International Law & the Death Penalty

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International Law and the Death Penalty

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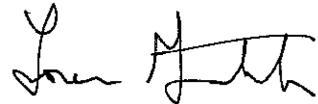
By 

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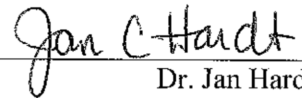

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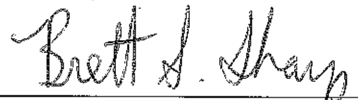

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ABSTRACT

In the beginning there was the death penalty. And it was good. Or so the countries of the world and international laws thought. But times do change and there have been many changes on many fronts in international law, general practices, norms and the customary law. When the Universal Declaration of Human Rights was signed in 1948, the norms of the day were very different than the norms of today. Almost 70 years later the world is different in almost every conceivable way and that extends to how the death penalty should be viewed in a contemporary context.

This thesis will examine major international legislation handed down that impacted the evolution of a customary norm with regard to the death penalty. In addition, it will review the current status and recent trends of countries in the abolitionist and retentionist camps, the role of some key non-governmental organizations and a wide survey of relevant literature. Benefits and losses will be checked, alternatives explored and causes for both optimism and pessimism uncovered.

In summary, while the direction toward a customary international norm for the universal abolition of the death penalty is emerging, tentatively at first, but gathering speed, the United States remains a significant outlier within the retentionist camp.

CHAPTER ONE: INTRODUCTION

Despite a centuries-old tradition of putting citizens to death for being criminals or political or religious dissidents, humanitarian and human rights principles appear to be making inroads toward the goal of abolition of the death penalty. A full 68 years after the signing of the Universal Declaration of Human Rights, evidence supports cautious optimism for the emergence of a customary international norm for the universal abolition of the death penalty, excluding the persistent objector and wartime actions.

This thesis contends that countries are moving towards abolishing the death penalty because the practice has been redefined by international law as a human rights issue, rather than as a punitive option under the law. However, while countries that still carry out executions are mostly illiberal and authoritarian, the United States remains an outlier in that regard for three main reasons: the hegemonic position of the United States in international politics limits the leverage that other nations or international organizations can exercise over American behavior; the domestic political institutions of American federalism distribute powers and policy responsibilities in such a way as to make abolition of the death penalty difficult to impose by the central government; and the very robustness of the American constitutional tradition makes it difficult to sustain human rights-based critiques of capital punishment if these critiques are not translated into the individualist and proceduralist terms that are characteristic of rights discourses in the American political tradition.

In 2012, the International Law Commission's Special Rapporteur on Torture, Juan Mendez, stated that "there is an evolving standard whereby states and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel and degrading treatment." He indicated that this was an emerging international law norm and that while international law does

not currently prohibit the death penalty, it does encourage its elimination. In general, this overall direction of the emergence of a new international law norm appears to be accurate. However, several countries including Singapore, the U.S. and Egypt voiced their disagreement with this claim during the ILC October 23 2012 Third Committee meetings (Boon, 2012).

As it stands, given the swelling ranks of abolitionist countries and those that have at least ceased using capital punishment, the emergence of a new enlightened customary norm against the death penalty would seem to be clear. The disturbing fly in the ointment is the dissenters, especially the persistent executors, above all the United States. In general, over the past 67 years the international trend has clearly been moving in the direction of abolition. The death penalty has been abolished for all crimes in 104 countries. This represents a significant increase in the number of abolitionist countries in recent years. The number has risen to the current level from just nine abolitionist countries in 1977 and 59 abolitionist countries in 1995, according to Amnesty International (AI) In addition to a sizable increase in the number of abolitionist countries, there is also a significant increase in the speed at which countries are abolishing the death penalty (Amnesty International, 2015).

As of 2015, AI reported that 140 countries – or two-thirds of the countries in the world – have abolished the death penalty in law or in practice. Of that number 102 countries have abolished the death penalty for any crime, while six countries have abolished the death penalty for “ordinary crimes”; an additional 32 countries have abolished the death penalty in practice, in the sense that while capital punishment remains a punitive option, it is no longer employed in those countries. Of those 58 countries that retain the death penalty, less than half of those are actively executing their citizens. These figures exclude China and North Korea which consider executions to be state secrets and which, therefore, do not report them (Amnesty International, 2014, 2015).

In general, most of the countries which retain the death penalty tend to have spotty or poor human rights records as a more general matter. One prominent exception to this tendency is the United States, which both retains the death penalty and makes active use of it. In most other respects the U.S. would seem to have much more in common with the countries that have abolished the death penalty, for example Canada, Mexico, Australia and almost all European countries. Yet, in the U.S. there are still 31 states that retain the death penalty on their books. In 2013, the U.S. handed down 80 death sentences and carried out 39 executions. To be sure, the rate of executions has fallen steadily in the United States. In 2004, 138 capital sentences were carried out, and even that number is a fraction of the 1990s rate, which averaged nearly 300 a year. In 2014, the U.S. handed down at least 72 death sentences and carried out 35 executions. (Amnesty International, 2014, 2015).

A wide variety of international agreements and institutions have contributed to the retreat of capital punishment. Barring universal abolition of the death penalty, these international legal documents form a trail of intention in the direction of increasing international abolition of the death penalty. These agreements include: the International Covenant on Civil and Political Rights, Customary International Law, Universal Declaration of Human Rights, European Convention of Human Rights, International Covenant on Civil and Political Rights (ICCPR), Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, African Charter of Human and People's Rights, Second Optional Protocol to the ICCPR, Protocol to the American Convention on Human Rights, International Criminal Tribunal for the Former Yugoslavia, UN Convention on the Rights of the Child, UN Commission on Human Rights Resolution, Protocol 13 to the European Convention on Human Rights, Arab Charter on Human Rights, Human Rights Resolution 2005/59, UN Resolution 62/149 and the Geneva Convention.

This thesis investigates the current state of the death penalty globally. In accounting for the overall trend, it is important to explore the current situation as well as historical trends to assess the directions both regional and international laws are moving in, and to understand the rationale for those directions as well as the implications for future developments. In addition to the efforts of international governmental organization such as the United Nations and the International Law Commission, the work of numerous non-governmental organizations is also relevant.

CHAPTER TWO: LITERATURE REVIEW

It is commonly believed the international law doesn't prohibit the death penalty. However, that belief is erroneous. According to Schabas (2002), a number of international treaties not only impose limits on the use of the death penalty but ban the practice entirely. Schabas has shown many international treaties implicitly or explicitly entail the abolition of capital punishment. These laws or treaties include the Inter-American Instruments, the European Convention on Human Rights Sixth Protocol to the Convention, the International Humanitarian Law, the Second Protocol and Sixth Protocol of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Schabas 1993, 2002).

The pace of adoption of abolition of the death penalty has been slow over the course of history but has been gaining speed in recent years. The nations of the world have been moving steadily and perhaps inexorably toward the goal of universal abolition of the death penalty. According to Roger Hood, the yearly rate at which countries abolished the death penalty tripled between 1965 and 1995 (Hood, 1996). William Schabas pinpoints the trauma of World War II as a formative moment in the development of a new international norm against the use of capital punishment. Prior to that conflagration only a handful of countries had given up the death penalty and there was no momentum towards pursuing its abolition (Schabas 2002).

Along with Schabas, Yorke (2008) believes international initiatives to abolish the death penalty across the world and its implications for the world have become a simmering topic for debate. Both Schabas and Yorke have discussed that in 2007, the United Nations General Assembly's plenary session for a moratorium on death penalties underscores how the world is moving towards abolition of the death penalty. Among all UN members, 54 countries voted against the resolution, 29 abstained from voting, while 104 countries voted in the favor of the resolution.

These statistics reflect the current disfavor to which the death penalty has fallen internationally. Additionally, the fact that the International Criminal Court (ICJ) does not impose the death penalty even for crimes such as genocide underscores how there is no crime considered severe enough to warrant that punishment. According to Hood (2001), the matter of imposing the death penalty for any criminal act has been transferred from the criminal or judicial perspectives to human rights perspectives.

While Amnesty International remains the pre-eminent international non-governmental organization documenting trends in the use of the death penalty, other credible sources of statistics and information include the International Bar Association, the International Federation for Human Rights, the World Coalition Against the Death Penalty, and the International Commission Against the Death Penalty. The texts of international agreements are provide a basic framework for interpreting the evolving possibilities for, and limitations upon, use of the death penalty. These include the International Covenant on Civil and Political Rights, the UN Moratorium on the Death Penalty, the Statute of International Court of Justice, and the Universal Declaration of Human Rights. Concluded by different international organizations over time, the changing implications of their language concerning the death penalty trace the evolving international norm against the use of capital punishment.

China’s use of, and experience with, the death penalty remains an enduring mystery for students of the phenomenon. Cristina Silva (2014) serves as the most authoritative Western data source for China, which Amnesty International has stopped reporting on due to its inability to obtain reliable data as a result of the fact that China considers executions to be a state secret and therefore does not release its data. Relying heavily on information provided by the human rights organization Dui Hua Foundation, Silva contends that China’s rate of execution far outstrips that

of other retentionist countries, even though the number for 2014 (2400) is much lower than those figures for the previous decade (e.g. 12,000 in 2002). As Silva notes, the inordinate pace of China's executions reflects the fact that China continues to use the death penalty for 55 crimes, including "counter-revolutionary crimes," treason, embezzlement, drug smuggling, money counterfeiting, rape and murder.

China's veil of secrecy limits the degree to which international pressure can curb its use of the death penalty. In contrast, the experience of the United States has been documented exhaustively (Dieter 2014). Despite the enduring legal reality of the death penalty, death sentences handed down in 2014 were the lowest in 40 years, while executions were the lowest in 20 years, with fewer and fewer states actually making use of that punishment. Along with this reduced use of the death penalty, exonerations of capital murder sentences have been on the upswing. The persistence of the death penalty in American law despite international moves away from its use is explained by Sangmin Bae (2007) in terms of five factors that might otherwise pressure a country towards abolition. The first factor consists of domestic agents, such as public opinion and the initiative of elite leadership. Secondly, international agents like the United Nations or the European Union can provide an important justificatory motives, as well as resources to leverage national rejection of the death penalty. Radical political transformation like the shift from authoritarian to liberal democratic political systems also dampen the willingness to retain and use the death penalty, as democratic transitions delegitimate the general expectation that governments can and should use violence against their citizens. Additionally, cultural values (religious or otherwise) that downplay the use of violence to solve private or public disputes, or which reject retributive models of justice, make retention of the death penalty inconsistent with those broader cultural outlooks. The fifth and final factor concerns domestic institutional structures that might discourage

or promote the death penalty. As will be addressed in greater detail (Chapter Six), in the case of the United States, public opinion still favors the death penalty and retributive attitudes towards justice still persist, particularly in the American South. For its part, elite leadership is not willing to comply with the change because it is afraid electoral consequences since the American criminal justice system is closely entangled with its electoral politics. Finally, in a federal political system like the United States, criminal law itself is largely a matter for states, rather than a responsibility of the central government.

