

**CAN WE END THE DEATH PENALTY?
THE ROLE OF NGOs IN THE WORLD-WIDE CAMPAIGN.**

by

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ABSTRACT

The death penalty that as recently as the end of the Second World War was prevalent and largely uncontested is now at a point where universal abolition appears to be achievable. The causes of the accelerating rate of abolition are examined, and the author critically assesses these causes to see if they would be sufficient to propel the abolitionist cause towards ultimate success. For this purpose, three case studies are presented diagnosing the capital punishment situation in three very different jurisdictions, the Philippines, Pakistan and the U.S.A. Interviews were conducted with knowledgeable persons and there was an extensive literature review. The author's findings are then related to the ongoing involvement of NGOs and, by studying previous successes such as the campaigns against slavery and torture, the question of how NGOs can be more effective in future is considered. This involves analysis of the international legal personality of NGOs and the manner in which norms of customary international law develop. From all of this research and analysis, the author concludes with a proposal to launch a new Campaign for the Universal Abolition of the Death Penalty on July 11, 2011. This would be a 30-year campaign, with measurable milestones at 5-year intervals, and comprehensive strategies to embrace the diverse situations involved.

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DEDICATION

I dedicate this thesis to my awesome – their favourite word of approval – sons Blake and Grayson. May their world of 2041 truly be free of the scourge of capital punishment.

1. Introduction

When one contemplates the universal status of the death penalty today, it is startling to realize the rapidity with which abolition, whether *de jure* or *de facto*, is occurring. It was not that long ago when universal abolition would have seemed a pipedream. Amnesty International's 1979 pertinent world survey, for example, had this to say:

Widespread concern about the use of the death penalty as a matter of principle is felt only in a minority of countries. In most of the world, the death penalty is not a public issue and there is little to suggest that many societies regard putting someone to death after judicial process as abhorrent.¹

A mere two centuries ago, in 1810, the United Kingdom had "at least 223 offences punishable by death";² now there are none. Even more remarkably, 139 States – more than two-thirds of the total – have to date either officially abolished the death penalty or abolished it in practice.³ The most telling statistic is that, in 2008, 93% of the world's known executions were carried out in only five States: China-1718, Iran-346, Saudi Arabia-102, USA-37, Pakistan-36.⁴ Looked at from another perspective, the 59 other retentionist States were responsible for only 7% of known executions in 2008. And, of these 59 States, only 25 actually carried out executions in 2008.⁵ By comparison, the execution statistics for 2009 were not quite so quantifiable. This is because Amnesty International had decided against trying to estimate the number of executions in China, announcing instead that it did not know the exact number of executions carried out there in 2009.⁶ Nonetheless, it did indicate that "...evidence from previous years and current sources indicates that the figure is in the thousands".⁷ In the result, for 2009 Amnesty documented 714 executions "...but this total does not include figures for China, where the majority of the world's executions take place, so the real global total is significantly higher."⁸ Only 18 States carried out

¹ Amnesty International, *The Death Penalty* (Plymouth, New Hampshire: Clarke, Doble & Brendon Ltd., Oakfield Press, 1979) at 17.

² Roger Hood & Carolyn Hoyle, *The Death Penalty: A World-Wide Perspective*, 4th ed. (Oxford: Oxford University Press, 2008) at 42.

³ Amnesty International recognizes States as abolitionist in practice if "...they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. Amnesty International, *Death Sentences and Executions 2009* (London: Amnesty International Publications, 2010) at 29.

⁴ Amnesty International, *Death Sentences and Executions in 2008*, March 2009, Index: ACT 50/003/2009 at 22.

⁵ *Ibid.* at 5.

⁶ *Supra* note 3 at 12.

⁷ *Ibid.* at 12.

⁸ *Ibid.* at 2.

executions in 2009, a significant reduction from the 2008 total. Moreover, no executions took place in Europe in 2009 for the first time in modern history.⁹

William A. Schabas, a renowned author on this subject, has commented on this apparently massive paradigm shift:

Since...1993, the debate about capital punishment in international law has been utterly transformed. The astonishing speed of events has only confirmed the original thesis of the book, that there is an inexorable trend in international law towards the abolition of capital punishment.¹⁰

In illustration of this insight, Schabas pointed out that a majority of States had shifted from favouring capital punishment to opposing it "(S)ometime in the middle of the 1990s...".¹¹ In 1989, some 44% of States were abolitionist; today, as stated above, this has grown to more than 67%, a 50% increase in twenty years. Were a similar pace of abolition to be maintained, there would be no retentionist States remaining by 2029. This thesis, *inter alia*, will consider the likelihood of this happening.

In further illustration of Schabas's "inexorable trend" (above), I refer to the moratorium presently in effect as a result of the UN General Assembly's historic vote on December 18, 2007. With 104 in favour, 54 opposed and 29 abstentions, resolution 62/149 was adopted calling for "a moratorium on executions with a view to abolishing the death penalty". Amnesty International called this "...an important tool to encourage retentionist countries to review their use of the death penalty."¹² The authority of the moratorium was buttressed exactly one year later when the UN General Assembly adopted resolution 63/168 calling on the Secretary-General to report to its 65th session in 2010 on the progress made in implementing the earlier resolution. This second resolution received 106 votes in favour, 46 against and 34 abstentions, representing "...a significant improvement on the vote on the UN GA moratorium resolution 62/149 (2007)".¹³

⁹ *Ibid.* at 18.

¹⁰ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002), Preface to the third edition at xiii.

¹¹ *Ibid.* at 364.

¹² Amnesty International, "UN calls for halt to executions", December 18, 2007, online: <<http://www.amnesty.org/en.../un-calls-halt-executions-20071218>>.

¹³ *Supra* note 4 at 11.

What is causing this demonstrable acceleration in the progress towards universal abolition? Roger Hood and Carolyn Hoyle have identified four factors:

- The emergence of the human rights perspective
- The developments of international treaties committed to abolition
- Mounting political pressure
- The strategy of non-cooperation (referring to the refusal of abolitionist States to extradite offenders to retentionist ones where they might face execution).¹⁴

Of these four factors, it is only the last one that is entirely within the bailiwick of States. The other three, clearly more important in the overall scheme of things, all involve the participation of non-State actors.

As stated by Henry J. Steiner, Philip Alston and Ryan Goodman, "One of the most dramatic developments within international human rights law over the past decade or more has been the growing importance of a range of non-state actors."¹⁵ Rather unusually, there has been no pivotal figure in the abolitionist movement akin to a William Wilberforce, Susan B. Anthony, Betty Friedan or Martin Luther King. The successes that have been achieved have been markedly due to a group process, the culmination of efforts by non-State actors dedicated to the abolitionist cause. There are so many that can be considered under the rubric of "non-State actors": labour groups, churches and other religious organizations, professional bodies, NGOs and ad hoc groups formed to deal with a single cause. All of these, as I hope to demonstrate in this thesis, have played a part in abolitionist successes to date.

However, it is the involvement of NGOs upon which I wish to focus. Although there is no generally accepted definition of such an organization, Professor Peter Willetts has proposed the following:

An NGO is any non-profit making, non-violent, organized group of people who are not seeking governmental office. An international NGO has a less restrictive definition. It can be any non-violent, organized group of individuals or organizations from more than one country.¹⁶

¹⁴ *Supra* note 2 at 18-32.

¹⁵ Henry J. Steiner, Philip Alston & Ryan Goodman, eds., *International Human Rights in Context*, 3rd ed. (Oxford: Oxford University Press, 2008) at 1385.

¹⁶ Peter Willetts, ed., *The Conscience of the World* (Washington, D.C.: The Brookings Institution, 1996) at 5.

More helpful for my purposes were the indicators he subsequently provided:

...the term carries different connotations in different circumstances. Nevertheless, there are some fundamental features. Clearly an NGO must be independent from the direct control of any government. In addition, there are three other generally accepted characteristics that exclude particular types of bodies from consideration. An NGO will not be constituted as a political party; it will be non-profit-making and it will not be a criminal group, in particular, it will be non-violent. These characteristics apply in general usage, because they match the conditions for recognition by the United Nations.... an NGO is never constituted as a government bureaucracy, a party, a company, a criminal organization or a guerrilla group. Thus, for this article, an NGO is defined as an independent voluntary association of people acting together on a continuous basis, for some common purpose, other than achieving government office, making money or illegal activities.¹⁷

I will proceed on a similar basis. More particularly, I will examine two NGOs that are heavily committed towards abolition of the death penalty: Amnesty International and the World Coalition Against the Death Penalty.

Amnesty International was formed in 1961, and is one of the world's largest and best-known human rights organizations. It claims to have more than 2.8 million members and supporters in over 150 countries and territories. Its activities are normally conducted through the auspices of its more than 7500 groups. Amnesty International describes itself as "a worldwide movement of people who campaign for internationally recognized human rights to be respected and promoted. Its vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards."¹⁸ It is funded largely by its membership and by donations from the public, neither seeking nor accepting funds from governments.

One of Amnesty International's principal objectives is to abolish the death penalty. Schabas duly recognized "...the thorough monitoring work of Amnesty International, a non-governmental organization whose pre-eminent role in the abolitionist movement is undisputed."¹⁹

¹⁷ Peter Willetts, "What is a Non-Governmental Organization?" (London: City University, 2002), online: <<http://www.staff.city.ac.uk/p/CS-NTWKS/NGO-ART.HTM>>.

¹⁸ Amnesty International, *The State of the World's Human Rights* (London: Amnesty International Publications, 2009), Preface.

¹⁹ *Supra* note 10 at 366.

The World Coalition Against the Death Penalty was founded in May 2002, and is essentially an umbrella group of over 75 NGOs, bar associations, local bodies and trade unions (and the City of Venice) concerned to achieve universal abolition of the death penalty. Amnesty International is itself a member of the World Coalition. It seeks to facilitate the development of national coalitions dedicated to the same purpose. Its most well-known achievement is the institution of an annual "World Day Against the Death Penalty", each October 10th, featuring pro-abolition events throughout the world.

At its General Assembly held in June 2007, the World Coalition launched an ambitious challenge to have all States that are party to the International Covenant on Civil and Political Rights ratify the Second Optional Protocol, abolishing the death penalty, by December 15, 2009, the 20th anniversary of the UN's adoption of this Protocol. It called on its supporters and sympathizers to ensure that, by the target date "...ratification processes are at the very least well and truly underway, if not successfully concluded, in all abolitionist states parties to the ICCPR." (emphases in original)²⁰ Although this objective was not realized, it served as a worthwhile focus for the worldwide abolitionist activities.

Against this backdrop, the questions to be answered in this thesis are the following:

1. What are the causes of the increasing acceleration in the world-wide campaign to abolish the death penalty?
2. To what extent have NGOs been effective in the campaign to abolish the death penalty and is there a means to evaluate their effectiveness?
3. How can NGOs become more effective in developing and enforcing an emerging universal legal norm against the death penalty?

Question 1 will be examined in Chapter 2. This thesis is being written from an abolitionist perspective: that, stated concisely, it is a fundamental human right not to be executed by the State. So Hood and Hoyle's "emergence of the human rights perspective" (above, page 3) will be particularly emphasized. I will also consider not only the causes that account for the recent acceleration in abolition but, more importantly for this thesis, whether those same causes can be expected to propel the world towards universal abolition. In this way, I will be utilizing Hood and Hoyle's four causes as a sort of springboard

²⁰ World Coalition against the Death Penalty, "Status of the WCADP campaign for ratification of the Second Optional Protocol of the ICCPR aiming at abolition of the death penalty", General Assembly, Brussels, June 22, 2007,

from which to launch the comprehensive analysis undertaken in this thesis and to develop the conceptual framework for my conclusions.

The extent to which NGOs have been effective in the abolitionist campaign is the subject of Chapter 3. I will therein trace the involvement of NGOs in the foundational work of the *UN Charter* and the *Universal Declaration of Human Rights*, as well as considering the campaigns against slavery and torture to see what lessons can be learned from these NGO successes. Finally, I address what it would take to abolish the death penalty in international law and how NGOs could be an effective part of that process.

In order to canvass the second part of question 2 as to evaluating NGO effectiveness, I have used three case studies in Chapter 4. Robert K. Yin, an authority in this area, had said that "Case Studies are the preferred strategy when how or why questions are being posed, when the investigator has little control over events and when the focus is on a contemporary phenomenon within some real-life context."²¹ This appears to suit the bill admirably. I have hence chosen to study the Philippines, the only State to have abolished the death penalty, resumed executions and then abolished it again; Pakistan, one of the world's leading executioners in 2008 (above, page 1), but offering some hope for optimism due to an announced mass commutation in that year and no executions in 2009; and the USA, another of the five leading executioners, both in 2008 and 2009 (*ibid.*), where a fascinating struggle – and a quite relentless one – between the forces of abolition and the retentionists continues unabated.

Chapter 5 deals with question 3, to consider how NGOs can become more effective. My conclusion calls for a 30-year campaign for universal abolition, based on the lessons of the past as described in this thesis and my own opinion concerning how to overcome the remaining challenges. I envisage the campaign as having measurable milestones so that its progress can be regularly monitored. I look to NGOs to initiate this campaign and to see it through to completion. Although I recognize the boldness of this proposal, I have endeavoured to demonstrate its achievability through my analysis and the envisaged aftermath of what has transpired to date.

²¹ Robert K. Yin, *Case Study Research: Design and Methods*, 2nd ed. (Thousand Oaks, Calif: Sage 1994) at 1, cited in Kevin Bales, *Disposable People* (Berkeley: University of California Press) at 266.

I have attempted to supplement my analysis and conclusions throughout the thesis by interviewing individuals knowledgeable and experienced in this area (Certificate of Approval-Minimal Risk, Behavioural Research Ethics Board Number H09-01222). In addition, I have conducted a literature review to provide not only the essential overview but also to assist in answering the research questions. Finally, I have endeavoured to remain current with the events affecting this rapidly developing issue but, for practical reasons, I concluded my research on August 31, 2010.

Although the path to universal abolition, based on recent trends, might seem to be clear, ultimate success is by no means a foregone conclusion. Often encountered are unique difficulties within the circumstances of each retentionist State. In particular, persuading the leading executioners (China, Iran, Saudi Arabia, Pakistan, Iraq and the U.S.A.) to change their ways will be an immense challenge.

Consider these cautionary words written a decade ago by Professor Sir Leon Radzinowicz:

The heaviest blow to the abolitionist cause has come from the United States, which has resolutely rallied behind the retentionist cause...I am inclined to state that I do not expect any substantial further decrease in the appointment and the use of capital punishment in the foreseeable future. In my opinion most of the countries likely to embrace the abolitionist cause have now done so.²²

Although events of the ensuing ten years have shown Professor Radzinowicz to have been generally too negative in his prognostication, he may have a point when it comes to what now lies ahead. So I will try not to make the reciprocal error of underestimating the scale and complexity of the remaining abolitionist struggle. What will it take to end forever this barbaric relic?

²² Leon Radzinowicz, *Adventures in Criminology* (London: Routledge, 1999), cited in Peter Hodgkinson & William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004) at 2.

2. Causes of the increasing acceleration in the world-wide campaign to abolish the death penalty

2.1 Review of Hood & Hoyle's four causes

In Chapter 1, I referred to the four factors identified by Roger Hood and Carolyn Hoyle as "...causing this demonstrable acceleration in the progress towards universal abolition..." (above, page 3): (a) The emergence of the human rights perspective; (b) The developments of international treaties committed to abolition; (c) Mounting political pressure; (d) The strategy of non-cooperation. I will canvass each of these factors in turn, mentioning the pertinent involvement and contribution of NGOs where applicable.

(a) The emergence of the human rights perspective

Hood and Hoyle declared at the outset that "(T)he dynamo for the new wave of abolition was the development of international human rights law."²³ In fact, one can identify the actual year in which the human rights perspective was definitively expounded: that would have been 1764 when Cesare Beccaria's *Dei delitti e delle pene* was first published. In this landmark book, Beccaria argued that there was no justification for the taking of a life by the State. In the dissenting judgment in *Kindler v. Canada*,²⁴ Beccaria's following passage was cited:

The death penalty cannot be useful, because of the example of barbarity it gives men. If the passions or the necessities of war have taught the shedding of human blood, the laws, moderators of the conduct of men, should not extend the beastly example, which becomes more pernicious since the inflicting of legal death is attended with much study and formality. It seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it, and that to deter citizens from murder, they order a public one.²⁵

There followed quite shortly after Beccaria's landmark book the first permanent abolition of the death penalty in modern times, that by Grand Duke Leopold II in the Grand Duchy of Tuscany in November, 1786. The Roman Republic was next in 1849, Venezuela in 1863, San Marino 1865 and Portugal in 1867. A more contemporary scenario for abolition is the emergence of States from totalitarian repression

²³ *Supra* note 2 at 18.

²⁴ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

²⁵ *Ibid.* at 804.

and colonialist regimes leading those citizens, in an embrace of freedom and democracy, to seek protection from the power of the State. South Africa is a prime example where Nelson Mandela's ascent to the Presidency on May 10, 1994 was followed by the abolition of the death penalty by the Constitutional Court in a unanimous decision on June 6, 1995.²⁶

More characteristically than outright abolition, however, was the reduction in the number of capital offences. As reflected by the dissenting judges in *Kindler*, above, the work of the reformers did eventually prevail with capital punishment in the United Kingdom, by 1860, being reserved for only a handful of crimes including treason and murder.²⁷ This process of gradual reduction in the number of capital offences on the path to abolition, an incremental approach, seemed to be a well-established model of how best to proceed. In fact, the French jurist Marc Ancel virtually enshrined it in 1962 when he wrote:

The process of abolition has usually taken a long time and followed a distinctive pattern; first the reduction of the number of crimes legally punishable by death until only murder and (sometimes) treason are left, then systematic use of commutation leading to *de facto* abolition, and eventual abolition *de jure*.²⁸

Slow and steady momentum towards abolition was the initial consequence. By 1965 – recent times indeed – there were still only 25 abolitionist States. Over the next 20 years, Hood and Hoyle spoke of the pace of abolition as being "...steady but hardly spectacular."²⁹ Yet in 1989 there began what they referred to as "...a striking increase in the number of countries that abandoned capital punishment."³⁰ Much of the impetus for this was a renewed, or more accurately, new emphasis on human rights. The dissenting judges in *Kindler*, above, had explained:

The end of hostilities following World War II signalled a massive movement towards the greater protection of human rights. Prior to the war, international law paid scant attention to human rights. However, the atrocities committed during the war led to international recognition of the fundamental importance of human dignity and human rights.³¹

²⁶ *State v. T. Makwanyane and M. Mchuna*, Case No. CCT/3/94, Constitutional Court of South Africa, (1995).

²⁷ *Supra* note 24 at 804.

²⁸ Marc Ancel, *The Death Penalty in European Countries* (Strasbourg: Council of Europe, 1962) at 3, cited in *supra* note 2 at 13.

²⁹ *Supra* note 2 at 13.

³⁰ *Ibid.*

³¹ *Supra* note 24 at 804.

...The international recognition of the importance of human dignity culminated in the abolition of the death penalty in many countries.³²

Supporting, or in tandem with, the above-described trend was the political movement to transform capital punishment from an issue of criminal justice to one of fundamental human rights, that the right to life could not be taken away for any reason. This human rights approach to abolition rejected the principal justifications for capital punishment: retribution and deterrence. The former based on killing the killer is not defensible as a rational argument. There will always be people who are attached to the moral argument that the perpetrators of the most heinous deeds should be dealt with by death, and it is not easy to shake this conviction if it is emotionally, culturally or religiously held. But the fact is that to ask the State to respond to one act of killing with another is not a worthy motivation for a modern society. The human rights perspective obviously rejects the notion of people living their lives on the premise of "an eye for an eye" so the State that represents them should not be engaged in such behaviour. Moreover, if retribution were a guiding principle, it is hard to see how it is adequately reflected when the death penalty is imposed so rarely. For example, since the death penalty was re-instated in the U.S.A. in 1976, the average number of murders each year has been approximately 19,000.³³ Contrast this with the actual number of executions in 2009, 52, and the notion of retribution is meaningless.

Trying to deter would-be murderers from carrying out their crimes is the second justification for capital punishment; the theory being that, if they face death themselves, they might back off. But there has never been a properly researched and convincing study supporting this deterrence theory. In a recent poll of U.S. Police Chiefs, a majority, 57%, said "...the death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence."³⁴ The report further noted: "When asked to name one area as 'most important for reducing violent crime' greater use of the

³² *Ibid.* at 806.

³³ Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (Washington, D.C.: Death Penalty Information Center, October 2009) at 22.

³⁴ *Ibid.* at 10.

death penalty ranked **last** among the police chiefs, with only 1% listing it as the best way to reduce violence."³⁵ And these are the U.S. Police Chiefs talking... looking at capital punishment practically and realistically. The report commented that the statement with which they most identified was:

"Philosophically, I support the death penalty, but I don't think it is an effective law enforcement tool in practice."³⁶ So, if that is the conclusion of philosophical supporters, how would the deterrence argument play out amongst abolitionists? Well, some would grasp at the lack of any proven deterrent value of capital punishment to expound on the need for abolition. But I would suggest that principled abolitionists would take the view that, even if capital punishment were demonstrated to have the effect of deterring heinous crimes, it should still be abolished. That, in my opinion, is what the human rights approach really means.

Similarly, some who are in favour of abolition argue that the risk of executing an innocent person necessitates an abolitionist view. This is certainly an important factor in public opinion. But principled abolitionists would argue that, even if the death penalty regime could be made foolproof (i.e. with no risk of executing an innocent), that would not affect the human rights approach of the right to life. This fundamental viewpoint cannot be swayed by the ebbs and flows of public opinion. As said by Hood and Hoyle, "...the appeal to human rights centres on the protection of all citizens from cruel and inhumane punishment, whatever crimes they may have committed."³⁷

(b) The developments of international treaties committed to abolition

The inaugural date is easily identified: December 10, 1948, the celebrated day on which the *Universal Declaration of Human Rights* was adopted by the General Assembly of the United Nations. It was described by Professor Schabas as "...a touchstone for all subsequent international instruments dealing with human rights and fundamental freedoms."³⁸ This success reflected the obligation imposed upon all member States by article 55 of the *United Nations Charter* to promote and encourage respect for human

³⁵ *Ibid.* at 9.

³⁶ *Ibid.* at 10.

³⁷ *Supra* note 2 at 42.

³⁸ *Supra* note 10 at 13.

rights. Responsibility for such matters had been assigned to the Economic and Social Council ("ECOSOC") and to commissions to be established by this Council. The Commission on Human Rights, under the chairmanship of Eleanor Roosevelt, was duly constituted and, amongst its many challenges, it had to decide upon the relationship between the "right to life" and capital punishment. (I will consider in Chapter 3 the contribution of NGOs to the immense achievement of the *Universal Declaration* and its aftermath).

