Surat-al-Imran*, 3:159.

64 Libya, for example, has reduced the death penalty in 1980 to only four crimes.

penalty for several crimes in Muslim States is a policy choice, but not one which is necessarily mandated by the *Shari'a*. Most of the Muslim States that apply the death penalty for a variety of crimes rely on the optional alternatives provided by *Hudud*, *Qesas,* and *Ta'azir* crimes.

The *Qu'ran* offers ample guidance to enlightened legal policy for the purposes of establishing a just and humane society. The Muslim opens every prayer and should start every deed with the words from the *Qu'ran* in the *Fatiha*, the opening of the scripture: "In the name of Allah, the source of mercy, the Merciful". It is mercy that is Islam's hallmark because it is Allah's foremost characteristic. The just, *el-Adel*, is also one of Allah's divine characteristics.[65] How Muslim societies have managed to stray so far away from these and other noble characteristics of Islam can only be explained by reasons extraneous to Islam.

65 Allah is referred to in the *Qu'ran* with 89 names or characteristics. Among them: The Merciful, The Compassionate, The Beneficent, The Exonerating, The Oft-Forgiving, The Oft-Pardoning, and The Just. See Muhammad A. Zimaity, *The Most Magnificent Names of Allah* (1971).

A Site of Mass Execution

The Death Penalty in the Russian Federation

*Anatoly Pristavkin**

"We are dying in exile, suffering unthinkable pain for Russia, which has been transformed into an enormous *Lobnoye Mesto* [Site of Execution]," wrote the outstanding Russian author Ivan Bunin, overwhelmed by the endless executions by the Bolsheviks who seized power in 1917. Lobnoye Mesto, as anyone who has been to Russia knows, is a raised place in Red Square that was used in ancient times for public executions. We have not escaped this "unthinkable pain for Russia" drowned in cruelty and blood - the pain that tormented our spiritual fathers -, for very little has changed in the country since then. Russians continue to believe, as they believed in ancient times, that criminals must be killed - the more of them, the better. "Mercy" is not a popular word here. Obligations to our European partners have kept primitive instincts more or less under control - but for how much longer?

The Russian Federation was admitted to the Council of Europe in February 1996. The admission was conditional; Russia had to sign a prior obligation (statement 193) under which it undertook to stop all executions immediately upon its admission to the Council of Europe. However, after a year, in early 1997, it was declared at the Council of Europe session that "... the Parliamentary Assembly of the Council of Europe has received reliable information that in the first half of 1996 as many as 53 death sentences had been carried out in Russia," which constituted "an outrageous violation of Russia's commitments and obligations." Furthermore, the Assembly warned that it would "...take all measures necessary to supervise the observance of Russia's obligations", including, if need be, a withdrawal of the Russian delegation's status.

* Anatoly Pristavkin, Chair of the Commission for Pardons, Moscow, Russian Federation.

I admit, and we never tried to conceal it, that it was our Commission of Pardons that informed the Council of Europe of the 53 executions (in fact, there were slightly more than that). The government, as usual, remained silent. In the winter of 1996/97, an ad-hoc parliamentary group, of which I was part, drafted a moratorium on the death penalty. Sadly, the Parliament rejected the draft in March 1999. Only 75 members voted in favour (one parliamentarian out of seven), and 175 voted against the draft, including the whole Communist faction - which had a parliamentary majority. As I already mentioned, Bolshevik traditions with their focus on death penalty still hold strong. When Mr. Lenin reigned they once killed "exactly one thousand souls" in a day, so they boasted in newspapers, in retribution for the murder of the Bolshevik leader Uritsky. I will not even mention Stalin's repressions, when they assassinated women and children as young as twelve. Even in the times of the "liberal" Nikita Khrushchev, in 1962, three thousand people were executed in one year - most of them sentenced for "economic", rather than violent, "crimes". A total of 21.000 people were executed in Russia between 1962 and 1990. Moreover, these are official statistics which cannot be trusted in this country. Why should we expect the "new Bolsheviks" to abandon their attachment to Lobnoye Mesto?

Nevertheless, thanks to the efforts of the Commission of Pardons, which has been supported by the President, no one has been executed in Russia since August 1996. There exists a sort of unwritten moratorium under which all death row cases have been suspended. This uncertainty, of course, cannot last forever - the country's leadership may change tomorrow, and then executions may resume, with the almost universal approval of the Russian public, as is happening now in Chechnya.

Executions in Chechnya were broadcast on television channels over the world. In a square in Grozny, with thousands of people watching, a young woman and a young man were shot. The execution of another woman was postponed, as she was pregnant. After the Russian TV channels had repeatedly shown this act of inhumanity, opinions of people in Moscow and St. Petersburg - two of the most educated cities in Russia - were canvassed. The survey demonstrated that as many as 40 per cent of the population approved of public executions. In the Russian provinces, this figure jumped to 58 per cent. These figures, I repeat, represent only those who support public executions, while over 75 per cent of Russians generally approve of the death penalty.

A newspaper reader wrote a letter to the editor suggesting that Russia should "use the Chechen method" and line up all those "guilty of economic crimes" (which usually implies businessmen, bankers, and the like) in Red Square for people to "stone them to death. They do not even deserve to be shot with a bullet, because bullets cost money, the people's money."

It is a sad fact that not only "the man in the street", but also some important and popular figures in Russia, including artists and writers, actively support the death penalty. One of my colleagues, a writer, recently published an article in which he described the trial of an American terrorist and the resulting death sentence. He wrote that the American public "cried with joy" at the sentence, and that it was, in his opinion, "a healthy response of healthy individuals."

Not only writers but even our closest friends and family members do not understand. What do you expect of ordinary people who shower us with letters - it is fortunate that letters are not stones - after reading in a newspaper about a convict we saved from death row.

