

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)

Introduction

This study could not have been written fifty-five years ago because its subject matter did not exist. International norms addressing the limitation and the abolition of the death penalty are essentially a post-Second World War phenomenon. As a goal for civilized nations, abolition was promoted during the drafting of the *Universal Declaration of Human Rights*¹ in 1948, although it found expression only implicitly in the recognition of what international human rights law designated ‘the right to life’. At the time, all but a handful of States maintained the death penalty and, in the aftermath of a brutal struggle which had taken hundreds of millions of lives, few were even contemplating its abolition. When Uruguay objected to inclusion of the death penalty in the *Charter of the Nuremberg Tribunal*,² it was accused of having Nazi sympathies.³ In 1946, a Norwegian court ruled that the death penalty was actually prescribed, by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country’s ordinary criminal law.⁴ The United Nations Command, during the Korean War, formally provided for imposition of the death penalty on prisoners of war for post-capture offences.⁵

The idea of abolition gained momentum over the following decades. International lawmakers urged the limitation of the death penalty, by, for example, excluding juveniles, pregnant women and the elderly from its scope and by restricting it to an ever-shrinking list of serious crimes. Enhanced procedural

¹ GA Res. 217 A (III), UN Doc. A/810 (hereinafter, the *Universal Declaration* or *Declaration*).

² *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, (1951) 82 UNTS 280, art. 27. On the debate about use of the death penalty for war crimes, see: Claude Pilloud, ‘La protection pénale des conventions humanitaires internationales’, [1953] *Revue internationale de la croix-rouge* 842, pp. 862–863.

³ UN Doc. A/C.3/SR.811, para. 28.

⁴ *Public Prosecutor v. Klinge*, (1946) 13 *Ann. Dig.* 262 (Supreme Court, Norway).

⁵ ‘Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command’, in Howard S. Levie, ed., *Documents on Prisoners of War*, Newport, R.I.: Naval War College Press, 1979, p. 592; ‘Regulations Governing the Penal Confinement of Prisoners of War of the United Nations Command’, *ibid.*, p. 614.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)2 *The abolition of the death penalty*

safeguards were required where the death penalty still obtained. Eventually, three international instruments were drafted that proclaimed the abolition of the death penalty, the first adopted in 1983 and the others only at the end of the 1980s.⁶ Sixty-eight States are now bound by these international legal norms abolishing the death penalty,⁷ and the number continues to grow rapidly.⁸ Fifty-five years after the Nuremberg trials, the international community has now ruled out the possibility of capital punishment in prosecutions for war crimes and crimes against humanity.⁹

The importance of international standard setting was evidenced by parallel developments in domestic laws. From a handful of abolitionist States in 1945, the list grew steadily until, by 2001, considerably more than half the countries in the world had abolished the death penalty *de facto* or *de jure*. Those that still retain it find themselves increasingly subject to international pressure in favour of abolition, sometimes quite direct, for example, in the refusal to grant extradition where a fugitive will be exposed to a capital sentence. Abolition of the death penalty is generally considered to be an important element in democratic development for States breaking with a past characterized by terror, injustice and repression. In some cases, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty.¹⁰ In others,

⁶ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, ETS 114 (hereinafter *Protocol No. 6*) (see Appendix 15, p. 424); *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, GA Res. 44/128, (1990) 29 ILM 1464 (hereinafter the *Second Optional Protocol*) (see Appendix 4, p. 397); *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OASTS 73, 29 ILM 1447 (see Appendix 21, p. 438). A fourth treaty, the *American Convention on Human Rights*, (1979) 1144 UNTS 123, OASTS 36 (hereinafter the *American Convention*) (see Appendix 20, p. 436), is also an abolitionist instrument because it prevents countries which have already abolished the death penalty from reintroducing it. Thus, a State which has abolished the death penalty at the time of ratification of the *American Convention* is abolitionist from the standpoint of international law.

⁷ Albania, Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkmenistan, Ukraine, United Kingdom, Uruguay, Venezuela and Yugoslavia. These States are abolitionist either *de jure* or *de facto*, and parties to one or more of the abolitionist treaties.