Article 3 of the *Universal Declaration* provides that "Everyone has the right to life, liberty and security of person." Despite immense discussions about the prospects for enshrining an exception for capital punishment, the death penalty ended up not being mentioned at all. Schabas has explained that the drafters had three general approaches to choose from: firstly, to recognize explicitly the death penalty "...as a limitation or an exception to the right to life";³⁹ secondly, to proclaim unequivocally the abolition of the death penalty; or, thirdly, to make no mention of the death penalty either way. In his opinion, because of Chairperson Roosevelt's position of no explicit reference, it was the compromise resolution that prevailed, a decision that, more than 60 years later, seems to have been one of considerable farsightedness: since the States of that time were not ready for an abolitionist stance, saying nothing set the stage for progressive developments. As he then commented:

The inescapable conclusion is that article 3 of the *Universal Declaration* is indeed abolitionist in outlook. By its silence on the matter of the death penalty, it envisages the abolition of capital punishment and, at the same time, admits its existence as a necessary evil, a relatively fine line which in hindsight appears to have been rather astutely drawn.... No better proof exists that the drafters of the *Declaration* contemplated the eventual abolition of the death penalty than the fact that article 3 has retained its pertinence during the evolution of more comprehensive abolitionist norms over subsequent decades.⁴⁰

Impressively, the Commission on Human Rights had already started drafting the International Covenant on Civil and Political Rights ("*ICCPR*") in early 1947, whilst still engaged with the *Universal Declaration*. This work for the Commission continued until 1954. After that, it was dealt with in the

³⁹ *Ibid.* at 24.

⁴⁰ *Ibid.* at 42-43

General Assembly itself, taking an extraordinary twelve years to finish the drafting and formally adopt the *ICCPR*. Not that surprisingly, it was again the question of capital punishment that proved to be difficult and time-consuming. Schabas pointed out: "The original drafts of the *ICCPR* in 1947 gave few hints of either abolition or limitation of the death penalty."⁴¹ But this evolved through the long years of drafting and discussion to the clear signal within the *ICCPR* that abolition was the direction. Article 6 was the contemplation of abolition, even if it made no immediate demands on the States. It reads:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone 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.
5. Sentence to death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. 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.

The *ICCPR* came into force on March 23, 1976 after it had been ratified by 35 States. Pressures for stronger measures continued within the U.N. throughout the 1970s, culminating in the submission at the 1980 session of the General Assembly of a draft treaty to abolish the death penalty. Article 1 provided:

1. Each State party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.

⁴¹ *Ibid.* at 77.

2. The death penalty shall not be re-established in States that have abolished it.

The task of re-formulating the draft as a second optional protocol to the *ICCPR* was assigned to the Commission on Human Rights in 1982. This responsibility eventually devolved upon Marc Bossuyt of the Sub-Commission on Prevention of Discrimination and Protection of Minorities whose revised draft was submitted to the General Assembly in 1989. There was significant opposition from States having predominantly Muslim populations, mainly on the basis that Islamic law permitted the death penalty. Despite this, the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* was adopted on December 29, 1989, with 59 votes in favour, 26 against and 48 abstentions. The adopted form of Article 1 read:

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

The *Second Optional Protocol* came into force on July 11, 1991 following its tenth ratification. It has now been ratified by 72 States with another three having signed but not ratified.⁴² Since this represents the ultimate commitment to the abolition of the death penalty by any State, it is a remarkable milestone on the path to world-wide success.

While all this was going on internationally, the various regions were grappling with their own treaties about capital punishment. In Europe, a protocol to the *European Convention* abolishing the death penalty in peacetime came into force in 1985, being entitled *Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*. It has been ratified by nearly all members of the Council of Europe – 46 States in total – with only the Russian Federation having signed but not ratified. As explained by Schabas: "The Council of Europe

⁴² United Nations Treaty Collection, November 17, 2010, online <treaties.un.org/Pages/Treaties.aspx?id=44&subid=A&lang=en>.

requires new members to undertake to ratify the *Protocol*, a condition that has resulted in the abolition of the death penalty throughout Eastern Europe and deep into Asia."⁴³

There has been even more progress since then: *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, providing for abolition in all circumstances including time of war, was adopted by the Council of Europe in 2002. To date, it has achieved 42 ratifications with Armenia, Latvia and Poland having signed but not ratified.⁴⁴ The *American Convention on Human Rights*, adopted in 1969, does not go as far towards abolition as the European measure, but it does provide safeguards and limitations on its use. Furthermore, with its prohibition of a return to capital punishment by any party State that had abolished it, it could fairly be described, in Schabas's words, as "an abolitionist instrument."⁴⁵ The aptness of this description was vindicated in 1990 when the General Assembly of the Organization of American States adopted a Protocol to the *American Convention* calling upon States to abstain from the use of the death penalty. 11 of the 35 member States have so far ratified the *Protocol*. In contrast, the *African Charter of Human and Peoples' Rights*, adopted in 1981, made no reference to the death penalty. Similarly, the thirty Asian governments that had met on this subject in 1996 concluded that setting up a formal human rights mechanism in Asia would be premature. Although the *Asian Human Rights Charter* was adopted in 1998 declaring that "all states must abolish the death penalty",⁴⁶ this was the work of the Asian Human Rights Commission, an NGO. Finally, the *Arab Charter of Human Rights*, adopted in 1994, whilst proclaiming the right to life, contained provisions that recognized the legitimacy of the death penalty. As so succinctly pointed out by Piers Bannister, Coordinator of the Death Penalty Team, Amnesty International, in an interview: "Look at a map of the world; abolition is geographical."⁴⁷

⁴³ *Supra* note 10 at 14.

⁴⁴ *Supra* note 3 at 31-32.

⁴⁵ *Supra* note 10 at 15.

⁴⁶ *Supra* note 2 at 24.

⁴⁷ Interview with Piers Bannister, Coordinator of the Death Penalty Team, Amnesty International (London), November 11, 2009.

(c) **Mounting political pressure**

According to Hood and Hoyle, the political pressure towards abolition has emanated almost entirely from Europe. As indicated above, the Parliamentary Assembly of the Council of Europe in 1994 made a time-specified ratification of *Protocol No. 6* a precondition for any country wishing to join the Council. Right now for example, Belarus, the only European State that carried out executions in 2008 according to the Amnesty International Report 2009, is seeking membership of the Council of Europe. In order to be successful, it would need to institute an immediate moratorium on the use of the death penalty and commit to abolition within three years of accession. In 1998, the European Union also required abolition of the death penalty as a precondition of membership. Hood and Hoyle described this position of both the Council of Europe and the European Union as conveying a profoundly important message: "a *principled* opposition to the death penalty as a violation of fundamental human rights."⁴⁸

So Europe is close to becoming the first death penalty free region in the World (with no executions at all reported in 2009, above, page 2). But the Europeans wanted to go further than that. Their view was uncompromising as described by Hood and Hoyle: "The Europeans will not accept the argument that capital punishment can be defended on relativistic grounds of religion or culture, or as a matter which sovereign powers ought to be left to decide simply for themselves."⁴⁹ The European Union, in consequence, adopted in 1998 the *Guidelines to European Union Policy towards Third Countries on the Death Penalty*, setting forth its objective to work towards abolition of the death penalty throughout the World. To this end, it has pursued a diplomatic strategy of meeting with retentionist States such as China and Vietnam. Through the European Union President, it has been engaged in sending pleas for clemency to U.S. State Governors and Boards of Pardon where executions are imminent. It has also filed *Amicus Curiae* briefs with the U.S. Supreme Court in connection with such constitutional issues as the execution of juveniles and the mentally disabled. This was only the beginning....

⁴⁸ *Supra* note 2 at 25.

⁴⁹ *Ibid.*

On July 5, 2001, the European Union adopted a resolution entitled "The Death Penalty in the World",⁵⁰ calling for a worldwide moratorium on executions. Paragraph 10 of the resolution characterized abolition as "an essential element in relations between the European Union and third countries and one that should be taken into account, in concluding agreements with third countries."⁵¹ To evidence its seriousness towards this end, the Parliamentary Assembly threatened to remove the observer status of both the U.S.A. and Japan if they did not make significant progress by January 1, 2003 on abolishing the death penalty. In October of that year, the Parliamentary Assembly declared both these States to be "in violation of their fundamental obligation to respect human rights due to their continued application of the death penalty."⁵²

On "World Day against the Death Penalty," October 10, 2003, the European Parliament adopted a resolution in favour of a universal moratorium on the death penalty under the auspices of the United Nations. Europe became a strong proponent of the moratorium that was eventually adopted by the UN General Assembly on December 18, 2007 (above, page 2). This was another milestone date for it made clear that the abolitionist cause was prevailing. Amnesty International had commented: "Although not legally binding, the UN moratorium on execution carries considerable moral and political weight."⁵³ For Aubrey Harris, Coordinator of the Campaign to Abolish the Death Penalty, Amnesty International Canada, the UN moratorium vote confirmed that world opinion against the death penalty was growing; in his view, the "...major foundations were in place for political acceptance of abolition."⁵⁴

I mainly agree with Hood and Hoyle about the important role of Europe in mounting political pressure towards abolition, but I do think that Latin America warrants a special mention. Schabas has reminded us:

...Latin American countries such as Uruguay and Venezuela played a pivotal role within the United Nations in promoting abolition of the death penalty. Several Latin American States abolished the death penalty in the nineteenth century or early in the twentieth century. Many Latin

⁵⁰ *Ibid.* at 26.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Supra* note 12.

⁵⁴ Interview with Aubrey Harris, Coordinator of the Campaign to abolish the death penalty, Amnesty International Canada (Toronto), October 4, 2009.

American constitutions contain references to the death penalty, usually limiting its scope, or providing for due process in capital cases, or in some cases, declaring it to be abolished.⁵⁵

So Europe has not had to generate "...the political pressure towards abolition" without the earlier and generally consistent efforts of Latin American States.

(d) The strategy of non-cooperation

When a retentionist State seeks the extradition from an abolitionist State of a person wanted on a capital charge, it is important to know what is likely to happen. The change in the answer to this question has happened rapidly, and is particularly illustrated by the Canadian experience.

In *Kindler v. Canada (Minister of Justice)*,⁵⁶ the Supreme Court of Canada had to rule on the application of Pennsylvania for the extradition of a person accused of capital murder. Pennsylvania had declined to provide an assurance that the death penalty would not be imposed. In a 4-3 split decision, a majority of the Court decided that Kindler could be extradited without this assurance. The judgment of L'Heureux-Dubé, Gonthier and McLachlin JJ. pointed out:

The question, I reiterate, is not whether the death penalty is constitutional or even desirable in this country, but whether returning a fugitive to face it in another jurisdiction offends the Canadian sense of what is fair and right. The answer to this question turns on attitudes in this country toward the death penalty, and toward extradition, considered along with other factors such as the need to preserve an effective extradition policy and to deter American criminals fleeing to Canada as a "safe haven."⁵⁷

...I turn to consider Canadian attitudes to the death penalty. Much had been said and written in this country on the death penalty. While it is difficult to generalize about a subject so controverted, this much can be ventured. There is no clear consensus in this country that capital punishment is morally abhorrent and absolutely unacceptable.

...To this day, capital punishment continues to apply to certain military offences. At the same time, public opinion polls continue to show considerable support among Canadians for the return of the death penalty for certain offences. Can it be said in light of such indications as these, that the possibility that a fugitive might face the death penalty in California or Pennsylvania "shocks" the Canadian conscience or leads

⁵⁵ *Supra* note 10 at 311.

⁵⁶ *Supra* note 24.

⁵⁷ *Ibid.* at 850.

Canadians to conclude that the situation the fugitive faces is "simply acceptable"? The case is far from plain.⁵⁸

In a separate judgment concurring in the result, La Forest J. remarked on the growing trend for Western nations to abolish the death penalty and the various international agreements that supported this trend. But he cautioned that these agreements generally fell short of actually prohibiting capital punishment. He contrasted this with the overwhelming universal condemnation directed at practices such as genocide, slavery and torture, concluding: "there is thus, despite these trends, no international norm."⁵⁹

Even in 1991, however, there was a dissenting judgment that pointed to a different standard. Lamer C. J. and Sopinka and Cory JJ. concluded that the death penalty constituted cruel and unusual punishment and that to extradite anyone to face the prospect of such a sentence would be in breach of the Canadian Charter of Rights and Freedom (the "*Charter*"). After a far-ranging review of the history of the death penalty, both internationally and in Canada, they had summarized:

Capital punishment for murder is prohibited in Canada. Section 12 of the *Charter* provides that no one is to be subjected to cruel and unusual punishment. The death penalty is *per se* a cruel and unusual punishment. It is the ultimate denial of human dignity. No individual can be subjected to it in Canada. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to Article 6 is one which can be reviewed under s. 12 of the *Charter*. It follows that the Minister must not surrender Kindler without obtaining the undertaking described in Article 6 of the Treaty. To do so would render s.25 of the *Extradition Act* inconsistent with the *Charter* in its application to fugitives who would be subject to the death penalty.

This conclusion is based upon the historical reluctance displayed by jurors over the centuries to impose the death penalty; the provisions of s.12 of the *Charter*; the decisions of this Court pertaining to that section; the pronouncements of this Court emphasizing the fundamental importance of human dignity; and the international statements and commitments made by Canada stressing the importance of the dignity of the individual and urging the abolition of the death penalty.⁶⁰

⁵⁸ *Ibid.* at 851-852.

⁵⁹ *Ibid.* at 833-834.

⁶⁰ *Ibid.* at 827.

A vigorous dissent indeed and, not that surprisingly in the light thereof, the Supreme Court of Canada, a mere ten years later, took a different view of extradition. In *United States v. Burns*,⁶¹ the State of Washington had applied for the extradition of Burns to face trial for murder, again with no assurance that, if found guilty, he would not be executed. This time the Court decided that extradition in these circumstances would be in violation of section 7 of the *Charter*. A unanimous Court commented on the factors involved:

65 It is inherent in the *Kindler* and *Ng* balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance....Our analysis will lead to the conclusion that in the absence of exceptional circumstances, which we will refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.⁶²

78 ...It is, however, incontestable that capital punishment, whether or not it violates s.12 of the *Charter*, and whether or not it could be upheld under s.1, engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering. It has been rejected by the Canadian Parliament for offences committed within Canada. Its potential imposition in this case is thus a factor that weighs against extradition without assurances.⁶³

The Court noted the passing by the General Assembly of the UN in December 1990 of the *Model Treaty on Extradition*, Article 4(d) of which provided that extradition could be refused: "If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out". The Court commented:

83 We are told that from 1991 onwards Article 4(d) has gained increasing acceptance in state practice. Amnesty International submitted that Canada currently is the only country in the world, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad. Counsel for the Minister, while not conceding the point, did not refer us to any evidence of state practice to contradict this assertion.⁶⁴

⁶¹ *United States v. Burns*, [2001] 1 S.C.R. 283.

⁶² *Ibid.* at 323.

⁶³ *Ibid.* at 329-330.

⁶⁴ *Ibid.* at 331-332.

Having reviewed international events and decisions concerning the death penalty, particularly in the years since *Kindler*, the Court concluded that a rule requiring that assurances be obtained prior to extradition in death penalty cases would accord not only with Canada's principled advocacy on the international level, but would also be "...consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States."⁶⁵ So the Court's decision from this was predictable:

131 The arguments against extradition without assurances have grown stronger since this Court decided *Kindler* and *Ng* in 1991. Canada is now abolitionist for all crimes, even those in the military field. The international trend against the death penalty has become clearer. The death penalty controversies in the requesting State – the United States – are based on pragmatic, hard-headed concerns about wrongful convictions. None of these factors is conclusive, but taken together they tilt the s.7 balance against extradition without assurances.⁶⁶

Although the basic tenets of the Canadian legal system had not changed since 1991 when *Kindler* and *Ng* were decided, subsequent factual developments in Canada and other relevant jurisdictions would have to be taken into account. The Minister of Justice's appeal was accordingly dismissed:

144 ...When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilted against the constitutionality of such an outcome....⁶⁷

David Matas, counsel appearing before the Supreme Court on behalf of Amnesty International in both *Kindler* and *Burns*, commented in an interview: "Law is changing internationally. In *Burns*, there was no precedent in international law, but change was recognized by the Supreme Court – the Court accepted change."⁶⁸

This change was reflected internationally soon after the *Burns* decision. Hood and Hoyle pointed out that the UN Human Rights Committee, in conformity with this Canadian decision, held in August 2003,

⁶⁵ *Ibid.* at 355.

⁶⁶ *Ibid.* at 356.

⁶⁷ *Ibid.* at 361.

⁶⁸ Interview with David Matas, lawyer, September 29, 2009.

in *Judge v. Canada*,⁶⁹ that abolitionist countries had an obligation not to expose a person to the real risks of the application of the death penalty as this would constitute a violation of the defendant's right to life under Article 6 of the ICCPR. Only a year after *Judge v. Canada*, the UN Secretary General's Seventh Quinquennial Report mentioned that all but one of the 32 abolitionist States responding "...had adopted a policy to refuse to extradite a person charged with a capital offence to a requesting state that had not abolished capital punishment unless that state would give assurances that he/she would not be sentenced to death or executed."⁷⁰ This principled strategy of non-cooperation has continued to escalate. Hood and Hoyle gave various examples: the "firm policy"⁷¹ of the European Court of Human Rights against extraditions where there was a risk of a sentence of death; China's entering into extradition treaties with Spain, France and Australia "...in which it has agreed not to execute criminals who are repatriated to it";⁷² and the USA's guarantees to Mexico that it would not seek to impose the death penalty on extradited "drug lords", leading to "a considerable increase in the number recently extradited from that country."⁷³

In summary, the refusal of abolitionist States to extradite is having an increasingly strong influence on the overall campaign for universal abolition. Those States that persist in carrying out executions are faced with an ever-tightening web of abolitionist practice, an inherent moral reprimand of their own choices. In time, there should be a cumulative effect in which the retentionist States recognize the futility of extradition applications because of the growing external abhorrence of the possible outcome of death. This in itself will clearly not be a major step towards abolition, but it will make the administration of capital punishment more difficult and less consistent (i.e. accused murderers resident in external States will not be facing the same punishment as those accused who are captured within the retentionist State). So, although this is doubtless the least significant of the four causes, I do agree with Hood and Hoyle that it certainly warranted inclusion in the list.

⁶⁹ *Judge v. Canada*, UN HRC Communication No.829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).

⁷⁰ *Supra* note 2 at 30.

⁷¹ *Ibid.* at 28.

⁷² *Ibid.* at 31.

⁷³ *Ibid.*

At the end of their analysis of the four causes, Hood and Hoyle commented:

Thus, the recognition of the death penalty as a human rights issue, combined with the development of international human rights law and the political weight that has been given to the campaign led by European institutions to get rid of capital punishment completely, is the main explanation for the surge in abolition over the past quarter of a century.⁷⁴

Comments in similar vein were offered by several of my interviewees:

Piers Bannister: "It's not the issue of whether people support the death penalty. It's a human rights violation so it's not acceptable."⁷⁵

Aubrey Harris: "It wouldn't have happened at the rate it did without the NGOs – but it would still have happened. Without Amnesty (International), it would have been religion. But that's other factors than human rights."⁷⁶

Mark Warren: "The UN moratorium resolution was a 'kind of watershed'. It's a signpost – we've reached a point. Forty years ago, it was a limited discussion. It's now transformed, mainly because of NGOs, into a human rights issue. There's no going back from the UN resolution."⁷⁷

Alex Neve: "The Second Optional Protocol was a big advance, gave a sense of momentum. Countries want to show they're committed to human rights.... The death penalty benefits by being tied in to a broader process of adhering to human rights. To be a credible member of the international community, you need to be human rights conscious."⁷⁸

All of this appears to be salutary, but are these identified "Causes of the increasing acceleration in the world-wide campaign to abolish the death penalty" maintainable? Are they sufficient to propel the abolitionist cause towards ultimate success? Mr. Neve added a perceptive postscript to his above comments: "There's acceleration and exhilaration! But we're plateauing ...".⁷⁹ Hood and Hoyle may have substantially accounted for past causes, but I am not so sure that this retrospective analysis affords a

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 47.

⁷⁶ *Supra* note 54.

⁷⁷ Interview with Mark Warren, human rights researcher, October 29, 2009.

⁷⁸ Interview with Alex Neve, Secretary-General of Amnesty International Canada (Ottawa), October 6, 2009.

⁷⁹ *Ibid.*

sufficient foundation for the attainment of complete abolition. So let me return to the five States that were responsible for 93% of the world's known executions in 2008: China, Iran, Saudi Arabia, Pakistan and the USA. Are the identified causes likely to have any effect on these retentionists or have we indeed "plateaued"? I will examine each in turn.

2.2 Prospects for the future success of the four causes

(a) China

Described as "the world's most prolific State executioner",⁸⁰ China was responsible for a disturbing 72% of all verified executions in 2008. The number may even be higher because China has consistently refused to disclose death penalty statistics so Amnesty International publishes what it considers to be a conservative estimate. In fact, as shown earlier, Amnesty declined to provide any estimate for 2009 (above, page 2). Remarkably, China was one of the first countries to have completely abolished capital punishment; it did so in 747 A.D. under Emperor Taizong of the Tang Dynasty (although this measure only remained in effect until 759 A.D.).⁸¹ But this was a blip in the face of China's more characteristically prolonged commitment to use of the death penalty, as encapsulated by Dr. Lu Hong:

2.1 China has had a long history of the death penalty with the earliest available record dating back to the Shang Dynasty (1700-1027 BC). It is a long historical tradition throughout the dynastic rules, the Republic era, and the PRC era that justifies capital punishment on the grounds of retribution, deterrence, and incapacitation. Chinese traditional sayings like "a life for a life," "killing one to warn a hundred," "killing a chicken to warn a monkey" are embodiments of these retributive and deterrent beliefs.⁸²

Dr. Hong pointed out that, throughout Chinese history, the death penalty had been used as a tool to suppress crime and maintain social order. It had been heavily relied upon during the early 1950s to suppress counterrevolutionary activities and corruption. It was again utilized during the strike-hard campaigns to swiftly and severely punish offenders. Despite this, a more consistent official policy on the

⁸⁰ Reuters, "China says no plans to abolish the death penalty", April 15, 2008, online: <<http://www.reuters.com/article/latest/Crisis/idUSPEK237931>>.

⁸¹ Charles Benn, *China's Golden Age: Everyday Life in the Tang Dynasty* (Oxford: Oxford University Press, 2002) at 8.

⁸² Lu Hong, *China's Death Penalty: Reforms on Capital Punishment*, EAI Background Brief No. 412, November 5, 2008.

death penalty, emanating from Chairman Mao himself, had been to prevent excessive execution and execute with caution. Post-Mao leaders had also voiced their views on the death penalty. Deng Xiaoping, who had initiated the strike-hard campaigns in light of rampant crime, had commented that the authorities could not be soft on crime, and the death sentence was a necessary educational tool in dealing with a few most serious offences. According to Dr. Hong, current leaders, such as President of the PRC Hu Jintao, Premier Wen Jiabao and President of the Supreme Court Xiao Yang, have stated that China cannot abolish the death penalty under the current social conditions, but it will make sure that the death sentence is meted out fairly and cautiously.

Trying "to prevent excessive execution" may be in the eye of the beholder, but there is no doubt of the massive reduction in the number of capital offences. Hood and Hoyle contrasted the more than 940 capital crimes in China at the beginning of the 20th century with the reduction to 68 in 1997.⁸³ And even these 68 reduce significantly upon analysis:

4.2 ...about one third of the capital offenses have rarely been used in practice; another one third consisted of non-violent, non-lethal offenses (i.e., corruption, economic offenses, and public order offenses). It was proposed to gradually narrow the scope of capital offenses by eliminating the offenses rarely used first, and then the non-violent and non-lethal offenses. The final step would be the complete abolition of the death penalty.⁸⁴

What steps, if any, are being taken towards "the complete abolition of the death penalty"? Frankly, it seems hard to imagine such an accomplishment taking place within years, maybe even decades. As stated by Senior Judge Huang Emei of the Supreme People's Court ("SPC"): "Currently our country does not have the conditions to abolish the death penalty and will not have those conditions for a considerable period of time."⁸⁵ Dr. Hong herself had concluded: "...The complete abolition of the death penalty remains only a long-term goal in China".⁸⁶ Yet, given my earlier remarks about an incremental approach

⁸³ *Supra* note 2 at 100.