The Commission of Pardons works in extremely unfavorable conditions. It is exposed to enormous pressure both from above and from below, to blackmail, phone tapping, bribery and threats. Recently a Commission member, a Moscow University professor, was attacked and severely beaten by strangers who had waited for him in the lobby of his apartment building; they fractured his skull and broke his teeth.

Members of the Commission belong to the Russian *intelligentsia*, they may be described as "cultural workers". They sit on the Commission for free, meeting every week, while, like many Russian intellectuals, they live below poverty level. In fact, this small group is working against a powerful movement of death penalty supporters. We do not rule out the possibility that our opponents might, in their efforts to neutralize us, use slander and discrediting materials, which, as anyone who follows Russian events knows, is common practice in this country. We have no protection from such attacks other than our reputation of honesty.

I do not need to look very far for examples - in November, a novel was published about my humble self. I was described in the novel as a writer and as Chairman of the Commission of Pardons, who - so the story goes -, is bribed to pardon the most hardened killer in the country. The killer is needed by the vice premier, whose appearance reminds us

of [liberal politician] Anatoly Chubais - even the character's name begins with a "Ch" - to get rid of his political opponents. According to the plot, the killer then kidnaps the daughter of the Commission chairman, rapes and murders her. The Commission chairman commits suicide by tying explosives to his body; he blows up both himself and the Chubais look-alike. Given that I have a young daughter - and that the author is a police major - this novel is not only slanderous (slander is so common here that it is almost the norm), but somewhat threatening, the threat coming from those "types in uniforms". My friends try to comfort me by saying that it could be worse and that [Russian former Human Rights Commissioner] Sergei Kovalyov has been the subject of as many as five novels. It does not seem so amusing, however.

Notably, two powerful monsters are the most zealous in their efforts to preserve and even extend the death penalty; they are the Office of the Russian Prosecutor General and the Ministry of Interior (MVD). The head of MVD, Minister Kulikov, is at the same time the second highest official in the government. He personally wrote a negative assessment of the aforementioned draft moratorium on the death penalty when the draft was discussed in Parliament. The arguments they use are simple: crime is on the increase, and the abolition of death penalty will cause crime rates to rise even higher. However, statistics prove the opposite: in 1995-1996, the number of executions increased nearly fourfold, while the number of murder cases did not fall, but increased twofold. In 1997, there were no executions, and the number of murder cases (based on data for the first nine months, and only in Moscow) fell by approximately 10 percent.

Our opponents use the argument of combating the organised crime which horrifies the public. However, among the hundreds of cases which our Commission considered in five years, there was not a single Mafia case, or a hired killer, or a terrorist. We do not know the actual reasons, but we suspect that organised criminals are able to buy their freedom at earlier stages of police investigation or in courts.

Concurrently, statistics show that the rate of crime in the ranks of the police itself has reached enormous proportions. During a recent survey, people, 60-80 per cent of them victims of various crimes, said that they do not call the police when in danger, and do not report crimes to the police, because they are more afraid of police than of criminals. In fact, criminals and police are often the same individuals.

High-ranking MVD officials have yet another argument which, on the outside, looks compelling - that of economic constraint. They use this argument to intimidate both the impoverished population and the authorities. They say that if we now comply with the Council of Europe requirement and pardon 600 convicts (this is the current number of death row inmates), then billions upon billions of roubles will be needed to build new colonies and new prisons and provide for the prisoners. This is a false argument. At present, the number of inmates in colonies and prisons totals approximately 2,200,000, and adding half a thousand (0.05 per cent) will not cause any loss to the State budget.

On the other hand, it is worth mentioning that 300,000 inmates out of the abovementioned total are kept in pre-trial detention cells (the so-called SIZO). Most of them are young people. About half of them will eventually be released due to lack of evidence. They are dying of tuberculosis in overcrowded cells; take turns to sleep, lose their eyesight and mental sanity and many do not live to attend their trial or find out what crime they are accused of. Recently, the Commission dealt with the case of a man who was kept in SIZO for six years in such conditions, awaiting trial. About 300 pre-trial detainees die each year in the notorious Butyrka prison in Moscow. These deaths are, in fact, executions without trial - and no one is ever held responsible for them. The stereotypical image of the penitentiary as a GULAG-type system aimed at humiliating the convict and repressing his personality remains valid in our prisons and is supported by those who are in charge.

There have been some recent and apparently positive changes in this area. By a governmental decree, prisons were made a part of the Ministry of Justice system - as in most civilized countries - rather than the MVD. While the MVD generals are resentful and reluctant to lose their free labour force, and the MVD Minister warns that there will be unrest in labour camps, there is hope that this reform will make life in prisons more bearable. A lot of issues remain to be addressed however.

So what can we say about the camps for the former death row convicts whom the Commission pardoned; camps modeled on the GULAG, located far from any human settlement in dense taiga where even basic medical assistance does not exist, not to mention psychological support and other services. Prisoners are not allowed to leave their cells, be visited by their families, or receive any information from the outside world, including newspapers and letters.

The Commission is proud to have succeeded a few years ago in getting Parliament to adopt legislation on life imprisonment as an alternative to the death penalty. But in fact, such torturous imprisonment is the same as a prolonged death penalty. We keep hearing about suicides in camps, we receive letters from inmates with desperate requests to reverse the pardon and to kill them, because they do not want to live and suffer under such conditions.

Due to the enthusiasm of some young doctors who were able to get through the roadless Siberian taiga to one such camp located on an island, in a monastery formerly used as a GULAG camp to hold Stalin's prisoners, we learned more about the people whom we had pardoned. Thus, we learned that 30 per cent of the prisoners suffered from mental illness at the time when they committed the crimes; another 36 per cent were diagnosed as chronic alcoholics. Consequently, almost 70 per cent of these people were obvious invalids whom courts sentenced to death in violation of the law. How would we have known about this had they been executed? It is clear that the death penalty is a way to hide problematic convictions. As Stalin's executioners used to say, "no person - no problem."