⁸ Several European States have pledged to ratify *Protocol No. 6*, within twelve months as a condition for joining the Council of Europe.

⁹ The Security Council has excluded use of the death penalty by the two international *ad hoc* tribunals created to deal with war crimes in the former Yugoslavia and Rwanda: *Statute of the International Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827 (1993), annex, art. 24 §1; *Statute of the International Tribunal for Rwanda*, UN Doc. S/RES/955 (1994), annex, art. 23 §1. The death penalty is excluded from the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, art. 77.

¹⁰ For example, the Arusha peace agreement of August 1993, which forms part of Rwandan fundamental law, provides for accession to all human rights treaties, and this is generally recognized as including the *Second Optional Protocol*: 'Protocole d'Accord entre le Gouvernement de la République Rwandaise et le

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)

Introduction

3

it has been the contribution of the judiciary, of judges applying constitutions that make no specific mention of the death penalty but that enshrine the right to life and that prohibit cruel, inhuman and degrading treatment or punishment.¹¹ Abolition of capital punishment features as one of the criminal law initiatives of the United Nations in its administration of Cambodia,¹² Kosovo¹³ and East Timor.¹⁴ The day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of *jus cogens*, is undeniably in the foreseeable future.

The death penalty has existed since antiquity. Anthropologists even claim that the drawings at Valladolid by prehistoric cave dwellers show an execution. The death penalty may well have had its origins in human sacrifices. In positive law, capital punishment can be traced back as early as 1750 BC, in the *lex talionis* of the Code of Hammurabi.¹⁵ The Bible set death as the punishment for such crimes as magic, violation of the sabbath, blasphemy, adultery, homosexuality, relations with animals, incest and rape.¹⁶ Yet the Jewish courts developed procedural safeguards for its employment. According to the Talmud, one rabbi called 'destructive' a Sanhedrin who imposed the death sentence once in seven years. Another said 'once in seventy years', and two others said they would never impose a death sentence.¹⁷

Front Patriotique Rwandais portant sur les questions diverses et dispositions finales signé à Arusha', 3 August 1993, *Journal officiel*, Year 32, no. 16, 15 August 1993, p. 1430, art. 15. The *Constitution of Bosnia and Herzegovina*, which forms Annex IV of the 'General Framework Agreement for Peace in Bosnia and Herzegovina', reached at Dayton, Ohio in November 1995, is even more explicit, providing that the new republic respect the protocols to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955) 213 UNTS 221, ETS 5 (hereinafter the *European Convention*), including its *Protocol No. 6* at arts. II§2 and IV§3(c), and the *Second Optional Protocol* at Annex I, §7. See also Annex IV to the Dayton agreement, dealing with human rights, at arts. I and II§2(a) and Appendix §8. The Human Rights Chamber of Bosnia and Herzegovina has declared the death penalty to be unconstitutional: *Damjanovic v. Federation of Bosnia and Herzegovina* (Case No. CH/96/30), 5 September 1997, Decisions on Admissibility and Merits 1996–1997, p. 147.

¹¹ *S. v. Makuranyane*, 1995 (3) SA 391, (1995) 16 HRLJ 154 (Constitutional Court of South Africa); Ruling 23/1990 (X.31) AB, Constitutional Court of Hungary, Judgment of 24 October 1990, *Magyar Közlöny* (Official Gazette), 31 October 1991; Ukraine, Constitutional Court ruling, 30 December 1999; Albania, Constitutional Court ruling 10 December 1999.

¹² 'Provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period,' Supreme National Council decision of 10 September 1992.

¹³ 'Regulation No. 1999/1, on the Authority of the Interim Administration in Kosovo', UN Doc. UNMIK/REG/1999/1.