⁸⁴ *Supra* note 82.

⁸⁵ CBS Evening News, "Rare Look at China's Death Penalty", March 10, 2008, online: <<http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?tag=mncol;lst;1>>.

⁸⁶ *Supra* note 82 at para. 4.6.

of gradually reducing the number of capital offences being "...a well-established model of how best to proceed" (above, page 9), Dr. Hong's analysis may, even now, constitute grounds for optimism.

At the time of writing, "The emergence of the human rights perspective", either in the case of individuals pressing for change or from the influence of other countries, does not seem to carry much weight. For the former, *The Economist* noted: "In a new mood of even sharper hostility towards dissent, China is coming down hard on the country's small but courageous community of human-rights activists."⁸⁷ With respect to the influence of other countries, editorial commentator Xia Qingwen responded quite succinctly:

We cannot talk about the death penalty without understanding Chinese culture and the present situation.

The notion of "returning like for like" is rooted in China. The majority of the public could not accept that some murderers could go free after 10 years' imprisonment. Until Western ideas on human rights and life have been popularized in China, the abolition of the death penalty will not be supported.⁸⁸

Nonetheless, there is some slim but encouraging evidence that the human rights perspective may yet be emerging. A quite extraordinary project was launched in Beijing in June 2007, entitled the "China Death Penalty Project". This was intended to be a three year project, funded by the European Initiative for Democracy and Human Rights, and organized under the auspices of the Great Britain China Centre, the Irish Centre for Human Rights and the College for Criminal Law Science at Beijing Normal University. The "Launch Seminar" was held on June 20/21, 2007, and it was attended by leading experts from Europe and Asia, including senior Chinese representation from the SPC, the National People's Congress Legislative Affairs Commission, the Supreme People's Procuratorate and top academics. Although abolition is the ultimate focus of the Project, the following topics emerged in the opening discussions:

- Grand Judges Liu Jiachen and Xiong Xuanguo of the SPC spoke of the necessity of reform of the death penalty

⁸⁷ The Economist, "China's embattled dissidents: Tougher and tougher", February 13, 2010.

⁸⁸ China Daily News, "China questions death penalty", January 27, 2005, online: <http://www.chinadaily.com.cn/english/doc/2005-01/27/content_412758.htm>.

- Discussion sessions analysed the route to abolition, including potential compromise formulations such as the application of the death penalty for the worst of the worst crimes and the suggestion of the use of life without parole
- Professor Zhao talked about a step by step reduction in numbers subject to the death penalty, stimulating debate on the number of crimes currently eligible for the death penalty, particularly with regard to non-violent crimes
- Discussion of the vital role of the judiciary in the application of the death penalty, ensuring that a full fair trial is held in capital cases.⁸⁹

Much of the Project will be concerned with public opinion surveys and interviews with key actors, all of this work to be carried out by the Max Planck Institute for Foreign and International Criminal Law and the Faculty of Law at the University of Wuhan. The Project is expected to culminate in 2010 with a comprehensive research report, containing a series of suggested reforms, to be presented to the Legislative Commission of the National People's Conference.⁹⁰ I would not anticipate a recommendation for abolition *per se*, but there should be a proposal for progressive steps along the way, all founded on a human rights perspective. I see three immediate areas for reform: the disclosure of death penalty statistics; the enhancement of the process of review by the SPC, commenced in 2007, of all death sentences in an effort to minimize erroneous executions; and the reduction in the number of capital offences. These reforms should set China on the path towards abolition. As stated by Hood and Hoyle:

While Chinese political leaders still strongly defend capital punishment as an essential tool to fight crime and preserve social order in a country of 1.3 billion that is undergoing wrenching economic and social changes, it appears that they are becoming increasingly uncomfortable that it is too readily applied, and apparently in an arbitrary way. Cases of innocent persons being sentenced to death have been uncovered and widely discussed. Reform of the death penalty would be in step with President Hu Jintao's commitment to build a harmonious society.⁹¹

In terms of "The developments of international treaties committed to abolition", China has signed, but not ratified, the *International Covenant on Civil and Political Rights*. For obvious reasons, it has not signed the abolitionist *Second Optional Protocol*. During the first examination of China's record by the

⁸⁹ Irish Centre for Human Rights, "China Death Penalty Project", December 1, 2007, online: <http://www.nuigalway.ie/human_rights/Projects/death_penalty.html>.

⁹⁰ Max Planck Institute for Foreign and International Criminal Law, "Moving the Debate Forward: China's Use of the Death Penalty", April 9, 2009, online: <<http://www.iuscrim.mpg.de/ww/en/pub/forschung/forschungsarbeit/kriminologie/peking.htm>>.

⁹¹ *Supra* note 2 at 100.

UN Human Rights Council conducted in early 2009, the death penalty was considered. China rejected proposals to end its use of capital punishment, but it did at least concede to "...consider further restrictions on its use."⁹² I do not expect China to go much beyond this within the foreseeable future, and its ratification of the *Second Optional Protocol* is almost unimaginable in present circumstances. As to "Mounting political pressure", we have seen little susceptibility by China to external pressures surrounding any issue – let alone human rights. It was widely hoped that the Beijing Summer Olympics might have strengthened the forces of liberalization but, if anything, reactionary positions hardened. China is an ancient, increasingly powerful and economically successful superpower; it is unlikely to be swayed by the opinions of non-Chinese. Mark Warren told me: "There's no movement in China. It's not [at] an abolitionist point. As external activists, how do we convince these countries? There's a limit to external influence. We need to know the local situation."⁹³ I think this aptly summarizes the present challenge: the hope for abolition lies within China itself. The principal exception to this, according to Hood and Hoyle, was the effect on China of "The strategy of non-cooperation":

Also China has signed extradition treaties with Spain, France, and Australia in which it has agreed not to execute criminals who are repatriated to it. This development is having a profound effect on the death penalty debate in China, especially as it concerns the abolition of the death penalty for major economic crimes.⁹⁴

I had earlier alluded to the strategy of non-cooperation as not being "...a major step towards abolition" (above, page 22) so I am sceptical of these three extradition treaties as having "...a profound effect on the death penalty debate in China." Nonetheless, whether it has only some effect, it does demonstrate that, even in a society as autonomous as China's, inroads can be made. And the "China Death Penalty Project" report may yet be a watershed in focusing and furthering the debate.

⁹² Guardian News, "China rejects UN recommendation to end death penalty and labour camps", February 11, 2009, online: <<http://www.guardian.co.uk/world/2009/feb/11/china-death-penalty-united-nations>>.

⁹³ *Supra* note 77.

⁹⁴ *Supra* note 2 at 31.

(b) Saudi Arabia

Here are Amnesty International's dismal comments from its 2009 Report: "The death penalty continues to be applied extensively after summary and secret trials. Defendants are rarely allowed legal assistance and can be convicted solely on the basis of confessions obtained under duress or deception."⁹⁵ It is noted that capital punishment was used disproportionately against the poor, including many migrant workers from Asia and Africa, and women. Many of the 102 executed in 2008 had been for non-violent offences, including drug offences, sodomy, blasphemy and apostasy, most executions being held in public.

It has been reported that Saudi Arabia carried out 86 executions in 2005, 39 in 2006, 140 in 2007⁹⁶ and, as stated above, 102 in 2008. For 2009, Amnesty International reported: "In Saudi Arabia, the authorities continued to execute at an alarming rate. At least 69 people were publicly beheaded during 2009."⁹⁷

When I asked Piers Bannister about this, he answered forthrightly: "Some years they do a lot of executions, others not many."⁹⁸ Amnesty has sought access to the Kingdom in order to investigate human rights, but the Government has not permitted it. So we do not have a factually determined perspective. Yet we do know one overriding fact: along with Yemen, Saudi Arabia is the only country in the region to apply Islamic law in its entirety. So the four identified "causes" are of little guidance when it comes to Saudi Arabia. Any notion of a "human rights perspective" is entirely subsumed within the dictates of Islamic law. Saudi Arabia has not even signed the *International Covenant on Civil and Political Rights*, and it voted against the UN General Assembly's moratorium on executions. What possible "political pressure" could be mounted against Saudi Arabia's position on capital punishment? Finally, I know of no instance where extradition has even arisen as an issue; other States simply do not extradite to Saudi Arabia. So the question becomes a different one: if the four "causes" that have been identified as causing the acceleration in progress towards universal abolition hit the wall in an Islamic State, how is progress then to be measured and achieved?

⁹⁵ *Supra* note 18 at 280.

⁹⁶ *Supra* note 2 at 71.

⁹⁷ *Supra* note 3 at 20.

⁹⁸ *Supra* note 47.

Professor Cherif Bassiouni, described by Hood and Hoyle as "a leading scholar of Muslim criminal law",⁹⁹ has analyzed the sources of Islamic law, the *Shari'ā*, to determine the extent to which the death penalty was prescribed.¹⁰⁰ The two principal sources were the *Qu'rān* and the *Sunna*, the former being the controlling source. According to Bassiouni, "The prescriptions contained in these two primary sources of Islamic law...require interpretation."¹⁰¹ He described the various schools of jurisprudence that had emerged over the centuries, noting the particular strictness of the *Wahabi* school followed mainly in Saudi Arabia. The great doctrinal debate among all these schools of jurisprudence was whether to interpret the *Qu'rān* and the *Sunna* literally "...or on the basis of the intent and purpose of the text, or both."¹⁰² Bassiouni explained the three broad categories of thinking and practice that had developed around this debate: "the traditionalists ... representing the prevailing religious establishments in the *Sunna* and *Shari'ā* worlds",¹⁰³ the "fundamentalists...who are essentially dogmatic, intransigent and literal",¹⁰⁴ and the so-called *ilmani*, meaning those who seek to achieve the legislative goals of the *Shari'ā* by recognized techniques, including scientific knowledge. According to Bassiouni, the *ilmani* "...also search for the purposes and policies of the *Shari'ā* in order to address contemporary problems."¹⁰⁵ Tracing the complex and disputatious history of these factions over fifteen centuries, Bassiouni concluded:

The knowledgeable became the elite, the advisers to the rulers, and the teachers of the masses. This may explain why the *Sunni* "traditionalist" clergy in order to preserve their power, decided in the fifth century AH [*sic*] or twelfth century AD to foreclose resort to *ijtihad* or best reasoning as a source of law and as a method of interpretation. Since *ijtihad* is the basic source of progressive development, its closure preserved the past and condemned the future to follow that past. No Muslim country has so far dared to officially re-open the door to *ijtihad*, even though the need to resort to it in light of so many scientific and technological developments is obvious.¹⁰⁶

⁹⁹ *Supra* note 2 at 71.

¹⁰⁰ M. Cherif Bassiouni, *Death as a penalty in the Shari'ā*, in Hodgkinson & Schabas, eds., *supra* note 22 at 169-185.

¹⁰¹ *Ibid.* at 170.

¹⁰² *Ibid.* at 172.

¹⁰³ *Ibid.* at 173.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at 174.

¹⁰⁶ *Ibid.* at 175-176.

There are three categories of crimes in the *Shari'ā*: *Hudad*, *Qesas* and *Ta'azir*. Their study is difficult because, according to Bassiouni, "The *Sunni* and *Shi'ā* jurisprudential schools differ as to some of the elements of the crimes contained in these three categories and their evidentiary requirements..."¹⁰⁷.

Nonetheless, contrary to certain prevailing misconceptions, Bassiouni's analysis demonstrated that, based on the *Shari'ā* itself, mandatory resort to the death penalty was carefully constrained. The death penalty was prescribed for only one *Hudad* crime: *haraba* (or brigandage) and then only if a death occurs. Three others allowed the death penalty as an option: *ridda* (apostasy, the renunciation of Islam); *zina* (adultery), but the Prophet had imposed the death penalty only for the married transgressor; and *baghi* (transgression or uprising). The death penalty for *Qesas* crimes (such as homicide and the infliction of physical injury) is either conditional or optional. And the death penalty for any *Ta'azir* offence (lesser crimes) is optional. Moreover, not only is the mandatory application of the death penalty limited but there is also the consistent acknowledgement of the value of repentance. Hence, in Bassiouni's view, the widespread use of the death penalty in certain Muslim countries does not reflect fundamental Islamic values:

Repentance and forgiveness are two consistent themes throughout the *Qu'rān*. Since Islam is a holistic religion, repentance and forgiveness are not limited to the Hereafter, but apply also to this world. The *Qu'rān* specifically provides that an offender who has committed a crime may repent and, if the repentance is made and is genuine, that person should not be punished.¹⁰⁸

Bassiouni seemed justifiably enthralled with this principle, and he bemoaned the interpretations of the *Shari'ā* that did not recognize its importance:

Repentance is surely grounds for remission of all penalties. Why repentance is not recognized and applied by contemporary theories of rehabilitation of offenders, can only be attributed to selective application of the letter of the law taken without regard for *Shari'ā*'s enlightened spirit.¹⁰⁹

¹⁰⁷ *Ibid.* at 176.

¹⁰⁸ *Ibid.* at 184.

¹⁰⁹ *Ibid.*

Bassiouni concluded that Muslim countries could indeed restrict the death penalty by legislation whilst remaining "consistent with the *Shari'ā*."¹¹⁰ He gave the example of Libya that, in 1980, had reduced the application of the death penalty to only four crimes. In other words, having the death penalty available was not necessarily mandated by the *Shari'ā* (although I had understood him to say that, for *haraba*, it was) but it was a policy choice for the individual State. Muslim countries that were continuing to execute their own citizens and foreign nationals were a cause for deep consternation on the part of Bassiouni who ended with these stirring words:

The *Qu'rān* offers ample guidance to enlightened legal policy for the purposes of establishing a just and humane society. The Muslim opens every prayer and should start every deed, with the words from the *Qu'rān* in the *Fatiha*, the opening of the scripture: "In the name of Allah, the source of mercy, the Merciful." It is mercy that is Islam's hallmark because it is Allah's foremost characteristic. The just, *el-Adel*, is also one of Allah's divine characteristics. How Muslim societies have managed to stray so far from these and other noble characteristics of Islam can only be explained by reasons extraneous to Islam.¹¹¹

Schabas has voiced a similar sentiment: "It appears that religion is little more than a pretext to justify a resort to harsh penalties that is driven by backward and repressive attitudes in the area of criminal law."¹¹²

In a report on the abolitionist arguments within the World's major religions,¹¹³ Amnesty International substantially mirrored Bassiouni's views concerning Islam. It noted that the diversity of the schools of interpretation of the *Shari'ā*, as well as the differing post-colonial histories, "...has meant that penal codes of countries where Islam is the predominant religion have taken different views of the death penalty, when and how it can be applied and what flexibility can be permitted to those with the authority to impose it."¹¹⁴ It also pointed out the emphasis in the *Qu'rān* on the value of pardon and mercy. It was therefore up to the judge to aim "...to prevent criminals from repeating offences and to reform them, which suggests that the death penalty should not be applied."¹¹⁵ We are a long way from the 102

¹¹⁰ *Ibid.* at 185.

¹¹¹ *Ibid.*

¹¹² William Schabas, *Islam and the Death Penalty*. William and Mary Bill of Rights Journal 9:1 (December 2000) 223 at 236.

¹¹³ Amnesty International-British Section, *Religions and the Death Penalty*, undated.

¹¹⁴ *Ibid.* at 7.

¹¹⁵ *Ibid.* at 8.

executions in Saudi Arabia in 2008, many of which were "...for non-violent offences, including drug offences, sodomy, blasphemy and apostasy."¹¹⁶ Or, indeed, from the bizarre sentencing to death in 2009, of Ali Hussain Sibat, a predictor of the future on television, for "sorcery."¹¹⁷ Perhaps these executions do result from governmental policy choices flowing from the strictness of the dominant *Wahabi* school, but this activity does not seem to be mandated in the *Shari'ā*. The Amnesty report pointed out that just because an activity is permitted in the *Qu'rān* does not mean that it has to be followed today, giving the example of slavery that no Islamic country now upholds. So why couldn't the death penalty be similarly discarded? The report ended with a glimpse of encouragement:

The Arab Lawyers Union and the Union of Arab Jurists as well as the World Muslim Congress have publicly signed a joint non-governmental organizations' appeal for the abolition of the death penalty to the 6th United Nations Congress on the Prevention of Crime and Treatment of Offenders.¹¹⁸

I will consider other such initiatives in the penultimate Chapter (below, pages 141 to 146).

(c) Iran

The Islamic Republic of Iran is notorious for its harsh human rights practices. Although Amnesty International had reported 346 executions in 2008, it did note: "The actual totals were likely to have been higher, as the authorities restricted reporting of executions."¹¹⁹ There were even more recorded in 2009: 388 executions.¹²⁰ Amongst those executed during this period were three men executed by stoning, and eight juvenile offenders in 2008 and five in 2009 (with Iran being the world's leading executioners of juveniles).¹²¹ The offences for which these individuals paid the supreme price included "enmity against God", murder, rape, sodomy, drug smuggling and corruption. A new capital offence was legislated in January 2009: for producing pornographic videos (although there was a prescribed alternative sentence of flogging). Just as for Saudi Arabia, it is hard to see the four identified causes having much effect on

¹¹⁶ *Supra* note 18 at 280.

¹¹⁷ *Supra* note 3 at 21.

¹¹⁸ *Supra* note 113 at 8.

¹¹⁹ *Supra* note 18 at 176.

¹²⁰ *Supra* note 3 at 18.

¹²¹ *Supra* note 2 at 190.

Iran's death penalty, at least in the foreseeable future. So, again, we must look to the powerful influence of Islam – or, more accurately, Iran's interpretation of Islam. Even more insidiously, Iran has other motivation for this continued use of the death penalty: the disputed Presidential election of June 2009 identified the widespread opposition to the Ahmadinejad regime. We thus see the death penalty being used as a tool of both extremist religious orthodoxy and political repression, examples being the following:

- The remarks of Mohsen Yahyavi, leader of a delegation of Iranian MPs meeting with British MPs in May 2007, that homosexuals deserved to be executed or tortured;¹²²
- The hanging of a woman who had become pregnant by her brother (who was himself absolved after expressing his remorse);¹²³
- The sentencing to death of a 22 year-old man for his fourth violation of Iran's ban on drinking alcohol;¹²⁴
- The death sentences imposed upon individuals identified as MZ, AP and NA, all apparently for their involvement in the countrywide protests following the Presidential election;¹²⁵
- Amnesty International reported that there were 196 executions in Iran in the first half of 2009, but between the June 12 election and the President's Inauguration on August 5th, "...executions surged to an average of two a day...".¹²⁶

Hossein Askari, a professor of international affairs at George Washington University, was reported as commenting: "The regime never expected to see people demonstrate so openly since the elections. The executions are intended to frighten them. It is absolutely intended for that purpose."¹²⁷ These comments echoed a similar perception voiced to me by David Matas when I asked him about the death penalty in Muslim countries:

The death penalty is tied in with the overall repression. They kill their opposition in large numbers. It's a much harder nut to crack in non-democratic nations. The death penalty in that context is a lot to do with the society. But they're gradually moving towards democratization even in Iran, although Iran rejects the international order at present.¹²⁸

¹²² The Times, "Gays Deserve Torture, Death Penalty, Iranian Minister Says", November 13, 2007, online: <<http://www.foxnews.com/story/0,2933,311025,00.html>>.

¹²³ *Ibid.*

¹²⁴ Payvand Iran News, "Iran: 'Hardened Drinker' Faces Death Penalty", August 2, 2008, online: <<http://payvand.com/news/08/feb/1078.html>>.

¹²⁵ The Observer, "Iran defiant as three more given death penalty over election protests", October 11, 2009, online: <<http://www.guardian.co.uk/world/2009/oct/11/iran-defiant-over-death-penalties>>.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Supra* note 68.

Iran's rejection of the international order was clearly demonstrated in its recent response to the UN Human Rights Council's review of its human rights record. Recommendations put forward by the Council included ending the execution of juvenile offenders, upholding fair trial guarantees, investigating torture allegations and releasing people detained for peacefully exercising their human rights, all of which, according to Amnesty International, were rejected by Iran.¹²⁹ Amnesty commented: "For human rights to really improve in Iran, the authorities must end the double-speak and take concrete measures, like ending the execution of juvenile offenders; ensure fair trials; halt torture and end impunity for all violations."¹³⁰ The achievement of any of this seems unlikely under the present regime. A prime example is that, having signed the *International Covenant on Civil and Political Rights* which specifically prohibits the death penalty for crimes committed by persons under 18 at the time of the offence, Iran remains "the world's leading executioner of juveniles."¹³¹ If Iran can so brazenly flout an international obligation, it is hard to see what type of pressure or commitment could possibly set it on a more progressive path. Yet Mr. Matas, an astute observer, pronounced himself, in the final analysis, "optimistic"¹³² about eventual abolition in Muslim countries, including Iran. Whatever would that take in Iran? I conclude that it could only be done through the emergence to power of the opposition forces that are so conspicuously in evidence – despite the repression. Whilst recognizing that no one has any idea as to whether that is a likely outcome of the continuing turmoil, I will canvass the prospects in Chapter 5 (below, pages 158 to 161).

(d) Pakistan

This is my Case Study #2 (below, page 101) so I will defer comment until then. I do note immediately, however, the salutary report of no known executions having taken place in Pakistan in 2009.¹³³ This is a remarkable change from its position the previous year as one of the world's five leading executioners. However, when I examined the reason for this in the Case Study, it was almost entirely to do with the

¹²⁹ Amnesty International, "Iran 'shows contempt' for human rights by rejecting UN recommendations", February 17, 2010, online: <<http://www.amnesty.org/en/news-and-updates/iran-039shows-contempt039-human-rights-rejecting-un-recommendations-20100217>>.

¹³⁰ *Ibid.*

¹³¹ *Supra* note 121.

¹³² *Supra* note 68.

¹³³ *Supra* note 3 at 13.

political situation within Pakistan itself. Hood and Hoyle's four causes were not really influential factors, supporting my view that their retrospective analysis does not provide "...a sufficient foundation for the attainment of complete abolition" (above, page 24) going forward. It becomes increasingly a challenge of unique circumstances.

(e) U.S.A.

This is my Case Study #3 (below, page 112) so, again, I will defer comment.

In summary, there can be no doubt of the immense challenges facing the abolitionist movement. So far, so good, but to attain the ultimate goal of universal abolition will necessitate not only gleaning lessons from past successes but also incorporating the benefits of new directions. I have generally agreed with Hood and Hoyle about the causes of accelerated abolition up to the present time. However, more critically for this thesis, I have expressed doubt that these identified causes will carry the remaining retentionist jurisdictions towards abolition. As I have shown above in the cases of China, Saudi Arabia and Iran (and will do in the Pakistan and U.S.A. Case Studies) there are entirely different reasons for their continued adherence to the death penalty, none of which seem likely to be dislodged by a generalized approach. These retentionist jurisdictions need to be thoroughly understood historically, culturally and, perhaps, religiously. Only then can realistic and appropriate abolitionist campaigns, ultimately dependent on domestic institutions, be embarked upon. This is the tough challenge facing the NGOs concerned. I will accordingly next consider the overall effectiveness of NGOs in the campaign to abolish the death penalty, before proceeding to a detailed study of individual situations.