CHAPTER THREE: THE STATUS OF THE DEATH PENALTY UNDER INTERNATIONAL LAW

There is no universally-ratified single piece of binding international legislation prohibiting the use of the death penalty. However, there are many successive treaties, resolutions, protocols and pieces of legislation that impact the use of the death penalty regionally, nationally and internationally, all of which are moving in the direction of universal abolition of the death penalty, although not as quickly as could be hoped for. At the international level, a very important treaty provision relating to the death penalty is Article 6 of the International Covenant on Civil and Political Rights (ICCPR). A second treaty, the Second Protocol of the ICCPR, is in fact a multilateral treaty that formalizes the international norm of abolition of the death penalty. However, customary law informs the international legality of the use of the death penalty. Customary international law is used by both retentionist and abolitionist countries to defend their positions. Although there is no universal treaty to prohibit the death penalty, the worldwide trend of instruments of international law is moving in a distinctly abolitionist direction.

Universal Declaration of Human Rights

The United Nations' Universal Declaration of Human Rights set out in 1948 is perhaps the closest instrument to a universal declaration to prohibit the death penalty in all nations, although as a matter of fact, it does not even mention the death penalty. What it does very clearly, however, is enunciate a right to life in Article 3. Its limitations are many; it suffers from its context directly after the Nuremberg Trials immediately after World War II and it has taken almost 70 years to make as much progress as the world has seen to date. However, its true purpose was to set goals for humanity not to create a legally binding dictate and not to establish the status quo. Still, despite

the limitations, it is a codification of customary international law and serves as an authoritative interpretation of the human rights clauses in the Charter of the United Nations. (UN General Assembly 1948)

The Universal Declaration has since been joined by four further instruments, which together form what is known as the "International Bill of Rights": the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and A Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (OHCHR, 1996).

American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man, whose language concerning the right to life resembles that of the Universal Declaration, was enacted in Bogota, Colombia in 1948, by 21 members of the Organization of American States. Chapter one defined 28 rights, while Chapter Two defined 28 corresponding duties. In Chapter One, Article I recognizes that every human being has the right to life, liberty, and personal security, while Article 23 prohibits cruel, infamous or unusual punishment.

Although initially intended to be a non-binding declaration similar to the Universal Declaration of Human Rights, with the 1967 amendments to the Charter of the Organization of American States (OAS), it has become binding on all members of the OAS. This declaration has primarily been supplanted by the 1978 American Convention on Human Rights but still applies to states like Cuba and the United States, which have not acceded to the later convention. The Inter-American Commission regularly hears cases involving the death penalty, primarily against the U.S. which considers the document nonbinding. In *Roach and Pinkerton v. United States*, defense

lawyers argued that prohibition of executing a juvenile offender was actually customary law. Interestingly, not only did the Commission confirm that this norm prohibited the execution of juveniles, it also indicated that the definition of juvenile was somewhere (unspecified) below the age of 18 (Schabas, 2002).

European Convention of Human Rights

Enacted in 1953 by the 47 countries of the European Council, the European Convention of Human Rights (ECHR) is a treaty designed to protect human rights in European nations. Protocol 6 requires signatory countries to limit the death penalty to wartime circumstances. Forty-six of the countries have both signed and ratified this Protocol, while Russia has not yet ratified it.

International Covenant on Civil and Political Rights (ICCPR)

Drafted between 1947 and 1966, when the death penalty was still in widespread use, the ICCPR was enacted in the latter year by the UN General Assembly, and came into force a decade later. Article 6 of the documents recognizes an "inherent right to life" and proscribes the application of capital punishment to minors and pregnant women. It also admonishes countries employing the death penalty to progress towards its abolition (International Bar Association, 2008). Initially, only Ireland, Norway, and the United States registered reservations to article 6 and the right to life, with Norway and Ireland later withdrawing their reservations as they switched to the abolitionist category. While the United States ratified the Covenant in 1992, its reservations concerning Article 6 are extensive. The United States declared its right, under prevailing domestic constitutional restrictions, to employ the death penalty, and even for minors (though not pregnant women).

In response to the American stance, a number of countries have formally protested the scope of these reservations, arguing that they effectively nullify the very rationale of the Convention and thus are unsustainable. In addition to its reservations concerning Article 6, the United States has also insisted upon as interpreting Article 7's prohibition against torture and other inhuman forms of punishment as not encompassing capital punishment. Both reservations remain controversial to the extent that they concern provisions that are non-derogable with respect to the purposes of the Convention, or otherwise contravene customary international law.The American Convention on Human Rights of 1969, particularly Article 4, echoes those limitations on the death penalty provided in the UN Covenant. The Inter-American Commission further contends that together, the American Convention and the ICCPR, effectively excludes capital punishment from being inflicted on minors.

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

In 1984, first the UN Economic and Social Council (ECOSOC) and then the UN General Assembly endorsed Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. Although not legally binding, support by the General Assembly represents widespread international endorsement of the Safeguards. In particular, the Safeguards defined the concept of "most serious crimes" in a way that limited them to those with lethal or other extremely grave consequences. The nine safeguards further spelled out various restrictions on use of the death penalty including: not for use on those under the age of 18, pregnant women, and those with intellectual or mental disabilities, as well as other conditions for making appeal and seeking pardons. The document also included a commitment to minimizing the amount of suffering inflicted in the course of punishments.

African Charter of Human and Peoples Rights

Set in motion in 1981, the African Charter of Human and People's Rights has the stated goal of protecting human rights and basic freedoms in all of Africa. It does not in fact mention the death penalty but rather focuses on the protection of the right to life, particularly in Article 4. In November 1999 it adopted a further resolution that limits the imposition of the death penalty only to the most serious crimes with the vision of abolishing the death penalty. Although some 19 African states have abolished the death penalty, still many concerns existed about violations of the Charter including those regarding the use of the death penalty.

Second Optional Protocol to the International Covenant of Civil and Political Rights Aiming at Abolition of the Death Penalty

In 1989 the UN General Assembly adopted the Second Optional Protocol to the ICCPR, with the goal of each signing country abolishing the death penalty in its jurisdiction – an international treaty that establishes an international norm of abolition of the death penalty.
Article 1 states that each signatory shall undertaking measures to abolish the death penalty.The Second Optional Protocol came into force in 1991. By 2014 the protocol had been signed by 81 countries, some with various reservations, as noted earlier.

Protocol to the American Convention on Human Rights to Abolish the Death Penalty

Adopted in 1990 by the General Assembly of the Organization of American States, the A-53 protocol to the American Convention on Human Rights provides for the total abolition of the death penalty. According to it, abolition of the death penalty helps to ensure more effective

protection of the right to life. Although it does not oblige its members to abolish the death penalty, Article 1 admonishes them not to apply capital punishment to persons within their borders.

International Criminal Tribunal for the Former Yugoslavia

In 1993 the International Criminal Tribunal for the Former Yugoslavia was founded in order to bring justice for the victims and prevent atrocities of the same time from occurring in the future. Despite bloodshed generated by the Balkan conflict, Article 24 (1) of the statute provides that any penalty imposed at the conclusion of trials be limited to some form of imprisonment, thus preventing the death penalty from being used even to punish mass killings. This is a clear demonstration of the prevailing international attitudes of the day, in sharp contrast to the unquestioning allowance for the penalty of death for war crimes after World War II.

UN Convention on the Rights of the Child

In 1990 the UN Convention on the Rights of the Child was adopted by 20 countries. Currently, of all UN members, only three countries have yet to ratify it: the U.S, Somalia and South Sudan. In particular, Article 37(a) prohibits imposing the death penalty or a life sentence without possibility of release on anyone under the age of 18 when the crime was committed.

Although the U.S. signed the convention in 1995 it is not legally bound by its dictates as it has never been ratified by the Senate. The stumbling block appears to be the fact that the U.S. continues to allow a life sentence without parole for convicted defendants under the age of 18 and in fact, until 2005, applied the death penalty to minors as well. Somalia signed the convention in 2002 but due to internal wars and political and economic turmoil has yet to ratify it. South Sudan, a newly emerged state, has yet to sign or ratify the convention.

Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court came into force in July 1998, after five weeks of diplomatic conference meetings. It had 139 signatories by the cutoff date in December 2000 and went into force in July 2002. Extensive debate occurred between countries who wanted to explicitly address the death penalty issue and those who did not. The subsequent conflict threatened to overturn months and even years of work leading up to the conference. The Working Group debates showed a relatively small number of countries wanted to retain the death penalty and a very large number were opposed. This is a dramatic development when compared to just half a century earlier when international military tribunals were established to try war criminals from WWII, during which not only was the death penalty not a source of controversy, but indeed it was carried with enthusiasm by international justice (Schabas, 2002). The exclusion of the death penalty from the Rome Statute as a result is not viewed as a sign of neutrality. Instead, the quinquennial report on capital punishment by the Secretary-General of the UN noted the exclusion as a significant international development and in its 2000 annual report on human rights the European Union cited the exclusion as evidence of growing international consensus on the death penalty issue (Schabas, 2002).

UN Commission on Human Rights Resolution

In 1999 the UN Human Rights Commission (UNHRC) came out in favor of an end to capital punishment. Its resolution called for those countries that still used the death penalty to begin restricting its use in terms of who it would apply to (i.e. not to children) and for what offenses it would be used, with the long-run goal of completely eliminating capital punishment. Ten countries including the U.S. opposed the resolution.

Protocol 13 to the European Convention on Human Rights

In 2002 the Council of Europe's Committee of Ministers adopted Protocol 13 to the European Convention on Human Rights. Building upon Protocol 6 of the same Convention, approved in 1983, Protocol 13 represented the first binding international treaty to abolish the death penalty in all circumstances without exception. Article 1 calls for the unconditional abolition of the death penalty, without exceptions. No one shall be condemned to such a penalty or executed. Article 2 prohibits derogations and article 3 prohibits reservations. The protocol resulted in 44 ratifications.

Arab Charter on Human Rights

The 1994 Arab Charter on Human Rights (ACHR) was adopted by the Council of the League of Arab States in 2004 and enacted in 2008. It affirms the basic principles of right to life similar to other international tools. This Charter also provides for other conditions such as the right to appeal and the right to seek pardon. Three separate articles (10, 11 and 12) relate directly to the death penalty. These reserve the death penalty for “the most serious crimes”, excluding political offences. The Charter also exempts minors and pregnant or nursing women from the application of capital punishment.