¹⁴ 'Regulation No. 1999/1, on the Authority of the Transitional Administration in East Timor', UN Doc. UNTAET/REG/1999/1, was promulgated by the United Nations Transitional Administrator on 27 November 1999. Death sentences were pronounced in East Timor in December 1997, apparently the first since the Indonesian occupation in 1975: 'Situation in East Timor, Report of the Secretary-General', UN Doc. E/CN.4/1998/58.

¹⁵ Paul Savoy-Casard, *La peine de mort: esquisse historique et juridique*, Geneva: Droz, 1968, at pp. 4–14.

¹⁶ Exodus xxi, 14, xxii, 18; Leviticus xx, 13, 15, xxiv; Deuteronomy xxi, 21, xxii, 11, 25, xxix, 13; Numbers, xiii, 5, xvii, 7, xix, 19, xxii, 23, xxxiii 14, 37. See: Jean Imbert, *La peine de mort*, Paris: Presses universitaires de France, 1989, pp. 7–8.

¹⁷ Charles L. Black Jr, *Capital Punishment: The Inevitability of Caprice and Mistake*, New York: Norton, 1974, at p. 94; F. Frez, 'Thou Shalt Not Execute. Hebrew Law Perspective on Capital Punishment', (1981) 19 *Criminology* 25.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)4 *The abolition of the death penalty*

The scourge of the death penalty cut short the life of one of ancient Greece's greatest thinkers, Socrates. Plato discussed the scope of the death penalty at length in his *Laws*.¹⁸ Yet the death penalty had its opponents, even in early times. Thucydides reports a debate between Cleon and Diodotus concerning the implementation of the death penalty to suppress a rebellion of the island of Mitylene: 'We must not, therefore, commit ourselves to a false policy through a belief in the efficacy of the punishment of death, or exclude rebels from the hope of repentance and an early atonement of their error', said Diodotus, whose eloquent words rallied the majority of the Athenian assembly.¹⁹

During the Middle Ages, the death penalty was characterized by particular brutality.²⁰ Its legitimacy was defended by many of the great thinkers of the Renaissance and the Reformation. Grotius considered the issue at some length, finding it to be justified with reference to the Bible and other examples of Christian mores and in fact used the acceptance of capital punishment to justify the legality of warfare.²¹ Both Thomas Hobbes and John Locke admitted that the death penalty was justifiable.²²

Jean-Jacques Rousseau believed that in society man had a right not to be killed as long as he did not kill anyone else.²³ Diderot, too, was in favour of the death penalty: 'Il est naturel que les lois aient ordonné le meurtre des meurtriers.'²⁴ But the Enlightenment also saw the emergence of partial abolitionism. Montesquieu, for example, called for limitation of the death penalty to murder, attempted murder, certain types of manslaughter and some offences against property, although he did not commit himself to full abolition.²⁵

¹⁸ Plato, *The Laws*, Book VIII, Chapter 16, London: Harmondsworth, 1970, at pp. 353–366. Also on the death penalty in ancient Greece, see: P. Gelbert, 'L'exécution des condamnés à mort en Grèce antique', [1948] *Revue internationale de criminologie et de police technique* 38; Irving Barkan, *Capital Punishment in Ancient Athens*, Chicago, 1936; Jan Gorecki, *Capital Punishment, Criminal Law and Social Evolution*, New York: Columbia University Press, 1983, pp. 31–80.

¹⁹ Thucydides, 'The Peloponnesian War', ch. 9, §§38–48, in *The Complete Writings of Thucydides*, New York: Modern Library, 1934, pp. 164–172.

²⁰ Jean Imbert, *La peine de mort*, at pp. 16–24; Richard J. Evans, *Rituals of Retribution, Capital Punishment in Germany 1600–1987*, Oxford: Clarendon Press, 1996.

²¹ H. Grotius, *De jure belli ac pacis libri tres*, trans. Francis W. Kelsey, Oxford: Clarendon Press, 1925, at pp. 66–86. A similar connection between war and the death penalty was made by the Italian criminologist Garofalo: Raffaele Garofalo, *Criminology*, Montclair, N.J.: Patterson Smith, 1968, pp. 51–53.