3. To what extent have NGOs been effective in the campaign to abolish the death penalty?

In Chapter 2, I identified the date from which modern abolitionism can be justifiably viewed as having begun: December 10, 1948, the day on which the *Universal Declaration of Human Rights* was approved. Its Article 3 - "Everyone has the right to life, liberty and security of the person" – was perceived by Schabas to have been "abolitionist in outlook" (above, page 12). Despite having been expressed only implicitly in Article 3, he considered the drafting of the *Universal Declaration* to have promoted the abolition of the death penalty as a goal for civilized nations. This was at a time when "...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."¹³⁴ After December 10, 1948, the campaign for abolition began in earnest. In fact, the *Universal Declaration* utterly transformed the entire scope of human rights work. As poetically described by Dr. William Korey: "...emerging from the depths of the century's most horrendous bestiality – the Holocaust – was the instrument that would provide the compass for humankind's journey to the stars."¹³⁵

NGOs were very much involved in the creation of the *Universal Declaration*. As they had been in the earlier – and fundamentally essential – enactment of the *UN Charter*. As Korey pointed out: "Nor would the Declaration itself ever have been conceived of as an instrument were it not preceded by the UN Charter, whose human rights provisions were products of NGO determination and persistent lobbying in which the American Jewish Committee played the leading role."¹³⁶ In these early days, few NGOs held consultative status with the UN; Korey reported that only 41 NGOs held such status with the UN Economic and Social Council in 1948. Interestingly, however, the United States alone invited 42 NGOs to serve as consultants at the San Francisco Conference at which the *UN Charter* was to be debated. There were representatives from the American Association for the United Nations, American Association of University Women, American Bar Association, American Federation of Labor, American Jewish

¹³⁴ *Supra* note 10 at 1.

¹³⁵ William Korey, *NGOs and the Universal Declaration of Human Rights* (New York, NY: PALGRAVE, 2001) at 1.

¹³⁶ *Ibid* at 2.

Committee, Carnegie Endowment for International Peace, the Federal Council of Churches, the National Catholic Welfare Conference and the National Peace Conference.¹³⁷ Other NGOs, not formally invited, but attending anyway, included the Fraternal Council of Negro Churches, Council on African Affairs and the Universal Negro Improvement Association. Rather oddly to modern sensibilities, no other nation invited NGOs to participate at San Francisco. Korey attributed this to the importance of voluntarism in American society, noting (somewhat inaccurately I would have thought): "Voluntarism was hardly a basic element of foreign cultures."¹³⁸

Whatever the real explanation for their unique presence, there can be little doubt of the constructive role played by the American NGOs. Lauren commented: "They most certainly were not the type to meekly sit by, be mere sympathetic spectators, take an oath of silence, or be content, in the words of one of them, to serve as only 'window dressing' for the benefit of their government's public image. For weeks they energetically held news conferences, issued press releases, spoke in local churches, sought allies where they could find them, lobbied foreign delegations, attended sessions as observers, and applied pressure to their own delegation."¹³⁹ All this activity produced impressive results. In particular, five of the 42 NGO consultants were credited by Korey as having "...played critically important leadership roles with respect to human rights."¹⁴⁰ These were the Commission to Study the Organization of Peace, the Federal Council of Churches, the American Association for the United Nations, the American Jewish Committee and the National Peace Conference. The most prominent leader of these NGOs was Judge Joseph Proskauer, President of the American Jewish Committee. He was called upon by the other activists leaders to prepare a memorandum to Secretary of State Edward Stettinius, urging the American delegation to take a position of leadership on human rights.

The memorandum urged that leadership be exercised in three specific areas: "(1) human rights must be identified as a 'purpose' of the UN; (2) all member states of the UN must assume the obligations of

¹³⁷ Paul Gordon Lauren, *The Evolution of International Human Rights*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2003) at 182.

¹³⁸ *Supra* note 135 at 32-33.

¹³⁹ *Supra* note 137 at 182.

¹⁴⁰ *Supra* note 135 at 33.

guaranteeing human rights; and (3) establishment of a 'human rights commission' must be stipulated by name in the Charter."¹⁴¹ In a dramatic meeting with all the NGO consultant groups, Secretary of State Stettinius, visibly impressed, promised to bring the proposals to the attention of the U.S. delegation that very evening. He was successful. The U.S. delegation agreed to sponsor the consultants' proposed human rights amendments and, almost miraculously in hindsight, Britain, France and the USSR quickly came on board as co-sponsors. Stettinius was able to announce, only three days after his meeting with the NGOs, that the U.S. would formally submit their proposals to the San Francisco Conference.

Once at San Francisco, the NGOs began a major lobbying effort. As Korey observed:

They planted several firm human rights seeds in the UN that, in time, would bear considerable fruit. The secret of their strategy was to persuade the U.S. government of the value of human rights in the Charter, relying upon its leadership to affect decisively the perspective of others. It was a strategy that would be pursued at various intervals later on in UN history. And it was, to a large extent, the key to human rights advancement.¹⁴²

The success of this NGO lobbying meant that the *UN Charter* would contain, in Korey's words, "...not a passing and extremely limited note about human rights but rather seven major references to human rights, several of enormous consequences."¹⁴³ Two specific outcomes would play an immense part in the future activities of NGOs. Firstly, Article 71 provided that the newly created ECOSOC "...may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence." Secondly, although not explicitly mentioned in the text, "...everyone understood that the initial primary function of the proposed human rights commission would be the preparation of an International Bill of Rights."¹⁴⁴ This landmark work began no more than a year after the San Francisco Conference. The Commission on Human Rights was appointed on April 29, 1946 and, chaired by the venerated Eleanor Roosevelt, met on January 27, 1947, to commence drafting an international bill of human rights. Not surprisingly, the gargantuan task before the Commission, even at the relentless pace

¹⁴¹ *Ibid.* at 36.

¹⁴² *Ibid.* at 39.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.* at 41-42.

set by Mrs. Roosevelt, took nearly a year to complete. The *Universal Declaration* that emerged was said by Korey to be a document that "...would rank in historic significance with the Magna Carta, the French Declaration of the Rights of Man, and the American Declaration of Independence."¹⁴⁵ It contained 30 articles, embracing the totality of human rights then of concern to the international community. I have already noted the importance of its Article 3 to the ongoing campaign for abolition of the death penalty (above, pages 12 and 37).

It was NGO pressure and lobbying that led to the *Universal Declaration*. But what of the drafting itself? Korey cited three sources for the contention that NGOs were regularly involved in the drafting work: Charles Malik, Chairman of the General Assembly's Third Committee; René Cassin, principal architect of the *Universal Declaration*; and UN Secretary-General U Thant. These august gentlemen praised the comprehensive contribution of the NGOs. However, as pointed out by Korey, "That the interested NGOs 'kept in close touch' with the drafters of the Declaration would not be surprising, but pertinent data about when, how, and in which respect and in what precise way NGOs made their recommendations known have thus far not been established."¹⁴⁶ Korey referred to a study by Theo van Boven, a former Director of the UN Division of Human Rights, which indicated that NGOs had indeed participated in the debates on drafting. The problem was that, because NGOs could not make proposals in their own names, there was no way of knowing which specific ideas were theirs. As Korey put it: "NGOs were totally dependent, at the time, upon the willingness of governmental delegations to sponsor one or another of their ideas."¹⁴⁷ In other words, because of the then limitations on the role of NGOs, we cannot define with precision their contribution to the final result, the *Universal Declaration*. What we do know however – and, ultimately, it proved to be of even greater significance – was the role played by NGOs going forward. After the successful vote in the Third Committee on December 7, 1948, Mrs. Roosevelt pondered a question that may have been on delegates' minds but, doubtless because of political delicacy, was not articulated: "How would the repressed and oppressed ever know what their rights were under the

¹⁴⁵ *Ibid.* at 43.

¹⁴⁶ *Ibid.* at 46.

¹⁴⁷ *Ibid.*

Universal Declaration of Human Rights?"¹⁴⁸ She answered the unasked question with an evocative expression, that the words and significance of the *Universal Declaration* would be carried to all peoples by a "curious grapevine." Korey commented: "She may have never defined her striking phrase of a 'curious grapevine,' but it is not at all unlikely that she was thinking of nongovernmental organizations."¹⁴⁹ Whatever the level of their involvement in the actual drafting, NGOs had clearly taken the lead in establishing the paramountcy of human rights and the need for international standards. Now they would have to find ways to promulgate the message of the *Universal Declaration* beyond prison walls and to confront violations of its 30 articles. Korey realized: "The 'curious grapevine' was pregnant with possibilities. The impact of the nongovernmental organizations ultimately would be felt in international affairs in a major way."¹⁵⁰ So December 10, 1948 was indeed the landmark date. Before that, NGOs had striven untiringly to place human rights on the international agenda. After that, the ranks of NGOs concerned about human rights would expand and blossom to an extent probably unimaginable in 1948. Prominent NGOs such as Amnesty International would be committed not only to developing human rights standards but also to systematic campaigning for their adoption and subsequent enforcement. Before considering the implications of this vast movement for abolishing the death penalty in particular, I will examine other single-issue human rights campaigns to see what lessons can be gleaned that might now be of assistance to NGOs in the campaign against the death penalty .

(a) The campaign against slavery

The first human rights campaign to involve NGOs – in fact, the one that really started NGOs – was the fight to end slavery. In the 18th century, slavery was a widely practised evil, supported by government and commerce alike. The first anti-slavery society on record was formed by Quakers in England in 1783. They were responding particularly to "...the terrible conditions faced by the enslaved in the British slave trade."¹⁵¹ Others joined and, influenced by Thomas Clarkson, an anti-slavery scholar at Cambridge University, they established the Society for the Abolition of the Slave Trade. The most famous member

¹⁴⁸ *Ibid.* at 48.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at 118.

was William Wilberforce whose eloquent speeches in Parliament denouncing the slave trade were a tremendous asset to the Society. Clarkson and Wilberforce were described by Lauren as "...two charismatic and indefatigable British crusaders deeply inspired by their religious faith who viewed the slave trade as fundamentally a moral issue rather than a political matter."¹⁵² The Society's campaigning, aided significantly by Wilberforce's advocacy in Parliament, produced the early success of the British *Act for the Abolition of the Slave Trade* in 1807. In that same year, the US Congress, inspired by President Thomas Jefferson's 1806 message to cease further participation in the violations of human rights of the "the unoffending inhabitants of Africa" and swayed by the pressures from anti-slavery groups, notably the nonconformist churches,¹⁵³ passed the *Act to Prohibit the Importation of Slaves*. However, as Lauren pointed out:

Both of these laws provided a necessary beginning to eliminating the slave trade, but neither could solve all the difficulties at once. They lacked sufficient enforcement capabilities and applied only to their own areas of jurisdiction, and thus could not significantly influence the behaviour of others beyond their own borders. In order to address this larger problem, therefore, those who wanted truly to end the slave trade turned their attention and energies towards an international solution.¹⁵⁴

Led by Clarkson and Wilberforce, the anti-slavery forces lobbied the delegates to the 1815 Congress of Vienna to deal with the international slave trade. The delegates eventually agreed to sign the *Eight Power Declaration*, condemning the slave trade and recognizing their responsibility to abolish it as soon as practicable. But there were no provisions specifically making the slave trade illegal or providing any type of enforcement mechanisms. Lauren recognized a reoccurring pattern for all subsequent international human rights efforts: "...agreement was easier to obtain on the general words of solemn declarations than on the specific provisions of enforceable commitments."¹⁵⁵ Despite this, abolitionists were generally encouraged by the new international declarations. NGOs, such as the Society for the Abolition of Slave Trade and the Aborigines Protection Society in Britain, the Society for the Suppression of the Slave Trade and the Association of Friends for Promoting the Abolition of Slavery in

¹⁵² *Supra* note 137 at 40.

¹⁵³ *Ibid.* at 39.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* at 42.

the USA, and the Société des Amis des Noirs and the Société de la Morale Chrétienne in France, were "...determined to build on the words of these first declarations and to press onward for the 'teeth' to abolish the trade."¹⁵⁶ This they did on several different fronts, listed by Lauren as follows:

They rejoiced when the pope finally issued moral instructions to all Catholics to abstain from the slave trade. They appealed to national leaders, petitioned governments, and pressured diplomats to consider such actions as making the slave trade an act of piracy.... In addition, they organized the British and Foreign Anti-Slavery Society (later becoming the Anti-Slavery International for the Protection of Human Rights and today acknowledged as the oldest human rights NGO in the world) and by 1840 sponsored its first World Anti-Slavery Conference in order to arouse global opinion.¹⁵⁷

(emphasis added)

This multi-faceted approach of NGOs petitioning leaders, governments, diplomats and combining internationally, remains their fundamental *modus operandi* today. What is particularly interesting is the involvement of religious groups, the nonconformist churches in the USA and the Roman Catholic Church worldwide. To this must be added the lead taken by the British government which "...proved to be the most responsive to this kind of public pressure, and thus came to be the leading crusader to abolish the international slave trade."¹⁵⁸ All of this combined to produce the abolition of slavery throughout the British Empire as of July 31, 1834. Yet this was only a beginning, and the Anti-Slavery Society lobbied the governments of Austria, France, Britain, Prussia and Russia to adopt a treaty in 1841 "...recognizing the right of each to halt ships on the high seas of any of the group engaging in the slave trade."¹⁵⁹ Sadly, however, much of the success in ending the slave trade flowed more from revolutionary upheavals or wars (notably, the American Civil War) than from reasoned discourse. As Lauren observed: "...after all the wars and revolutions of the nineteenth century most of those nations who had been so actively involved in trading realized that politically, diplomatically, economically, intellectually, and morally, they simply could no longer sustain the slave trade."¹⁶⁰

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Supra* note 135 at 118.

¹⁶⁰ *Supra* note 137 at 45.

At the 1890 Brussels Conference, the participating nations created what was intended to be a permanent International Slavery Bureau responsible for policing the Red Sea and Indian Ocean. Although this Bureau did not survive World War I, the Anti-Slavery Society moved forward by pressing the League of Nations to adopt a convention banning slavery.¹⁶¹ This was achieved in 1926. Meanwhile, the whole notion of what slavery meant was evolving. It was being understood to include circumstances "...that bordered on the slave condition even if they were not formally defined as slavery,"¹⁶² such as serfdom, debt bondage, bride purchase, child labour and human trafficking. To reflect all of this, the Anti-Slavery Society set its sights on the adoption of a new treaty, reaffirming and strengthening the League of Nations Slavery Convention but expanding its ambit to embrace those circumstances that "...bordered on the slave condition" (above). An important step was to become involved in the process towards an international bill of human rights. C.W.W. Greenridge, Secretary of the Anti-Slavery Society, met in early 1948 with five of the eleven members of the Commission on Human Rights, including Mrs. Roosevelt and René Cassin, to request the establishment of a working group of experts on slavery. As a result of this initiative, ECOSOC was asked to study the problem of slavery. And, of course, Article 4 of the *Universal Declaration* did transpire to provide: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

On May 13, 1949, the General Assembly requested the Secretary-General to appoint a five-member Committee of Experts to study slavery, Greenridge being one of the five. Korey commented: "...it was probably the first time that a top official of an NGO was selected for an important, if temporary, UN post."¹⁶³ And again: "With his new status, Greenridge was in a position virtually to guide decision-making of the UN with respect to slavery."¹⁶⁴ The Committee of Experts realized that the expanded notion of slavery affected many more people than had the recognized slavery of earlier centuries. In consequence, it sought a Supplementary Convention to the 1926 treaty to cover these wider situations. A 10-member drafting committee worked on this Supplementary Convention, and Korey pointed out:

¹⁶¹ *Supra* note 135 at 118.

¹⁶² *Ibid.* at 119.

¹⁶³ *Ibid.* at 120.

¹⁶⁴ *Ibid.*

"Significantly, the Anti-Slavery Society was in close contact with the members of the drafting committee and most of its recommendations were adopted."¹⁶⁵ The proposed Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was unanimously approved at a specially convened Conference of Plenipotentiaries held in 1956. Reflecting back on the formation of the first anti-slavery society nearly 200 years before, the *Supplementary Convention* was a transformative achievement, a landmark for international law. Its significance, in the words of Korey, "...lay in its recognition of, and, more particularly, its banning of, a host of contemporary practices that were deemed akin to slavery itself: debt bondage, serfdom, bride price, treatment of wives as property and child labor peonage."¹⁶⁶ Thus was delineated what the international community was not prepared to tolerate. Korey, having paid tribute to "the key role" of the Anti-Slavery Society and Greenridge's "personal hand in the entire development," aptly concluded: "The Anti-Slavery Society could take great pride in the adoption of the Supplementary Convention."¹⁶⁷ So it was that the leadership and commitment of NGOs, the Anti-Slavery Society in particular, with the support of religious groups and, later on, the British government, combined to achieve an inspiring statement of international law, the 1956 *Supplementary Convention*. This was not the last time that this type of informal alliance would produce an effective result (see Case Study #1, below, page 101).

(b) The campaign against torture

NGO involvement in the campaign to abolish slavery is certainly illustrative of what can be accomplished, but its lessons may not be quite as pertinent for the abolition of the death penalty as the more contemporary example of the campaign against torture. Article 5 of the *Universal Declaration* provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Yet the campaign to effectuate this exhortation did not get seriously underway for many years. It was on the perfectly chosen date of December 10th, but in 1972, that Amnesty International launched its worldwide Campaign for the Abolition of Torture. It was intended to culminate one year

¹⁶⁵ *Ibid.* at 121.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

later in a high-level international conference about torture on the 25th anniversary of the *Universal Declaration*. This Campaign was described by Korey as "...one of the most successful initiatives ever undertaken by an NGO."¹⁶⁸ In short, it was a campaign worthy of emulation so I will examine its main features.

The first noteworthy factor was the comprehensiveness of the campaign. It was described by Korey as "...impressively orchestrated, with a variety of individual and separate initiatives integrated into the overall effort, each reinforcing the other."¹⁶⁹ The foundation of the campaign, not surprisingly, was Amnesty's 1973 publication *Report on Torture*, a carefully researched description of the over 60 States in which torture was being practised. The Preface set forth as follows the noble rationale for this work:

...what for the last two or three hundred years has been no more than an historical curiosity, has suddenly developed a life of its own and become a social cancer. To describe torture as a malignant growth on the body politic is, however, not simply to employ a figure of speech but to announce a programme of action to remove it. This is Amnesty's purpose....

In the face of so much that is deliberately brutal, Amnesty reasserts the principle which has guided it from the beginning: that every man, woman and child is of value, that none should be made to suffer for holding or expressing his own opinions and that in consequence torture must be recognized for the evil that it is, the public mobilized and international and domestic machinery set up to bring it to an end.¹⁷⁰

With the published data as their support, Amnesty sections throughout the world embarked on a massive effort to submit a petition to the UN, calling for the immediate outlawing of torture of prisoners. The petition was prepared in 30 languages and, by the end of 1973, had been signed by over a million people.¹⁷¹ Korey pointed out: "The enormous figure hardly would have been possible without the assistance of the mass base of Amnesty."¹⁷²

¹⁶⁸ *Ibid.* at 171.

¹⁶⁹ *Ibid.*

¹⁷⁰ Amnesty International, *Report on Torture* (London: Amnesty International Publications, 1973) at 10-11.

¹⁷¹ *Supra* note 135 at 171.

¹⁷² *Ibid.*

Again with its considerable flair for building on auspicious dates, Amnesty next announced its intention to convene an international meeting on torture on December 10, 1973, the 25th anniversary of the *Universal Declaration*. This Conference for the Abolition of Torture attracted "...over 300 participants from governments, the UN and NGOs as well as from the Amnesty membership."¹⁷³ It also generated a lot of media interest due to UNESCO's unworthy decision to cancel the use of its facilities for the Conference because of Amnesty's "naming names" of the member States in its *Report on Torture*. Whilst publicly feuding with UNESCO might not have been part of the "impressive orchestration", Amnesty's continued pressure on UN delegates certainly was. At the 1973 fall session of the General Assembly, the Danish and Dutch Foreign Ministers voiced their concern about the reports detailing the widespread practice of torture. The Swedish delegate specifically referred to Amnesty's call for the eradication of every form of torture.¹⁷⁴ The encouraging result from all of this activity was the adoption of a UN Resolution condemning torture. Amnesty's avowed intent to make torture "as unthinkable as slavery"¹⁷⁵ was beginning to take shape.

I was taught at an early age that success in any venture emanates from the combination of diligence, perseverance and good luck. The first two factors are, of course, controllable, but luck is the intangible. On September 11, 1973, there was a military coup in Chile against the Allende government, precipitating years of brutality including murder, "disappearances" and torture. It was this awful sequence that, in fact, served to focus world attention on the issue of torture. The widespread suspicion that the U.S.A. was involved in Allende's death meant that Third World countries, usually sensitive about Western criticism of their governmental practices, now joined in the condemnation of Chile's human rights' abuses. As Korey commented: "For Amnesty International, the uniqueness of the political elements provided a distinctive opportunity to accelerate the remarkable momentum in combating torture."¹⁷⁶

¹⁷³ *Ibid.* at 172.

¹⁷⁴ *Ibid.*

¹⁷⁵ Amnesty International, *Annual Report 1974-75* (London: Amnesty International, 1976) at 18.

¹⁷⁶ *Supra* note 135 at 173.

Amnesty consequently extended its campaign beyond the originally announced one year, and started including known victims of torture in its "Urgent Action" appeals. This is a surprisingly effective mechanism that quickly generates communications from all over the world to any government that is mistreating a "prisoner of conscience", Amnesty's staple cause. The mobilization of its resources and membership meant that, by May 1975, Amnesty was sending out one "Urgent Action" appeal per week.¹⁷⁷ The combination of this enormous groundswell of indignation, combined with increasingly horrific reports of torture in Chile, put further pressure on the UN to deal with the issue more tangibly than by just adopting a resolution. More and more States were insisting that torture be properly combated, including the USSR which "...referred to testimony submitted to the UN Sub-Commission by several NGOs including Amnesty, the International Commission of Jurists and the Women's International League for Peace and Freedom."¹⁷⁸ Norway went further, specifically acknowledging Amnesty for "...the campaign against torture which that organization has launched."¹⁷⁹ The upshot was the adoption by the General Assembly on November 6, 1974 of Resolution 3218 (XXIX), calling for specific action against torture by the UN and its agencies. It requested the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, scheduled to take place in September 1975, to prepare rules to protect detained persons. Amnesty prepared for the Fifth Congress diligently and with perseverance. Amongst other "individual and separate initiatives integrated into the overall effort" (above, page 46), Amnesty:

- lobbied governments, submitting a 16-page document with a series of recommendations
- sponsored two seminars on torture at the Fifth Congress
- had Nigel Rodley, its chief legal officer, attend as an official observer
- called upon its national sections to ask their respective governments to support its recommendations
- held a seminar for senior police officers and police representatives from eight West European countries.¹⁸⁰

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.* at 174.

¹⁷⁹ *Supra* note 175 at 21.

¹⁸⁰ *Supra* note 135 at 174-175.

The co-sponsor of the police seminars, the Dutch section of Amnesty, took a particularly strong subsequent role in the process, ensuring that the Dutch delegation to the Congress would assume the lead in drafting the formal act against torture. What emerged was a remarkable breakthrough: from the Congress's own Declaration against torture to the General Assembly's unanimous adoption on December 9, 1975 of a formal Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The struggle to stop torture continued of course but, from now on, there was this powerful, internationally approved underpinning for the campaigners' efforts. This brings to mind the immense boost to the campaign against the death penalty engendered by the UN General Assembly's moratorium against its use (above, pages 2 and 3).

