

Introduction

The death penalty is on the decline, if not yet on its deathbed. As death sentences and executions have declined globally,¹ the number of countries that have abolished capital punishment, either in law or in practice, has grown substantially in the last several decades.² Annual statistical data compiled by Amnesty International in 2021 shows that only a small fraction of the world's countries now actively use executions.³ Decades earlier, in December 1977, Amnesty International had led the way by convening a major international conference on capital punishment in Stockholm, Sweden, to coincide with the group's acceptance of the Nobel Peace Prize in Oslo, Norway.⁴ That conference resulted in the Declaration of Stockholm – a declaration expressing “total and unconditional opposition to the death penalty.”⁵ The world has more than 190 countries,⁶ but globally, executions are becoming more and more of an outlier. Amnesty International's 2018 annual report on capital punishment recorded executions in only twenty nations,⁷ with Amnesty's 2020 annual report reflecting that, for that year, the number of executions decreased by 26 percent in comparison to 2019 and the number of known executing countries fell to eighteen. “The significant drop,” the 2020 report observed of state-sanctioned executions, “was primarily linked to important reductions in executions in two of the countries that have historically reported high execution figures, Iraq and Saudi Arabia; and to a lesser extent some hiatuses that took place in response to the Covid-19 pandemic.” “The global total of newly imposed death sentences known to Amnesty International (at least 1,477),” the 2020 report added, “fell by 36% compared to 2019, partly because the Covid-19 pandemic caused disruptions and delays in criminal proceedings across the world.”⁸

The vast majority of the world's highly industrialized countries, including in Europe, have now either outlawed capital punishment or no longer use it.⁹ Although Japan and the United States (or, more accurately, *certain* American

jurisdictions) remain notable holdouts, all of Europe, except Belarus and Russian-occupied portions of eastern Ukraine, has become a death-penalty-free zone.¹⁰ In addition, many developing nations, national constitutions, and judicial systems around the globe no longer permit executions. The Hungarian Constitutional Court and the Constitutional Court of South Africa, for example, declared the death penalty unconstitutional in 1990 and 1995, respectively, with many other countries, including Mexico (2005), Albania (2007), Rwanda (2007), Bolivia (2013), Mongolia (2015), and Chad (2020), abolishing capital punishment in subsequent decades.¹¹ Already, many countries (e.g. Austria, Colombia, Ecuador, Germany, Honduras, Iceland, Italy, Mozambique, The Netherlands, Nicaragua, and Panama) explicitly prohibit the death penalty's use in their constitutions.¹² In a 2017 amicus brief submitted to the US Supreme Court in support of Abel Daniel Hidalgo's challenge to Arizona's death penalty law, Amnesty International emphasized that – at that time – 105 countries had abolished the death penalty, more than two-thirds of the world's nations had ceased using executions (either in law or practice), and fifty-six countries that had repealed the death penalty for all crimes had enshrined the death penalty's abolition in their national constitutions.¹³

This represents a sea change with respect to state practice. According to Amnesty International, the number of abolitionist countries stood at just eight in 1945, the year the United Nations was founded, and at only sixteen in 1977, when Amnesty International was awarded the Nobel Peace Prize for its “defence of human dignity against torture, violence, and degradation.”¹⁴ It was in the 1970s that Amnesty International launched its global campaign against capital punishment,¹⁵ ultimately leading to the landmark Declaration of Stockholm (1977). The declaration proclaimed that “[a]bolition of the death penalty is imperative for the achievement of declared international standards”; called upon “[a]ll governments to bring about the immediate and total abolition of the death penalty”; and asked “[t]he United Nations unambiguously to declare that the death penalty is contrary to international law.”¹⁶ Two years earlier, the World Medical Association's Declaration of Tokyo (1975) – which physicians later reaffirmed¹⁷ – had declared that doctors “shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected, accused or guilty” and that doctors “shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment are used or threatened.”¹⁸ In spite of a perception of long odds, even by its own front-line organizers, Amnesty International's campaign proved to be highly successful.