²² R. Zaller, 'The Debate on Capital Punishment During the English Revolution', (1987) 31 *American J. Legal History* 126.

²³ Jean-Jacques Rousseau, *Le contrat social*, Book II, ch. 5, Paris: Pléiade, Vol. III, pp. 376–377.

²⁴ Quoted in Jacques Goulet, *Robespierre, La peine de mort et la terreur*, Paris: Le Castor Astral, 1983, p. 13.

²⁵ Montesquieu, *De l'esprit des lois*, Paris: Société des belles lettres, 1950, pp. 159–161. See J. Graven, 'Les conceptions pénales et l'actualité de Montesquieu, [1949] *Revue de droit pénal et de criminologie* 161; Jean Imbert, 'La peine de mort et l'opinion au XVIII^e siècle', [1964] *Revue de science criminelle et de droit pénal comparé* 521; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol. I, London: Stevens and Sons, 1948, pp. 268–284.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)

Introduction

5

The modern abolitionist movement establishes its paternity with the great Italian criminologist, Cesare Beccaria. His work, *Dei delitti et delle pene*,²⁶ convinced such statesmen as Voltaire, Jefferson, Paine, Lafayette and Robespierre of the uselessness and inhumanity of capital punishment²⁷ and even led to ephemeral measures abolishing the death penalty in Austria and Tuscany.²⁸

During debate on the adoption of the French *Code pénal* in 1791, Robespierre argued vigorously for the abolition of the death penalty.²⁹ He failed to convince the majority of the National Assembly, and the death penalty was retained, although in the relatively humane form proposed by his colleague, Dr Joseph-Ignace Guillotin. Robespierre later had a change of heart, calling for the execution of Louis XVI as a 'criminel envers l'humanité',³⁰ something that Thomas Paine, also an abolitionist, deemed a betrayal.³¹ But the abolitionist ideal had not been completely obscured, and the Convention, in its final session, following the execution of Robespierre, decreed: 'À dater du jour de la publication générale de la paix, la peine de mort sera abolie dans la République française.'³²

The abolitionist movement grew during the nineteenth century, rallying the support of such important English jurists as Bentham and Romilly.³³ In 1846, Michigan became the first jurisdiction to abolish capital punishment permanently.³⁴ Venezuela and Portugal abolished the death penalty in 1867,

²⁶ Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci, Indianapolis: Bobbs-Merrill, 1963.

²⁷ Steven Lynn, 'Locke and Beccaria: Faculty Psychology and Capital Punishment', in William B. Thesing, *Executions and the British Experience from the 17th to the 20th Century: A Collection of Essays*, Jefferson, N.C.: McFarland, pp. 29–44; Robert Badinter, 'Beccaria, l'abolition de la peine de mort et la Révolution française', [1989] *Revue de science criminelle et de droit pénal comparé* 245; Mireille Delmas-Marty, 'Le rayonnement international de la pensée de Cesare Beccaria', [1989] *Revue de science criminelle et de droit pénal comparé* 252; Jean Imbert, *La peine de mort*.

²⁸ Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform*, Philadelphia: Temple University Press, 1972; Radzinowicz, *A History*, pp. 290–293.

²⁹ Maximilien Robespierre, *Œuvres*, VII, Paris: Presses universitaires de France, 1952, pp. 432–437. See: Savy-Casard, *La peine de mort*, pp. 70–75; Goulet, *Robespierre*.

³⁰ Maximilien Robespierre, *Œuvres*, IX, Paris: Presses universitaires de France, 1952, p. 130.

³¹ Thomas Paine, 'Preserving the Life of Louis Capet', in Michael Foot, Isaac Kramnick, *The Thomas Paine Reader*, London: Penguin, 1987, pp. 394–398.

³² Decree of the fourth brumaire, year IV, quoted in Savy-Casard, *La peine de mort*, p. 80. It was not, however, until 1981 that France consigned its guillotine to the museum. On the history of capital punishment in France, see: Jean-Claude Chesnais, *Histoire de la violence en Occident de 1800 à nos jours*, Paris: Robert Laffont, 1981, pp. 138–154; Daniel Arasse, *La Guillotine et l'imaginaire de la terreur*, Paris: Flammarion, 1987.