Human Rights Resolution 2005/59

In 2005 the UN Commission on Human Rights approved Human Rights Resolution 2005/59 that seeks to abolish the death penalty progressively and completely. The resolution urges all States that no longer apply the death penalty but that nonetheless retain it in their legal codes formally abolish the practice.

UN Resolution 62/149

In 2007 the UN General Assembly approved Resolution 62/149, Moratorium on the Use of the Death Penalty. This is also known as the Universal Moratorium. This Resolution called for all countries that retained the death penalty as a punishment option to adopt moratoriums on its use, with an eventual eye to ending the practice as a formal matter. In addition, the Resolution called upon countries that had abandoned capital punishment never to adopt its use again.

International Humanitarian Law & International Criminal Law

In the related field of international humanitarian law there are a number of provisions relevant to the use of the death penalty in war and peace. Schabas points out that because humanitarian treaties are easier to ratify than are human rights treaties, and because they apply in the extreme conditions of wartime, they provide important insights into the core values about the death penalty held by the international community. (Schabas, 2002)

Schabas admits that until recently, international human rights law as it pertained to the death penalty focused on the norm of protecting the right to life, as seen in article 6 of the ICCPR, article 2 of the European Convention on Human Rights and article 4 of the American Convention on Human Rights. More recently, the death penalty has been attacked on the grounds that it constitutes cruel, inhumane and degrading treatment or punishment. Challenges on this basis take issue with the method of execution, delays informing offenders of reprieves and lengthy waits on death row. Cruel, inhumane and degrading treatment or punishment is also specifically prohibited by several international tools, above all by the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the General Assembly in 1984 (Schabas, 2002).

Schabas also points out that the death penalty is also treated within the norms and practices of international criminal law. International tribunals no longer impose the death penalty as punishment for the worst international crimes, as was once their prerogative. He cites the debate within the Security Council, ILC and others while establishing the International Criminal Court as being relevant to identifying customary legal rules with implications far beyond the specific cases involved. Schabas cites challenges brought before the ICJ by Paraguay and Germany involving U.S. cases, requesting stays of execution, one of which was too late and one of which was only partially successful. In the second case, the court averred that while that case did not directly take issue with the use of the death penalty by American states, the litigation was motivated by increasing international discontent, in Europe and elsewhere, with the persistence of capital punishment in the United States (Schabas, 2002).

This review of the various international agreements pertaining to restrictions upon, and even abolition of, the death penalty as a punishment option underscore the breadth of the trend in a developing international norm against the use of capital punishment. Whether concerning the means by which executions are carried out, the offenses for which capital punishment is allowed, or the category of offender to which capital punishment could be applied, international law has evolved in the direction of mandating increasing restrictions, up to and including abolition, upon this form of punishment.

International Non-Governmental Organizations

There are many international non-governmental organizations (NGOs) that deal with the death penalty as some aspect of their agendas. While it is beyond the scope of this thesis to review each and every one, a brief overview of some of the key organizations working hard in this regard

illuminates yet another aspect of the developing international norm against the use of the death penalty. These NGOs include: Amnesty International, the International Federation for Human Rights, the World Coalition Against the Death Penalty and the International Commission Against the Death Penalty.

Amnesty International

Amnesty International (AI) has done much work on the issue of human rights and the death penalty and is widely regarded as a leading authority on death penalty statistics and conditions worldwide. Started in 1961, AI has evolved in its agenda from seeking the release of political prisoners, particularly through letter-writing campaigns, to upholding many different human rights. AI is a non-government organization (NGO) that claims 7 million members worldwide. It does not receive funds from any governmental, economic or religious organization and therefore maintains its independent ability to point a finger wherever it finds infringements on human rights. AI opposes the death penalty at all times, regardless of who is accused, the crime, guilt or innocence or method of execution. The organization calls for countries that still use the death penalty to immediately halt all executions. For countries that have already stopped executing people as a practical matter, AI advocates that this punishment be removed from the national legal codes. In addition, AI advocates for the commutation of all existing death sentences to prison sentences. AI compiles and publishes many reports including the annual compilation *Death Sentences and Executions*. Many media, NGOs and other organizations access the vast amount of data collected by Amnesty International to do their own work in this field.

International Federation for Human Rights

The International Federation for Human Rights (FIDH) is an NGO that acts regionally, nationally and internationally to defend civil, political, economic, social and cultural rights, as these are set out in the Universal Declaration of Human Rights. FIDH is a non-partisan, non-religious, apolitical and non-profit organization, based in France. It acts through and for its 178 member nations throughout the world. FIDH calls for the abolition of the death penalty for all crimes; a moratorium on executions; and the universal ratification of treaties providing for abolition, including the Second Optional Protocol to the International Covenant on Civil and Political Rights.

World Coalition Against the Death Penalty

The World Coalition Against the Death Penalty is an alliance of more than 150 NGOs, bar associations, local authorities and unions, created in Rome on 13 May 2002. It was founded as a result of the commitment made by the signatories of the Final Declaration of the 1st World Congress Against the Death Penalty organized by the French NGO Together Against the Death Penalty (ECPM) in Strasbourg in June 2001. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty, with the ultimate objective of its universal abolition. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. The Death Penalty Worldwide database covers the 90 States and two territories which retain the death penalty. The database was created by Professor Sandra Babcock of the Center for International Human Rights at Northwestern Law School's Bluhm Legal Clinic, in partnership with the World Coalition Against the Death Penalty and with financial support from the European Union.

International Commission Against the Death Penalty

The International Commission Against the Death Penalty (ICDP) was established in October 2010 in Madrid. The Spanish Government launched an initiative to establish the International Commission against the Death Penalty (ICDP) in order to reinforce the fight against the death penalty in all regions of the world and in order to establish a moratorium on the use of the death penalty, with a view to its complete abolition of the death penalty. The initiative is supported by 18 countries representing all the regions of the world. The ICDP mandate is to undertake complementary actions to the ones carried out by international and regional organizations, civil society and representatives of the political world, favoring the abolition of the death penalty.

Death Penalty Information Center

The Death Penalty Information Center is a U.S. national non-profit organization providing the media and the public with analysis and information on issues concerning capital punishment. Founded in 1990, the Center promotes informed discussion of the death penalty by preparing in-depth reports, conducting briefings for journalists, and serving as a resource to those working on this issue. The Center releases an annual report on the death penalty, highlighting significant developments and featuring the latest statistics. The Center also produces reports on various issues related to the death penalty such as arbitrariness, costs, innocence, and race. The Center is funded by individual donors and foundations, including the Roderick MacArthur Justice Center, the Open Society Foundation, Atlantic Philanthropies, and the Death Penalty Project, a Proteus Action League initiative.

Human Rights Watch

Human Rights Watch is a nonprofit, nongovernmental human rights organization made up of roughly 400 staff members around the globe. Its staff consists of human rights professionals including country experts, lawyers, journalists, and academics of diverse backgrounds and nationalities. Established in 1978, Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups. Each year, Human Rights Watch publishes more than 100 reports and briefings on human rights conditions in some 90 countries, generating extensive coverage in local and international media. With the leverage this brings, Human Rights Watch meets with governments, the United Nations, regional groups like the African Union and the European Union, financial institutions, and corporations to press for changes in policy and practice that promote human rights and justice around the world.

Jus Cogens

The legal definition of *jus cogens* is a peremptory law or higher, mandated law permitting no domestic derogations. It refers to a fundamental, universally accepted standard of international law such as prohibition of torture and genocide; however, unexpectedly it does not currently explicitly apply to the death penalty. In the Vienna Treaty on the Law of Treaties of 1969 *jus cogens* is defined as a “peremptory norm of general international law ... A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

In contrast to customary international law, *jus cogens* is considered to be binding on all states, not simply those that consent to be bound by the law. In *Siderman de Blake v Argentina*, Justice Fletcher of the U.S. 9th Circuit Court of Appeals adopted these words: "In contrast [to

customary international law], *jus cogens* embraces customary laws considered binding on all nations, and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals.... The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal. The universal and fundamental rights of human beings identified by Nuremberg - rights against genocide, enslavement, and other inhumane acts - are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*..." (*Siderman de Blake v Argentina*, 1992)

One challenge to *jus cogens* is that its substance constantly evolving, which adds to the overall complexity of interpreting international law. In addition to the fact that the scene is inconsistent, peremptory norms have not been expressly stated for the international community as a whole, making it difficult to determine exactly which norms are indeed decreed peremptory. However, in this challenge also lies the solution, at some point in the future, for having the death penalty admitted into the ranks of *jus cogens* rather than remaining in the realm of customary international law. Although not expressly named, it is not expressly left out and if it were, it could be added at a later date as the definitions evolve. Partly it is a matter of time. After all, one can say with certainty that prior to the end of WWII the Axis powers would not have admitted the Holocaust to be a crime in the realm of *jus cogens*.

Persistent Objector Status

States which claim the status of “persistent objector” are not held to the standards of customary international law, since such law requires the consent of the state in order for that state to be bound to its laws. A state that objects consistently and openly throughout the early stages of the development of a norm, will not be bound by that norm when it becomes completely embedded in international agreements, despite the fact that other states are legally bound, having followed the norm believing they were legally obligated to do so. The persistent objector is not bound by the norm specifically because it has not accepted the obligation to be legally bound to it. An additional element involved is the notion of other states not dissenting to the persistent objector’s refusal to be bound at the outset.

As a result, it would appear that the persistent objector to death penalty abolition will *de facto* remain outside the bounds of customary international law indefinitely. Thus, as long as the death penalty remains in the realm of customary law rather than become the object of *jus cogens*. This in no way diminishes the emerging customary norm; rather, it simply means that the persistent objector will remain an exception to the norm as it continues to emerge and even after it becomes more widely accepted.

This limiting character of customary international law does not imply an indefinite stalemate in terms of the pressures exerted by persistent objectors. According to Charney (1986), there is potential for the situation to evolve once the rule is fully accepted in international law.

In fact, the two international court of justice cases which appear to support the persistent objector rule both arose in circumstances where the new rule itself was in substantial doubt. Thus, it was significantly easier for the objector to maintain its status. No case is cited for a circumstance in which the objector effectively maintained its status after the rule became well accepted in international law. In fact, it is unlikely that such a status can be maintained in light of the realities of the international legal system. This is certainly the plight that befell the US, the UK and Japan

in the law of the sea. Their objections to expanded coastal state jurisdiction were ultimately to no avail, and they have been forced to accede to 12-mile territorial seas and the 200-mile exclusive economic zone (Charney, 1986).

In addition, the U.S. track record of variations between cases and between states may impact its ability to maintain status as a persistent objector. A state seeking to block application of a customary norm must do so persistently. "In leaving the issue of this 'most fundamental right – the right to life' – to its states, with the ensuing 'pattern of legislative arbitrariness', the United States had created a situation of 'arbitrary deprivation of life and inequality before the law', contrary to articles I and II of the American Declaration, said the Commission" (Schabas, 2002). As a result, the United States may prove unable to maintain the pattern of persistence required to remain a persistent objector status in the longer term.