Uruguay became the next focus of Amnesty's work, and the NGO assembled over 350,000 signatures on a petition calling for an independent international investigation into torture taking place in that country. Amnesty even persuaded the European Economic Community to reject better terms of trade for Uruguay in protest at police tactics against political prisoners. This specific campaign was being fought at the same time that Amnesty had established a special department, the Campaign Against Torture, to pursue "Urgent Actions" against torturers and to lobby for stricter enforcement. Amnesty's ability to call on its national sections throughout the world gave it a significant lobbying advantage over other NGOs. The massive effort against torture in Uruguay drew world attention to the abuses taking place. The "Urgent Action" appeals were producing encouraging results. And Amnesty continued to bombard Western governments with documentation about torture.¹⁸¹ Yet, just as it had been "lucky" with the Chilean situation, (Korey had acknowledged: "...were it not for the singular uniqueness of the Chile problem at the UN, the extent of the victory won by Amnesty hardly would have been as great."¹⁸²), now Argentina became the *cause celebre*. On March 16, 1976, a military coup took place in Argentina, and there commenced the "dirty war" in which every imaginable kind of brutality became routine. Amnesty sent a delegation to Argentina in November 1976, and produced a chilling report on the situation four months

¹⁸¹ *Ibid.* at 177.

¹⁸² *Ibid.*

later. Korey commented: "The international community had been provided with a rich and not easily challenged source of data on the new and horrendous crimes of disappearances."¹⁸³ For its work campaigning in this way to protect prisoners from being mistreated in violation of their human rights, Amnesty was awarded the Nobel Peace Prize on October 10, 1977. This recognition was a profound step forward. But, as Korey extolled that achievement, he also cautioned against premature celebration:

Its [Amnesty's] image was enormously enhanced, as was the cause for which it had fought – human rights. A watershed in the recognition of human rights and its advocates had been reached. Attitudes towards the subject never would be the same again. Still, torture had not diminished; nor had disappearances.¹⁸⁴

It was not until 1984 when the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment was adopted, and it came into force in 1987. Nearly 160 States have since signed this Convention. It provided for the Committee on Torture, comprising ten experts who could investigate where reliable information indicated that torture was being practised.¹⁸⁵ Through this, it has a practical mechanism for confronting violators.

Examining the immense struggles against slavery and torture in the context of the campaign to abolish the death penalty, Schabas concluded encouragingly:

A parallel with the prohibition of torture and the slavery is helpful in this respect. Slavery was a common practice throughout history, and its prohibition, even in so-called civilized countries such as the United Kingdom and the United States, dates only to the 1800s. Torture was widely accepted and admitted, in certain circumstances, until the end of the Second World War. These two forms of barbarism are now proscribed in international human rights law, not only as conventional norms but also as customary norms. Although their prohibition naturally appears in the various international instruments, the mention is to some extent superfluous, because these are also peremptory norms, rules of *jus cogens*, enshrined by international custom. The abolition of the death penalty may well be only a matter of decades behind the prohibition of slavery and torture.¹⁸⁶

¹⁸³ *Ibid.* at 179.

¹⁸⁴ *Ibid.* at 180.

¹⁸⁵ *Ibid.* at 266.

¹⁸⁶ *Supra* note 10 at 20.

It will be recalled, however, that, in *Kindler v. Canada (Minister of Justice)*, Justice La Forest had contrasted "...the overwhelming universal condemnation that has been directed at practices such as genocide, slavery and torture" (above, page 19) with the lesser disapprobation of the death penalty. But this was said in 1991. In the nearly two decades since then, the relentless "delegitimizing" of capital punishment by NGOs, abolitionist governments and the United Nations has pushed it closer towards "overwhelming universal condemnation." So I think that Schabas is right in his analogy with the prohibition of slavery and torture, thereby suggesting a two-fold strategy for the abolition of the death penalty in international human rights law:

- (i) to have it prohibited in "the various international instruments";
- (ii) to have it accepted as a rule of *jus cogens*, "enshrined by international custom".

I will accordingly examine what it would take to fully achieve each of these objectives.

(c) Requirements for abolition under international law

(i) International instruments

I have previously considered the origins of the *Universal Declaration*, notably the contribution thereto of NGOs (above, pages 37 to 41). I have noted Schabas's comment that its Article 3, although not explicitly abolitionist, pointed the way in that direction (above, page 12). There followed the *ICCPR*, Article 6 of which "...was the contemplation of abolition" (above, page 13). The overwhelmingly affirmative vote on this Article – 55 in favour, none opposed, 17 abstentions – was remarkable encouragement for abolitionists, to see such State support for a covenant that impliedly looked towards universal abolition. Although it had taken 19 long years to reach this point, another significant initiative had taken place during this period. ECOSOC had retained Marc Ancel, Director of the Criminal Science Section of the Institute of Cooperative Law in Paris, to carry out a study on capital punishment. He presented his study in 1962, noting the evolving tendency towards using the death penalty "...only in exceptional cases, such as capital murder or crimes against the external security of the State."¹⁸⁷ He also pointed out that most

¹⁸⁷ *Ibid.* at 158.

legal systems protected juveniles and pregnant women from capital punishment. The Ancel report was subsequently referred to the Commission on Human Rights which, in 1968, proposed a draft resolution to reflect what it perceived to be the trend towards abolition by providing for a reduction in the number of capital offences and the persons to whom they would be applicable. However, when the UN Secretary-General reported to ECOSOC in February 1973, his prognosis was not so optimistic. Schabas commented: "...the report said that governments were inclined to favour the death penalty, and that the impression of a steadily abolitionist evolution was a misconception created by trends in a few large countries."¹⁸⁸ There ensued years of debate between the abolitionist and retentionist States in which it became clear that any attempt to propose the outright prohibition of capital punishment would fail. Instead, attention moved to the preparation of "safeguards" to govern the carrying out of the death penalty. These safeguards or guidelines, drafted initially by the UN Committee on Crime Prevention and Control, solidified the intention to achieve "...a reduction in the number of capital offences and the persons to whom they would be applicable." (above, page 51). Capital punishment was only to apply to "the most serious crimes", and it could not be carried out on those who were under 18 at the time of committing the crime, pregnant women, new mothers or on persons who had become insane. The *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* ("*Safeguards*") were first adopted by ECOSOC and then by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985. A resolution was subsequently adopted in 1988, providing for the implementation of the *Safeguards* and for a new category eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence. Schabas cautioned though: "Neither the '*Safeguards*' nor the 1988 resolution on their implementation are treaties."¹⁸⁹ But he was nonetheless positive about the overall consequence: "The effect of the '*Safeguards*' is probably to elevate the norms of articles 6 and 14 of the *International Covenant on Civil and Political Rights*, in death penalty cases, to the status of customary international law.... the '*Safeguards*' represent an invaluable benchmark and an important development in the limitation – that is,

¹⁸⁸ *Ibid.* at 163.

¹⁸⁹ *Ibid.* at 173.

the partial abolition – of the death penalty."¹⁹⁰ This was a heartening analysis in itself, but an even more important development was about to take place.

As discussed earlier, the *Second Optional Protocol* came into force on July 11, 1991. States ratifying this important document have committed themselves to abolition of the death penalty. Already there are 72 ratifiers (above, page 14), and this is an obvious area in which NGO lobbying should be pursued. I have already noted the World Coalition's 2007 "ambitious challenge to have all States that are party to the International Covenant on Civil and Political Rights ratify the Second Optional Protocol..." (above, page 5) by December 15, 2009. However, despite the principled and laudable nature of this challenge, I respectfully wonder whether it could have been intended as realistically attainable. Its success would have required over 90 States to have ratified within 2 ½ years! If abolitionists are to lobby for ratification of the *Second Optional Protocol*, as they certainly should, I think it becomes necessary to do so not only on a co-ordinated basis but also with achievable targets. This realization will become an important component of my discussion of future strategy in Chapter 5.

(ii) *Jus cogens*

There is considerable debate as to whether there exists a customary norm in international law prohibiting the death penalty. It is a difficult question, both generally and specifically. When it comes to the exposition of the existing recognized rules of international law, Lassa Oppenheim commented: "Whatever we think of the value of a recognized rule – whether we approve or condemn it, whether we want to retain, abolish, or replace it – we must first of all know whether it is really a recognized rule of law at all, and what are its commands. This task is often difficult to fulfill."¹⁹¹ Oppenheim looked ahead to the eventual codification of international law when knowing "a recognized rule of law" would be straightforward. This would be a glorious day: "The all-powerful force of the good which pushes mankind forward through the depths of history will in time unite all nations under the firm roof of a

¹⁹⁰ *Ibid.*

¹⁹¹ Lassa Oppenheim, *The Science of International Law: Its Task and Method*, in Malcolm Evans & Patrick Capps, eds., *International Law, Volume 1* (Farnham, England: Ashgate Publishing Limited, 2009) at 16-17.

universally recognized and precisely codified law."¹⁹² Until this nirvana is attained, the more mundane dictates of customary norm determination and evaluation must continue to be addressed. Jonathan I. Charney explained: "A norm of international law is established if states act in conformity with it and the international community accepts that norm as obligatory under law. This development may take some time or it may happen quickly."¹⁹³ There are obvious problems with all of these statements.

Firstly, it is not the acceptance of individual States that is required, but the acceptance of "the international community". How can this be expressed? In traditional theory, customary international law is produced from "...uniform state practice in international relations combined with an *opinio juris*...".¹⁹⁴ The reality is that "...when the authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them."¹⁹⁵ The International Court of Justice, for example, when considering a new rule of customary international law, "...rarely presents a documented examination of the actual practice of a broad cross-section of the international community's members, their opinions on the legal character of the practice, their knowledge of the facts that might produce new law, or their unpublicized opposition to the rule."¹⁹⁶ Hence, the acceptance of the international community seems to be a less than definitive criterion.

Secondly, since it does not seem to be required that all States adhere to the proposed new rule, what will be the effect on those States that have objected to it? Some States, aware of that proposed new rule and knowing that failure to object will be taken as acceptance, may be regarded as having acquiesced in the establishment of the norm even though they may in fact disagree with it. The proposition that failure to object to a developing norm would constitute consent does not sit well. It means, according to Charney: "The awareness and opinions of other states that take no overt position are rarely considered."¹⁹⁷ But what of the States that do specifically object? Can they be exempted from the subject norm? There is a

¹⁹² *Ibid.* at 58.

¹⁹³ Jonathan I. Charney, *Universal International Law*, in Evans & Capps, eds., *supra* note 191 at 422.

¹⁹⁴ *Ibid.* at 423.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

so-called "persistent objector rule" which provides that "...if a state objects to the establishment of a norm while it is becoming law and persistently objects up to the present, it is exempt from that norm."¹⁹⁸ Charney considered this rule "...open to serious doubt,"¹⁹⁹ not least for the reason that it was "...rarely invoked in practice."²⁰⁰ This is not surprising given the demonstrable lack of recognition of any legal right to be exempt; in practice, the pressure is always on the objecting State to comply. It is also clear that a State that does not object to a norm when it is being established is bound by it even if it subsequently objects (and similarly bound, in all likelihood, will be States created after the establishment of a customary norm). On the face of it, this makes eminent sense but it does go back to Charney's comment about timing because at what point on the spectrum – between taking some time and happening quickly – does a widespread practice ripen into a customary norm? Charney pointed out: "It is difficult to fix the precise date at which any customary norm is established. Thus, the ability of a state to object in a timely manner is limited."²⁰¹ There are accordingly significant limitations to attaining and holding the status of "persistent objector", and this will become an important consideration when considering the possible emergence of a norm against the death penalty.

Another complication is the categorization of norms. These are primarily the *jus cogens* norms (those that cannot be set aside by agreements) and the ordinary norms. Professor Prosper Weil explained the distinction as follows: "In other words, we have a few 'peremptory' norms at the summit (elite norms, as it were) of enhanced normality – 'highest ranking' norms worth a 'quality label'; then, below them, the great mass of merely binding rules which the International Law Commission eloquently styles 'ordinary customary or conventional rules'."²⁰² *Jus cogens* norms are binding on all States, are non-derogable and are exempt from the persistent objector rule. It is a category "...based on natural law propositions applicable to all legal systems, all persons, or the system of international law."²⁰³ Charney gave the example of international laws prohibiting genocide, slavery, war crimes and crimes against humanity. He

¹⁹⁸ *Ibid.* at 424.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² Prosper Weil, *Towards Relative Normativity in International Law* in Evans & Capps, eds., *supra* note 191 at 317-318.

²⁰³ *Supra* note 193 at 427.

also mentioned international law that gave voice to the common heritage of mankind, exemplified by the argument that the unilateral development of the deep seabed by a State for its own use would violate international law, regardless of that State's own view of it. Charney's conclusion was this:

Once an argument acknowledges that a rule of international law can be binding on the state in the face of its timely and active objection, it must be accepted that the international legal system has the authority to legislate universal norms, notwithstanding the objections of some states. The only issue that remains are [*sic*] the circumstances in which such a norm can be established. When this issue is examined, it becomes clear that the determining factors are the strength and intention of the supporting states and the significance of the opposition. Today, few suggest that *jus cogens* norms emanate from some deity. Rather, they are the product of human actions, including argumentation and behaviour. The process of law creation might establish that there is sufficiently strong support to place the norm in an exceptional category such as *jus cogens* or the common heritage of mankind. This classification may give rhetorical strength to the view that no nation may be exempt from the law in question. Realistically, the international legal system determines for moral, practical or political reasons that a rule of law shall be established, notwithstanding some objections, and that exceptions from it cannot be tolerated.²⁰⁴

From this, if there is not already a customary international norm prohibiting the death penalty, we know how to get there. There may be too much retentionist objection to be able to generate "sufficiently strong support to place the norm in an exceptional category", but this should come eventually. For now, it does not seem to be an overwhelmingly formidable barrier to the establishment of one of the International Law Commission's "ordinary customary or conventional rules" (above, page 55). But, first, does such a norm exist already? Jens David Ohlin recognized that some activists considered this to be already the case, but he was not prepared to go beyond the assumption "...that a prohibition against the death penalty is slowly ripening into a general norm of international law...".²⁰⁵ This was consistent with the view expressed by Schabas. In considering the emergence of a norm effectively abolishing the death penalty, he had stated: "Although still far from enjoying universal acceptance, its very existence testifies to its significance."²⁰⁶ As to Ohlin's "slowly ripening", Schabas acknowledged that it is still correct to say "...that *customary*

²⁰⁴ *Ibid.* at 428.

²⁰⁵ Jens David Ohlin, "Applying the Death Penalty to Crimes of Genocide" (2005) 99 A.J.I.L. 747 at 751.

²⁰⁶ *Supra* note 10 at 20-21.

international law does not prohibit capital punishment."²⁰⁷ But he then clarified: "This is still true, 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."²⁰⁸

(d) International legal personality of NGOs

Do NGOs have the power and authority they need in order to be effective in working on "international instruments" and enhancing customary norms of international law? At first blush, NGO effectiveness would appear to be more attainable if they were to be recognized as having international legal personality and, hence, being full participants in the international legal regime. So I will take this question as my starting-point.

The origin of the recognition of State power under international law is well established as emanating most decisively from the Treaty of Westphalia in 1648. The result of this Treaty "...was the centralization or consolidation of authority in international politics around the state resulting to centralized sites of authority and centralized sources of legitimacy as the state became the focus of international politics. The state therefore became not only the primary actor in the system but also the only institution through which other actors acquired right to participate in global politics."²⁰⁹ As a result of this historical process, the traditional conclusion was not that surprising: "The standard law textbook position is that NGOs are not international legal persons and therefore not subjects of international law – specifically NGOs do not enjoy rights and duties under international law."²¹⁰

But as the role of NGOs grows in importance, can this traditional view be challenged? Is there any basis for regarding them as having legal personality under international law? I will canvass some differing views about this before considering the implications of my conclusion.

There can certainly be no doubt of the growing influence of NGOs on the international stage:

²⁰⁷ *Ibid.* at 377.

²⁰⁸ *Ibid.*

²⁰⁹ Bosire Maragia, "Almost There: Another way of conceptualizing and explaining NGOs' quest for legitimacy in global politics" (2002) 2 Non-St. Actors & Int'l. L.301 at 314.

²¹⁰ *Ibid.* at 317.

...NGOs such as Greenpeace and Amnesty International are increasingly participating in the international decision making process by advocating new international policy agendas and agitating for changes in existing international legal regimes. They are also active in the enforcement of international law by monitoring State compliance with international legal rules and through their incorporation in international regimes, as in the areas of environmental protection, international human rights, and humanitarian law. These developments are increasingly viewed as a growing challenge to the role of the nation-state in international relations, first to their position as the primary actor in the international system, and second, to the notion of statehood itself.²¹¹

Having established this foundation, Karsten Nowrot advocated "...a need to establish an international legal status for NGOs".²¹² There were two aspects to this: firstly, to enhance the participatory rights of NGOs in international decision-making; secondly, to consider developing or increasing the accountability of NGOs under a global legal framework. With respect to the former, Nowrot pointed out that NGOs are already participating informally:

....they (NGOs) are nevertheless influencing, through their participation in the international decisionmaking process and through their informal strategies within States and international organizations, the behavior of States and of international organizations. Therefore NGOs participate at least indirectly in the norm-creating process of customary international law. This development is also reflected by a number of international legal scholars who highlight the growing importance of non-State actors, such as individuals and NGOs, in the norm-creating process of customary international law, especially in the areas of human rights and environmental protection.²¹³

To move towards a more formal status for NGOs under international law, Nowrot considered two possibilities: to regard them as already "...at least partial subjects of international law"²¹⁴ and, complementarily, to create an international agreement to govern the conduct of NGOs. For my present purpose, I will only examine her first possibility where she established the parameters as follows:

De facto participation in the international system is not equivalent to acting on the international scene in legally relevant ways and thus not deserving of the qualification as a subject of international law. Rather, international legal personality requires factual participation and some

²¹¹ Karsten Nowrot, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law" (1998-1999), 6 Ind. J. Global Legal Stud. 579 at 579-580.

²¹² *Ibid.* at 580.

²¹³ *Ibid.* at 595.

²¹⁴ *Ibid.* at 614.

form of community acceptance through the granting of rights and duties under international law to the entity in question.²¹⁵

Her conclusion from this was rather predictable:

With the exception of some traditional non-State actors in international relations, like the Holy See, the International Committee of the Red Cross, and the Sovereign Order of Malta, which more or less indisputably hold the status of subjects of international law, the still prevailing view among international legal scholars is that NGOs cannot generally be regarded as subjects of international law.²¹⁶

This was to do with the fact of NGOs having been created under national law, not international law. But

Nowrot continued:

However, the fact that NGOs are not created through a specific legal act under international law cannot be regarded as an ultimate obstacle to the possible legal personality of NGOs under international law....The issue of an international legal personality for NGOs requires a closer look at the current international regulations concerning these non-State entities in order to determine whether NGOs can already be regarded as partial subjects of international law.²¹⁷

Having fairly extensively canvassed the legal status of NGOs under what she termed "secondary international law" (i.e. a body of law implemented by international organizations under international treaty regimes), Nowrot determined:

These various rights, granted to NGOs by international organizations and their organs, and existing under treaty regimes, can be regarded as indications of legal status under international law. Secondary international law thus provides the "community acceptance" required for an entity to become a subject of international law. The institutionalization of NGO rights to participate in conference deliberations and international legal regimes provides for the effective presentation of their views and thus has to be regarded as a significant step in the development toward an international legal status of NGOs.²¹⁸

What about under primary international law? Nowrot examined the international legal status of NGOs in the areas of labour organization, human rights protection and humanitarian law, and concluded from this:

This illustrative list of rights granted to NGOs under primary international law shows that these entities not only possess a certain

²¹⁵ *Ibid.* at 621.

²¹⁶ *Ibid.* at 622.

²¹⁷ *Ibid.* at 622-623.

²¹⁸ *Ibid.* at 627.

legal status under the secondary international law of international organizations and treaty regimes, but also hold a growing number of legal entitlements under primary international law. This can be regarded as a further indication that NGOs not only participate in the interactions of the international system, but also have gained acceptance by the international community and thus received a legal personality under international law.²¹⁹

Nowrot concluded "...that NGOs have gained recognition by the international community as important actors in the current international legal order."²²⁰ They could accordingly be regarded "...as partial subjects of international law, with the consequence that they are also bound by the norms of the international legal order applicable to them."²²¹ (But see comments under "Liability under international law", below, pages 73 and 74). With the growing power and influence of NGOs in the modern international system, Nowrot considered an international legal incorporation of NGOs to be essential.

An interesting perspective was provided by Professor Peter J. Spiro who looked broadly at the future of international law at the dawn of the new millennium. He anticipated immense changes, the "sweeping away of foundations that had been in place if not for a millennium then at least for several centuries",²²² and commented:

In the new millennium, international law will no longer remain the preserve of the small club of nation-states, effective over a narrow range of issues. Rather, it is growing to encompass the full range of actors comprehended by other areas of law, and over the full range of issues. As globalization emerges to become the new organizing principle of society at large, international law appears to be a primary beneficiary.²²³

This would seem inevitably to embrace a more formalized participation by non-State actors such as NGOs and, indeed, Spiro had this to say:

In both its making and its implementation, international law now routinely involves the participation of non-state actors, sometimes in roles that eclipse those of states. Non-state actors are also becoming the objects of international law, in practice if not yet in doctrine, so that we may find an emerging legal responsibility on their part.²²⁴

²¹⁹ *Ibid.* at 631.

²²⁰ *Ibid.* at 634.

²²¹ *Ibid.* at 635.

²²² Peter J. Spiro, "Globalization, International Law, and the Academy" (2000) 32 N.Y.U.J. Int'l L. & Pol. 567 at 567.

²²³ *Ibid.* at 567-568.

²²⁴ *Ibid.* at 569.

How is this "emerging legal responsibility" currently reflected? Spiro pointed out: "NGOs and corporate actors negotiate increasingly refined codes of conduct, with elaborate monitoring mechanisms. The results of these private institutional processes are the functional equivalent of law...."²²⁵ And then this: "Among the notable challenges of the new era will be the parameters of formal non-state participation in lawmaking....A world that moves beyond states as legal actors faces an infinite number of possible participants."²²⁶ He considered the primary challenge to be "...to define the terms of legal personality on the new world stage, and then in a sense to work up."²²⁷ The old international order had worked on the basis of "a fairly strict equality norm"²²⁸ among the nation-states, but others were not recognized, a "grossly inegalitarian" system according to Spiro. But, once the legal status of non-State actors such as NGOs is recognized, he foresaw "the pretext of equality"²²⁹ as having to be abandoned. For this new regime to operate effectively, the inequalities among States, NGOs, corporations, religions, etc. would have to be recognized. Spiro acknowledged that the prospect of such institutionalized inequality was one cause of the defence of the traditional order that has already been noted. (above, page 57)

Spiro's article was a well-written, stimulating read, quite inspirational in fact. He finished with these careful words:

...this dawn could prove as false as have many in the past, and the whole phenomenon of globalization could find its way to the landfill of history. But I rather doubt it. Unlike earlier conceptions of post-Westphalian transformation, globalization is too embedded in the real world of technology to be easily reversed.

