

A SURVEY OF DEATH PENALTY IN INTERNATIONAL LAW

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I. The Dialectic of War Crimes and Human Rights

It is the shock of reality out of the atrocities and barbarism in the Second World War, that brought humanity into a new level of realization as to the value of human life. The horrors of the Holocaust, the brutalities of Auschwitz and other extermination camps, and the mass extermination of civilian population in Hiroshima and Nagasaki by atomic bombing, should suffice to justify a total shift in the premises upon which human civilization will continue to uphold and protect the value of life.

The Philippines' own war experience in the desecration of life was concretized in the evidence it presented before the Military Tribunal for the Far East. As the Philippine prosecutor generalized, "the crimes committed to my country and my people were so shocking, so brutal and so revolting that resort to euphemisms would only do violence to the truth."¹

II. New International Public Order of Human Rights

On the whole, it was humanity's experience of the appalling atrocities in the war that crystallized the emergence and internationalization of the protection of human rights. As early as 1941 and 1942, the Allied Powers recognized the abhorrence to inhumanity committed by the German and Japanese forces, which decisively led to the making of human rights as the foundation principles of the post-war international public order.

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¹ R. JOHN PRITCHARD & SONIA M. ZAIDE, *THE TOKYO WAR CRIMES TRIAL* 12, 157 (1981).

In mid-1944, the Allied Powers proposed in the Dumbarton Oak meeting the establishment of “a general international organization” founded on respect for human rights and fundamental freedoms.² The Charter of the United Nations which was signed on 26 June 1945 in the San Francisco Conference on International Organization strengthened the Dumbarton Oak proposals. At its Preamble, the Charter correlated the war crimes with the new regime of human rights. It affirms that:

We the Peoples of the United Nations determined

- to save succeeding generations from the scourge of war, which twice in our time has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person

Have resolved to combine our efforts to accomplish these aims.

Among the Purposes of the United Nations (UN) in Article I of its Charter is the emphasis on human rights in terms of “international cooperation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

As an international legal obligation, respect for human rights and fundamental freedoms on the part of every Member of the UN is defined in Articles 55 and 56 of the Charter. While Article 55 specifies that the United Nations shall promote “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion;” Article 56 defines the following obligation:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

III. Human Rights without Frontiers

Until 10 December 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights in 30 articles, human rights under the UN Charter were never known in concrete identities. It was the Declaration that

² MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 243-246 (2005).

reaffirmed in enforceable terms the human rights under the UN Charter as a new foundation of the international public order. Almost thirty years after its adoption, the human rights and fundamental freedoms of the Declaration were translated into conventional rules of law under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. But by itself the Declaration has been regarded as an authoritative interpretation of the UN Charter and as a source of general principles of law.

By the end of the twentieth century, progress in human rights characterized regional developments, as their enforcement extended to broader problem-areas, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948); Convention Relating to the Status of Refugees (1951); Convention on the Political Rights of Women (1953); Slavery Convention (amended 1955); Convention relating to the Status of Stateless Persons (1953); International Convention on the Elimination of all Forms of Racial Discrimination (1966); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).³

Based on UN initiative, regional systems of human rights developed thus: European Convention for the Protection of Human Rights and Fundamental Freedoms (1953); European Social Charter (1961 & 1996); Framework Convention for the Protection of National Minorities (1995); American Convention on Human Rights (1969); African Charter on Human and People's Rights (1981); and Arab Charter on Human Rights (1994).⁴

IV. Capital Punishment in the Universalization of Human Rights

Contemporaneous with the consolidation of human rights as the foundation of the international community, death penalty as capital punishment has been

³ For texts of these International Conventions, see BASIC DOCUMENTS OF HUMAN RIGHTS 108-272 (Ian Brownlie & Guy S. Goodwin-Gil eds., 2002).

⁴ *Id.*, at 397-423, 665, 671-701, 728, 774.

relegated to the past when it was a punishment for a crime to behead a person; hence the word *capital* is derived from Latin *capitalis*, “of the head”.⁵

In recent times, the broadest rejection of death penalty was demonstrated in the proceedings of the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court which convened on 15 June 1998 in Rome. In the final result, the Rome Statute rejects death penalty. Attended by delegates from 160 States, the Rome Conference was a landmark departure from the maximum penalty of death imposed by the Nuremberg and Tokyo War Crime Trials. As notably observed by one commentator,

Reflecting developments in international human rights law, the [International Criminal] Court excludes any possibility of capital punishment, despite the seriousness of the offenses that it will judge.⁶

In deliberate omission of the death penalty, the applicable penalties in Article 77 of the Rome Statute of the International Criminal Court⁷ are limited to the following:

1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

⁵ Lief H. Carter, *Capital Punishment* in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 125 (Kermit L. Hall ed., 1992)

⁶ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 162 (2004).