The Death Penalty During Wartime

Wartime actions will also likely continue to remain outside the purview of the emerging customary norm of death penalty abolition. During times of war, not only are countries at odds, but communication and standard protocols also tend to become complicated, impossible or at least temporarily lost in the shuffle. As a result, in times of war customary international can perhaps be impossible to uphold. Even international humanitarian law can be difficult to maintain. International humanitarian law includes both the Geneva and Hague Conventions which govern the engagement as well as the forces that are engaging. Particularly with regard to an issue such as the death penalty, so close to the very actions that make up the war, it would appear that the chances of successfully untangling the two "on the ground" would be extremely remote. As a result, formal written treaties are typically the solution for enforcing international law immediately before, during and immediately after times of war. After the war has concluded, those who have breached

the laws of war become liable for their actions and may be prosecuted for war crimes under international law. Even in the prosecution of war crimes, however, can be seen the clear trend away from imposing the death penalty in retaliation.

Defining the basic rights of wartime prisoners, both civilian and military, the Geneva Convention which has been ratified by almost every state, is now made up of a series of four treaties and three protocols. The first convention was created in 1864, then updated several times until its final 1949 version post World War II. These treaties form some of the most upheld international laws ever conceived. Article 3 of the Geneva Conventions prohibits the retroactive imposition of capital punishment (Schabas, 2002).

In addition to the Geneva Convention, the Hague Conventions of 1899 and 1907 were among the earliest international law instruments to address laws of war, disarmament and war crimes. Article 23 of the 1907 Convention, Regulations Concerning the Laws and Customs of War on Land prohibited the execution of prisoners of war, who having laid down their arms and having no means of defense were deemed to have surrendered at discretion. Schabas identified this as an early codification of international customary law and pointed out that with the addition of the Martens clause it was extended to conflicts not originally covered by the Conventions (Schabas, 2002)

Implementation and Enforcement

International laws are complex to implement and enforce. To many it may seem impossible to implement and enforce international laws. Treaties may or may not include the methods of enforcement written into them. Some treaties make specific reference to arbitration and some

treaties simply refer matters of dispute to the ICJ. Some treaties make no reference to an enforcement mechanism at all. These "unwritten" enforcement mechanisms complicate the interpretation of international law. As mentioned earlier, another challenge is the constantly shifting sands of what actually makes up customary international law and what actually constitutes *jus cogens* at any given time.

Currently, the most well-known enforcement mechanism for international law is the United Nations Security Council, acting under the UN Charter, Chapter VII. This chapter permits the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression, and to impose remedial sanctions. The sanctions may be economic (such as a trade embargo against a country threatening the peace), diplomatic (such as severance of diplomatic relations) or military, in the form of armed interventions to maintain or restore international peace and security (Kirgis, 1996). The intent of mandatory sanctions is to apply pressure on a State without resorting to the use of force.

A trade embargo can be either comprehensive or selective. A comprehensive trade embargo blocks the transport of all goods by any means to and from a country, while a selective embargo blocks only specific goods, such as war materiel. The Security Council has used this tactic relatively often, as an enforcement tool when peace has been threatened and diplomatic efforts have failed, against various countries including Iraq, Liberia, Libya, Rwanda, Somalia, Yemen, and countries formerly part of Yugoslavia.

Concerns have been raised that sanctions may harm the most vulnerable (and least culpable) segments of the population. Concerns have also been raised about the overall impact of sanctions on the economies of poor countries. As a result a number of actions have been taken to mitigate these possible adverse and unintended effects. For example, trade embargoes have sought

to exempt humanitarian aid. Likewise, “smart sanctions” have focused on very narrow targets, such as freezing the financial assets of specific political elites. The intent is to ensure the measure is effective but does not result in collateral damage. Currently targeted groups include organizations such as Al-Qaida and Al-Shabaab among many others. Resolution 2206 (2015) concerning South Sudan outlines both a travel ban and freezing of assets in regard to South Sudan.

In 2000 the Security Council established the Informal Working Group on General Issues of Sanctions to investigate ways of improving the effectiveness of UN sanctions. In 2006 the Working Group submitted its recommendations and best practices report to the Security Council (S/2006/997). In 2006 the Security Council adopted Resolution 1730 (2006) requesting the Secretary-General to establish a focal point to receive sanction de-listing requests as part of its commitment to establish fair and clear procedures for adding individuals and entities to sanctions lists and, importantly, removing them from the lists. The Security Council subsequently established the Office of the Ombudsperson by its Resolution 1904 (2009), representing an additional measure to ensure fairness and clarity. (U.N. Security Council Sanctions Committees, 2015).

In addition to sanctions, three additional methods of enforcing international law can be put to use, sometimes in conjunction with sanctions. These methods are: reciprocity, collective action and shaming. Reciprocity, particularly with regard to extradition, is a commonly used tool that could be used to assist in the enforcement of an emerging customary norm for universal abolition of the death penalty. Reciprocity is often used successfully in international trade as well as in times of war or other coercive episodes between states. Collective action can be organized by multiple states working together or by an organization such as the United Nations to threaten or take action against one nation in order to bring that nation into the fold. This is a tactic that could be employed

successfully to assist in the enforcement of universal abolition of the death penalty. Economic sanctions are often the tool of choice by the organizers of collective actions.

Finally, shaming can work when the offending country wishes to avoid condemnation by their citizens or citizens of the world by having their actions made public. This tactic could work on the issue of enforcing a new norm of death penalty abolition as it has been used successfully for other instances of human rights abuse. Shaming works when a state does not wish to interfere themselves with the domestic affairs of another state but wants to highlight a human rights abuse in order to end it. Shining a spotlight on the situation, particularly through credible media outlets, can create a strong negative public opinion backlash in the offending country and around the world. Several actions may result: it may bring sufficient world focus to gain the attention of an international organization such as Amnesty International to champion the cause; it may serve to bring together, focus and strengthen several international grassroots organizations; and a strong outcry from a state's citizens may empower that state to take action or stop taking action, whichever may be the case (Drinan, 2002).

CHAPTER FOUR: COUNTRIES WITH THE DEATH PENALTY

There are 90 countries that have retained the death penalty to date. Despite the fact that this seems like a large number of countries still embracing the death penalty, its use is not as widespread as this number would suggest. Of those 90 countries, 73 of them did not execute anyone in 2014, according to the Worldwide Death Penalty Database maintained by Cornell University Law School.

Table 1: Reported Executions in 2014

REPORTED EXECUTIONS IN 2014			
CHINA	*	PAKISTAN	7
IRAN	289	AFGHANISTAN	6
SAUDI ARABIA	90	TAIWAN	5
IRAQ	61	BELARUS	3
USA	35	VIET NAM	3
SUDAN	23	JAPAN	3
YEMEN	22	MALAYSIA	2
EGYPT	15	SINGAPORE	2
SOMALIA	14	UNITED ARAB EMIRATES	1
JORDAN	11	NORTH KOREA	*
EQUITORIAL GUINEA	9		

Source: Amnesty International Death Sentences and Executions 2014

While trends toward an increasing number of death sentences in 2014 are concerning international organizations such as Amnesty International, the direction overall toward abolition of the death penalty is clear. Organizations such as AI and the United Nations are quick to praise countries that join the abolitionist ranks and to encourage others to join them.

In total, 22 countries were reported to have executed people in 2013 with the reported death toll at 778, excluding China and North Korea. In 2014 again 22 countries were reported to have executed people, this time with the death toll down 22 percent to 607.

China is believed to execute thousands of people each year, although the exact number cannot be confirmed. The U.S.-based human rights group Dui Hua Foundation estimated that China executed 2400 people in 2013 (Silva, 2014) but reports this as a significant improvement over time. North Korea also maintains intense secrecy around its judicial executions and no reliable figures are made public. Amnesty International reported 70 executions in 2013, stating that they have grounds to believe the figure to be much higher. (Amnesty International, 2014) It is similarly unknown whether Egypt and Syria carried out judicial executions. Almost 80 percent of all known executions worldwide were recorded in Iran, Iraq and Saudi Arabia. Despite more countries than ever before abolishing the death penalty, the number of reported executions in 2013 increased by 96 over those reported in 2012.

Countries maintain the death penalty for various reasons, sometimes only for serious crimes but too often for less serious crimes such as drug-related offences and even violations of social codes of behavior. Islamic countries have a history of maintaining the use of the death penalty for many crimes that are considered to be in this last category in the West, if they are viewed as crimes at all. Reports various international organizations indicate that, in addition to such undisputedly serious crimes as premeditated murder and treason, the death penalty is also applied in some states for various economic crimes and a wide range of criminal infractions ranging from trafficking in illegal drugs to various categories of social disobedience (Schabas, 2002).

AI has been tracking an increase in certain categories of crime resulting in death penalty sentences and raised the issue in its annual reports. In 2014 Amnesty International became concerned with the jump in the number of reported death sentences which increased by almost 500 or 28 percent over those reported in 2013.

Table 2: Reported Death Sentences 2014

REPORTED DEATH SENTENCES 2014					
CHINA	*	UNITED ARAB EMIRATES	25	SIERRA LEONE	3
NIGERIA	659	ALGERIA	16	SINGAPORE	3
EGYPT	509	DEM. REP. OF THE CONGO	14	QATAR	2
PAKISTAN	231	SUDAN	14	TRINIDAD & TOBAGO	2
BANGLADESH	142	ZAMBIA	13	TUNISIA	2
TANZANIA	91	AFGHANISTAN	12	BARBADOS	2
IRAN	81	LEBANON	11	JAPAN	2
USA	72	ZIMBABWE	10	MALDIVES	2
VIET NAM	72	GHANA	9	GAMBIA	1
INDIA	64	MOROCCO/W.SAHARA	9	LESOTHO	1
SRI LANKA	61	KUWAIT	7	LIBYA	1
THAILAND	55	MALI	6	MYANMAR	1
SOMALIA	52	INDONESIA	6	BOTSWANA	1
SAUDI ARABIA	44	BAHRAIN	5	GUYANA	1
IRAQ	38	JORDAN	5	SOUTH KOREA	1
MALAYSIA	38	PALESTINE (GAZA)	4	TAIWAN	1
KENYA	26	CONGO (REP)	3	UGANDA	1
YEMEN	26	MAURITANIA	3	NORTH KOREA	*
				SOUTH SUDAN	*

Source: Amnesty International Death Sentences and Executions 2014

In 2014 AI reported the five top executioners in the world: China at 1000+, Iran at 289+, Saudi Arabia at 90+, Iraq at 61+ and the U.S. at 35. AI gave up publishing estimates for the number of executions in China in 2009. Although the Iranian government claims it executed 289 people in 2014, Amnesty International cites reliable sources putting that the figure up to at least 743. AI also

condemns Iran for carrying out many executions in secret, with some offenders' family members and lawyers finding out only after the fact and not even being allowed to reclaim their bodies. At least 14 people executed by Iran last year were under 18 at the time their crime was committed as Iran continues to ignore international laws that outlaw executing juvenile offenders. The Iranian authorities executed numerous people for crimes such as drugs offences, religious blasphemy and apostacy, or for being a member of an armed opposition group. AI insists that many proceedings resulting in death sentence verdicts did not meet international standards for fair trials.