The global shift in attitudes was dramatic. By 1980, the number of abolitionist countries had expanded to approximately sixty, although in the years ahead, many nations and their leaders – clinging to habit and tradition – chose to retain capital punishment even as more and more nations abandoned that practice or restricted its use to limited circumstances. As Egyptian-American law professor M. Cherif Bassiouni (1937–2017), then president of the International Association of Penal Law, wrote in 1993 of the death penalty's status:

The right to be free from torture and cruel and degrading treatment or punishment is provided for in at least eighty-one national constitutions. Although the death penalty is not historically considered to constitute “cruel and unusual punishment” and is still in practice in a majority of the countries of the world, an increasing number of countries have either abolished it, restricted it to time of war, or have completely refrained from practicing it.¹⁹

By 2012, Juan Méndez – the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – had this to say: “Although it may still be considered that the death penalty is not *per se* a violation of international law, my research suggests that international standards and practices are in fact moving in that direction.” As Méndez explained of the state of the law he observed: “International law decidedly encourages abolition of the death penalty but does not require it. There is evidence, however, of an evolving standard within regional and local jurisprudence and state practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and CIDT.”²⁰ “CIDT” is the standard abbreviation of “cruel, inhuman or degrading treatment.”

In the twenty-first century, death sentences are increasingly the exception rather than the rule. By 2020, a record 123 nations voted in favor of a UN General Assembly resolution calling for a global moratorium on executions.²¹ In that year, the number of known executions around the globe fell to the lowest level that Amnesty International had recorded in at least a decade.²² After the plenary session of the UN General Assembly adopted the moratorium resolution in December 2020, Rajat Khosla, an Amnesty International representative, had this to say: “Countries which still practice the death penalty must treat this as a wake-up call – state-sponsored executions have no place in the modern world, or in any society committed to upholding human rights.” “This resolution brings us one step closer to consigning the death penalty, the ultimate cruel, inhuman and degrading punishment, to the history books,” he said. “We call on states that retain the death penalty,” he added, “to immediately

establish a moratorium on executions, as a first step towards abolishing its use completely.”²³ In 2021, Malawi’s highest court declared capital punishment unconstitutional and Sierra Leone became the twenty-third African country to abolish it, with its critics calling the death penalty a vestige of colonialism.²⁴ In signing the bill, Sierra Leone’s president, Julius Maada Bio, called capital punishment “inhumane,” observing: “As a nation, we have today exorcised horrors of a cruel past.” Sierra Leone’s last executions were carried out in 1998, when twenty-four military officers were executed after a coup attempt.²⁵

The Death Penalty’s Denial of Fundamental Human Rights: International Law, State Practice, and the Emerging Abolitionist Norm details why international law and domestic legal systems should no longer tolerate capital punishment. In particular, the book explains why the death penalty – still seen by a dwindling number of retentionist countries, in modern parlance, as a “lawful sanction”²⁶ – violates an individual’s right to life and is at odds with human dignity, the concept at the very heart of the world’s international human rights regime.²⁷ After all, if an individual is treated as sub-human and deprived of the right to life, that individual will have been deprived of *all* rights. The book also explains why capital punishment violates longstanding legal prohibitions against arbitrary, discriminatory, and excessive or disproportionate punishments, and how the death penalty is totally incompatible with the Rule of Law ideal and the existing bar on torturous punishments.

Twenty-first-century lawmakers and jurists – guided by human rights principles and using their own moral consciences – must abolish and outlaw capital punishment everywhere. The book argues that since the publication of the Italian philosopher Cesare Beccaria’s *Dei delitti e delle pene* (1764), the first published text to make a comprehensive case against capital punishment,²⁸ the law’s protection of human rights has evolved to a point such that the death penalty should be absolutely barred throughout the world in both peacetime and wartime. As Victor Hugo, the author of the novel *Le Dernier Jour d’un Condamné* (*The Last Day of a Condemned Man*, 1829), himself elegantly sought more than a century and half ago in an 1848 speech to France’s Constituent Assembly: “*l’abolition pure, simple et définitive de la peine de mort*” (the pure, simple, and definitive abolition of the death penalty). In a preface to the 1832 edition of his novel, Hugo – calling the death penalty’s abolition “the highest, holiest, most noble aim” – gave specific credit to Beccaria for condemning the practice that had “loomed over Christianity for centuries.”²⁹ In short, the global community, through the mechanism of international law, additional national constitutions, judicial decisions, and the passage or repeal of domestic laws, should insist on the death penalty’s total abolition and finally relegate executions to the past.³⁰