³³ Radzinowicz, *A History*, pp. 497–525; Hugo Adam Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', (1983) 74 *J. Criminal Law and Criminology* 1033; James E. Crimmins, "'A Hatchet for Paley's Net': Bentham on Capital Punishment and Judicial Discretion', (1988) 1 *Canadian J. Law and Jurisprudence* 63. For the history of the English abolitionist movement during the nineteenth century, see Leon Radzinowicz, Roger Hood, *A History of English Criminal Law and its Administration from 1750*, Vol. V, London: Stevens and Sons, 1986, pp. 661–688.

³⁴ D. B. Davis, 'Movement to Abolish Capital Punishment in America, 1787–1861', (1957) 63 *American Historical Rev.* 23; Louis Filler, 'Movements to Abolish the Death Penalty in the United States', (1952) 284 *Annals of the American Academy of Political and Social Science* 124.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)6 *The abolition of the death penalty*

followed by the Netherlands (1870), Costa Rica (1882), Brazil (1889) and Ecuador (1897). Panama, created in 1903, never enacted the death penalty.³⁵ But abolition suffered a setback in the first decades of the twentieth century. Part of this was due to the influential criminological doctrines of Garofalo, Lombroso and Ferri, who argued that the death penalty was scientifically necessary as a social measure.³⁶ The rise of totalitarianism in Europe after the First World War was also responsible for a resurgence of the death penalty. Hitler, an enthusiast of the death penalty from his earliest days, wrote casually about the execution of 10,000 people in *Mein Kampf*.³⁷ Nazi use of the death penalty against prisoners and civilians was cited in the final judgment of the international war crimes tribunal at Nuremberg,³⁸ and Nazi judges and prosecutors were themselves punished by post-war tribunals for their cavalier resort to capital punishment.³⁹

The international experts who assembled in the aftermath of the Second World War with the mission of enumerating fundamental rights and freedoms included in their lists a 'right to life'. As obvious as the right's importance appeared, its content was far from evident. Central to the preoccupations of these drafters was the issue of the death penalty. The post-war context had sensitized them to the terrible abuses of the death penalty prior to and during the armed conflict. Furthermore, they were conscious of giving effect to an abolitionist movement that had been gaining support, albeit with sporadic reversals, for the past two centuries. At the same time, the death penalty was almost universally applied, and even many of the most steadfast opponents of capital punishment were tempted to make exceptions in the cases of war criminals and collaborators. This was the dialectic that confronted those who first proclaimed, in international law, a 'right to life'.

The *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on 10 December 1948, declared the right to life in absolute fashion, any limitations being only implicit.⁴⁰ The same approach was taken in the *American Declaration on the Rights and Duties of Man*, adopted 4 May 1948.⁴¹ In several subsequent international human rights instruments,

³⁵ See: Ricardo Ulate, 'The Death Penalty: Some Observations on Latin America', (1986) 12–13 *United Nations Crime Prevention and Criminal Justice Newsletter* 27.

³⁶ Raffaele Garofalo, *Criminology*, pp. 104–105, 376, 410; Cesare Lombroso, *Crime, Its Causes and Remedies*, Montclair, N.J.: Patterson Smith, 1968, pp. 426–428; Enrico Ferri, *Criminal Sociology*, New York: Agatha Press, 1967, p. 527.

³⁷ Adolf Hitler, *Mein Kampf*, Boston: Houghton Mifflin, 1943, p. 545.

³⁸ *France et al. v. Goering et al.*, (1946) 22 IMT 203.

³⁹ *United States of America v. Alstötter et al.* ('Justice trial'), (1948) 3 TWC 1, 6 LRTWC 1, 14 ILR 278 (United States Military Commission).

⁴⁰ Art. 3 (see Appendix 1, p. 379).