Half of the executions that occurred in Saudi Arabia during 2014 were for lesser crimes and offenses, some of which are not crimes at all, including witchcraft, sorcery, adultery, drug-related offenses and kidnapping. AI insists that the Saudi Arabian government has used the death penalty against people protesting against the state, with the apparent objective of preventing dissent. At least 20 people have been executed in relation to protests in the Eastern Province in the last four years.

The U.S. is not only the only country in the Americas to make this list, but also the only country in the Americas to execute its people in 2014. AI reported that there were a number of cases in which people with mental and intellectual disabilities were executed or sentenced to death, in contravention of international law on the use of the death penalty. AI also reported on the issue of the shortage of lethal injection drugs which led to use of alternative drugs and international attention to mishandled executions that resulted in prolonged periods of suffering prior to death, in contravention of the U.S. constitution’s requirement to avoid cruel and unusual punishment as well as international law prohibiting cruel, inhuman punishment.

In 2014 AI reported 11 countries as persistent executioners for 2010-2014, with the United States being the only country on the list which otherwise upholds liberal democratic values.

Table 3: Persistent Executioners 2010-2014

PERSISTENT EXECUTIONERS 2010-2014	
1	CHINA
2	IRAN
3	SAUDI ARABIA
4	IRAQ
5	USA
6	SUDAN
7	YEMEN
8	SOMALIA
9	TAIWAN
10	PALESTINE
11	NORTH KOREA

Source: Amnesty International Death Sentences and Executions 2014

CHAPTER FIVE: COUNTRIES THAT ABOLISHED THE DEATH PENALTY

The number of abolitionist countries are on the rise, reaching 141 by the end of 2016. But not all abolitionist nations are equally abolitionist. AI divides them into three categories: Abolitionist for all crimes: 104, Abolitionist for ordinary crimes only: 7, and Abolitionist in practice: 30.

Table 4: Abolitionist Countries

ABOLITIONIST COUNTRIES		
ALBANIA	GEORGIA	NORWAY
ANDORRA	GERMANY	PALAU
ANGOLA	GREECE	PANAMA
ARGENTINA	GUINEA-BISSAU	PARAGUAY
ARMENIA	HAITI	PHILIPPINES
AUSTRALIA	HOLY SEE	POLAND
AUSTRIA	HONDURAS	PORTUGAL
AZERBAIJAN	HUNGARY	ROMANIA
BELGIUM	ICELAND	RWANDA
BHUTAN	IRELAND	SAMOA
BOLIVIA	ITALY	SAN MARINO
BOSNIA-HERZEGOVINA	KIRIBATI	SAO TOME AND PRINCIPE
BULGARIA	KYRGYSTAN	SENEGAL
BURUNDI	LATVIA	SERBIA
CAMBODIA	LIECHTENSTEIN	SEYCHELLES
CANADA	LITHUANIA	SLOVAKIA
CAPE VERDE	LUXEMBOURG	SLOVENIA
COLOMBIA	MACEDONIA	SOLOMON ISLANDS
COOK ISLANDS	MALTA	SOUTH AFRICA
COSTA RICA	MARSHALL ISLANDS	SPAIN
COTE D’IVOIRE	MAURITIUS	SWEDEN
CROATIA	MEXICO	SWITZERLAND
CYPRUS	MICRONESIA	TIMOR-LESTE
CZECH REPUBLIC	MOLDOVA	TOGO
DENMARK	MONACO	TURKEY
DJIBOUTI	MONTENEGRO	TURKMENISTAN

DOMINICAN REPUBLIC	MOZAMBIQUE	TUVALU
ECUADOR	NAMIBIA	UKRAINE
ESTONIA	NEPAL	UNITED KINGDOM
FIJI	NETHERLANDS	URUGUAY
FINLAND	NEW ZEALAND	UZBEKISTAN
FRANCE	NICARAGUA	VANUATU
GABON	NIUE	VENEZUELA
MADAGASCAR		

Source: Amnesty International Death Sentences and Executions 2014

The six countries that have abolished the death penalty for ordinary crimes only are: Brazil, Chile, El Salvador, Israel, Kazakhstan and Peru. Fiji was also previously in this category. These countries have laws that allow the death penalty to be used only for exceptional crimes, which typically means crimes under military law or crimes committed in exceptional circumstances.

AI identifies 35 countries that are abolitionist in practice for reasons that may include inhibitions resulting from international efforts to restrict use of the death penalty. The list includes countries that retain the death penalty for “ordinary crimes” including murder but have not executed anyone during the past 10 years and are believed to have established a policy or practice of not carrying out executions. This list also includes countries that have made an international commitment not to use the death penalty.

Table 5: Abolitionist Countries in Practice

ABOLITIONIST COUNTRIES IN PRACTICE		
ALGERIA	LIBERIA	RUSSIAN FEDERATION
BENIN		SIERRA LEONE
BRUNEI DARUSSALAM	MALAWI	SOUTH KOREA
BURKINA FASO	MALDIVES	SRI LANKA
CAMEROON	MALI	SURINAME
CENTRAL AFRICAN REPUBLIC	MAURITANIA	SWAZILAND
CONGO (Republic)	MONGOLIA	TAJIKISTAN
ERITREA	MOROCCO	TANZANIA

GHANA	MYANMAR	TONGA
GRENADA	NAURU	TUNISIA
KENYA	NIGER	ZAMBIA
LAOS	PAPUA NEW GUINEA	

Source: Amnesty International Death Sentences and Executions 2014

Why has the death penalty been abandoned over time

The death penalty has been abandoned over time for two main reasons: widespread changes in social attitudes and the increasing recognition of human rights as constraints upon punitive state behavior. The death penalty, like other certain other practices, has been in decline due to the spread of normative awareness that certain practices that can no longer be tolerated. For instance, ritual human sacrifice, slavery, and physical torture, have been abandoned and condemned by practically all nations. With the due course of time, these practices are likely to fade and underscore by the fact that the world has awakened against these issues. However, many countries do not stand against these social issues and have not yet formed a consensus against the death penalty. For example, both the United States and China execute hundreds of prisoners every year. But it is inevitable that many countries have struggled to reduce the death penalty. According to Dieter (2014) it is significantly evident that continuing changes in international attitudes will continue to place pressure on remaining retentionist nations to abandon death penalty practices.

Until the twentieth century, punishing people by death was not considered a violation of human rights. But now many nations have designed and implemented anti-death policies in response to a growing awareness that the death penalty could be regarded as a violation of human rights. Until World War II, the death penalty was not a major human rights issue. The Holocaust and the overall magnitude of the wartime carnage triggered a worldwide revulsion against the death penalty. During the post-war era, the public became concerned for the protection of human

rights. As a result of movement regarding human rights, the "right to life" gained momentum (Schabas, 2002). After many rallies and protests, the focus shifted from the state's right to punish a citizen to a civic demands for abolishing executions by the state as a rule of law. Thus, with the passage of time, the majority of nations began to abolish the practice of the death penalty in light of human rights protection as it was considered an inherently cruel form of punishment and violative of human dignity. Moreover, many nations abolished capital punishment due to the inconsistency and arbitrariness of its use, replacing it with prison sentences of corresponding severity.

Death Penalty Use in Relation to Broader Human Rights Profile, 2017

	Free#	Partly Free#	Not Free#	Percent Free	Percent Not Free
Abolitionist*	64	31	12	59.8	11.2
Abolitionist in Practice	6	14	10	20.0	33.3
Retentionist	16	13	27	29.6	48.2

*"Abolitionist" includes complete abolition and abolition for ordinary crimes.
#"Free"= Freedom House score of 1.0-2.5; "Partly Free"= Freedom House score of 3.0-5.0; "Not Free" = Freedom House score of 5.5-7.0.

Sources: Freedom House, 2017 Country Scores (https://freedomhouse.org/report/fiw-2017-table-country-scores); Amnesty International, Abolitionist and Retentionist Countries, 2017 (https://www.amnesty.org/en/documents/act50/6665/2017/en/)

(Does not include: Cook Islands, Holy See, Niue, Palestinian Authority, and Sao Tome and Principe)

Respect for human rights is one of the reasons of abolition of the death penalty. However, many countries with worse human rights records such as Azerbaijan, Rwanda and Russia have abolished the death penalty. Conversely, countries with good human rights records like the United