The ink had hardly dried on Russia's signature of its obligations under Protocol No. 6 concerning the Abolition of the Death Penalty, when Prosecutor General Yuri Skuratov signed a series of letters to the President of the Republic in which he argued that "at present, the country is not ready to abolish the death penalty." Further, having made negative remarks about the work of our Commission, Skuratov recommends "putting in good order the use and execution of the death penalty." Skuratov's version of order means few pardons and many executions. In his explanation of why Russia cannot stop the executions, the Prosecutor General quoted crime rates in Russia which are higher than in Western Europe. The conclusion he makes is as follows: as Russia has not yet ratified the Protocol on the Abolition of the Death Penalty and the draft moratorium has not been adopted by the Duma, "there are no grounds to refrain from execution of those convicts sentenced to the death penalty." Furthermore, quoting public attitudes favoring the death penalty, and a few actual cases of mob law dealing with criminal suspects, he asks the President to take a decision without delay and to give instructions to the "departments concerned." We already know what they are "concerned" about.

Such recommendations are inherently dangerous, especially insofar as they are not expressed by "the man in the street" who would undoubtedly enjoy a bloody spectacle in Red Square, but by a high-ranking official who has real power to influence decision-making in this area. Moreover, he has powerful allies who support him in the government and in Parliament, as well as in the President's administration.

I do not know if it is purely by chance that our discussion today is taking place between two symbolic dates: December 6, the day of Stalin's constitution, is in the past; December 12, the day of the new constitution, is in the future. Figuratively speaking, we are stuck between the past and the future, and the outcome is unpredictable. Whether or not the death penalty will be abolished in this country depends on this outcome. In order to resolve this problem, as Valery Savitsky, Professor of Law, put it when speaking in Parliament, we should combine both legal and ethical norms. I subscribe to this view, although Russia has always had problems with ethics. I also agree with his other statement: either we live as honest people in an honest country, or we are liars and do not deserve to be in the European Community.

The Death Penalty in Trinidad and Tobago

*Frank D. Solomon**

Introduction

On the 12th of April 1999, the International Commission of Jurists sponsored a Roundtable discussion of experts which was entitled "The Death Penalty: Some Key Questions". Unavoidable limitations on time prevented full discussion of some issues. One such issue was the role of "arbitrariness" (that is legally unaccountable selectivity, deliberate or capricious) in the implementation of the death penalty in Trinidad and Tobago, and how this had increased, and some of the legal implications of that increase, since the 1994 judgment of the Privy Council in the landmark case of *Pratt and Morgan v The Attorney General of Jamaica.* (1993) 4 All ER 469 (hereinafter referred to as *Pratt and Morgan*).

Background

For as long as can be recalled, and certainly from the time of its settlement as a colony under British rule, the death penalty has been an unpleasant feature of the public life of Trinidad and Tobago, and it was routinely employed as the punishment for murder. At the time of the ICJ roundtable discussion, the death penalty in Trinidad and Tobago, though still the mandatory sentence on a conviction for murder, had been effectively kept in abeyance for over twenty years. The last lawful execution up to that time (and for these purposes one excludes the illegal execution [infra] of Glen Ashby on 14th July 1993) was in November of 1979, when one Bobby Gransaul was put to death for the murder, while in a state of uncontrolled jealousy, of his common law wife.

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* Frank Solomon S.C., Barrister, Attorney at law, Trinidad and Tobago.

This prolonged abatement in the practice of capital punishment was never the consequence of State policy which had consistently, albeit with fluctuations in enthusiasm, favoured hanging, regardless of changes in government. It was the consequence actually of a number of factors, the most potent being the use - some say abuse - by abolitionist lawyers in Trinidad and Tobago of certain provisions in the revised Constitution of 1976 which appeared to offer the potentiality for the infinite postponement of executions. In a nutshell, these constitutional provisions offered an accused person the opportunity to have his execution stayed once a complaint as to the constitutionality of his conviction or sentence was under consideration by the Court. Thus, by the repeated filing of often tenuously founded constitutional motions, it became the norm that each sentence of death would be followed first by the routine exhaustion of appeals against conviction, first to the local Court of Appeal and then to the Privy Council; and thereafter by the filing of constitutional motions which would themselves be prosecuted through the appellate system until their final rejection by the Privy Council in London, (which was, and still is, the highest appellate court in the legal system of Trinidad and Tobago). By this time, a second, and even on occasions a third, constitutional motion could be slipped into the pipeline with the appellant's execution being postponed pending their slow and predictably futile journey through the courts.

In the meanwhile death sentences continued to be delivered with unrelenting frequency. Indeed, as the criminal culture of Trinidad and Tobago became more and more deeply infiltrated by international trafficking in illegal drugs, the general rate of crime increased, as well as the rate at which murders were committed and sentences of death handed down. In this way the natural increase in the death-row population reached staggering heights, with more and more persons being sentenced to death, but none at all being executed. Apart from the obvious problems of enhanced prison accommodation and security which such a situation created, the increase in the crime rate generated considerable insecurity in the population at large, with more and more strident demands being made on the government to do something about it. Moreover, the repeated filing of constitutional motions followed, as they invariably were, by ritual stays of execution, were in themselves provocative in the extreme to a population thirsting for "cowboy justice" (as one popular calypsonian put it) and a continuing source of embarrassment and frustration to governments, whose impotence to

deal with escalating crime came to be symbolized by their conspicuous inability to carry out the death penalty. In situations of this kind governments that have no, or no secure, philosophical foundations are easily tempted by simplistic solutions.