International law, or the “law of nations,” is the set of laws and norms governing relations between countries.³¹ It emerged to guide diplomacy, war, and trade, but it also articulates general principles of human rights. Already, international law strictly prohibits various vile and atrocious acts, such as genocide, slavery, war crimes, and torture, because of their grotesque cruelty and inhumanity. Such legal prohibitions, reflected in UN conventions, customary international law, and other sources of law, are generally accepted to embody *jus cogens* norms that bind all nations, notwithstanding any treaties or domestic laws to the contrary.³² The *jus cogens* terminology has its roots in Roman law and describes peremptory norms from which no country can deviate no matter the circumstances.³³ As *Black’s Law Dictionary* defines *jus cogens*, the Latin phrase for “compelling law”: “A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.”³⁴ In 2017, Nils Melzer, the UN Special Rapporteur on Torture, opined that:

While customary international law had not yet evolved to prohibit the death penalty in all circumstances, which meant that it was theoretically possible to retain the death penalty in compliance with international law, in practice the increasingly rigorous conditions imposed by international human rights jurisprudence made it almost impossible to carry out the death penalty without violating the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.³⁵

With more and more countries abandoning capital punishment, the international community may be on the cusp of renouncing the death penalty’s use in all circumstances, although the decades-old International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, still purports to allow executions for “the most serious crimes.” Certainly, premature predictions of the death penalty’s demise have been made over time. It’s worthwhile, however, to recall the way things once were and just how far the global community has come since World War II as regards abolition. Thirty years after the Paris Peace Treaties (1947), Amnesty International, the London-based NGO that now has regional offices throughout the world, was instrumental in producing the Declaration of Stockholm. Despite its present-day global reach, the NGO has decidedly humble origins and was initially not even focused on convicted offenders who’d been sentenced to death. It was formed in 1961 by British lawyer Peter Benenson after he read a newspaper on the London Underground about two individuals who’d been arrested, tried, and sentenced to terms of imprisonment in Portugal. They had, according to some accounts, simply raised their glasses at dinner in a toast to freedom. As

Benenson recalled in a 1962 interview with BBC radio over what drew his ire in late 1960 about the plight of the Portuguese citizens: “The only evidence against them was that over the dinner table they’d conspired to overthrow the government. I thought then ‘what a crazy world this is, when two friends can’t have dinner together without being arrested.’”³⁶

Amnesty International’s work originally focused exclusively on the release of prisoners of conscience – persons imprisoned around the globe for the nonviolent expression of their political beliefs.³⁷ Eventually, that core mission expanded to address more human rights abuses, including those pertaining to all offenders condemned to death.³⁸ In 1971, the NGO requested that the United Nations and the Council of Europe “make all possible efforts” to eliminate executions worldwide. Three years later, the organization pledged to oppose “by all appropriate means the imposition and infliction of death penalties and torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons whether or not they have used or advocated violence.”³⁹ And then came its much-publicized international campaign against capital punishment, with more than 200 delegates from Africa, Asia, Europe, the Middle East, North and South America, and the Caribbean producing the Declaration of Stockholm (1977). That declaration specifically recited that “[t]he death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life.”⁴⁰

Amnesty International’s two-day conference in Stockholm, Sweden, in December 1977 began with a twenty-four-hour public vigil against capital punishment, with the conference’s stated goal – as Amnesty International’s Secretary General Martin Ennals announced – to produce a declaration against the death penalty. Its opening session was chaired by former Rhodesian Prime Minister Garfield Todd, who’d been detained for five and a half years by a successor government – that of Prime Minister Ian Smith – after he’d become critical of white minority rule.⁴¹ Activists and prominent public figures from more than fifty nations took part in the conference. Among them: Swedish Premier Thorbjörn Fälldin, Swedish Foreign Minister Karin Söder, and 1974 Nobel Peace Prize winner Seán McBride from Ireland. From the United States: Henry Schwarzschild (a leader of the ACLU’s Capital Punishment Project who, in 1976, founded the National Coalition to Abolish the Death Penalty), Hugo Adam Bedau (a leading academic and the author of *The Death Penalty in America*), Deborah Leavy (the director of the ACLU’s Capital Punishment Project), and former US Attorney General Ramsey Clark.⁴² An outspoken critic of capital punishment, Clark had written a report railing against the increasing use by governments of “summary executions under color of law to eliminate opposition, deter dissent and protest and to

terrorize the populace.”⁴³ In 1976, before the Subcommittee on Criminal Law and Procedures of the US Senate Judiciary Committee, Clark had said that executing a criminal “will not undo the crime, prevent other crimes, or bring justice to the victim, the criminal or society.” “Executions cheapen life,” he’d observed.⁴⁴