This is not to exalt globalization. Indeed, it presents in some respects a serious threat to justice, to individual liberty, and to world order. It is also true that the liberal nation-state can be a protector of justice and liberty, and a foundation of order. But wishing the state to play these roles will not make it so. As identities and loyalties migrate to institutions other than the state, it will become increasingly difficult for it to remain the primary locus of governance. The challenge, then, is to understand how justice, liberty, and order are to be protected outside of state and inter-state structures.²³⁰

²²⁵ *Ibid.* at 571.

²²⁶ *Ibid.* at 573-574.

²²⁷ *Ibid.* at 574.

²²⁸ *Ibid.* at 575.

²²⁹ *Ibid.*

²³⁰ *Ibid.* at 590.

Spiro had examined the influence of globalization on the development of international law. Professor John King Gamble and Ms. Charlotte Ku carried out a similar exercise, but focused on the impact of technological change, particularly in communications. Their thesis is simply put: "Technology and the information age are changing the allocation of power and authority in the international system with non-state actors such as intergovernmental organizations (IGOs) and non-governmental organizations (NGOs) assuming decision-making roles previously reserved primarily to states."²³¹

In consequence, Gamble and Ku sought to examine "...both international law's encounters with NGOs and how NGOs relate to the sources of international law."²³² Describing the traditional view, the authors noted: "It would be inaccurate to imply that international law – primarily as described by leading scholars – had ignored NGOs. Before World War II, NGOs were thought to play only a secondary role. Even those international law scholars who seemed most progressive and willing to extend the reach of the law showed a certain hesitance about NGOs".²³³ They saw the earlier role of NGOs as having been informational. But this had changed: "Contemporary international law is much less rigid and more inclusive – NGOs have benefitted from this disposition."²³⁴ As part of this more expansive "disposition", NGOs were becoming able to achieve results through direct action:

A good example of this broader view is presented by Judge Rosalyn Higgins, who wrote: [I]nternational law is not rules. It is a normative system...harnessed to the achievement of common values". She rejects the traditional concept of "subjects" and "objects" of international law as too narrow and prefers the phrase "international legal participants", which includes individuals, corporations and NGOs. The law-making process in which all these participants are engaged is open and competitive.²³⁵

Gamble and Ku concluded that NGOs were on the way towards the "authoritative decision-making"²³⁶ that is definitive of international law – but they were not there yet. There is no new structure yet in place:

²³¹ John King Gamble & Charlotte Ku, "International Law – New Actors and New Technologies: Center Stage for NGOs?" (2000) 31 Law & Pol'y Int'l Bus. 221 at 222.

²³² *Ibid.* at 226.

²³³ *Ibid.* at 233.

²³⁴ *Ibid.* at 235.

²³⁵ *Ibid.* at 236.

²³⁶ *Ibid.*

Structurally, international law remains constrained by a preoccupation with territorial states that conduct activities across borders. Change is occurring, albeit slowly, to accommodate new actors and new voices. Pressure from complex new issues and the intense involvement of non-state actors like NGOs accelerate the change....Although there are manifestations of new actors in areas previously reserved to states, a new structure for law-making has yet to emerge.²³⁷

Gamble and Ku cited the architectural metaphor of Professor Oscar Schachter in which he envisioned a three level structure: (i) Ground floor: the action of States; (ii) Second level: activities of a legal character, such as formation of legal norms; (iii) Third level: broad policy goals. There would be continuous movement from level to level. But where to place NGOs within this building? The authors wondered if NGOs were going up the stairway to Schachter's second level....They evaluated this in the light of the four traditional sources of international law: international conventions, international custom, recognized general principles of law and, lastly, judicial decisions and the teachings of the most highly qualified publicists. Their conclusion: there was no direct link between NGOs and the first three sources of conventions, custom and general principles; they were almost exclusively linked to state action. But with respect to what they considered to be the least important source, judicial decisions and the teachings of the most highly qualified publicists, the authors could conceive the possibility of groups of scholars and experts, working through NGOs, having this direct access. So, in the result, "...opportunities for NGOs to affect any of the sources directly remain marginal."²³⁸ I do not necessarily concur in this assessment because, for me, it depends on what is meant by "directly". International custom does indeed flow from State practice but, as I have surely demonstrated in my description of the campaigns against slavery (above, pages 41 to 45) and against torture (above, pages 45 to 50), NGOs did have a profound influence on the eventual emergence of what Schabas had referred to as "...peremptory norms, rules of *jus cogens*, enshrined by international custom." (above, page 50).

Gamble and Ku next reviewed the participation of NGOs in various global events: the 1982 UN Convention on the Law of the Sea; the 1997 Ottawa Convention on Land Mines; the 1998 Multilateral

²³⁷ *Ibid.* at 238.

²³⁸ *Ibid.* at 245.

Agreement on Investment (more than 600 NGOs estimated to have been opposed). These examples illustrated the influential role of NGOs. But they did not suggest from this that NGOs were on – or even close to – Schachter's second level. This is what they wanted to see, not what existed: "We have argued that an expanded place for NGOs is inevitable and can be constructive – even decisive – in the development of international law. Prosaic as it may seem, an enormous amount of analytical work on NGOs remains to be done."²³⁹ Looking at an expanded role for NGOs before the courts, Gamble and Ku took a more positive view of what is already happening:

Recent efforts creating international tribunals and courts to enforce international standards and norms in areas where national judicial institutions are found to be inadequate, e.g. the International Criminal Court and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, suggest that a new era is dawning. This new era is characterized by expanded roles for NGOs contemporaneous with international law focusing more on human rights.²⁴⁰

In conclusion, they thought that technology had made "a qualitative difference for NGOs in two primary ways",²⁴¹ as information purveyors and as mass mobilizers of public opinion. This dramatically enhanced process of communication required:

...both more complicated as well as more open-ended international legal obligations and frameworks to support them. This more intense process of making and developing law has moved international law away from a rule orientation towards one that considers values, frameworks, and processes. In this context, private actors – corporations, individuals, and NGOs – have an opportunity to help determine which questions should engage the attention of governments.²⁴²

Gamble and Ku pronounced their final verdict:

Recent scholarship and practice demonstrate that NGOs are an important factor for a full understanding of contemporary international legal and political processes and have the potential to advance human rights and develop international law in myriad ways....²⁴³

²³⁹ *Ibid.* at 258.

²⁴⁰ *Ibid.* at 259.

²⁴¹ *Ibid.* at 260.

²⁴² *Ibid.*

²⁴³ *Ibid.*

NGOs have heightened status and efficacy as part of international law's effort to balance and advance human values. We live in interesting – cyberspacial – times.²⁴⁴

In contrast to Gamble and Ku's rather colourful exposition of the NGO role, I had earlier recited the traditional view "...that NGOs are not international legal persons, (above, page 57). But Bosire Maragia, having stated the preceding, embarked on the bold thesis "...that NGOs have become or are increasingly becoming legitimate actors contrary to traditional theories of international law and international relations."²⁴⁵ The difficult issue that arises from the perceived lack of legal status was described by him as follows:

The role and new indispensability of NGOs in global politics today would not be of interest to us if NGOs enjoyed official status and (*sic*) international legal persons with full participatory rights as IGOs, MNCs, as states do. Yet, the fact that NGOs have defied these odds and now almost outnumber all existing international legal persons, and their activities almost eclipse those of other actors, deserves serious attention. Clearly, NGOs are an anomaly as their existence and extent of participation in international relations does not easily fit in with existing rules of international law or mainstream theories of international relations. NGOs are not international legal persons, and by extrapolation, are not therefore subjects of international law with rights and duties thereunder.²⁴⁶

Maragia understood participation in the international system to be rooted "...in the dual pillars of legitimacy and authority."²⁴⁷ He considered there to have been three major systemic changes involving accompanying shifts in the sources of authority and of legitimacy: the pre-1648 stateless era; the Westphalian international order based on states; and the post-Westphalian global order. From this, he argued "...that NGOs may be regarded as legal or legitimate actors in world politics today if we understand global change as constituting shifts in sites of authority (SOA) as well as corresponding shifts in sources of legitimacy (SOL)".²⁴⁸

Maragia thought that authority itself had been de-centred with the result that "...one may argue NGOs need not go through traditional processes of legitimization to be deemed legal persons or legitimate

²⁴⁴ *Ibid.* at 262.

²⁴⁵ *Supra* note 209 at 301.

²⁴⁶ *Ibid.* at 304.

²⁴⁷ *Ibid.* at 305.

²⁴⁸ *Ibid.* at 307.

actors."²⁴⁹ Alternatively, that NGOs have managed to stay within the traditional processes of legitimization. How could this be? Because, according to Maragia, "there are no clearly defined rules and procedures for attaining international legal personality."²⁵⁰ He made a not entirely convincing argument from this: "Under these circumstances, states' continued acquiescence of NGOs as partners in world politics, absent any compulsion or legal duty to do so, would be interpreted as tacit conferment of legal personality on NGOs. Second, NGOs' role in international affairs may be defended as creating implied international legal personality consistent with customary international law."²⁵¹ But his conclusion seemed to be quite unequivocal: "Because international legal personality is about a bundle of rights and duties an actor enjoys under international law, there is no doubt NGOs have acquired either quasi or a limited form of international legal personality."²⁵² After this assertion, Maragia proceeded to consider the basic question: "In international law, the question is: is an actor an international legal person?"²⁵³

The clear involvement of NGOs in the making of international norms told Maragia that they had to have achieved legitimacy. He postulated: "It is indeed counterintuitive to hold on the one hand that NGOs make significant contributions in norm making, while on the other hand maintain that they are not directly subject to the very norms they have promulgated."²⁵⁴ If you are participating in global norm making, then you should have to be responsible and accountable. Hence: "Acknowledging NGOs as legitimate actors would not only strengthen the legitimacy of international rules and norms but would also enhance accountability of NGOs for their activities."²⁵⁵ Maragia proceeded with a review of the evolution of the legal status of international law. He determined from this: "International legal personality was initially concocted to pre-empt recognition of those societies that did not meet the criterion of statehood from being put at par with modern nation-states."²⁵⁶ But, within the current "de-

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.* at 308.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.* at 310.

²⁵⁴ *Ibid.* at 313.

²⁵⁵ *Ibid.* at 314.

²⁵⁶ *Ibid.* at 316.

centering of authority"²⁵⁷, the legitimacy of NGOs "...may be seen as emerging."²⁵⁸ Maragia viewed the traditional processes of legitimization (through state consent) as less relevant, "if not irrelevant."²⁵⁹ It was not just a matter of being recognized by other states; there was the alternative of "actual fulfillment of the criteria of statehood...."²⁶⁰ Where does this leave the issue? Maragia continued: "The presence of NGOs in the world scene is transformative to the extent that it forces us to question their existence and the basis upon which they have acquired authority to participate in a previously predominantly state-centric international system."²⁶¹ This was an evolving process according to Maragia: "Acknowledging the presence of other actors, such as NGOs, limits earlier sweeping assertions regarding the supremacy of statehood and sovereignty and confirms that legitimation of actors in the systems has not been static."²⁶² He examined the rapidly expanding involvement of NGOs in so many arenas of international life, and concluded: "The ability of NGOs to exert influence at the grassroots level acts as a form of governance. By acting at the local level, NGOs help define the parameters of acceptable behaviour, which eventually becomes the basis from which norms are generated."²⁶³ From this, he proceeded to assert his principal thesis:

...it would be erroneous to detach NGOs from, and indeed misleading to hold that they are not legitimate or do not possess legal personality while they have been part and parcel of international norm making. Because NGOs cannot be isolated from international norm making process without calling the validity and legitimacy of international law to question, they should be regarded or deemed as legitimate international actors fully clothed with international legal personality, which enjoy the rights and duties of international actors with the ability to sue or be sued in their own name and to be held culpable for infractions of international rules, at least to the extent of their participation in global politics. This is because the legitimacy of the norms does not hinge on the substance of the norms *per se* but also on the processes through which they have been generated and the parties that have participated in generating them.²⁶⁴

²⁵⁷ *Ibid.* at 317.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.* at 318.

²⁶⁰ *Ibid.* at 319.

²⁶¹ *Ibid.* at 323.

²⁶² *Ibid.* at 324.

²⁶³ *Ibid.* at 327.

²⁶⁴ *Ibid.* at 329.

In his *Conclusion*, Maragia stated:

- "NGOs do not possess international legal personality, and are therefore not subjects of international law."
- "...that NGOs have acquired some measure of legal personality or what may be called quasi or implicit international legal personality."
- NGO global activities "...are all evidence of NGOs growing acceptance and emerging legitimacy in global politics consistent with customary international law."
- "It is indeed erroneous to particularly accept that NGOs contribute to the development and enforcement of international law but yet maintain that they are not directly subject to those norms as actors."²⁶⁵

A somewhat different notion about the place of NGOs within international law was Steve Charnovitz's enticing comment:

A decade ago, Antonio Donini, writing about the United Nations, declared that "the Temple of States would be a rather dull place without nongovernmental organizations". His observation was apt and is suggestive of a more general thesis: had NGOs never existed, international law would have a less vital role in human progress.²⁶⁶

According to Charnovitz, the key to understanding the NGO contribution to the vibrancy of international law lay in the voluntary nature of such organizations. People joined because they wanted to; they were committed to the organization's purpose. He commented: "That purpose plus organization gives NGOS whatever authority they have, and it will be moral authority rather than legal authority."²⁶⁷ One whole section of Charnovitz's article was devoted to the legal status of NGOs in which he explained:

Legal personality is a key factor in determining the rights and immunities of an NGO and its standing before courts. In general, an NGO enjoys legal personality only in municipal law, not in international law. Yet because NGOs so often operate in more than one country, they face potential problems of being subject to conflicting laws and of an inability to carry their legal status from one country to another. Aware that this situation could prove problematic for internationally active NGOs, both the Institut de droit international and the International Law Association began in 1910 to promote consideration of a convention to

²⁶⁵ *Ibid.* at 331-332.

²⁶⁶ Steve Charnovitz, "Nongovernmental Organizations and International Law" (2006), 100 Am. J. Int'l L. 348 at 348.

²⁶⁷ *Ibid.*

grant legal personality to international NGOs. Almost a century later, advocates have not made much progress towards that goal.²⁶⁸

Having reviewed the decades of efforts to establish an international legal status for NGOs, Charnovitz concluded that the lack of that status "...remains a problem, but not an insuperable one."²⁶⁹ There were two aspects to this. Firstly, international NGOs had "...learned how to manoeuvre without formal international personality...".²⁷⁰ Secondly, efforts to achieve an international legal personality for NGOs have exposed some unresolved tensions. On the one hand, providing such recognition may help prevent interstate conflicts but, on the other, States have been concerned that granting such international recognition may reduce governmental control over NGOs.²⁷¹ Charnovitz's conclusion was that, in the absence of international NGO law as such, we are left with Article 71 of the UN Charter (above, page 39) which serves as a *de facto* charter for NGO activities. He called the legal capacity derived from Article 71 as making an NGO "a consultation partner". But he also noted that this Article 71 status had become "a foundation stone for their [NGO] efforts to strengthen international law."²⁷² This strength is becoming increasingly noticeable:

In the early twenty-first century, NGOs are pervasive. No policy issues are off-limits for government-NGO consultations. As Alexandre Kiss and Dinah Shelton have observed, "Today, purely inter-state developments of norms is probably non-existent in most fields of international law."²⁷³

Hence, despite Charnovitz's clarity about the lack of legal personality of NGOs, he was equally in no doubt about their solid impact on international law:

The reformation of international law extends both to content and to process. The vastly expanded content of international law has been stimulated by NGOs, particularly in human rights, humanitarian, and environmental law. Through their focus on the rights of individuals, rather than the rights (and sovereignty) of states, leading NGOs surely deserve credit for helping to humanize modern international law, both treaty and customary.²⁷⁴

²⁶⁸ *Ibid.* at 355-356.

²⁶⁹ *Ibid.* at 356.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.* at 356-357.

²⁷² *Ibid.* at 358.

²⁷³ *Ibid.* at 359.

²⁷⁴ *Ibid.* at 360-361.

(e) Kamminga analysis

Although much of this preceding comment resonates, it is with the views of Menno T. Kamminga that I find myself most in accord. What he did was to examine the various ramifications of having legal personality under international law to see how NGOs would measure up. He looked at four distinct areas: (i) capacity to conclude treaties; (ii) capacity to participate in treaty-making; (iii) capacity to bring international claims; (iv) liability under international law.

(i) Capacity to conclude treaties

Kamminga noted that NGOs "...generally have no capacity to perform legal acts on the international plane. In particular they do not have the capacity to conclude treaties with States."²⁷⁵ There are exceptions to this, however, and he pointed out the international judicial capacity of the International Committee of the Red Cross ("ICRC"). This well-established NGO has entered agreements with more than 60 States, and "(T)here can be little doubt that all these agreements qualify as treaties under international law."²⁷⁶ The UN General Assembly granted observer status to the ICRC in 1990 and to the International Federation of Red Cross Societies in 1994. But, as Kamminga made clear: "The ICRC and the Federation are the only NGOs enjoying this status and the General Assembly clearly intends to keep it that way."²⁷⁷ On the other hand, the International Olympic Committee ("IOC") had unsuccessfully attempted in the early 1980s to "...have its international legal personality recognized by the Swiss authorities and even by the UN General Assembly."²⁷⁸ All that transpired from this was a confirmation from the Swiss Federal Council of the IOC's status under Swiss law, rather than international law. Kamminga concluded that States might be willing to conclude treaties on an equal footing with NGOs, but this type of *ad hoc* arrangement would only be "...if the NGO in question resembles an IGO by having States among its members or because it resembles a State by having State-like functions."²⁷⁹ Even

²⁷⁵ Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* in Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) at 98.

²⁷⁶ *Ibid.* at 98-99.

²⁷⁷ *Ibid.* at 99.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.* at 100.

then, he hastened to add "...such agreements bind only the parties, they do not create entitlements *vis-à-vis* third States."²⁸⁰

(ii) Capacity to participate in treaty-making

Kamminga declared: "Law-making on the international plane is a privilege that tends to be reserved for States".²⁸¹ NGOs generally did not have the right to participate in the drafting of international instruments, and Kamminga specifically noted paragraph 50 of ECOSOC Resolution 1996/31 which, whilst welcoming NGO participation at intergovernmental conferences, did stipulate that "...this does not entail a negotiating role". A major exception to this was the International Labour Organization ("ILO") in which worker and employer representatives could participate on an equal footing with State representatives. However, because these employment representatives are selected by the governments of the States involved, Kamminga doubted "...whether the ILO presents an attractive model for the integration of NGOs into international law-making."²⁸² More encouragingly, Kamminga then turned to the practical realities of NGO involvement:

In spite of their limited formal status at IGO meetings, in practice NGOs often play a key role in creating awareness of the need to adopt international instruments and even in the drafting of such instruments. This is not a new development. The role of NGOs in international standard-setting stretches back to the role of the Anti-Slavery Society and other anti-slavery organizations in the nineteenth century in pressing for the adoption of treaties for the suppression of the slave trade. But it seems fair to say that this role has continuously increased since the Second World War. It is no exaggeration to suggest that some of the most important international legal instruments of recent years would not have seen the light without the input of NGOs.²⁸³

Kamminga perceived there to be "three broad strategies"²⁸⁴ developed by NGOs for their involvement in international standard-setting: "high level approaches, campaigning, coalition building."²⁸⁵ I will return to this thought in Chapter 5 (below, page 146). In the meantime, I note Kamminga's impressive list of Conventions in which NGOs have played a successful part: the European Convention for the Prevention

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.* at 101.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

of Torture, the Convention against Torture, Convention on the Rights of the Child, Framework Convention on Climate Change, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and, perhaps most impressively of all, the Rome Statute of the International Criminal Court. In this last endeavour, the NGO Coalition for an International Criminal Court grew to a movement of more than 800 organizations, including Amnesty International. During the five weeks of the Rome Conference itself, the Coalition members "...prepared detailed briefing papers, divided into thirteen working groups on the 128 Articles of the Statute, held regular meetings with governments and weekly meetings with the Conference Chair, provided expert advice and translations to governments, convened regional and sectoral caucuses, provided the Conference's only two daily newspapers, and organized media briefings."²⁸⁶ Kamminga saw this as a more sophisticated NGO contribution than had been previously exhibited, especially as the Statute was "...a highly complicated legal instrument that required considerable technical drafting skills that many governmental delegates did not possess."²⁸⁷ In short, he regarded this as "...yet another milestone in the contribution of NGOs to international law-making."²⁸⁸ Moreover, just as other conventions had provided NGOs with a formal role in their implementation, Article 15(2) of the *Rome Statute of the International Criminal Court* provided: "The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate..."(emphasis added). Hence, these "practical realities of NGO involvement" (above, page 71) suggested a strong foundation from which to move forward in the campaign to abolish the death penalty.

(iii) Capacity to bring international claims

Again, a generalization can be made that NGOs do not have the legal capacity to bring international claims against States since "...States tend not to owe any international legal obligations at all to

²⁸⁶ *Ibid.* at 104.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

NGOs."²⁸⁹ And even if such obligations did exist, "they cannot usually be enforced on the international plane."²⁹⁰ Nonetheless, there are some circumstances in which States have accepted enforceable international obligations towards NGOs. Kamminga gave the following examples:

- The ICRC's enforcement rights through international arbitration
- Article 34 of the European Convention on Human Rights allowing NGOs the right to lodge petitions with the European Court of Human Rights
- NGOs being allowed to bring complaints under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
- Article 44 of the American Convention on Human Rights allowing NGOs to lodge petitions with the Inter-American Commission on Human Rights
- *Amicus curiae* briefs to the European Convention on Human Rights and the Inter-American Court of Human Rights (and, I would add, to the Supreme Court of Canada in *Kindler* and *Burns* – see above, pages 18 to 21).²⁹¹

Finally, Kamminga observed the practically important fact of NGOs informally bringing relevant information to the attention of international monitoring bodies.

(iv) Liability under international law

The corollary to the preceding realities was that NGOs can generally only be held accountable under domestic law. Kamminga's question though was this: "Can an NGO also be held liable under international law if it acts contrary to an international obligations incumbent upon it?"²⁹² After considering the *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by the UN General Assembly in 1999, Kamminga concluded it to be "...unlikely that any liability under international law could ever be based on these provisions, even if it were assumed that they contain binding obligations."²⁹³ He also examined paragraph 57(a) of ECOSOC Resolution 1996/31 which provided for an NGO to be deprived of its consultative status if it engages in "a pattern of acts

²⁸⁹ *Ibid.* at 105.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* at 106-107.

²⁹² *Ibid.* at 107.

²⁹³ *Ibid.* at 108.

contrary to the purposes and principles of the Charter of the United Nations including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with these principles and purposes." Kamminga referred to several NGOs that had lost their consultative status since 1996 "...on highly arbitrary grounds and with scant respect for the procedures laid down for this purpose by ECOSOC itself."²⁹⁴ He cautioned: "These decisions by ECOSOC appear to mark a significant change in its attitude towards NGOs. They seem to indicate a greater willingness on the part of States to assume that NGOs may be held accountable, and that they should pay a heavy price even for minor transgressions."²⁹⁵

Despite the many areas in which NGOs were gaining ground, Kamminga did not wish to see the effects of such progress being exaggerated. He pointed out: "The formal status of NGOs under international law is still extremely weak."²⁹⁶ He saw "...little evidence that States will ever allow NGOs to become a serious threat to the inter-State system."²⁹⁷ In his views, whenever NGOs are permitted to participate in international decision-making, it is because the States see it as a strengthening of the inter-State system. NGOs, because they contribute the views of civil society, can "...confer badly needed legitimacy on the international system."²⁹⁸ Without this, international decisions run the risk of "...remaining unimplemented because they lack the required degree of public support."²⁹⁹ NGOs can also improve the quality of international decisions because they can contribute specialist knowledge. So the role of the NGOs is absolutely vital to the development and functioning of international law even if, in the final analysis, the case for their having legal personality thereunder is, in my conclusion, a flimsy one. As so succinctly stated by Professor Philip Alston: "Any entity can aspire to international personality, but it will need to look an awful lot like a traditional state in order to meet the requirements."³⁰⁰

²⁹⁴ *Ibid.* at 110.