⁴¹ OAS Doc. OEA/Ser.L./V/I.4, art. I (hereinafter, the *American Declaration*) (see Appendix 19, p. 435).

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)*Introduction*

7

notably the *International Covenant on Civil and Political Rights*,⁴² the *European Convention on Human Rights*⁴³ and the *American Convention on Human Rights*,⁴⁴ the death penalty is mentioned as a carefully worded exception to the right to life. In other words, from a normative standpoint, the right to life protects the individual against the death penalty unless otherwise provided as an implicit or express exception. The right to life in international law also ensures that the death penalty cannot be imposed without rigorous procedural safeguards, or against certain protected categories of persons, such as juveniles, pregnant women and the elderly.

There are some rather obvious exceptions to the right to life, indeed so obvious that there is really no need to make explicit mention of them in the international norms. An individual has the right to self-defence, including the right to take another's life where his or her own life is threatened by that person. In recognizing a defence of self-defence in its criminal legislation, the State breaches the right to life of the attacker. It is an exception that all but the most suicidal would quarrel with, and one that can also be justified in the name of the right to life, for it protects the right to life of the victim. The international law of armed conflict protects enemy combatants from criminal charges if captured, providing they bear arms, wear uniforms and meet the other requirements of the third *Geneva Convention*⁴⁵ and the *Protocol Additional I*.⁴⁶ Yet such protection, by tolerating the 'accidental' killing of civilians caught in the armed conflict, violates the right to life of these innocent victims. Here too, the exception to the right to life is an implicit one.

The *European Convention on Human Rights* is the only instrument to attempt an exhaustive list of exceptions to the right to life. The United Nations and the Inter-American systems chose to avoid such an approach, and instead declared simply that life could not be taken 'arbitrarily', leaving the scope of such exceptions to the interpreter. But all three instruments list separately what is the most striking exception to the right to life, the death penalty. Even the *European Convention* sets the death penalty apart from the other exceptions, dealing with it in a distinct paragraph. This is because, while the other exceptions are logical and self-evident, there is something contradictory and incompatible about recognizing a right to life and at the same time permitting

⁴² (1976) 999 UNTS 171, art. 6 (hereinafter, the *Civil Rights Covenant* or *Covenant*) (see Appendix 2, p. 380).

⁴³ (1955) 213 UNTS 221, ETS 5, art. 2§1 (hereinafter the *European Convention*) (see Appendix 14, p. 423).

⁴⁴ See Appendix 20, p. 436.

⁴⁵ *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135.

⁴⁶ *Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 3.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)8 *The abolition of the death penalty*

capital punishment. The drafters of the various instruments, intuitively, knew this.

The 'right to life' has been described at various times as 'the supreme right',⁴⁷ 'one of the most important rights',⁴⁸ 'the most fundamental of all rights',⁴⁹ 'the primordial right',⁵⁰ 'the foundation and cornerstone of all the other rights',⁵¹ 'le droit suprême, . . . la condition nécessaire à l'exercice de tous les autres',⁵² 'le noyau irréductible des droits de l'homme',⁵³ the 'prerequisite for all other rights',⁵⁴ and a right which is 'basic to all human rights'.⁵⁵ Basic as it appears, it is at the same time intangible in scope, and vexingly difficult to define with precision. The French scholar Frédéric Sudre describes it as an 'uncertain' right.⁵⁶ Perhaps more than any other, it is a right whose content is continuously evolving, in step with the hegemony of ever more progressive attitudes to capital punishment, nuclear arms, abortion and euthanasia, to mention only a few of the many issues that interpreters of the right to life have addressed.

There are two contending schools on the interpretation of the 'right to life'. The more restrictive school, one of narrow construction, would limit its scope to those issues considered by the drafters of the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.⁵⁷ The narrow view confines the protection offered by the right to life to such matters as capital punishment, abortion, disappearances, non-judicial executions and other forms of intentional or reckless life-taking by the State.