In promoting the Stockholm Declaration, Thomas Hammarberg, Amnesty International’s Swedish chairman, said at a press conference in December 1977 that the group’s campaign against torture had gained initial support because governments were ashamed of using torture.⁴⁵ He predicted, however, that the NGO’s global campaign against capital punishment would “not be popular.” “Nowadays,” he said, “most countries are ashamed of using torture and do not readily admit to that.” “But many,” he observed, “seem almost proud to declare they apply the death penalty and look upon executions as a demonstration of power.”⁴⁶ With Amnesty International calling executions an “act of violence which fosters further violence,” the 1975 Nobel Peace Prize laureate, nuclear physicist, dissident, and Soviet Union human rights advocate, Andrei Sakharov, weighed in with a letter, declaring: “I fully support the basic arguments advanced by opponents of the death penalty.” He said that abolition was “especially important in a country as ours, with its unrestricted dominance of state power and uncontrollable bureaucracy and its widespread contempt of law and moral values.” Although the number of executions in the Soviet Union was unknown, Sakharov said “there are grounds to suspect that it now comprises several hundred persons per year.”⁴⁷ Meanwhile, Amnesty International’s Martin Ennals braced for a long and arduous fight. “It’s more than just the start of a campaign,” he observed, asserting: “A campaign has a beginning and an end. The fight to abolish the death penalty is something more.”⁴⁸

In tracking the world’s emerging anti-death penalty norm, this book contemplates that, in time (and hopefully, in very short order), international law will bar the death penalty without any exception, even in wartime. It’s impossible to predict the future, unknowable when death sentences and executions will finally wither away and disappear worldwide. And it’s hard to forecast when capital punishment might be absolutely prohibited by international law’s highest level of protection for human rights: a *jus cogens* norm. But there’s a growing consensus at the United Nations that executions should be prohibited, and multiple *jus cogens* norms already protect fundamental human rights – a fact that indicates a strict prohibition on the death penalty is not only possible, but plausible. “The legal literature,” DePaul University law professor, M. Cherif Bassiouni, the godfather of international criminal law, wrote back in 1996 of the law’s then-existing state, “discloses that the

following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.” “Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*,” he said, adding:

This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.⁴⁹

Existing legal scholarship on international law and universal jurisdiction reveals that a well-settled consensus exists that the bars against apartheid, crimes against humanity, crimes against peace, extrajudicial killing, forced disappearances, genocide, maritime piracy, murder, prolonged arbitrary detention, racial discrimination, slavery, torture, and war crimes have already achieved *jus cogens* status.⁵⁰ In *The Treatment of Prisoners under International Law* (2009), one international law expert, the late Nigel Rodley, wrote of one of those *jus cogens* norms: “[T]he prohibition of torture has been widely recognised as being not only a rule of customary international law, but one of the very few *jus cogens* or peremptory norms of general international law, and there is evidence too that this status extends to the whole of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment.”⁵¹ The prohibition against torture, Rodley pointed out, has been “recognised by a variety of tribunals and inter-governmental bodies to constitute just such a ‘peremptory’ *jus cogens* norm.”⁵² The law of armed conflict itself prohibits torture, although whether the widely adopted CIDT prohibition is a *jus cogens* norm is still contested by some.⁵³ What is very clear: if the death penalty were to be reclassified as a form of torture, as this book asserts it must be, the use of executions would become *absolutely prohibited* by the existing *jus cogens* norm barring torture.

Both international humanitarian law and international human rights law protect a variety of human rights. From the Geneva Conventions, to the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to post-UN Charter treaties governing specific topics, provisions of international law – along with regional human rights systems and domestic legal systems – proscribe official and other actions that violate fundamental human rights.⁵⁴ For instance, international law protects the right to life⁵⁵ and the right to “the enjoyment of the highest attainable standard

of physical and mental health.”⁵⁶ It also abhors arbitrariness,⁵⁷ discrimination,⁵⁸ slavery,⁵⁹ and torturous and other cruel, inhuman, and degrading punishments⁶⁰ as reflected in specific covenants, treaties, and other provisions of law protecting individual rights.⁶¹ Whereas the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”)⁶² prohibiting torture and CIDT entered into force in 1987, major UN treaties forbidding racial⁶³ and gender discrimination⁶⁴ entered into force in 1969 and 1981, respectively. All of these legal prohibitions now constitute important norms of international law – norms that should be carefully considered in evaluating capital punishment regimes. The right to life and its associated right, not to be *arbitrarily deprived of life*, are explicitly codified in Article 6 of the ICCPR, with the ICCPR making clear the right to life is nonderogable.⁶⁵