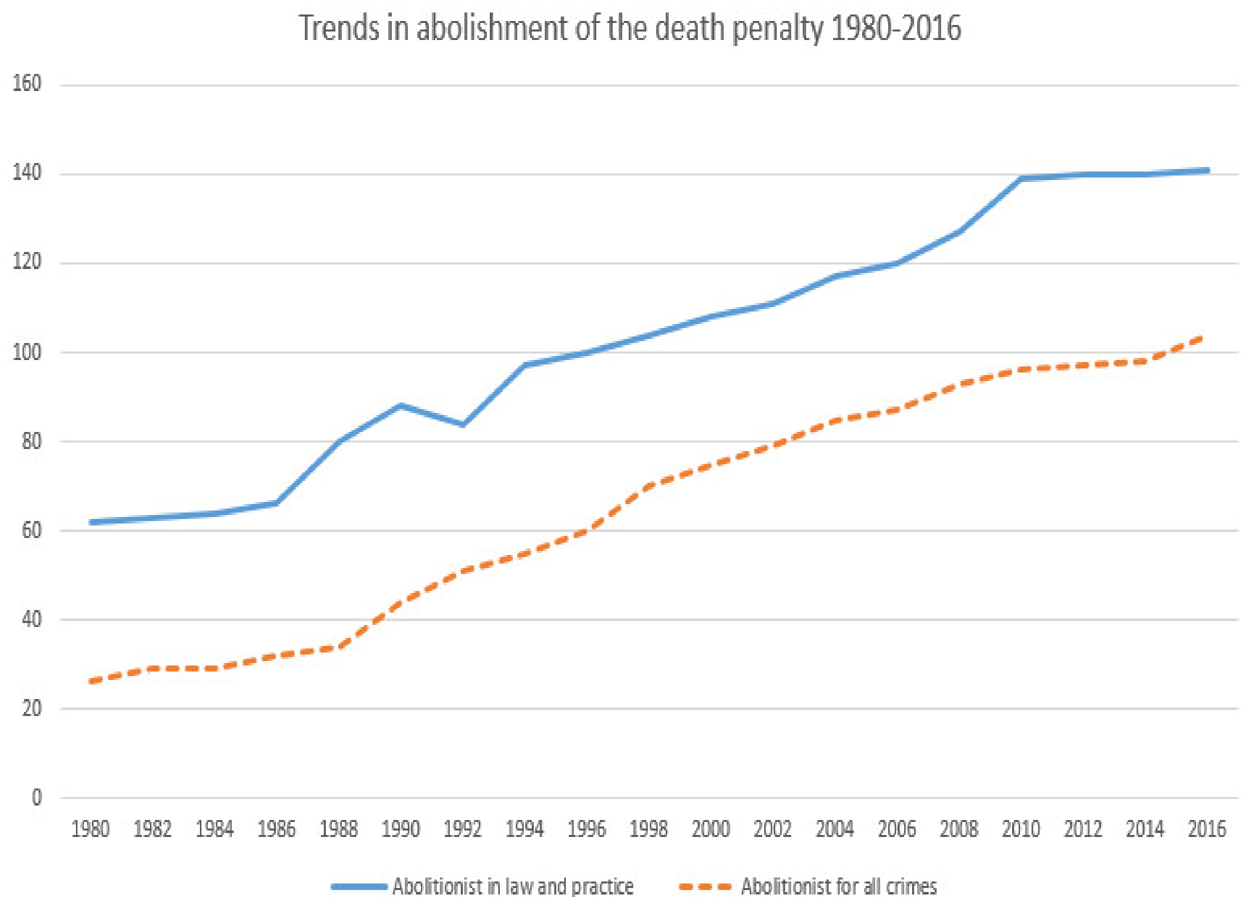
States and Japan still retain the death penalty. Moreover, as it is seen on the table above, even though 80% of democratic countries are either abolitionist or abolitionist in practice, there is also a substantial percentage of undemocratic countries that have abolished the death penalty. The question one may ask is why have so many repressive countries abolished the death penalty? The answer seems to come from the pressure from the European Union.

The European Union has abolished the death penalty for all crimes and is forcing other countries to do the same. According to Resolution 1044 of the Parliamentary Assembly of the Council of Europe, “the death penalty has no legitimate place in the penal systems of modern civilized societies, and its application may well be compared with torture and be seen as inhuman and degrading punishment.” The human rights objections to capital punishment would have lacked political force if the European Union had not used its leverage and influence. For instance, since 2002, to become member of the Union, a potential candidate must not only clean up its human right record but must also abolish the death penalty. This policy had an enormous influence on countries in Eastern Europe as well as on Russia, all of which expect to benefit from the economic advantage associated with dealing with the European Union. (Hood & Hoyle, 2009).

Moreover, to induce other nations to abolish the death penalty, the EU states unconditionally in its Article 19 (2) of its Charter that it will not extradite prisoners that face the death penalty. Not only does the European Union encourage countries to abolish the death penalty, it obliges other countries that have abolished the death penalty to refuse to extradite criminals that face the death penalty as well. For instance, Rwanda had to abolish the death penalty in 2007 because several countries refused to extradite the masterminds of its genocide.

Countries that have abolished the death penalty also give several reasons for the abolition. In 1995, Spain abolished the death penalty and stated that the death penalty has no place in civilized

societies. According to Spain, there is no degrading punishment as to deprive the life of a person (International Bar Association, 2008). In addition, the South African Constitutional court categorized the death penalty as unconstitutional and in this favor Justice Chaskalson stated that the dignity and right to life are core dimensions of human rights and this should be reflected in state behavior across a range of policy domains, including criminal prosecutions (Alston, 2006).



Source: Amnesty International

Other than the reasons evoked earlier, additional grounds for the abolishment of the death penalty are the evolving standards of decency and the fact that capital punishment is cruel. Indeed,

it has been found that even when applied with complete legal scruples and standards the punishment is tantamount to torture. According to Méndez (2012), the threat of death triggers anxiety which leads to trauma and psychological pressure. Likewise, extended stays on death row in the conditions accompanied by the death sentence constitute a breach of the prohibition against torture.

CHAPTER SIX: THE UNITED STATES

The United States reported the seventh highest number of executions, at 20, of any country in the world in 2016. It also made the list of persistent executioners in every year between 2010 and 2016 and it is the only country in the Americas to have conducted an execution in 2016. (Amnesty International, 2016)

Although Michigan became the first state to abolish the death penalty, except for treason against the state, as early as 1846, the rest of the U.S. has been vastly slower to join in. Although only 19 states have abolished the death penalty to date, that general direction is looking increasingly more popular. Of the 31 states with the death penalty still on their books, 17 are not actively executing anyone. The question to explore now is why the U.S. still retains the death penalty in the face of international movement in the other direction.

American resistance to abolishing the death penalty is the result of three factors. First, the hegemonic position of the United States in international politics limits the leverage that other nations or international organizations can exercise over American behavior. What is true about campaigns for children's rights or against landmines is also the case with the death penalty. Second, the domestic political institutions of American federalism distribute powers and policy responsibilities in such a way as to make abolition of the death penalty difficult to impose by the central government, even if it wanted to. Third, and ironically, the very robustness of the American constitutional tradition makes it difficult to sustain human rights-based critiques of capital punishment if these critiques are not translated into the individualist and proceduralist terms that are characteristic of rights discourses in the American political tradition.

1. The American Attitude towards International law

For Western states that have abolished the death penalty, the major influencing factor was the coming into effect of international declarations and treaties, which specifically required that the death penalty be abolished by the state parties. These include the Universal Declaration of Human Rights 1948 (UDHR 1948), the International Covenant on Civil and Political Rights (ICCPR), the ICCPR Second Protocol 1989 and the American Convention on Human Rights Protocol to Abolish the Death Penalty 1990. These treaties contain specific provisions that may be used to strengthen the case against the death penalty. For instance, article 3 of the UDHR 1948 provides that "everyone has the right to life, liberty and security of the person". The ICCPR Second Protocol 1989 goes further to provide in article 1 that no person shall be executed in the territory of a signatory state.

International law that may place limits upon or even prohibit the death penalty has no effect in the U.S., which has either refused to sign these treaties or has signed these treaties with reservations as to the abolition clauses. For instance, the U.S. made a reservation to the ICCPR in context of imposing the death penalty against those under the age of 18 years. At the time of signing it asserted that it will not adhere to the condition of not imposing the death penalty on offenders under the age of eighteen and the American Supreme Court has upheld death sentences to people as young as 16 years of age [*Stanford v. Kentucky*, 492 US 361 (1989); *Wilkins v. Missouri* 492 US 937 (1990)]. Nonetheless, in a recent case the court has disallowed the use of the death penalty on a person who was less than 18 years of age at the time of commission of the crime *[Roper v. Simmons*, 543 US 551 (2005)].

Moreover, there are other mechanisms by which international law could influence the United States' decision over the death penalty but has not succeeded so far because of the the

country's hegemonic position. According to Goodman & Jinks, (2004) countries can be influenced by three mechanisms: coercion, persuasion, and acculturation.

First, it seems unlikely to coerce the United Sates to abandon the death penalty. Coercion usually takes place in the form of either military might or economic sanctions (positive or negative). Using force to push the US to comply is impossible because American military might is the most advanced in the world. Likewise, the budget spent by the American military is almost equal to the rest of the world combined. Additionally, with the United States being the first economic power, economic sanctions will hurt the rest of the world more than it will hurt the United States because of the size of its economy. However, coercion seems to work in a different way. For instance, European drugs companies that manufacture drugs used in the death penalty refuse to sell the drugs to United States' prisons. Additionally, Europe had clearly stated that it will not extradite criminals to the United States if they will face the death penalty.

Persuasion is the least powerful mechanism of influence over the US decision. It is defined as the action of influencing someone's decision by a sound argument. According to Goodman and Jinks (2004) it is the "inculcation of norms… [in which] actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice." Countries that have abolished the death penalty and non-governmental organizations have extensively written to discourage the use of the death penalty. However, US Supreme Court judges, especially Chief Justice Rehnquist, and Justice Scalia, have always resisted or denounced the use of international precedent in US cases. Nevertheless, there have been times in which amicus briefs from western countries have been successfully used in Supreme Court cases. For instance, in *Thompson V. Oklahoma* the majority opinion recognized that all industrialized Western nations had banned the execution of minors

under 16 years of age. That means persuasion seems to work, but the truth is persuasion is less powerful than coercion and acculturation.

Acculturation means the international community will apply social pressure to make a state adopt a certain behavior pattern. This happens after a state has been included as a member of the group. For instance, the United States and other Western countries share many democratic principles and human right values. According to Patterson (2006, p. 1233), there are two types of social pressure that can be used in acculturation: "the imposition of social-psychological costs through shaming or shunning and the conferral of social-psychological benefits through back-patting and other display of public approval." It is worth noting that acculturation seems to be working in the United States in the sense that fewer and fewer states still use capital punishment.

2. Legislative Process: Criminal law in America is a matter for Local Autonomy

One other reason why the death penalty continues in the United States, years after other Western and many other countries have abolished it, is due to the distinct political structures and institutions of the country. The United States is a federal state, and unlike other Western states, a top down abolition of the death penalty cannot happen as it will not be constitutionally permissible. European states do not have the death penalty as a consequence of the European Union law that bars its use.

Of course, having a federal political structure does not make the United States unique among Western democracies. More relevant is the fact that, in the United States, criminal law is administered at the state, and not at the national level. Congress cannot intervene to make a law barring the death penalty. Also, in the US Constitution, legislative powers are distributed between the Congress and the states. As far as the death penalty is concerned, it is not within the competence of the Congress to repeal the application of the death penalty. As per the Tenth Amendment, the

powers that are not expressly provided to the national government are reserved to the states. Therefore, the Congress lacks the ability to legislate any repeal of the death penalty that would be binding upon the states.

Although the United States is commonly classified as a retentionist country, that category does not provide an entirely accurate description of the death penalty law in the United States. The death penalty has been abolished in nineteen states and the District of Columbia. As criminal law falls within the domain of states, state legislatures have from time to time, abolished the death penalty on their own. Pennsylvania abolished capital punishment, barring for the crime of first-degree murder in 1786. It was followed by Virginia in 1796 and Ohio in 1815. Presently, there are 31 states that allow the use of the death penalty. Also important to consider is the fact that there are states, like Kansas and New Hampshire, that have not executed anyone for many decades, despite being death penalty states on paper (Garland, 2012).