To this temptation the government in 1994, misled by its particularly cynical and ambitious Attorney General, one Mr. Keith Sobion, succumbed, and in a spasm of petulance abandoned its commitment to the rule of law and resolved to accomplish an execution at any cost, even while the intended victim was literally having his constitutional motion considered by the Court of Appeal. To evade judicial intervention this Attorney General frankly dishonoured his undertaking to the Privy Council that the petitioner would not be hanged before the Courts had completed their adjudication. Also it was no surprise, though it was a matter for profound disappointment, that the local Court of Appeal lent its support to this murderous stratagem by adopting and maintaining throughout a posture of stubborn inertia. This was how Glen Ashby, a feckless murderer and layabout, came to be martyred, and the Government of Trinidad and Tobago internationally disgraced.

The Law in Trinidad and Tobago and the Case of *Pratt and Morgan v the Attorney General* of Jamaica

Though Trinidad and Tobago derives its jurisprudence very directly from the British common law, and indeed retains the Judicial Committee of the Privy Council as its highest Court of Appeal, it nevertheless, since its Independence in August 1962, has established as its fundamental law a written Constitution which entrenches a number of those traditional fundamental rights and freedoms which adorn most modern written Constitutions, including the right to life, to due process of law, to the protection of the law, to protection from cruel and unusual treatment or punishment, and to equality of treatment from public authorities.

These are the fundamental rights that have been most frequently preyed in aid and have been of the greatest service to abolitionist activists in Trinidad and Tobago. However the draughtsmen of Trinidad's constitutional instruments concurrently contrived (by the still insurmountable

"existing law clause") to retain the death penalty by hanging, notwithstanding its obvious moral incompatibility with these fundamental rights. The coexistence of the death penalty and the fundamental rights provisions in the Constitution has not been, as one might expect, harmonious, and the inclination of the modern Privy Council, particularly since the entry of Great Britain into the more humane jurisprudence of the European Community, has been towards the gradual decommissioning of the gallows.

This inclination reached a historic watershed in November of 1993 when the Judicial Committee (consisting for the occasion of seven judges, as opposed to its normal five) reversed its previous position and ruled in *Pratt and Morgan* that to keep condemned persons for a period of five years awaiting execution would constitute cruel and unusual treatment or punishment, and that such treatment would entitle the condemned person to a commutation of his sentence of death to one of life imprisonment. This judgment had a profound effect on countries of the Commonwealth Caribbean which are still bound or heavily influenced by judgments of the Privy Council.

The retentionist lobby in the region, which included almost all governments as well as the vast majority of the citizenry at large, howled in rage at what they regarded as blatant judicial legislation, and there was talk immediately of severing links with the Privy Council. On the other hand, abolitionists in the region, who are universally a pathetically small but persistently vocal minority, rejoiced, as literally dozens of condemned persons were transferred out of their death cells in which they had been languishing for decades into the general prison population. In Trinidad alone some seventy-five death sentences were immediately commuted. In Jamaica the figure was over one hundred and fifty. Naturally the pressure on death-cell accommodation in the prisons was greatly relieved, but the public pressure on governments to give prompt effect to death sentences was, if anything, increased.

The commutations of sentence that followed the ruling in *Pratt and Morgan* were technically (but only technically) performed as executive acts through the use of the power of pardon. But they were in fact performed directly in obedience to a judicial order. The executive had no desire whatsoever to commute death sentences. On the contrary its declared policy was to do everything in its power to effect executions.

The Power of Pardon

On a conviction for murder the passing of the death sentence is mandatory. Once guilt is determined the judicial system permits of no further discrimination in the matter. The guilty person is sentenced to suffer death by hanging. The passing of the sentence of death (subject of course, to appeal against the conviction) marked the end of the judicial function. This did not mean however that every person who was sentenced to be hanged did in fact suffer death by hanging. The law provided for post-trial intervention by the executive, originally by the Monarch personally, later in his name but on the advice of a minister, and presently (Trinidad and Tobago having become a Republic) in the name of the President on the advice of the Minister of National Security. This intervention was through the use of the power of pardon. Pardon was considered to be a question of mercy and not of law, and so was never granted as a matter of right nor on judicial direction, nor has its use been considered traditionally to be a suitable subject for judicial review. The unreviewability of the power of pardon ought not to be regarded as settled law, as applicants continue to chip away at the doctrine, encouraged by dissenting sounds that issue from time to time from high judicial quarters.

By the use of the power of pardon there was therefore in theory, and probably also in fact (though this can be no more than surmise since no reasons for its use are ever made public) a further judgment which might discriminate among the condemned so as to determine who from among them deserved to live and who should die. It was a grave and serious power which one can only hope was never improperly exercised, and in a democratic culture it was vested in an elected official, namely the minister who was, at any rate in theory, accountable politically for its use. Two of the essential attributes of the power are first that it is vested in the donor personally; and second that it is always exercised *ad hominem*, each case being reviewed and evaluated on its merits.

As a matter of historical fact, only a relatively small percentage of persons who are sentenced to death are in fact hanged. Those who are not hanged (or die in prison awaiting execution) are invariably the beneficiaries of presidential pardon. In this way the gross unreasonableness of a mandatory sentence of death, which by definition does not discriminate morally among those guilty of murder, is recognised and, to some

extent, mitigated. This is the only legal means by which discrimination may be exercised among persons sentenced to death, the intention, and until *Pratt and Morgan* the unhappy practice, being that those who were not the beneficiaries of the due exercise of the power of pardon, should without further discrimination suffer death by hanging. And this was so regardless of the efficiency or inefficiency, the dispatch, sluggishness or indifference of the administrators of the criminal justice system.

It is submitted that the power of pardon ought not to be used to exempt a class of persons from liability to the death penalty. To use the power of pardon in this way would be to transform it into a dispensing power, an obsolete prerogative of absolute monarchy.