Because capital prosecutions, death sentences, and executions violate basic human rights, their use, when fairly and objectively considered in light of their inherent characteristics, should be seen as irreconcilable with existing precepts of international law. They violate the all-important right to life (although the ICCPR, on its face, purports to allow death sentences “for the most serious crimes” in countries “which have not abolished the death penalty”), and their arbitrary and capricious use flies in the face of a robust understanding of the Rule of Law and Article 6 of the ICCPR, which declares that “[n]o one shall be arbitrarily deprived of his life.”⁶⁶ The Rule of Law is the foundation of free and democratic civil societies and – properly understood – requires the protection of universal human rights and a fair, even-handed, and nonarbitrary administration of justice.⁶⁷ Capital prosecutions and death sentences, by contrast, deliberately seek to put people to death, thereby dehumanizing them and subjecting them to extreme anxiety and torturous fear of loss of life.⁶⁸ As Dr. Amy Maguire, a lecturer at the University of Newcastle’s law school, writes: “[T]he death penalty is torturous. Not only does capital punishment inflict pain and suffering at the time of execution, but it imposes years of mental anguish on death row inmates.”⁶⁹ The punishment of death certainly produces psychological terror, and, when executions occur, causes lethal bodily harm, too, transgressing the concept of human dignity upon which the UN Charter⁷⁰ and the world’s post-World War II international human rights system is built.⁷¹

These realities make the death penalty ripe for abolition under international law and in countries – these days, mostly totalitarian or authoritarian ones – where executions are still being regularly carried out.⁷² In the twenty-first century, international law should not tolerate the use of torturous, discriminatory, and capriciously inflicted punishments such as executions. Like

nonlethal corporal punishments (e.g. ear cropping, the pillory) long abandoned by civilized countries,⁷³ state-sanctioned killing makes a mockery of basic human rights principles. Indeed, *an immutable characteristic* of any capital punishment regime is that it involves the use of torturous death threats. Because credible death threats intentionally inflict severe pain and suffering, and because executions strip individuals of the right to have rights,⁷⁴ the death penalty must be seen – as it already has been by some – as an illegitimate use of state power. As Judge Sergio García Ramírez, of the Inter-American Court of Human Rights, wrote more than ten years ago in a concurrence in *DaCosta Cadogan v. Barbados* (2009): “The day must come when universal consensus – which for now does not appear to be near – establishes the prohibition of capital punishment within the framework of *jus cogens*, as in the case of torture.”⁷⁵

The Death Penalty's Denial of Fundamental Human Rights contends that that contemplated day, once thought far off, should be declared to have arrived. The use of capital punishment, with its employment of death threats, violates basic human rights, and it's time to forthrightly say so – and in no uncertain terms, just as the Declaration of Stockholm did in the late 1970s. In recognition of its inherently torturous characteristics, lawmakers in retentionist countries should promptly abolish capital punishment and jurists should swiftly adjudicate death penalty regimes to be violative of core human rights, including the right to be free of torture. In particular, they should declare in laws and judicial opinions that executions fall squarely within the rubric of torture and interpret the existing *jus cogens* norm prohibiting torture⁷⁶ to encompass capital punishment. There's actually no need to establish a new *jus cogens* norm; it only needs to be recognized that the death penalty's use *constitutes* torture.

Many have advocated for capital punishment's abolition to help achieve broader criminal justice reform that is less punitive in nature. “We *must* abolish the death penalty,” Brandon Garrett – now a Duke Law School professor – emphasizes in *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice* (2017).⁷⁷ At a minimum, the death penalty's use inflicts extreme and impermissible *psychological* torture, although the death penalty obviously ends *physical* lives, too. Indeed, unlike nonlethal corporal punishments such as limb amputations or flogging (already considered torturous but that leave the targets of them alive but maimed in some fashion), executions irretrievably take lives. Leaders of the United Nations have themselves called for the death penalty's abolition, with the UN General Assembly repeatedly voting for a global moratorium on executions.⁷⁸ As one of the United Nations' past leaders, the late Secretary-General Kofi Annan, put it in 2000: “The