²⁹⁵ *Ibid.* at 109.

²⁹⁶ *Ibid.* at 109.

²⁹⁷ *Ibid.* at 110.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in Alston, ed., *supra* note 275 at 20.

(f) Conclusion on potential NGO effectiveness

It thus becomes a practical matter: Is the current role of NGOs sufficient to allow them to carry forward to completion the campaign for abolition of the death penalty or do they need additional powers and/or recognition? To answer this, let me begin by examining exactly what their consultative status entails.

I had mentioned earlier that Article 71 of the *UN Charter* provided that ECOSOC "...may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence." (above, page 39). For this purpose, NGOs were originally divided into the following categories:

- Category A organizations having a basic interest in most of ECOSOC's activities
- Category B for those with special competence in a few of the fields of activity
- Category C organizations primarily concerned with the development of public opinion and dissemination of information.³⁰¹

These Categories changed and evolved until, following a major review in 1968, they were re-labelled respectively as Category I, Category II and the Roster. The review findings were enshrined in ECOSOC Resolution 1296 (XLIV) which provided for "Arrangements for Consultation with Non-Governmental Organizations." Three aspects of these new arrangements, according to Professor Peter Willetts, were to "...have a most important and direct effect on an NGO's political behaviour."³⁰² These were:

- (i) NGOs had access to all UN documents, once they were officially circulated;
- (ii) NGOs had security passes, giving them access to all the buildings used by UN diplomats;
- (iii) NGOs had a legitimate place within the political system.³⁰³

Willetts usefully contrasted this with what lobby groups might expect in domestic legislatures: "Many would be very pleased if they could gain immediate access to official papers, talk to members of their

³⁰¹ Peter Willetts, *Consultative Status for NGOs at the United Nations*, in Willetts, *supra* note 16 at 32.

³⁰² *Ibid.* at 43.

³⁰³ *Ibid.*

parliament and be seen as having a legitimate concern with the outcome of the proceedings."³⁰⁴ He proceeded to examine the characteristics of influential, successful NGOs:

Most possess specialized information or expertise; they will thus be influential if that information or expertise is seen as being relevant to the types of decisions that are to be taken.... More generally, decision-makers will listen to NGO activists who appear to know more about a subject than they do.... NGOs may also have a breadth of experience or range of contacts on a subject which surpasses that of government officials.... It is very important for an NGO to establish a reputation for reliability and integrity; Amnesty International has a policy of systematically checking from multiple sources of information.... Finally, NGOs may also try to build up their prestige, for example by associating prestigious individuals with their work.... These major assets of information, expertise, experience, reliability, integrity and prestige, once acquired, help to sustain each other and provide a formidable basis for exercising influence.³⁰⁵

(emphasis added)

Reflecting on the more mundane activities of their daily toil, Willetts viewed NGOs as being essential to agenda-setting; to be less important in policy formulation; and to have mixed influence in policy implementation, depending on the commitment and expertise of the government/s involved. I will consider these factors in greater detail in Chapter 5. Willetts also noted the exploding NGO participation in UN conferences, and he commented: "Whatever the type of conference, it is standard practice to give rights of participation at UN conferences to NGOs with ECOSOC consultative status.... NGOs have learnt a variety of ways to exercise influence, both in the preparatory work and in conference negotiations."³⁰⁶ Although NGOs, except for the ICRC, are not allowed officially to participate in regular sessions of the General Assembly, they may well have influence on determining the text of an Assembly resolution through their prior work with a subsidiary body of ECOSOC. In fact, it may be fair to say that the contribution of NGOs to UN achievements is not fully acknowledged. Willetts raised this issue:

For example, a brief study by Kaufman on the adoption of the UN declaration against torture talks in detail about the government proposals, speech-making and negotiations, but fails to mention

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.* at 44-45.

³⁰⁶ *Ibid.* at 49.

Amnesty International or any other NGO. Nevertheless...Amnesty was central to this whole process. Diplomats like to see NGOs as useful advisers, having "consultative status", but definitely not as equal participants in diplomacy. Thus NGOs are usually very careful not to step beyond the bounds of accepted procedure. They have much less ability to take part in formal public UN meetings than in informal private meetings. Most of their influence is invisible except to the immediate participants, and it is therefore very easy to underestimate the impact of NGOs on UN proceedings.³⁰⁷

I have previously demonstrated the central role of Amnesty International in the 1984 adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (above, pages 45 to 50). Taking this as an example and considering all of the attributes currently wielded by NGOs having consultative status, I determine this to be sufficient to ensure their effectiveness in any human rights campaign. That is to say more appositely that, in my conclusion, NGOs such as Amnesty International have everything they need with which to mount the final campaign to abolish the death penalty universally. When I asked him about it, Aubrey Harris, Co-ordinator of Amnesty Canada's Campaign to abolish the Death Penalty, could not see that having international legal personality would be an advantage. He pointed out: "NGOs are recognized. We have rigid rules to ensure that we are cautious."³⁰⁸ Alex Neve, Secretary-General of Amnesty International Canada, acknowledged that Amnesty did not have as much UN access as it would like, "...but we make a lot of use of our status as a fully accredited NGO."³⁰⁹ David Matas suggested to "...change the rules of procedure so that petitions from NGOs can be accepted"³¹⁰ but, although I can see the merit in this, I think the time and energy necessary to achieve such an advance would be more beneficially expended on campaigning against the death penalty itself.

In summary, I think it indubitable that NGOs were instrumental at all the key stages in developing the "international instruments" needed for the universal abolition of the death penalty and that they have developed a position of pertinent effectiveness for themselves, both as evidenced in achievements so far and, more significantly for this thesis, from which to move forward to ultimate success. So what I will

³⁰⁷ *Ibid.* at 54.

³⁰⁸ *Supra* note 54.

³⁰⁹ *Supra* note 78.

³¹⁰ *Supra* note 68.

do next is to scale down as it were, to examine the role of NGOs in three particular State situations involving the death penalty. This case study approach should enable me to answer all three of my research questions, albeit to varying degrees. The causes that either led, or seem to be leading, towards abolition will be examined. The extent of NGO involvement will be identified and, more importantly for this thesis, I will attempt to evaluate that effectiveness. Finally, I will gauge the extent to which any lessons learned can be applied more broadly, towards universal abolition. But, before this, I will close this Chapter with these supportive words from then UN Secretary-General Boutros Boutros-Ghali to a conference of NGOs held in September 1994:

On behalf of the United Nations and for myself, I welcome you. I want you to consider this your home.

Until recently, these words might have caused astonishment. The United Nations was considered to be a forum for sovereign States alone.

Within the space of a few short years, this attitude has changed. Non-governmental organizations are now considered full participants in international life.³¹¹

³¹¹ Willetts, *supra* note 16, Appendix C at 311.

4. **Can the effectiveness of NGOs be evaluated?**

In order to answer my research questions, I needed to examine the struggle to abolish the death penalty in certain national jurisdictions. By selecting situations of particular interest and importance, I would be able to see the causes trending towards abolition, to assess the involvement of NGOs in that process and, most critically, to then consider whether lessons could be derived that would result in enhanced NGO effectiveness in the future. So I wanted to begin with probably the most dramatic struggle around capital punishment, abolition in the Philippines. That is the only State in the world that has abolished capital punishment, re-instated it, executed prisoners and then abolished it again. Can anything be gleaned from this extraordinary sequence that might be of value in facilitating abolition in other jurisdictions?

Case Study #1 – The Philippines

The first abolition of the death penalty in the Philippines was in reaction to the corrupt and brutal regime of Ferdinand Marcos. He was President from 1965 to 1986, during nine years of which – from 1972 to 1981 – the Philippines were ruled under martial law. To the established capital offences of murder, rape and treason, President Marcos had added drug trafficking; but it was resistance to the regime that seemed to be the prevalent reason for execution. The Philippine Alliance of Human Rights Advocates, an NGO, commented: "The lesson of Martial Law, underscored by the more than 10,000 victims who were either tortured, disappeared or summarily executed, was that the state alone should not be given the awful power of life and death over its citizens."³¹²

With the support of U.S. Presidents from Johnson to Reagan as being a bulwark against Communism, President Marcos seemed to be able to steal and kill with impunity. But his regime started to unravel when his chief rival, Benigno ("Ninoy") Aquino, returned to the Philippines in 1983. Aquino had worn a bullet-proof vest as a precaution, but it was a shot in the back of the head that killed him within seconds of leaving his plane at Manila Airport. This was on August 21st, a day when the world became unusually

³¹² Santos Lamban, "Death Penalty in the Philippines" (Philippine Alliance of Human Rights Advocates, March 2000), online: <<http://www.philsol.nl/A00a/Pahra-deathpenalty-mar00.htm>>.

aware of the Philippines. Although President Marcos had first created a fact-finding commission and then an independent board of inquiry to investigate the Aquino assassination, there was widespread dissatisfaction with the outcome. All those, including high-ranking military personnel, accused of having been complicit in the murder were acquitted. But the forces opposed to Marcos were strengthening. There was an attempt to impeach him in August 1985, but he was able to have it dismissed. Nonetheless, the escalating public discontent and the pressure from foreign allies induced Marcos to call a presidential election in 1986. Aquino's widow Corazon ("Cory") ran against him and, despite the contested result, the "People Power" movement, with its yellow ribbons, eventually forced Marcos and his wife Imelda to flee to Hawaii. Notoriously, 2500 pairs of shoes were left behind by the outgoing First Lady.³¹³

As President, Corazon Aquino promulgated a law on April 23, 1986 appointing a 50-member Commission, charged with the responsibility of framing a new constitution "truly reflective of the ideals and aspirations of the Filipino people...".³¹⁴ Despite the immensity of the task, progress was impressively rapid. A draft constitution was presented to the President on October 15, 1986 and, following a national plebiscite, the new Constitution was ratified and took effect on February 11, 1987.³¹⁵ Its Preamble enshrined the post-Marcos commitment to the Rule of Law:

We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality and peace, do ordain and promulgate this Constitution.

Article III of the Constitution contained a Bill of Rights, section 19(1) of which provided:

Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter

³¹³ Kallie Szczepanski, "Biography of Ferdinand Marcos", About.com, online: <<http://asianhistory.about.com/od/profilesofasianleaders/p/fmarcosbio.htm>>; Britannica Concise Encyclopedia, "Ferdinand Marcos", Answers.com, online: <<http://www.answers.com/topic/ferdinand-marcos>>.

³¹⁴ The Law Governing The Constitutional Commission Of 1986, Supreme Court E-Library, online: <<http://elibrary.judiciary.gov.ph/index7.php?doctype=Constitutions&docid=a45475a11ec72b843d74959b60fd7bd64558f9fe5f5e5>>.

³¹⁵ The 1987 Constitution of the Republic of the Philippines, 15 October, 1986, online: <<http://www.thecorpusjuris.com/laws/constitutions/8-philippineconstitutions/70-1987-constitution.html>>.

provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.

That "unless" phrase was indicative of the compromise necessary for the Commissioners to have proceeded with abolition. But what were "heinous crimes"? There was enough of an opening there for the pro-execution forces, almost immediately, to begin lobbying for re-imposition of the death penalty. In the meantime, the Philippines had achieved the distinction of being the first State in Asia to have abolished the death penalty, and to have done so autonomously and through the auspices of a constitutional drafting process.

Within months of the ratification of the 1987 Constitution, formal moves were underway to re-instate the death penalty. The Philippine Alliance of Human Rights Advocates explained that, in mid-1987, a bill to reinstate the death penalty was submitted to Congress with military pressure being very much evident in the preamble which cited the pestering insurgency as well as the recommendations of the police and the military as compelling reasons for the reimposition of the death penalty. According to the Alliance, "the bill cited recent right wing coup attempts as an example of the alarming deterioration of peace and order and argued for the death penalty both as an effective deterrent against heinous crimes and as a matter of simple retributive justice."³¹⁶ This bill was supported most prominently by the then Armed Forces of the Philippines Chief General Fidel ("Steady Eddie") Ramos; he sought to re-introduce the death penalty for rebellion, murder and drug trafficking.³¹⁷ Anti-death penalty NGOs, such as Amnesty International, opposed the bill, but the House of Representatives voted for restoration by 130 votes to 25.³¹⁸ Amnesty International commented on the aftermath: "Three similar bills were put before the Senate. After a bloody 1989 coup, President Aquino certified as urgent one of these bills on the prompting of Ramos. The said bill again proposed death penalty for rebellion, as well as for sedition, subversion and insurrection."³¹⁹ The Senate decided in 1990 to suspend voting on the certified bill for one year but, once

³¹⁶ *Supra* note 312.

³¹⁷ *Ibid.*

³¹⁸ Amnesty International, "Death Penalty in the Philippines", May 20, 2008, online: <<http://gmanews.tv/htmlfiles/death-penalty/Death-Penalty-in-the-Philippines.html>>.

³¹⁹ *Ibid.*

that year had elapsed, still made no decision.³²⁰ It thus appeared to be a stalemate between the competing forces but, in fact, public opinion was moving decisively in favour of restoration of the death penalty.

Mr. Lamban of the Philippine Alliance of Human Rights Advocates explained why:

...in the preceding five years, public opinion, articulated by leading political figures had been flowing in the direction of support for the death penalty as a form of "retributive justice". A series of horrific, widely publicized crimes including rape, murder and kidnapping-for-ransom reinforced public fears that lawlessness and criminality had reached unprecedented levels. The tabloid reports painted a bloody picture, widely reporting on high profile murder, rape and kidnapping cases. The view that the death penalty was necessary to fight criminality became a popular notion.³²¹

Fidel Ramos was able to capitalize on this concerned public opinion. The 1992 elections were extraordinary with every political office in the Philippines being contested. 82,450 people competed for 17,205 positions, and the voter participation rate was 80%. Really extraordinarily, Imelda Marcos was elected as a congresswoman and her son Ferdinand Jr. ("Bong Bong") was elected to his father's old congressional seat. Ramos ran for President in this heated environment and, after he was elected, he "...declared that his administration would regard the restoration of the death penalty a legislative priority, and urged Congress to take speedy action".³²² The result of this intention was the passage of Republic Act No. 7659 on December 13, 1993, restoring the death penalty. Under this law:

...46 crimes are considered heinous and are now subject to the death penalty. It imposes the mandatory death penalty on 21 crimes while the other 25 crimes are death eligible. These are crimes for which a range of penalties including the death penalty is imposed.³²³

It is hard to see how this extensive array of capital offences could meet the constitutional requirement of "compelling reasons involving heinous crimes" (above, page 80). In fact, the Advisory Council of Jurists did subsequently recommend that the Supreme Court declare Republic Act No. 7659 "unconstitutional or unenforceable".³²⁴ But what I find so compelling about this moment is the sheer magnitude of what had

³²⁰ *Ibid.*

³²¹ *Supra* note 312.

³²² *Supra* note 314.

³²³ *Supra* note 312.

³²⁴ Advisory Council of Jurists, "ACT Standing Issues – Reports from APF Members: Philippines," undated, online: <http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/report-from-apf-members-on-acj-standing-issues/philippines_acj.pdf>.

happened. Abolition had been in place for seven years, with no executions at all. Now, with the apparent approval of public opinion, the death penalty was being extensively restored. How could this ever be turned back again? Certainly, the logic of the abolitionist cause seemed solid enough. The Asian Pacific Forum of National Human Rights Institutions, for example, pointed out that, before the passage of RA 7659, the Commission on Human Rights of the Philippines had expressed its views against the re-imposition of the death penalty by stating: "The proper response to the failure of our justice system is political will to effectively apprehend, prosecute and rehabilitate criminals. To mete out to criminals the very final, irrevocable and inhuman verdict of death is tantamount to punishing them for the failure of the system."³²⁵ But if the public felt safer as a result of Republic Act No. 7659, how could the abolitionists prevail upon them to see the correctness of their own position? It all came down to a rather surprising fact. Despite restoration having become effective on January 1, 1994 for "compelling reasons" (above, page 80), no executions actually took place or, at least, none for several years. To me, it seems to me that abstract discussions about the death penalty are beyond most people's reasoning capability or interest. What it takes to engender passionate and committed debate is the presence of an actually condemned prisoner; that is when people take notice. And so it was in the Philippines.

Not until February 5, 1999, five years after restoration and more than a decade after the last execution in the Philippines, was a man executed. He was Leo Echegaray, convicted of the rape of his stepdaughter. The Philippine Alliance of Human Rights Advocates reported on the outcry as this conviction sparked once again a heated debate between the anti and the pro-death penalty forces in the Philippines with a huge majority of people calling for Echegaray's execution. The Alliance commented empathetically: "That there was a strong clamour for the imposition of the death penalty should be viewed from the point of view of a citizen who is desperately seeking ways to stop criminality."³²⁶ So the prospects for

³²⁵ *Ibid.*

³²⁶ *Supra* note 312.

abolition remained seemingly dismal. Yet new views were emerging. In one of the most remarkable statements I have seen, 27 women's organizations combined to say "No" to the execution of Leo Echegaray:

We believe that Leo Echegaray is guilty of a terrible crime and must be punished. But we, 27 organizations representing women are against the death penalty. It may surprise the public that we who have long been working against rape and other forms of violence against women and children are against the death penalty.

Do not label us pro-Echegaray....

Our reasons for opposing the death penalty are fundamentally different from those who have already made themselves heard.

The death penalty will not put an end to violence against women and children. Our culture of violence and criminality will continue to breed more criminals who, in turn, will produce more victims. The death penalty will not arrest those violations. Rather, it will perpetuate the culture of violence.

The death penalty will desensitize people to killings....

The death penalty should not be equated with justice. Justice begins with examining the culture that systematically breeds violence against women and children....

The popular support for the death penalty is understandable. It stands as a desperate plea for protection from further violence and a clamor for solid justice. The death penalty will not justify these as it is in its essence only a form of retribution. What we can do is put Leo Echegaray away and ensure that he is truly kept away by prison officials. At the same time, we must engage in reflection, analysis and action to address the roots of violence and the ills of the system without forgetting to address the needs of abused women and children.

This is the direction to justice.³²⁷

Various NGOs campaigned for the commutation of Echegaray's death sentence to life imprisonment.

These included the Coalition against Death Penalty formed in 1992 by such groups as the Catholic Bishops Conference of the Philippines, Amnesty International and Ecumenical Movement for Justice and Peace.³²⁸ The Free Legal Assistance Group ("FLAG") joined this effort in 1997.³²⁹ This was a laudable

³²⁷ Sama-Samang Inisyatiba Ng Kababaihan Sa Pagbabago Ng Bates At Lipunan, "Women Say No to the Death Penalty", SIBOL Statement on Death Penalty, February 1999, online: <<http://www.philsol.nl/A99a/SIBOL-feb99.htm>>.

³²⁸ Federation Internationale De L'Acat, "Philippines: Abolition of the Death Penalty", October 2004, online: <<http://www.fiacat.org/en/spip.php?article140>>.

example of domestic and international NGOs combining for a specific purpose. A strong appeal about Echegaray's impending execution was also published by the Asian Human Rights Commission on December 23, 1998. It noted the urgency of the situation: "Thanks to all your support he was given reprieve for 6 months. Due (to) strong pressure from the pro-death penalty lobby – he now faces death again on 5th February 1999."³³⁰ The Commission urged then President Estrada to abolish the death penalty "...as recommended by the United Nations Commission on Human Rights resolution 1998/8".³³¹ The Philippine Alliance of Human Rights Advocates issued a Press Statement, commenting on the fate of the Supreme Court's six-month stay of execution to allow Congress time to review the law:

That the house vote would be to reject the review of the death penalty law was predictable even before the actual voting.

What is sad however is that the members of the House of Representatives failed to give the law the second look it justly deserved. It was disappointing to see these "noble Congressmen" who only see in this issue, the chance to shine by riding on the popular cry of the public forgetting what their duties as lawmakers are. The Supreme Court has given time to take another look at the death penalty to examine if this law is the antidote to crime that it is touted to be. But rather than be the lawmakers they are supposed to be, our Congressmen chose to be politicians. As before when it was reintroduced in 1994, there was public outcry for the government to stop the tide of criminality. Then as it is now, Congress chose the easy way out and promulgated the death penalty law....

We can understand the passionate cry of the public for vengeance which they see as justice but we can never understand why our lawmakers who are supposed to uphold the rule of law are championing the law of vengeance.

We in the human rights community are not asking our Congressmen to pardon Echegaray. We are asking them to do their duties, to rise above the emotions, and to really look at the law. That the death penalty is not a deterrent to crime has never been disputed....

Why then should our Congressmen push for the execution of Echegaray? To see if it will deter crime? What if it fails to be the antidote they are hoping it will be? Can our esteemed Congressmen legislate a law that will bring back the life of Echegaray?³³²

³²⁹ *Ibid.*

³³⁰ Asian Human Rights Commission, "Philippines (Update) Leo Echegaray Faces Death Sentence Again on 5 February, 1999", January 26, 1999, online: <<http://www.ahrchk.net/ua/mainfile.php/1999/64/>>.

³³¹ *Ibid.*

³³² Philippine Alliance of Human Rights Advocates, Press Statement, "Re: House vote on Death Penalty in the Philippines", January 19, 1999, online: <<http://www.philsol.n1/A99a/Pahra-19jan1999.htm>>.

In the end, it was a decision for the President. Joseph ("Erap"-"Buddy" reversed in Filipino slang) Estrada, a flamboyant former movie star, had been elected in 1998. He presented himself as a tough man of the people who would fight for the masses. His decision on the fate of Leo Echegaray was reported by a socialist news site as his having ignored a string of appeals from the European Union, Canada, Amnesty International, the Vatican and church leaders in the Philippines to grant clemency. He had furthermore declared that he would not change his mind even for the Pope, and had theatrically ordered the telephone "hotline" between the presidential palace and the death cell to be cut off to signify that there would be no last minute reprieve. The reporter commented:

Estrada, along with other politicians, right-wing religious organizations and vigilante groups, has been in the forefront of whipping up a lynch mob frenzy. His wife Luisa and Vice-President Gloria Macapagal joined a protest last month in Manila's central business district demanding Echegaray be executed. Just recently Estrada has told the "media" that he "feels good" about ordering the execution, saying he was doing it to protect "innocent people, especially innocent young girls."³³³

Seeing the person who should be expected to weigh the case for clemency apparently so involved in supporting Echegaray's death sentence must have been an unnerving spectacle for the groups campaigning for commutation. And Vice-President Macapagal Arroyo's participation in a pro-execution protest did not augur well for the abolitionist future once she succeeded Estrada as President. The groups aligned in favour of the death penalty must have seemed quite overwhelming at that time. There were groups such as the Volunteers against Crime and Corruption, the Citizens' Crime Watch and the Jesus is Lord and Philippines for Jesus Movement, as well as polls showing "...more than 80% of Filipinos support the death penalty."³³⁴ It would apparently be very much an uphill battle to return to the 1987 legal situation.

³³³ Peter Symonds, "First execution in the Philippines in 23 years". World Socialist Web Site, February 6, 1999, online: <<http://www.wsws.org/articles/1999/feb1999/phil-f06.shtml>>.