⁴⁷ *General Comment 6(16)*, UN Doc. CCPR/C/21/Add.1, also published as UN Doc. A/37/40, Annex V, UN Doc. CCPR/3/Add. 1, pp. 382–383 (see Appendix 5, p. 402). See also, *de Guerrero v. Colombia* (No. 45/1979), UN Doc. C/CCPR/OP/1, p. 112, p. 117.

⁴⁸ *Stewart v. United Kingdom* (App. No. 10044/82), (1985) 7 EHRR 453.

⁴⁹ Theo C. Van Boven, 'The Need to Stop Deliberate Violations of the Right to Life', in Daniel Prémont, ed., *Essais sur le concept de 'droit de vivre' en mémoire de Yougindra Khushalani*, Brussels: Bruylant, 1988, pp. 285–292, p. 285.

⁵⁰ Bertrand G. Ramcharan, 'The Concept and Dimensions of the Right to Life', in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1985, pp. 1–32, p. 12; René Brunet, *La garantie internationale des droits de l'homme d'après la Charte de San-Francisco*, Geneva: Grasset, 1947, p. 211.

⁵¹ Inter-American Commission of Human Rights, *Diez Años de Actividades, 1971–1981*, Washington, D.C.: Organization of American States, 1982, p. 339; *Annual Report of the Inter-American Commission on Human Rights, 1986–1987*, OAS Doc. OEA/Ser.L/V/II.71 doc. 9 rev. 1, p. 271.

⁵² Frédéric Sudre, *La Convention européenne des droits de l'homme*, Paris: Presses universitaires de France, 1990, p. 87.

⁵³ A.-C. Kiss, J.-B. Marie, 'Le droit à la vie', (1974) 7 *HRJ* 338, p. 340.

⁵⁴ 'Initial Report of Uruguay', UN Doc. CCPR/C/1/Add.57.

⁵⁵ *General Comment 14(23)*, UN Doc. A/40/40, Annex XX, UN Doc. CCPR/C/SR.563, para. 1.

⁵⁶ Frédéric Sudre, *La Convention européenne*, pp. 87–88.

⁵⁷ Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York: Columbia University Press, 1981, pp. 114–137, p. 115; J. E. W. Fawcett, *The Application of the European Convention on Human Rights*, 2nd ed., Oxford: Clarendon Press, 1987, p. 37; F. Przetacnik, 'The Right to Life as a Basic Human Right', (1976) 9 *HRJ* 585.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)*Introduction*

9

The broader view of the right to life is considerably more recent and attempts to introduce an economic and social content, a 'right to live', as it is sometimes called.⁵⁸ According to this approach, the right to life includes a right to food, to medical care and to a healthy environment. This is the outlook that has been adopted by the Human Rights Committee in the interpretation of article 6 of the *International Covenant on Civil and Political Rights*⁵⁹ and is shared by some of the States parties.⁶⁰

However, both schools agree that the issue of the death penalty is at the core of the right to life, and this is confirmed by an historical approach to the definition of the right. The early international instruments, notably the *Universal Declaration of Human Rights*, drew heavily on national declarations of fundamental rights that were inspired by the *Magna Carta*, the United States *Bill of Rights*, and the French *Déclaration des droits de l'homme et du citoyen*. There was nothing absolute about these early statements of the right to life; it was a right to protection of one's life from arbitrary deprivation by the State, in reality more of a licence to the State to execute, providing that procedural guarantees were observed. The earliest recognition of this protection is *Magna Carta*, whose chapter 26 provides:

No freedman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.⁶¹

Declarations of the right to life appear in a number of pre-revolutionary American documents, authored by Puritans who had fled religious persecution in England. For example, the *Massachusetts Body of Liberties*, dated 10 December 1641, proclaims:

No mans life shall be taken away . . . unlesse it be by bertue or equitie of some expresse law of the country narrating the same, established by a generall Cort and sufficiently published . . .⁶²

⁵⁸ Bertrand G. Ramcharan, 'The Right to Life', (1983) 30 *NILR* 297; Ramcharan, 'The Concept', p. 6; Hector Gros Espiell, 'The Right to Life and the Right to Live', in Prémont, ed., *Essais*, pp. 45–53; Mikuin Liel Balanda, 'Le droit de vivre', in Prémont, *ibid.*, pp. 31–41; Yougindra Khushalani, 'Right to Live', in Prémont, *ibid.*, p. 283; Thomas Desch, 'The Concept and Dimensions of the Right to Life – As Defined in International Standards and in International and Comparative Jurisprudence', (1985–86) 36 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 77.