⁷ The Rome Statute is published in Compilation of Core Documents of the International Criminal Court by the Coalition for the International Court (2003).

- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Under Article 110 of the Rome Statute, the Court may review the sentence it has pronounced before its expiration. It has the right to decide any reduction of the sentence. The convicted person may make an appeal against his conviction on error of law or of law on “[a]ny other ground that affects the fairness or reliability of the proceedings or decision.”⁸ His sentence may be appealed from “on the ground of disproportionate between the crime and the sentence.”⁹ In such a case, the Court may consider that “there are grounds to reduce the sentence.”¹⁰

An extraordinary remedy is provided by the Rome Statute in Article 84, as follows:

1. The convicted person or, *after death* spouses, children, parents or one person alive *at the time of the accused's death* who has been given express written instruction from the accused to bring such a claim, ... on the person's behalf, may apply to the Appeals Chamber *to revise the final judgment of conviction, or sentence....*

The Rome Statute may trace its origin from the first draft prepared for an International Criminal Court and adopted by the International Law Commission (ILC) in its forty-sixth session in 1994; it was submitted to the UN General Assembly in that year. In providing for “applicable penalties,” article 47, paragraph 1(a) of the ILC draft makes no mention at all of death penalty. It recommends instead that:

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:
 - (a) A term of life imprisonment, or of imprisonment for a specific number of years;
 - (b) A fine.

⁸ Rome Statute, art. 81, para. 1(b).

⁹ *Id.* art. 81, para. 2(a).

¹⁰ *Id.* art. 81, para. 2(c).

Both the *ad hoc* international criminal tribunals created by the UN Security Council are not allowed to impose death penalty. By authority of Resolution 827 of 25 May 1993, the Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1997. In his compliance report, the UN Secretary General, stressed the recommendation that “The International Tribunal shall not be empowered to impose the death penalty.” Without capital punishment, the principal penalty that may be imposed by the Trial Chamber under its Statute “shall be limited to imprisonment.”

The same limitation is imposed on the International Criminal Tribunal for Rwanda, as established by Security Council Resolution 955 of 8 November 1994, in which it is provided in Article 23 of its Statute that the death penalty “shall be limited to imprisonment.”¹¹

V. Abolition of Death Penalty as Integral to International Human Rights

Where abolition of death penalty is not normatively declared, the right to life is affirmed by which the value of human life is held as paramount. The International Covenant on Civil and Political Rights¹² has the following formulation in paragraph 1, Article 6:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.

In this context, the right to life extends its abolitionist implication to death penalty under paragraph 2 of the same Article which provides that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the laws enforced at the time of the commission of the crime and not contrary to the provisions of the present Covenant.

¹¹ For text of both Statutes, see 5 Criminal Law Forum 597-714 (1994).

¹² 999 UN Treaty Series 172.

The right to life is strengthened as a norm against death penalty in the light of the further regulatory limitations as set forth in the following provisions of paragraph 4, 5 and 6 of the aforementioned Article 6:

Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

In Resolution 44/128 of 15 December 1989, the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights.¹³ It entered into force on 11 July 1991 with its undertaking on “an international commitment to abolish the death penalty.” It declares that “all measures of abolition of death penalty should be considered as progress in the enjoyment of the right to life.”

The State Parties to this Protocol are of the agreement under paragraph 1, Article 6, that its provisions shall apply as additional provisions of the Covenant.” In particular, the Protocol provides in Article 1, as follows:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Much earlier than the Covenant, the European Convention for the Protection of Human Rights and Fundamental Freedoms which entered into force in 1953, carries the mandate on the right to life that it “shall be protected by

¹³ For the text of the Second Protocol of the Covenant, see Brownlie & Goodwin-Gil, *supra* note 3, at 203.

law.” It may be considered as integrated into the abolition of the death penalty by reason of its Protocol No. 6¹⁴ which provides in Article 1 that:

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Under Article 6 of the Protocol, the provision on the abolition of the death penalty “shall be regarded as additional articles to the Convention.”

It is virtually through the same process that the abolition of the death penalty is integrated into the right to life under the American Convention on Human Rights. Signed by 13 American States in 1969, it entered into force on 18 July 1978. Its protection of the right to life is provided under paragraph 1, Article 4, thus:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life.