The Renewed Campaign for Hanging

In Trinidad and Tobago a new government came to power in 1995 to replace the one that had committed the illegal execution of Ashby, and immediately declared its intention to reintroduce the practice of hanging and to do so (unlike its predecessor) in accordance with due process and law. The highly vocal leader of this campaign to reintroduce hanging again occupied the post of the Attorney General, a fallen angel of the human rights movement, a poacher-turned-gamekeeper, a Mr. Ramesh Maharaj.

Fuelled by encouragement from the United States of America, this government left no stone unturned. Massive State resources - administrative, political and human - were dedicated to the restoration and revitalisation of the practice of the death penalty. The Privy Council was bombarded with hostile criticism and threatened with withdrawal; global and regional international human rights treaties and covenants were abrogated; solidarity among Caribbean governments was solicited and pledged; the hangman's first victims, (the so-called "Chadee gang") were selected, convicted and condemned. From public political platforms and through the media promises of early gratification were tendered to a population (of some 1.5 million souls) thirsting for blood, and deadlines were set and reset; death warrants, which had no serious prospect of being executed were wantonly read on a weekly, sometime daily, basis, driving abolitionists lawyers and even the courts to exhaustion. A member of the Privy Council, Lord Browne-Wilkinson,

complained publicly that the majority of the time and resources of the Privy Council were preempted by death penalty related applications from the Caribbean, and suggested that this jurisdiction should be terminated.

Since the date of the ICJ roundtable which occasioned this paper, the Government of Trinidad and Tobago's huge investment in the killing of the condemned was finally crowned with historic success. Over a period of three bloody days in June of 1999, nine selected convicts were successfully hanged at the rate of three per day, which must surely be something of a record for the modern era in the Western world. As far as this author knows, such a rate of killing has not been achieved even at Texas's notorious Huntsville Penitentiary. Following this frenzy the government has committed only one further hanging, sensing no doubt that the appetite of the population for human sacrifice has for the time being been satisfied, and now appears to have turned its resources, and the focus of its energies elsewhere.

The Aftermath of *Pratt and Morgan*/The New Element of Chance

The judgment in *Pratt and Morgan* had the effect of removing from the death-row population those whose lives were immediately to be spared because, through no fault or merit of their own but because of the administrative sluggishness of the legal system, they had spent a long time on death-row. Those who were not so affected, relative newcomers to death-row, would remain eligible to be executed, but were now given the prospect that they too, through the passage of time, might be permitted to suffer the cruel and unusual punishment of having their executions delayed, and so earn their commutation.

This effect was definitive as far as the first batch of commutations was concerned: many lives were spared. But what of those who were still eligible to be hanged? And, what of those who with each new death sentence that was handed down would join that class? Any number of factors would influence and even determine how long any one of them would spend on death row before a date could be set for their execution, which could not take place before all appeals and constitutional motions had been disposed of. Investigations revealed that matters were not listed for hearing on a "first come first served" basis. And, even when

an effort was made to do this, distortions would result from trivial and casual recurrences such as the length of time which any given trial record might take to prepare, which in turn would be influenced by the legibility of a judge's handwriting or the absence on sick leave of a member of the typing pool, or the state of business of the Appellate Court or the industry or sloth of any relevant clerk in the court registry, or any other suchlike triviality. It was revealed that factors of this type would produce delays of weeks or months and even years.

This is the randomness with which matters might proceed without deliberate intervention. Patriotic Trinidadians lay claim to many outstanding attributes, but it has never been contended, even in jest, that administrative or bureaucratic efficiency is among them.

Randomness of this kind is one thing, and philosophically might be suffered as any other unpredictable occasion in a chaotic universe. But the advent of *Pratt and Morgan* opened the door to the operation of darker forces at a time when there was a substantial backlog of condemned persons waiting to have their appeals processed, together with the enthusiastic resolve of incumbent politicians to "pop some necks". It provided administrators in the criminal justice system with a unique and sinister new power: the power to select from the pool of condemned persons those whose lives would be spared and who would remain eligible to be killed. Since it was bureaucratically impossible for all appeals and constitutional motions to be listed, argued, and determined within the *Pratt and Morgan* time frames, some cases, perhaps even a majority, would necessarily fall outside of these time frames. This would confer upon the condemned the benefit of a delay amounting to cruel and unusual treatment or punishment, and automatically convertible into a commutation of sentence.

This is the unintended irony of the ruling in *Pratt and Morgan:* by enduring the cruel and unusual punishment of delay one became a member of the privileged class of the condemned whose life would be spared. Thus among the condemned the opportunity to suffer such cruel and unusual punishment became a desperately contested and highly cherished prize, particularly in the post-*Pratt and Morgan* environment where capital appeals and the disposal of post-conviction motions were being purposefully expedited by the State.

The judgment in *Pratt and Morgan* also had the following two immediate consequences: Firstly, which was clearly to have been foreseen, governments committed to the death penalty began to strain every sinew to speed up the appellate procedures of the Courts in a frantic effort to complete them within the two-year period proposed by the Privy Council. (In Trinidad and Tobago at one stage we witnessed the complete distortion of the legal system to the point where for several years the Court of Appeal, because it gave complete priority to the processing of capital appeals, was unable to deal with any other business either civil or criminal in nature).

Secondly, the judgment in *Pratt and Morgan* had the immediate effect of dividing the death-row population into two distinct classes: those who, because of administrative delay would be spared the death penalty, and those who would continue to be eligible for execution. This produced some egregious anomalies, so that persons guilty of truly horrendous murders such as the slaughter of children (the notorious Lincoln Guerra) had their sentences commuted, while others guilty of much less heinous murders, remained eligible to be put to death.