⁵⁹ *General Comment* 6(16); *General Comment* 14(23).

⁶⁰ E.g. 'Initial Report of Canada', UN Doc. CCPR/C/1/Add.43. See also: UN Doc. CCPR/C/SR.205, para. 26 (Opsahl).

⁶¹ 6 Halsbury's Statutes (3rd edn) 401.

⁶² Richard L. Perry, John C. Cooper, *Sources of Our Liberties*, Washington, D.C.: American Bar Association, 1952, p. 148.

Cambridge University Press

052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

Excerpt

[More information](#)10 *The abolition of the death penalty*

The *Virginia Bill of Rights*, drafted by George Mason at the dawn of the American revolution, referred to ‘inherent rights’ to ‘the enjoyment of life’.⁶³ The *Declaration of Independence*, which followed by a few weeks, stated:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.

The fifth amendment to the United States *Constitution* specifically provides for procedural guarantees in cases of ‘a capital or otherwise infamous crime’, adding that no person shall:

... be deprived of life, liberty, or property, without due process of law.

The fourteenth amendment, adopted on 28 July 1868, extended this protection to legislation of the States.

The drafters of the French *Déclaration des droits de l’homme et du citoyen* did not include the right to life, an omission that one scholar has explained with the observation that it is unnecessary to state a right without which all others have no *raison d’être*.⁶⁴ The *Déclaration* enumerates, at article 2, the ‘inalienable rights of man’ as being ‘liberty, property, security, and resistance to oppression’. The Marquis de Lafayette, who had been inspired by American models and assisted by Thomas Jefferson, included the right to life in his drafts of the *Déclaration*,⁶⁵ as did Marat and others.⁶⁶

Several national constitutions of the nineteenth and early twentieth century recognized the right to life, generally associated with a phrase acknowledging the exception of capital punishment. For example, Sweden’s 1809 *Constitution* states: ‘The King ... shall not deprive anyone or permit anyone to be deprived of life without legal trial and sentence.’⁶⁷ In a study prepared by the Secretariat of the Commission on Human Rights in early 1947, twenty-six such provisions in various national constitutions were identified.⁶⁸

The right to life is implicit in the early international humanitarian conventions. The random and arbitrary execution of prisoners of war was proscribed by article 23Sc of the Hague *Regulations* of 1907,⁶⁹ an interdiction that codified

⁶³ *Ibid.*, p. 311. See also: *Constitution of Pennsylvania*, *ibid.*, p. 329; *Constitution of Massachusetts*, *ibid.*, p. 374; *Constitution of New Hampshire*, *ibid.*, p. 382.

⁶⁴ Brunet, *La garantie*, p. 211.

⁶⁵ Stéphane Rials, *La déclaration des droits de l’Homme et du citoyen*, Paris: Hachette, 1988, pp. 528, 567, 590; Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, Vol. XIV, Princeton: Princeton University Press, 1958, pp. 438–440; *ibid.*, Vol. XV, pp. 230–233.

⁶⁶ Rials, *La déclaration*, p. 736 (Marat), p. 726 (Boislandry), pp. 717–718 (Pison de Galland), p. 707 (Georges-Cartou).

⁶⁷ Quoted in UN Doc. E/CN.4/AC.1/3/Add.1, p. 18. ⁶⁸ *Ibid.*, pp. 15–19.

⁶⁹ *Convention Regulating the Laws and Customs of Land Warfare (Hague Convention No. IV)*, *Regulations Concerning the Laws and Customs of Land War*, 3 Martens (3rd) 461, 2 *AJIL Supp.* 2, [1910] TS 9.