Its protection of the right to life impliedly includes the abolition of the death penalty. Paragraph 2 of Article 2 of the Convention provides:

1. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court....
2. Capital punishment shall not be re-established in States that have abolished it.
3. In no case shall capital punishment be inflicted for political offenses or related common crimes....

Just the same, the States Parties to the American Convention have expressed their commitments to the abolition of the death penalty in a Protocol¹⁵ on the following considerations:

1. That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

¹⁴ Text of Protocol No. 6, European Convention, See Brownlie & Goodwin-Gil, *supra* note 3, at 398.

¹⁵ Brownlie & Goodwin-Gil, *supra* note 3, at 701-702.

2. That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;
3. That the tendency among the American States is to be in favor of abolition of the death penalty;
4. That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;
5. That the abolition of the death penalty helps to ensure more effective protection of the right to life;
6. That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights; and
7. That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas....

Hence, in Article I:

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

VI. Human Rights as Erga Omnes Obligation in International Law

It may be assumed that the protection of the right to life against the death penalty is included in the category of obligations *erga omnes*. The distinctive character of this obligation is described by the International Court of Justice (ICJ) in the *Barcelona Traction Case* by distinguishing it from obligation *inter se* which it owes to another State. The Court declares that:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another state.... By their nature... [they] are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

As it gives examples of such obligations, the ICJ makes specific mention of “the principles and rules concerning the basic rights of the human person, ...”

VII. Derogation of Protection of Right to Life Against Death Penalty Rendered Impermissible Expressly by International Convention as a Source of Law

With regard to the International Covenant on Civil and Political Rights, in time of emergency that threatens the life of the nation, States Parties “may take measures derogating from their obligations,” as allowed under Article 4 of the Covenant. However, this derogation clause explicitly excludes from its coverage Article 6 which protects the right to life and abolition of the death penalty.

Under the Second Protocol of the Covenant, the prohibition against execution and the demand to take all measures necessary to the abolition of the death penalty, “shall not be subject to any derogation under Article 4 of the Covenant.”

Regarding the European Convention for the Protection of Human Rights and Fundamental Freedoms with respect to right to life,¹⁶ as well as under its Protocol No. 6 on the abolition of the death penalty,¹⁷ no derogation is permitted even in case of time of emergency.¹⁸

No derogation is permitted under the American Convention on Human Rights, even in time of war or other emergency.¹⁹ The no-derogation clause applies to the protection of the right to life to which abolition of the death penalty is integrated.²⁰

The Arab Charter on Human Rights, adopted by twenty-three members of the Arab League in 1994, provides for strict regulation in the application of the death penalty. It may be imposed “only for the most serious crimes. Anyone sentenced to death “shall have the right to seek pardon or commutation of the sentence. Death penalty shall not be imposed for a political offence.”²¹

¹⁶ European Convention for the Protection of Human Rights, art. 2 [hereinafter Convention].

¹⁷ *Id.*, art. 15; Protocol No. 6 of the Convention, art. 3 [hereinafter Protocol].

¹⁸ Convention, *supra* note 16, art. 15; Protocol, *supra* note 17, art. 3.

¹⁹ Convention, *supra* note 16, art. 27.

²⁰ *Id.* art. 4.

²¹ The Arab Charter on Human Rights, arts. 10-11.

VIII. Abolition of Death Penalty as Integral Part of the Right to Life: Characterized as Peremptory Norm (*Jus Cogens*) of General International Law

In Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law (*jus cogens*) is characterized as:

a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international norm of the same character.

In the presentation given above, a great number of States are shown as engaged in “general practice accepted as law,” evidencing international custom. Even as they are categorized as obligations *erga omnes* the “principles and rules concerning the basic rights of the human person,” may be regarded as well as “general principles of law recognized by civilized nations,” which the ICJ considers as a source of international law.²² Under the International Covenant alone, 169 State Parties which include the Philippines, may constitute “international community as a whole” in the acceptance and recognition of peremptory norm. Taking into account the regional application of the norms in question, as pointed above, their consolidation as such, and together with the States Parties of the International Covenant, may suffice to meet the standards in the making of peremptory norm.

Above all these considerations stands the right to life, together with the abolition of death penalty as integral part of it, as the most fundamental human right and as such, decisively, a peremptory norm of general international law.

This clears the way to the understanding that international law has gone through the process of renewing its foundation on the transcendental value of life.

²² Statute of the International Court of Justice, art. 38(c).