3. Constitutional Amendment Process

An additional reason the United States has retained the death penalty is that the process of amending the American Constitution is very rigid. At this time, the constitutional power to make criminal law is in the domain of state legislatures. If this power has to be exercised by the Congress, there needs to be an amendment in the Constitution. Article V of the Constitution provides that for an amendment to take effect in the Constitution, apart from 2/3rd majority voting in favor of the amendment in both Houses, 3/4th of all the state legislatures must also vote in favor of the amendment. This is a rigid amendment process and consequently, there have been very few constitutional amendments in the United States, despite the constitution being more than two centuries old. Considering the federal character of the distribution of legislative powers, it seems

unlikely that there will be an amendment giving the power to the Congress to make criminal law for all states.

4. Public Support for the Death Penalty

The death penalty continues to find a lot of public support, unsurprisingly also because arguments made in favor of retaining the death penalty are emotive and politically charged (Steffen, 2006, p. 2). The retentionists derive support for the death penalty from various arguments, which are grounded in the legal or ethical terms. The retentionists argue that retaining the death penalty is essential for creating deterrence. As per this argument, the deterrence value provided by the death penalty is useful for crime control (McCafferty, 2010, p. 66). Nevertheless, the real reason behind public support is that the death penalty benefits the politicians, the media, and some ordinary citizens. Politicians benefit from it because they easily get elected when they say they are tough on crime. For instance, in 1990, Mark White who was running for reelection as governor of Texas showed photographs of men executed and said "I did [execute], and I will" still execute (Garland 2012; 292).

In March 2015, the Pew Research Center found that 56 percent of Americans support the death penalty for crimes of murder, while 38 percent oppose it. However, this is the lowest level of support for the death penalty in four decades. For example in 1996 when the same question was asked, 78 percent of Americans supported the death penalty while just 18 percent opposed it. The largest change in voting is occurring among Democrats. In March 2015, just over 40 percent of Democrats supported the death penalty and 56 percent opposed it; while in 1996, 71 percent of Democrats supported the death penalty and 25 percent opposed it. The downward trend is also evident among Republicans but less dramatic. In March 2015, 77 percent of Republicans supported the death penalty, down from 87 percent in 1996.

The recent researched showed that 71 percent of Americans believe there is a risk that an innocent person will be executed and 61 percent believe the death penalty is not a deterrent to committing a serious crime. A full 52 percent believe that minorities are more likely to receive a death sentence for the same crimes as non-minorities.

While it is true that the United States still maintains the death penalty, it is also accurate to say that most states that still carry out executions are located in the Deep South, meaning that states that supported slavery, lynching, segregation, and Jim Crow laws are the same states that support the death penalty. So, it is evident that institutions of racialized chattel slavery and lynching are the same that support the death penalty because the death penalty is disproportionately carried out on black offenders against white victims. Although it would be simplistic to draw a direct link between the historical experience of extra-judicial killing and the persistence of the death penalty, the geographical coincidence of both is at least rooted in violent models of social control and retributive attitudes towards justice that are common in the culture of the American South. Garland (2012, p. 280) agrees that the death penalty is "concentrated in the south", and mostly "target blacks whose victims were white."

5. The Death Penalty in Supreme Court Jurisprudence

The Supreme Court has considered the constitutionality of capital punishment as well as the constitutionality of the mode of executing capital punishment. In 1971, the Supreme Court decided that the death penalty was not contrary to constitutional provisions *[McGautha v California,* 402 US 183 (1971)]. In this case, the death penalty was challenged under the Due Process clause of the Fifth Amendment (Latzer, 2010, p. 37). However, the very next year, the Supreme Court declared the death penalty to be unconstitutional for the first time (Latzer, 2010). In 1972, a landmark judgment by the Supreme Court led to a four year halt to all capital

punishments [*Furman v. Georgia*, 408 U.S. 238 (1972)]. The court held that the manner in which the sentences were executed was contrary to the Eighth Amendment to the American Constitution, which bars cruel and unusual punishments.

In *Furman v Georgia*, the unusual and cruel aspects of the penalty, were not related to the penalty itself, but were related to the selective and arbitrary application of the penalty. The decision of the court was not based on the lack of legality or constitutionality of the death penalty itself. Rather, the decision of the court was taken because of the capricious manner in which the punishment was being applied, where race had become a factor for such capricious application of the penalty (MacKinnon & Fiala, 2014). Therefore, even while the Supreme Court declared the penalty to be unconstitutional, it did so on the limited sense of the application of the penalty and not the penalty itself. Thus, the court left the door open for the penalty to be lawfully applied, where the state could show that it has not applied the penalty in a selective, discriminatory and racial manner.

As a result of the *Furman* decision, states redrafted their laws in order to ensure compliance with the Constitution. Ultimately, after a 4 year halt, the death penalty was once again reaffirmed as a constitutional punishment after the redrafted statutes were upheld by the Supreme Court in three cases that came before it in 1976 [*Gregg v Georgia*, 428 US 153 (1976); *Profitt v Florida,* 428 US 242 (1976); *Jurek v Texas*, 428 US 262 (1976)]. Therefore, as mentioned earlier, the death penalty itself was not a problem, the problem was the manner of its execution.

There has been a long-standing traditional belief by the American public that the most effective deterrent to crime is the death penalty. However, although no one can argue with the fact that it reduces the recidivism rate, the research simply does not back up the deterrence argument and public opinion is changing. In a 1985 Gallup Poll, 62 percent answered yes when asked if they

believed that the death penalty acts as a deterrent to committing murder thus reducing the murder rate. This number dropped significantly to 34 percent in 2006. In another way of looking at the same issue, twice as many people surveyed said the death penalty was not a deterrent in 2004, rising from 31 percent to 62 percent. In a 1995 survey of nearly 400 police chiefs and county sheriffs across the U.S. it was found that two-thirds of responders did not believe the death penalty significantly lowered the number of murders. A panel set up by the National Academy of Sciences and chaired by Nobel Laureate Lawrence R. Klein to examine the studies—primarily those published by economist Isaac Ehrlich—concluded that there is no evidence on the deterrent effect of the death penalty (Radelet and Lacock, 2009).

A 2007 National Omnibus Poll showed that the public is losing confidence in capital punishment (Yorke, 2008). A number of milestones in the declining use of the death penalty were attained in the U.S. during 2014: new death sentences in the United States reached their lowest level in 40 years; the fewest number of executions were recorded in the past 20 years; the number of states carrying out executions (seven states) was the lowest in 25 years; the number of inmates on death row declined for the 14th straight year; and 80 percent of the executions were carried out in just three states - Texas, Missouri, and Florida (Death Penalty Information Center, 2014).

In the United States, dissatisfaction with the criminal justice system is widely thought to spur many people to side with the death penalty based on the fear that dangerous offenders would be returned to society to commit more crimes. This argument is often cited in the media, however, in cases warranting the death penalty, life imprisonment with no possibility of parole or parole after 25 or 30 years as only a possibility is more the norm.

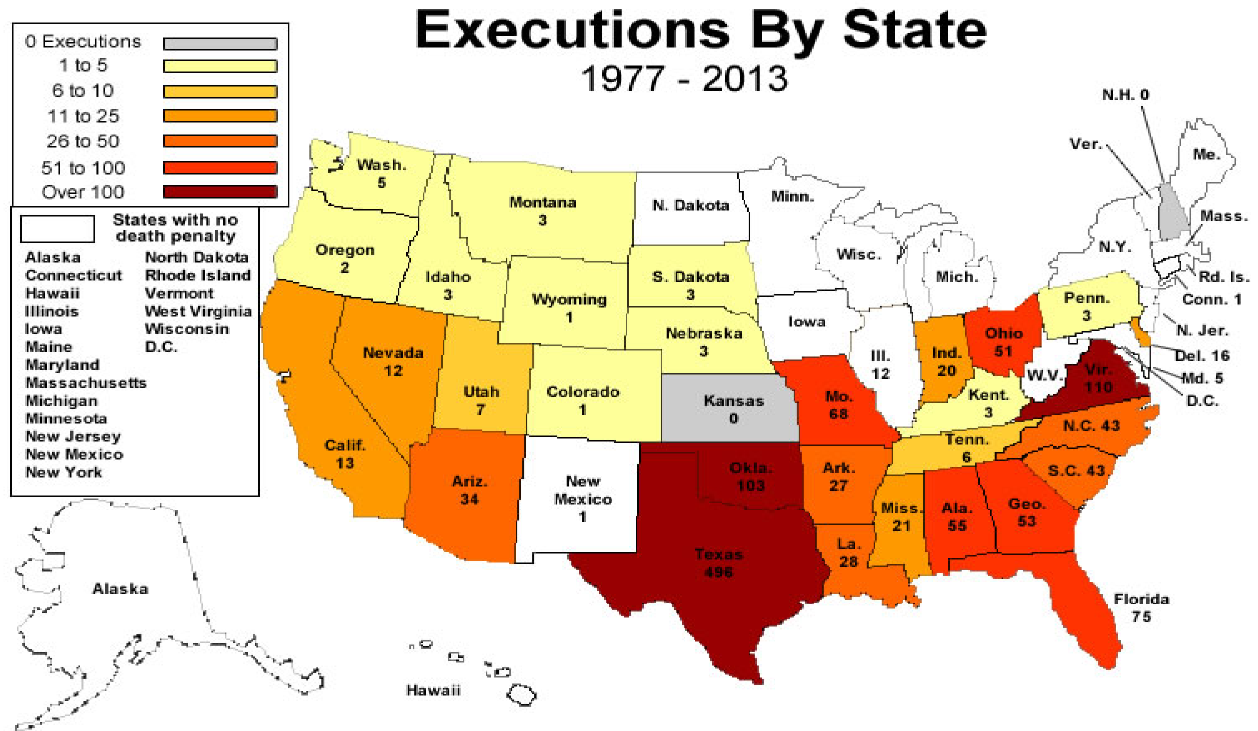
In the United States, opponents of the death penalty cite the standard reasons based on morality, ethics, economics, and human error but also cite the huge correlations between low income and racial minorities and the implementation of the death penalty, particularly in the South.

Finally, although the instances of death sentences and executions in the U.S. have dropped over the past decade, there are also other reasons to take into consideration to account for this shift. At the same time, there has been a decrease in violent crimes overall, so it makes sense that a decrease in death sentences would follow from this. Declining public support for the death penalty and increased judicial system review of certain populations such as youth and mentally impaired offenders have led to a corresponding decrease in death sentences and executions amongst these segments of the prison population. (*Harvard Law Journal* 2006 quoted in Yorke, 2008). While the world looks on, the United States continues to remain an anomaly on the death penalty issue, in the Americas, in the West and in many world organizations in which it normally takes the lead, particularly with regard to human rights issues around the globe. On this issue, although moving in the right direction it is moving much more slowly than international organizations and agencies might have hoped and remains out of step with the pace of change on the world stage.