Whether a condemned person fell into one class or the other depended not on any legal process. It was the consequence of the unaccountable zeal or sloth, discrimination, (mischievous or indifferent), or caprice, of those often nameless bureaucrats who prioritize, or pressed/neglected to move files forward. This is the best case scenario. At worst it was a consequence of positive discrimination at the behest of powerful persons, including politicians with a personal agenda to serve. Such was the case of the nine condemned men who were hanged in a virtual orgy of blood letting in June of 1999. These nine were convicted of high profile murders believed, (but not proved) to have been committed in connection with the drug trade. It was the declared agenda of the government to accomplish their execution, and accordingly their legal and administrative matters were given first priority and processed with exemplary expedition.

The notion that notorious crimes are entitled to high priority is of course superficially appealing. But the rule of law, it is submitted, cannot be made to accommodate extra-judicial selectivity or discrimination in the imposition of penalties, particularly severe penalties, by persons unaccountable for their selection, however popular such selection may be from time to time.

In doctrinal terms the argument runs thus: a person's entitlement to due process of law does not end with his conviction by a properly appointed tribunal, not even (and indeed one might argue particularly not even,) where the death penalty has been imposed. A condemned person's right to be dealt with according to "due process of law" remains intact and undiminished, even though the physical, psychological or economic conditions in which he finds himself after conviction severely impair his ability, from a practical point of view, to claim this protection.

As was stated in *Abbott v Attorney General of Trinidad and Tobago* (1979) 1 WLR 1342 at page 1347:

> Due process of law does not end with the delivery of judgment in a civil matter or the pronouncement of sentence in a criminal matter; it includes enforcement of judgments and the carrying out of sentences.

"Due process of law" is admittedly one of the most complex and volatile doctrines of constitutional law which not only grows, but also sometimes diminishes, in response to sociopolitical impulses. It is reported that in the U.S. alone there have been over three thousand judicial interpretations of "due process". Within the constraints of this presentation, however, a simplified approach is submitted: "due process" contains (among many other dimensions) a prohibition against the right of the State to inflict "cruel and unusual punishment". So that where "cruel and unusual punishment" is found to be inflicted, the victim's right to due process of law is necessarily also violated. A citizen's protection against the imposition of cruel and unusual punishment includes the prohibition against punishment which, although otherwise lawful, is imposed in a manner which is capricious or discriminatory or arbitrary. Therefore, to inflict punishment on a person arbitrarily (that is selectively or capriciously) is to impose cruel and unusual punishment, and will be a violation of the victim's rights not to be dealt other than in accordance with due process of law - the mother of all fundamental rights.

One is indebted to the Justices of the Supreme Court of the United States in *Furman v Georgia* (1972) 408 US 238 for the definitive elaboration of these propositions.

Note, for example Douglas J., at page 242 of the judgment where he says:

> There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.

And further at page 249:

> What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community... There is increasing recognition of the fact that the basic theme of equal protection is implicit in cruel and unusual punishments. "A penalty" should be considered "unusually" imposed if it is administered arbitrarily or discriminatorily: Goldberg & Dershowitz, "Declaring the Death Penalty Unconstitutional", 83 *Harv. L. Rev.* 1773, 1790. The same authors add that"[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness."

And, yet again at page 256:

> The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

And finally at page 257:

> Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.

The application of these principles by the Supreme Court in *Furman v Georgia* resulted in the proscription of the death penalty laws of the U.S. as they then existed.

The same doctrines are elaborated and expanded with great sophistication in the monumental judgment of the Constitutional Court of South Africa in the case of *The State v Makwanyane* (1995) L.R.C. 269 which declared the death penalty laws of that country to be unconstitutional.

Apart from its violation of due process, mandatory sentencing in capital cases has created the need for post-conviction intervention, for it is surely unacceptable, even to the most draconian of penologists, that all who are found guilty of murder should be killed. It is submitted however that while the mandatory nature of the death sentence does create this need, and has permitted the growth of the practice of unaccountable post-conviction discrimination, there are already built in to the criminal justice system even from the pre-trial stage of the process, inherent elements of arbitrariness and discrimination. While such elements may be tolerable in crimes which attract a lesser punishment than death, they are surely unacceptable where the execution of the death sentence is a mandatory consequence of their operation.

The judgment in *The State v Makwanyane* made the point in this way (at page 298 of the report):

> The argument that the imposition of the death sentence "is arbitrary and capricious does not, however, end there. It also focuses on what is alleged to be the arbitrariness inherent in the application of [the death penalty] in practice. At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors.

Brenan J., had this to say in *Furman v Georgia* at page 291-295:

> When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

> Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorised punishment for those crimes. However the rate of infliction is characterised - as "freakishly" or "spectacularly" rare, or simply as rare- it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be? When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system... Furthermore, our procedures in death cases rather than resulting in the selection of "extreme" cases for the punishment, actually sanction an arbitrary selection... Our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death. Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother Stewart puts it, "wantonly and freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

The question which the post-*Pratt and Morgan* capital punishment environment poses is this: Is it consistent with due process of law and the rule of law, for the power to determine who of the condemned shall live and who may die on the gallows, to be exercised by frequently unidentifiable persons who are without legal or even moral accountability?

The answer it is submitted, is clearly in the negative. The use of such power is arbitrary; and the contention that arbitrariness of this kind is capable of being cured by transparently even-handed and uniform administrative efficiency is highly questionable, as is the broader notion that legislation can ever be contrived which could eliminate it in practice.

Judge Chaskalson , in *The State v. Makwanyane* had this to say at page 302:

> The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity, is apparent, Blackmun J, who sided with the majority in *Gregg*, ultimately came to the conclusion that it is not possible to design a system that avoids arbitrariness: see *Callins v Collins* (1944) 114 Sct 1127, 127 Led 2d 435 per Blackmun J, dissenting. To design a system that avoids arbitrariness and delays in carrying out the sentence is even more difficult.

This author most humbly concurs.

Closing Remarks

H.E. Ambassador Lewalter [1]

First and foremost, and in the name of the European Union, I would like to express my gratitude to the experts who were invited to intervene today in this forum - Ms Jahangir, Mr. Hodgkinson, Mr. Bassiouni, Mr. Pristavkin; Mr. Solomon, and Mr. Stevenson. Many of them traveled from far away in Asia, Africa, the Caribbean, Russia, the United States and the United Kingdom, to take part in the roundtable - let them be sincerely thanked. I believe that their presence has, amongst other things, demonstrated once again that the questions that surround the death penalty ignore frontiers and transcend economic, social, cultural or religious differences.

I also extend my gratitude to you, Mr. President, representing the Council of Europe, the co-convenor of the roundtable, and Mr. Ramcharan, the Deputy High Commissioner for Human Rights. I, naturally thank Mr. Adama Dieng, the Secretary-General of the International Commission of Jurists, that has organised the roundtable.

Thanks to you, Mr. President, Mr. Secretary-General, Ladies and Gentlemen, we have been able to demonstrate that it is possible to hold a dispassionate debate on the question of the death penalty.

As you are aware, the governments of the European Union have committed themselves, some of them for many long years, to promote the universal and unconditional abolition of the death penalty. Abolition is one of the principal political objectives of the EU in the field of human rights. This EU objective relates to the most essential of all human rights: the right to life. The EU considers that the death penalty violates

1. Intervention of H.E. Ambassador Lewalter, Permanent Representative of the Federal Republic of Germany to the United Nations Office at Geneva.

the right to life. Article 3 of the Universal Declaration of Human Rights proclaims: "Everyone has the right to life". How can we not take note of the contradiction between that article and the fact that some State parties to the Declaration continue to arrogate to themselves the possibility to decide that some persons do not deserve to live?

The European Union is not in the business of making value judgments. But some of the facts raised during the debate, and in particular the following three, cannot be ignored :

- the possibility of miscarriages of justice cannot be underestimated since, unlike other punishments, the execution of death sentences is irreversible;
- in its application, the death penalty is imposed overwhelmingly on the disadvantaged whether it be for economic, social, ethnic or religious reasons;
- the assertion that the death penalty is, more than other punishment, able to deter potential criminals from committing crimes and hence lead to a decrease in the rate of violent crimes, is factually unsubstantiated.

Such established facts form the basis of the European Union's efforts to abolish the death penalty. The Council of Ministers of the European Union decided, on 29 June of last year [1998] to increase EU initiatives in this regard. As a result there has been an increase in EU initiatives, including declarations, interventions, and position statements made in multilateral fora.

At its 53rd and 54th sessions, the Commission on Human Rights adopted resolutions on the death penalty. The resolutions call upon States which still apply the death penalty to progressively reduce the number of crimes that carry the death penalty and establish a moratorium on executions with a view to obtaining the total abolition of capital punishment. Seizing the mantle which until recently was carried by the Italian Presidency, the European Union will act as the promoter of this resolution for the first time. Our objective is to support the universal movement to ban the death penalty that has gained momentum over the years. That is the reason for which I would like to thank all those who join our efforts to promote the resolution and endeavour to convince delegations, that are still hesitant, to join the list of co-sponsors.

Thank you.

Annexes

Annex A

United Nations Commission on Human Rights Resolutions on the Death Penalty

Resolution 2000

The Commission on Human Rights,

Recalling article 3 of the Universal Declaration of Human Rights, which affirms the right of everyone to life, article 6 of the International Covenant on Civil and Political Rights and articles 6 and 37 (a) of the Convention on the Rights of the Child,

Recalling also General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 on capital punishment, as well as resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,

Recalling further Economic and Social Council resolutions 1574 (L) of 20 May 1971, 1745 (LIV) of 16 May 1973, 1930 (LVI11) of 6 May 1975, 1984/50 of 25 May 1984, 1985/33 of 29 May 1985, 1989/64 of 24 May 1989, 1990/29 of 24 May 1990, 1990/51 of 24 July 1990 and 1996/15 of 23 July 1996,

Recalling its resolutions 1998/8 of 3 April 1998 and 1999/61 of 28 April 1999, in which it expressed its conviction that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights,

Welcoming the exclusion of capital punishment from the penalties that the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court are authorized to impose,

Commending those countries that have recently abolished the death penalty,

Welcoming the fact that many countries, while still keeping the death penalty in their penal legislation, are applying a moratorium on executions,

Referring to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (FJCN.4/2000/3), with respect to the Safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50,

Deeply concerned that several countries impose the death penalty in disregard of the limitations provided for in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child,

Concerned that several countries, in imposing the death penalty, do not take into account the Safeguards guaranteeing protection of the rights of those facing the death penalty,

1. Welcomes the sixth quinquennial report of the Secretary-General on capital punishment and implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, submitted to the Commission in accordance with Economic and Social Council resolution 1995157 of 28 July 1995;

2. Calls upon all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

3. Urges all States that still maintain the death penalty:

   (a) To comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious climes and only pursuant to a final judgement rendered by an independent and impartial competent court, not to impose it for crimes committed by persons below 18

years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(b) To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience;

(c) Not to enter any new reservations under article 6 of the International Covenant on Civil and Political Rights which may be contrary to the object and the purpose of the Covenant and to withdraw any such existing reservations, given that article 6 of the Covenant enshrines the minimum rules for the protection of the fight to life and the generally accepted standards in this area;

(d) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations;

(e) Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

(f) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending;

4 Calls upon all States that still maintain the death penalty:

(a) Progressively to restrict the number of offences for which the death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty;

(c) To make available to the public information with regard to the imposition of the death penalty;

5. Requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out;

6. Requests the Secretary-General to continue to submit to the Commission on Human Rights, at its fifty-seventh session, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement on changes in law and practice concerning the death penalty worldwide to his quinquennial report on capital punishment and implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty;

7. Decides to continue consideration of the matter at its fifty-seventh session under the same agenda item.

66th meeting

26 April 2000

[Adopted by a roll-call vote of 27 votes to 13, with 12 abstentions.]