Table 6: U.S. States with the Death Penalty

STATES WITH THE DEATH PENALTY		
Alabama	Louisiana	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	South Dakota
California	Montana	Tennessee
Colorado		Texas
Delaware	Nevada	Utah
Florida	New Hampshire	Virginia
Georgia	North Carolina	Washington
Idaho	Ohio	Wyoming
Indiana	Oklahoma	**Plus:**
Kansas	Oregon	US Gov't
Kentucky		US Military

Source: Death Penalty Information Center



Source: deathpenaltyinfo.org

CHAPTER SEVEN: WORLD LESSONS

The countries of the world demonstrate a wide range of practices with regard to death sentencing, just as they demonstrate a wide range of languages and cultures. In the latter, the diversity provides many benefits to the planet and its populace; however, in the former a stronger degree of homogeneity would be beneficial, not just on the international law stage, but also on the humanitarian front.

Benefits vs. Costs

Societal benefits afforded by the death penalty, according to retentionists, include: deterrence, cost-savings, reduced recidivism, reduced and prison populations, and a higher more appropriate level of justice served (i.e. retribution). There is, however, no evidence that the death penalty is a deterrent, according to many sources including the National Research Council who, in 2009 surveyed criminologists and found more than 88 percent believed there was no deterrent effect. (Radelet and Lacock, 2009).

States with death penalty laws do not have lower crime rates or murder rates than states without – in fact, just the opposite. States that have abolished the death penalty do not experience a sudden surge in their crime rates or murder rates. In fact Canada experienced a decrease and Australia experienced no change in its homicide rates after abolishing the death penalty and both the U.S. and Nigeria experienced an increase in crime after introducing and reintroducing the death penalty. (Simon and Blaskovitch, 2002).

The financial costs of enacting the death penalty are significantly higher than the cost of incarceration for life according to abolitionists who argue that the legal costs, interim prison costs and system costs to administer executions vastly outweigh the costs of life imprisonment.

Societal benefits afforded by abolishing the death penalty, according to abolitionists, include: advancement of civilization and a move away from barbarism, upholding universal humanitarian goals such as the inherent right to life, and the fact that life in prison is a stronger punishment and more effective deterrent.

Societal costs of maintaining the death penalty are substantial. In addition to perpetuating a cruel punishment that is contrary to basic human rights, it sends a confusing social message that killing people demonstrates that killing people is wrong. The fact that our legal systems are not perfect means that it is inevitable that at some point, innocent defendants convicted of capital offenses will be put to death unjustly (Feingold 2000). Humans make errors and yet an error in an execution cannot be reversed. Indeed, the very attempt to avoid errors results in the court backlogs created by many appeals granted.

Alternatives

The alternative to the death penalty for serious crimes such as murder, in the U.S. for example, is typically life imprisonment without possibility of parole. Such a sentence is not without its issues and detractors as the sentence does not allow for the possibility of rehabilitation into society or hope for the convicted person. International case law has not forbidden life imprisonment without possibility of parole, but the European Court of Human Rights has found the loss of hope of being released to be illegal. Neither the Council of Europe recommendations on the management of long term prisoners nor the UN recommendations on life imprisonment allow for the possibility of whole life sentences. However both allow for the possibility that after regular reviews some prisoners sentenced to life imprisonment may never be safe enough to be released from prison (Yorke, 2008).

The guidelines envisage rehabilitation to be an integral part of the justice process; however, life without possibility of parole is counter to this concept. Article 10(3) of the ICCPR similarly advocates for social rehabilitation of prisoners. Even the 1998 Rome Statue of the International Criminal Court (Articles 77 and 110), meting out life sentences for crimes such as genocide, crimes against humanity and war crimes, decrees that an assessment to determine whether the life sentence should be reviewed must take place after 25 years (Yorke, 2008). Lack of any hope for parole would also have a significant impact on the prison systems managing a large population of inmates with no hope at all of ever being released.

Other alternatives include a limitation on the number of years of imprisonment and/or the addition of the possibility of parole after a certain length of time and other conditions. In the U.S. an alternative popular with the public is monetary restitution to the victim's family. Finally a comprehensive program to reduce crime in the first place is widely considered to be a strong alternative to after-the-fact programs, whether they be the death penalty or prison sentences. Preventive and restorative alternatives include counseling and compensation for the surviving family members of homicide victims. If defendants are not to serve life sentences, then programs need to be in place to facilitate their re-entry into society, as well as to foster victim/offender mediation and dialogue. If life sentences were nonetheless retained, there would also need to be significant work to the prison systems to allow for imprisonment without possibility of parole on a large scale.

At the 5th World Congress Against the Death Penalty held in Madrid, Spain in June 2013 experts debated the issue of the risk of abolitionist countries perpetuating inhumane treatment by imposing life imprisonment without possibility of parole as well as the fears of retentionist countries that lack of a death penalty in their arsenal of sentences could cause disintegration into

anarchy. "With an irreducible life sentence, just like the death penalty, you will die in prison," said Dirk Van Zyl Smit, professor at Nottingham University and member of the International Academic Network for the Abolition of Capital Punishment (Hubert, 2013).

However, in certain countries, the death penalty is handed down for lesser crimes such as drug trafficking, armed robbery, hijacking, prostitution, rape, kidnapping, adultery, witchcraft, sodomy, and apostasy. There is significant opportunity to adjust penalties downward in keeping with the crimes or to remove them from the books entirely. More so than ever, death sentences in these cases make no sense and cannot be justified on any grounds.

Optimism and Pessimism

In general, there is significant reason to be optimistic with regard to the world trends toward the abolition of the death penalty. The number of countries and states embracing abolition of the death penalty has steadily increased, while the number of executions per year is falling apace, even in such execution-happy countries as China. In 2017, the world is currently awaiting news of which country will become the 103rd country to abolish the death penalty, which is a far cry from just nine abolitionist countries in 1977 and 59 abolitionist countries in 1995.

On the legislative front, the direction in general is positive. In 2014 the National Assembly of Madagascar adopted legislation to abolish the death penalty. Similar legislation was pending in Benin, Chad, and Mongolia. Barbados also began contemplation of draft legislation to abolish the death penalty. In the U.S., the state of Washington announced a moratorium on executions in February 2014 (Amnesty International, 2015). These trends in legislation and overall direction continued in 2015 as the state of Pennsylvania has abolished the death penalty. The state Senate of Delaware passed a bill in April 2015 to repeal its penalty. Nebraska had succeeded in passing legislation to abolish the death penalty, despite the veto power of its governor.

In April 2014, El Salvador, Gabon and Poland became state parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which takes direct aim abolishing the death penalty. In May 2014, Poland also ratified Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which aims to abolish the death penalty under all circumstances.

In December, when the UN General Assembly adopted its fifth resolution on the moratorium on the death penalty, six more countries voted in favor of the resolution than had voted in favor in 2012 for a total of 117 in favor. The six new votes were received from Equatorial Guinea, Eritrea, Fiji, Niger and Suriname (Amnesty International, 2015) The fifth resolution included several favorable additions. It includes requirements that its states not expand the scope of their use of the death penalty. It further calls for all states to comply with their obligations under the 1963 Vienna Convention on Consular Relations and to allow foreign nationals to receive information on consular assistance if legal proceedings are initiated against them.

To combat the issues of the death penalty statistics not being published or made available in countries such as China, North Korea and Syria, the fifth resolution calls for all states to provide relevant information on their use of the death penalty "disaggregated by sex, age and other criteria" as well as on the number of commutations, acquittals and pardons (Amnesty International, 2015).

CHAPTER 8: CONCLUSION

Based on the research undertaken to understand the trends with regard to the death penalty and international law, having reviewed international legislation leading up to the 1948 signing of the Universal Declaration of Human Rights and from then to the current day, as well as reviewing the current status and recent trends with regard to abolition of the death penalty in countries around the world, this thesis ventures that there is indeed optimism for the emergence of a customary international norm for the universal abolition of the death penalty.

Countries retaining the death penalty are decreasing steadily. In addition, those countries that still retain the penalty are executing fewer people over time, issuing temporary holds, moratoriums and delays that in some cases amount to a de facto abolition and in all cases amount to a drastic reduction in the number of executions over time, and in the numbers of countries performing those executions.

International sentiment, as expressed in conventions and other agreements, has increasingly marginalized a vocal few countries that continue to argue vehemently in favor. The International Criminal Tribunal for the Former Yugoslavia is a perfect example of the immensity of the swing from the norm with respect to the death penalty for war crimes at the end of World War II as compared to the norm with respect to the death penalty for war crimes at the end of the wars in the countries of the former Yugoslavia.

In addition to an increasing number of abolitionist countries and legislation moving assuredly in the direction of the abolitionists, from specific categories of exclusion (such as juveniles and pregnant women) to more widespread legislation, there is also work being undertaken in many other quarters by non-governmental agencies and organizations, academics

and others to track the statistics of the retentionist nations as part of a global media effort to maintain exposure of this practice.

In addition to tracking, there is increasing pressure being placed on the retentionists to step up to the plate and report their statistics to the world, assuming that those with little to hide will do so willingly. Global public opinion is strong and influential. Schabas (2002) cited the case of members of the Philippines Supreme Court using the second issue of his book, *The Abolition of the Death Penalty in International Law*, to demonstrate proof of the indisputable emergence of an international norm abolishing the death penalty and insisting their Constitution should be interpreted in the spirit of this international norm and declare the death penalty unconstitutional.

As a matter of realism, Schabas admits that more often judges and officials determine that international law does not prohibit the death penalty. However, that is not technically true, as a result of the three abolitionist protocols and the American Convention on Human Rights 102 countries are now bound by international law not to impose or reintroduce the death penalty. Possibly, what those judges imply is that customary international law does not prohibit the death penalty. This is actually accurate, "but trends in State practice, in the development of international norms, and in fundamental human values suggest that it will not be true for very long." (Schabas, 2002)

That is not to say that the new norm will encompass persistent objectors or wartime conditions. These will likely remain the exceptions. But at least now they will be the exceptions, no longer the rule. As the groundswell increases, more and more states and countries will join with the abolitionists, further spotlighting the remaining few clinging to their right to wield the death penalty as the exceptions rather than the norms. It behooves the U.S. to find a way to speed the process of joining this emerging norm sooner rather than later and join the ranks to which they

belong rather than clinging to a past that simply does not make sense in the context of the 21st century.

A sea-change is well under way and that sea-change is creating a new societal norm, new definitions of general practice and paving the way for new international customary norms to emerge. The change will not occur overnight but it is happening and happening much faster than anyone could ever have dreamed possible back in 1948 when the Universal Declaration of Human Rights was landmark legislation after a bitter war employing horrifying new methods of warfare as well as mass civilian executions that appalled and horrified the world.

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