Resolution 1999

The Commission on Human Rights,

Recalling article 3 of the Universal Declaration of Human Rights, which affirms the right of everyone to life, article 6 of the International Covenant on Civil and Political Rights and articles 6 and 37 (a) of the Convention on the Rights of the Child,

Recalling also General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 on capital punishment, as well as resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,

Recalling further Economic and Social Council resolutions 1574 (L) of 20 May 1971, 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975, 1984/50 of 25 May 1984, 1985/33 of 29 May 1985, 1989/64 of 24 May 1989, 1990/29 of 24 May 1990, 1990/51 of 24 July 1990 and 1996/15 of 23 July 1996,

Recalling its resolution 1998/8 of 3 April 1998 in which it expressed its conviction that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights,

Welcoming, the exclusion of capital punishment from the penalties that the International Criminal Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court are authorized to impose,

Commending those countries which have recently abolished the death penalty,

Welcoming the fact that many countries, while still keeping the death penalty in their penal legislation, are applying a moratorium on executions,

Referring to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1999/39 and Add. 1), with respect to the Safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984150 of 25 May 1984,

Deeply concerned that several countries impose the death penalty in disregard of the limitations provided for in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child,

Concerned also that several countries, in imposing the death penalty, do not take into account the Safeguards guaranteeing protection of the rights of those facing the death penalty,

1. Welcomes the report of the Secretary-General containing information on changes in law and practice concerning the death penalty worldwide (E/CNA/1999/52 and Corr. 1 and Add. 1) and further positive developments reflected in that report;

2. Calls upon all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

3. Urges all States that still maintain the death penalty:

   (a) To comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, not to impose it for crimes committed by persons below 18 years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(b) To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience;

(c) Not to enter any new reservations under article 6 of the International Covenant on Civil and Political Rights which may be contrary to the object and the purpose of the Covenant and to withdraw any such existing reservations, given that article 6 of the Covenant enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area;

(d) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50, and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations;

(e) Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

(f) Not to execute any person as long as any related legal procedure, at international or at national level, is pending;

4. Calls upon all States that still maintain the death penalty:

(a) Progressively to restrict the number of offences for which the death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty;

(c) To make available to the public information with regard to the imposition of the death penalty;

5. Requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out;

6. Requests the Secretary -General to submit his sixth quinquennial report on capital punishment and implementation of the Safeguards

guaranteeing protection of the rights of those facing the death penalty, due in 2000 in accordance with Economic and Social Council resolution 1995/57 of 28 July 1995, to the Commission at its fifty-sixth session;

7. Decides to continue consideration of the matter at its fifty-sixth session under the same agenda item.

58th meeting

28 April 1999

[Adopted by a roll-call vote of 30 votes to 11, with 12 abstentions]

Resolution 1998/8

The Commission on Human Rights,

Recalling article 3 of the Universal Declaration of Human Rights, which affirms the right of everyone to life, article 6 of the International Covenant on Civil and Political Rights and articles 6 and 37 (a) of the Convention on the R1-hts of the Child,

Recalling also General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 on capital punishment, as well as resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,

Recalling further Economic and Social Council resolutions 1574 (L) of 20 May 1971, 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975, 1984/50 of 25 May 1984, 1985/33 of 29 May 1985, 1989/64 of 24 May 1989, 1990/29 of 24 May 1990, 1990/51 of 24 July 1990 and 1996/15 of 23 July 1996,

Recalling its resolution 1997/12 of 3 April 1997, in which it expressed its conviction that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights,

Welcoming the exclusion of capital punishment from the penalties that the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda are authorized to impose,

Welcoming also the fact that several countries, while still keeping the death penalty in their penal legislation, are applying a moratorium on executions,

Referring to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions OCNA/1998/68 and Corr. 1 and Add. 1-3), with respect to the Safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50,

Deeply concerned that several countries impose the death penalty in disregard of the limitations provided for in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child,

Concerned also that several countries, in imposing the death penalty, do not take into account the Safeguards, guaranteeing protection of the rights of those facing the death penalty,

1. Welcomes the report of the Secretary-General containing information on changes in law and practice concerning the death penalty worldwide (E/CNA/1998/82 and Corr. 1) and further positive developments reflected in that report;

2. Calls upon all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

3. Urges all States that still maintain the death penalty:

   (a) To comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment and to ensure the right to seek pardon or commutation of sentence;

   (b) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50;

4. Calls upon all States that still maintain the death penalty:

   (a) Progressively to restrict the number of offences for which the

death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty;

(c) To make available to the public information with regard to the imposition of the death penalty;

5. Requests the Secretary-General to continue to submit to the Commission on Human Rights, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement on changes in law and practice concerning the death penalty worldwide to his quinquennial report on capital punishment and implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty;

6. Decides to continue consideration of the matter at its fifty-fifth session under the same agenda item.

31st meeting

3 April 1998

[Adopted by a roll-call vote of 26 votes to 13, with 12 abstentions]

Annex B

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

status of ratifications declarations and reservations

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party

claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant. 2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary- General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Reservations, communications and notifications under article 2 of the present Protocol;

(b) Statements made under articles 4 or 5 of the present Protocol;

(c) Signatures, ratifications and accessions under article 7 of the present Protocol:

(d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.