³³⁴ *Ibid.*

Echegaray's eventual execution was described as "...a media circus with 11 selected journalists as well as government officials permitted to watch the prisoner die."³³⁵ There were demonstrations both favouring and opposing the sentence. Schools in the area were shut down, and prisons placed on alert "...in anticipation of possible rioting."³³⁶ Despite this unstable atmosphere and the attendant public drama, six other executions took place during the next 11 months. Did any of this have any effect on the crime rate?

The Philippine Alliance of Human Rights Advocates thought otherwise:

From February 6, 1999, a day after Leo Echegaray was executed, to May 31, 1999 two leading newspapers reported a total of 163 crimes which could be punishable by death penalty. But perhaps the best indicator that this law is not a deterrent to criminality is the ever-increasing number of death convicts.

From 1994 to 1995 the number of persons on death row increased from 12 to 104. From 1995 to 1996 it increased to 182. In 1997 the total death convicts was at 520 and in 1998 the inmates in death row was at 781. As of November 1999 there are a total of 956 death convicts at the National Bilibid Prisons and at the Correctional Institute for Women.³³⁷

By the end of 2000, Amnesty International was reporting "over 1400 prisoners...under sentence of death...".³³⁸ Clearly, the availability of the death sentence was not serving as a deterrent. U.S. Attorney General Janet Reno had said on January 20, 2000: "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point".³³⁹ The reporter commented on this: "Reno, a life-long prosecutor, has conceded that there is no evidence for the argument based on deterrence. Can we conclude therefore that the myth of deterrence is a front that serves as a cover for the primal urge for revenge?"³⁴⁰

The 2000th anniversary of the birth of Jesus Christ was an important date to Christians. Throughout the world, the Roman Catholic Church, in particular, urged that the Jubilee Year be marked with a moratorium on the death penalty. There was a Moratorium 2000 movement aiming to deliver 1 million

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Supra* note 312.

³³⁸ Amnesty International, *International Report 2001* (London: Amnesty International Publications, 2001), Philippines.

³³⁹ Robert F. Drinan, "Zeal to end death penalty growing", National Catholic Reporter, June 16, 2000, online:

<http://www.natcath.com/NCR_Online/archives/061600/061600q.htm>.

³⁴⁰ *Ibid.*

signatures on a petition to the United Nations on Human Rights Day, December 10, 2000. In the Philippines, the Roman Catholic bishops pressed President Estrada to be a part of this movement and, rather surprisingly to my mind (given his earlier position), he acquiesced.

The decision of the Philippine president was made public on March 24. In a statement released after the announcement, CBCP [Catholic Bishops' Conference of the Philippines] President Archbishop Orlando B. Quevedo expressed his satisfaction for the decision to suspend death penalty, saying it will give "breathing space" for all death row convicts....

He also noted it was a fitting gesture to mark the fifth anniversary of Pope John Paul II's Encyclical "Evangelium vitae" which was written to encourage a "culture of life".

In his statement, Archbishop Quevedo also urged legislators to make use of the moratorium period as an opportunity to review and eventually cancel the Death Penalty Law.³⁴¹

The temporary moratorium announced by President Estrada was to continue until January 2001, and meant the immediate commutation of 18 death sentences (executions had to be carried out no earlier than one year and no later than 18 months after the sentence had been declared final by the Supreme Court). The reaction was predictable. Prison chaplain Roberto Olaguer was reported as saying that death row inmates at the national penitentiary clapped their hands and jumped for joy when he announced the moratorium. They later sang a thanksgiving song. In particular, he mentioned one inmate, Renato Robles, convicted of rape and murder and scheduled for execution on April 5th, who had "...stood up in his cell and slowly tore up a farewell letter he was writing to his mother".³⁴² Anti-crime groups, on the other hand, criticized the decision.

Despite this last observation, it was truly extraordinary to witness the sea-change between February 1999 and March 2000. Not only was this a recognition of the sheer power and influence of the Roman Catholic Church in this predominantly Catholic nation, but it was also a reflection of NGO and other international pressure. For example, Amnesty International published the following statement:

³⁴¹ EWTN News, "Philippines bars executions in 2000", March 29, 2000, online: <<http://www.paulrougeau.altervista.org/mondo%20en/Filippine0300.htm>>.

³⁴² *Ibid.*

President Estrada's announcement today that no one will be executed for the rest of the year is a breakthrough for human rights in the Philippines, Amnesty International said today welcoming the moratorium.

The announcement came within hours of a joint press conference in Manila by the Coalition against the Death Penalty, attended by representatives of Amnesty International, members of the Catholic Bishops Conference of the Philippines (CBCP), local parliamentarians and other human rights activists.

The Head of the CBCP, Bishop Teodoro Bacani, is also reported to have made a personal request to the President to suspend all executions out of respect for the 2,000th anniversary of the birth of Christ.

Today 108 countries around the world, encompassing widely different societies, cultures and religions, have abolished the death penalty in law or practice. The Philippines now has the chance to reflect on the right to life and the futility of the death penalty in fighting crime....³⁴³

The European Union welcomed the decision taken by President Estrada to declare a moratorium on executions and expressed its hope "...that this decision will be extended after the end of the year and might constitute an important step towards the future abolition of the death penalty in the Philippines".³⁴⁴

The Central and East European countries associated with the European Union, the associated countries Cyprus and Malta, and the EFTA countries members of the European Economic Area aligned themselves with these comments.

The European Union's hope for an extension of the moratorium was fulfilled. President Estrada, in December, granted 108 "Executive Clemencies" to prisoners facing execution. On Human Rights Day, he went further than that: "Noting that most of those sentenced to death were poor and underprivileged, President Estrada declared his support for a congressional review and the eventual repeal of the death penalty law."³⁴⁵ On December 10, 2000, he announced that he would commute sentences of all death convicts to life imprisonment, expressing his desire, "...to certify as urgent a bill seeking a repeal of the Death Penalty Law".³⁴⁶ Ironically, before he could take steps to implement these intentions, Estrada found himself facing possible execution. He was accused of illegally acquiring U.S. \$80 million during

³⁴³ Amnesty International, "Philippines : Executions put on hold", AI Index: ASA 35/03/00, March 24, 2000.

³⁴⁴ European Commission, "Bulletin EU 4-2000, Common foreign and security policy (16/19) – Philippines", July 10, 2000, online: <<http://europa.eu/bulletin/en/200004/p106016.htm>>.

³⁴⁵ *Supra* note 338.

³⁴⁶ Amnesty International, "Death Penalty in the Philippines", May 20, 2008, online: <<http://www.forum-asia.org>>.

his time in office, mostly from allegedly accepting bribes. He was also accused of skimming off tobacco excise taxes and benefiting personally from government deals. CNN commented: "In the movies, Joseph Estrada was the tough but kind-hearted hero who beat his adversaries in a rousing comeback at the end. But it's hard to see how the Philippine actor can get out of his deepest hole yet, facing criminal charges and the real threat of a long prison sentence. One of the charges – that of economic plunder – carries the maximum penalty of death."³⁴⁷ He was impeached and tried by the Senate but, when "...the trial collapsed, after some prosecution evidence was ruled inadmissible, the anger spilled on to the streets".³⁴⁸ A revolt backed by the Catholic Church and the army ousted him in January 2001. The Supreme Court nullified the Estrada presidency, and Gloria Macapagal Arroyo took the oath of office at a street demonstration. Her chief of staff, Renato Corona, was asked about the plunder charge and responded that the maximum penalty was death, and the government was emphasizing yesterday that it would not interfere with the judicial process. He added: "If the court decides that he should be executed, that's the way the ball bounces."³⁴⁹

It is not easy to discern the personal view of President Arroyo concerning the death penalty. It will be recalled that she had been portrayed as a campaigner for the execution of Leo Echegaray (above, page 87). Yet, soon after assuming office, she announced the continuation of the Estrada moratorium for another three years. As with her predecessor, her decision seems to have been influenced by the Catholic Church. The Church certainly responded favourably whilst denying its own influence:

"The country is leading towards a culture of life," said Archbishop Orlando Quevedo, president of the bishops conference commenting on the news that on April 3 President Macapagal-Arroyo opted to suspend all executions of criminals in the country during her three year term, until 2004.... "The announcement of the government regarding the temporary lifting of the death penalty is a step forward towards a culture of life. It can protect life by punishing criminals in a human responsible way," the archbishop said....

According to groups in support of the death penalty, President Arroyo has been influenced by the Church, in particular by Cardinal Jaime Sin

³⁴⁷ CNN.com/world, "The rise and fall of Joseph Estrada", May 2, 2001, online:

<<http://edition.cnn.com/2001/WORLD/asiapcf/southeast/04/22/estrada.profile/>>.

³⁴⁸ BBC News World, "Profile: Joseph Estrada", October 26, 2007, online: <<http://news.bbc.co.uk/1/hi/world/asia-pacific/1063976.stm>>.

³⁴⁹ The Independent, "Estrada told he faces death penalty for plunder", January 22, 2001, online:

<<http://www.independent.co.uk/news/world/asia/estrada-told-he-faces-death-penalty-for-plunder-703231.html>>.

of Manila. "Such arguments", Archbishop Quevado said "belittle the president, her freedom to make her own judgement in the light of her own conscience."³⁵⁰

Whether influenced by the Church or of her own volition, the new President made clear that she was not in favour of executions. As well as the Church, NGOs such as Amnesty International and domestic human rights groups welcomed this commitment. And there continued to be no executions carried out in the Philippines after the seven in 1999. But then, also like her predecessor (but in the opposite way), President Arroyo changed her position. According to Amnesty International: "...in October 2001, she announced a change of heart, saying that the government needed to strike fear into the hearts of criminals and that those convicted of kidnapping for ransom should be put to death. Her about-turn appears to have been prompted by pressure from anti-crime lobbyists, victims of kidnappings and members of the business community concerned that the high level of kidnappings in the country was having an adverse effect on business and economic investments."³⁵¹ This was alarming enough for the abolitionist cause, but the President went even further: "President Arroyo also announced that she wanted to reverse previous presidential decisions to commute death sentences. She is also considering executing convicted drug-traffickers and those found guilty of economic crimes."³⁵²

Amnesty International and other abolitionist NGOs urged President Arroyo not to resume executions: "The death penalty is nothing more than a brutal and unjust punishment that always carried the risk of extinguishing the lives of innocent people. This risk is heightened in the Philippines because of the lack of protection of detainees during interrogation. Many of those on death row were held incommunicado, tortured to coerce confessions, and then subjected to unfair trials."³⁵³

Once again, a tumultuous debate focused on identified individuals. This time it was three prisoners convicted of raping their daughters, and they were all scheduled to be executed before October 2002.

³⁵⁰ FAMVIN: The International Vincentian Family, "Philippines Moratorium on Death Penalty for Three Years", April 7, 2001, online: <<http://famvin.org/en/archive/philippines-moratorium-on-death-penalty-for-three-years>>.

³⁵¹ Amnesty International, "Philippines: Death Penalty Briefing", AI Index: ASA 35/010/2002, August 2, 2002, online: <<http://asiapacific.amnesty.org/library/Index/ENGASA350102002?open&of=ENG-2AS>>.

³⁵² Amnesty International, "Philippines: Alarm bells ring for human rights as President announces about-turn on the death penalty", AI Index: ASA 35/005/2001, October 18, 2001.

³⁵³ *Ibid.*

Amnesty International lamented this apparently likely end to the freeze on executions, pointing out:

The President should know that executions fail to deter criminals. Soaring crime rates are a concern for many governments worldwide. However there are ways of tackling law and order problems and punishing criminals without resorting to killing. The death penalty achieves nothing but revenge.

....Women's groups in the Philippines have pointed out that the death penalty is not the solution to high rates of incest, saying that it has a brutalizing effect and risks increasing the suffering of vulnerable child victims. In 1999 a man convicted of incestuous rape was executed, despite pleas from his daughters that his life should be saved.³⁵⁴

This last reference was to the execution of Eduardo Agbayani, also convicted of raping his daughter.

President Estrada, as he was then, finally agreed to grant clemency when all six of Agbayani's daughters made a personal plea to him. But by the time his call went through, the lethal injection had already been administered and the prisoner could not be saved from execution.

Amnesty International identified two of the convicted prisoners by name: Filemon Serrano and Alfredo Nardo.³⁵⁵ Things did not look good for them. A court had ruled that the first judicial execution under President Arroyo's government would take place on October 16, 2002. But the Catholic Bishops' Conference of the Philippines swung into action once more, renewing its call for the abolition of the death penalty. The 120-strong bishops' group said that the death penalty would not reduce crime, but only complicate the country's problems. The bishops said they vigorously supported the efforts of "enlightened legislators who have pushed for the scrapping of the onerous Death Penalty Law".³⁵⁶ The reference to "enlightened legislators" was to the hundred authors of a bill, recently introduced into Congress, that would scrap former President Ramos's "Heinous Crimes Law" (above, page 82). Under this iniquitous law, only a presidential pardon or commutation could save the life of a death row convict. Despite the familiar pressures building in favour of clemency and abolition, President Arroyo seemed to be holding firm.

³⁵⁴ Amnesty International UK, "Philippines: first execution in two years imminent", August 23, 2002, online: <http://www.amnesty.org.uk/news_details.asp?NewsID=13758>.

³⁵⁵ *Supra* note 346.

³⁵⁶ Philippine Star, "CBCP renews opposition to death penalty", July 10, 2002, online: <<http://www.philsof.nl/news/02/DPenalty01-jul02.htm>>.

President Gloria Macapagal-Arroyo is hanging tough on her position to resume the execution of death convicts at the risk of alienating some of her supporters, including the Church....

When she was installed president, the President said that her administration would not allow state executions in deference to the position of the Church and civil libertarians.

Later on, President Macapagal-Arroyo said that she was in favor of executing kidnapping convicts only because of the strong clamor by the Chinese-Filipino community, whose members are often the victims of kidnapping syndicates.³⁵⁷

This professed determination to proceed with executions transpired, thankfully, to be illusory. The President suddenly decided to postpone the execution of the three death row prisoners for three months. She explained that a bill authored by a hundred legislators scrapping the death penalty was the most important influence in her decision to postpone the execution of three death row convicts. Referring to her vote rejecting the return of the death penalty while she was still a senator, she added: "You cannot say that my position has softened because from the very beginning I voted against the death penalty".³⁵⁸ But she said she reluctantly supported the death penalty when she became president because of the spate of kidnappings, which she said was now in decline. Finally, she told reporters: "At this point in time, the most important thing that affected my decision is there is this bill with a hundred authors so I have to respect the sense of Congress and at least review it. I'm not saying that I'm already accepting it but give me a chance to hear the congressional debates."³⁵⁹

I find it interesting that the President was this time ostensibly willing to ignore the bishops, but was publicly succumbing to the legislators. Indeed, the latter group pressed their apparent advantage, calling on her the same month to stay all executions until Congress repealed the death penalty. 110 congressmen supported a House resolution favouring the repeal of Republic Act No. 7659. Loretta Ann Rosales, Chair of the House Committee on Civil, Political and Human Rights, delivered the sponsorship speech for House Bill 5114, "An Act Abolishing the Death Penalty in the Philippines". In her speech, Rosales said

³⁵⁷ *Ibid.*, Philippine Star, "President set on carrying out executions", July 15, 2002.

³⁵⁸ *Ibid.*, Philippine Star, "Anti-death penalty bill behind delay in executions", August 28, 2002.

³⁵⁹ *Ibid.*

that the 10-year death penalty law had failed to curb the crime rate in the country and, thus, was not a deterrent to crime. "Rather, the death penalty is an act that has a brutalizing effect and which incites the violent tendencies of persons," she said; "The only answer to crime is enforcement."³⁶⁰

This had all happened so quickly. On October 1st, the President suspended all executions indefinitely "...until Congress 'wraps up' its review on the death penalty law."³⁶¹ There was no specific timetable for the suspension "...which anti-crime advocates said would 'weaken' Ms. Macapagal's campaign to crush the rising criminality."³⁶² As time passed, this faction became more vociferous in its condemnation of the suspension of executions. Contrary to President Arroyo's assertion (above, page 93), kidnapping was on the rise and those affected were demanding action.

The rise in kidnappings in the Philippines has revived calls for lifting a moratorium on the death penalty in what some officials see as a reflection of growing public exasperation toward kidnappers and the government's inability to stop them. On Monday, a member of the Philippine House of Representatives filed a resolution asking President Gloria Macapagal Arroyo to lift the moratorium on executions.... Kidnap-for-ransom gangs have been targeting mainly rich Chinese Filipinos. Last week, Betti Chua-Sy, a 32 year-old Coca-Cola executive, was kidnapped and killed south of Manila. During the funeral march on Sunday, mourners called for the application of the death penalty.

"The government should give us a chance to give justice to our loved ones by lifting the moratorium on the death penalty," said Grace Maguan, the founder of Crusade Against Violence, a group of relatives of crime victims.³⁶³

The intensive pressure emanating from the Chinese-Filipino community, and their supporters, caused the President to again shift gears. She decided to lift the moratorium in December, 2003. This immediately affected two men, Roberto Lara and Roderick Licayan, who had been convicted in a 1998 kidnapping. However, it was by no means clear that they had received a fair trial, their counsel alleging that witnesses on their behalf had been prevented from testifying during the trial. Even the prosecutors agreed that the case should be re-opened. "There is enough reason to at least hold off the execution," said Alfredo

³⁶⁰ *Ibid.*, Philippine Star, "110 Solons seek stay of State executions", August 29, 2002.

³⁶¹ *Ibid.*, Philippine Star, "Palace confirms suspension of executions by President", October 1, 2002.

³⁶² *Ibid.*

³⁶³ International Herald Tribune News, "Abductions in Philippines spark death penalty debate", November 25, 2003 online: <<http://www.gmanews.tv/story/149127/3-get-30-years-for-kidnapping-of-businessman-aide>>.

Benipayo, the government's chief prosecutor. "If after this we are certain of their guilt, then we can execute them."³⁶⁴ This illustrated the fundamental difficulty of carrying out executions in a country such as the Philippines where the justice system was so defective. The abolitionist forces were again able to rally around condemned individuals, with logic on their side.

During the presidential election in January 2004, the Episcopal Commission on Prison Pastoral Care asked all five candidates, including Ms. Arroyo, to declare themselves against the death penalty. The Commission and the Anti-Death Penalty Coalition organized a mass for Lara and Licayan, eliciting the following comment:

Jesuit priest and coalition member, Fr. Silvino Borres, said that the Philippines are sinking even more into the "culture of death". "As if all the violence and armed conflict bloodying the world were not enough, there is an increasing number in society who tend to end life when it is no longer believed to be useful," he said. The Philippine government holds that the execution of death row inmates, condemned to death for kidnapping, will improve the country's social and economic climate. "This is false. There are other factors making investment unsafe. The greater cause is government corruption," said Fr. Borres.³⁶⁵

(Roberto Lara and Roderick Licayan were duly granted a new trial by the Supreme Court, but it did not go well for them and they were eventually sentenced to 30 years' imprisonment each).

On World Day Against the Death Penalty, October 11, 2004, the Episcopal Commission was back at it, urging President Arroyo to repeal Republic Law No. 7659. The bishops were quoted in a press statement as saying:

"We believe that we should give lawbreakers a chance to repent, rehabilitate and truly pay for their crimes...while in prison a convict can work and the money he or she earns may be used to pay back the families of the victims. At the same time convicts should have the chance to change their lives and attitudes and perhaps truly repent and atone for the actions and reconcile with society."

³⁶⁴ International Herald Tribune News, "Major death penalty case takes twist in Philippines", January 27, 2004 online: <http://www.ihf.com/articles/2004/01/27/a3_77.php>.

³⁶⁵ Asia News, "Philippines Bishops ask presidential candidates to say "no" to death penalty", January 15, 2004, online: <<http://www.asianews.ihf/index.php?art=255&1=en>>.

The Bishops' Conference says that the abolition of the death penalty will also prevent the execution of innocent persons who might have been convicted because of flaws in our judicial system....

Through local and national representatives the Church in the Philippines has always pressed for the repeal of the Death Penalty law which, it underlines, does not serve as a deterrent for criminals.³⁶⁶

The pressure for abolition continued throughout 2005 with President Arroyo indicating an increasing willingness to support repeal. By early 2006, the abolitionist groups were showing renewed confidence in the ultimate success of their cause. The Coalition against Death Penalty (CADP) and International Commission of Catholic Prison Pastoral Care (ICPPC) also lauded Arroyo's inclination to heed their call. CADP President Fr. Silvino L. Borres said that, by seeking to abolish this law, the President was declaring that, in pursuing justice, one need not yield to vengeance and barbarism. He added: "One can work for justice that heals and not justice that kills."³⁶⁷ During Easter 2006, on April 15th, President Arroyo made what surely was the courageous and magnificent decision to commute the sentences of all those condemned to death, a decision affecting the lives of about 1200 convicts. Not surprisingly, this dramatic occurrence proved to be immediately and profoundly controversial.

President Gloria Arroyo on Monday defended a decision to commute death sentences as religiously inspired, while an anti-crime activist warned that outraged victims' families may attempt to take revenge against inmates whose lives will be spared.

President Gloria Macapagal Arroyo's Easter announcement was applauded by the powerful Roman Catholic church and anti-death penalty crusaders, but her spokesman, Ignacio Bunye, said "the president is not seeking nor does she expect any political return from her decision."

The decision "came after deep contemplation and reflection in the field of Christian values", Bunye said in a statement. "We understand the deep hurt inflicted upon the families of the victims of heinous crimes, but the president believes that learning to forgive without compromising criminal justice would be a good start for the nation to move on."³⁶⁸

³⁶⁶ Agenzia Fides, "Catholic Bishops urge President Gloria Arroyo to abolish capital punishment", October 11, 2004, online: <http://www.fides.org/eng/news/2004/0410/11_3271.html>.

³⁶⁷ CBCP News, "Hope floats for anti-death penalty advocates", February 23, 2006, online: <<http://www.cbcponline.net/html/news2-feb23.html>>.

³⁶⁸ Manila Bulletin, "'Tooth for tooth' justice feared with death penalty commutation; Death row inmates rejoicing, says prison chaplain", April 17, 2006, online: <<http://www.mb.com.ph/node/70830>>.

A day later, President Arroyo made it clear that she would support legislation to abolish the death penalty. Her spokesman Ignacio Bunye said: "The president's moral compass clearly indicates that no executions will take place under her term. And she is prepared to certify legislation to abolish the death penalty."³⁶⁹ Bunye said Arroyo, who survived an impeachment vote the previous year over allegations of election fraud, made the decision not to allow any executions "as a basic moral issue affecting pro-life values,"³⁷⁰ and not for political gain. She certified a bill for abolition as urgent, and floor debates began in the House of Representatives in May. Bill 4826 known as "An act prohibiting the imposition of the death penalty in the Philippines" had been sponsored by Representative Edcel Lagman who gave the following reasons for why capital punishment should be abolished:

- It violates the ultimate right of a person to live
- The death of a criminal in the hands of the State will diminish rather than uplift the human spirit
- The death penalty is viewed as a "cruel, degrading, and inhuman" punishment
- The enforcement of the death penalty did not comply with the law which requires the existence of "compelling reasons" to justify its imposition
- It has not been proven that the death penalty will be a deterrent to crimes³⁷¹

Quite extraordinarily, after the intense debate through all the years, Congress approved the repeal bill quickly. Opponents questioned the speed of passage, suggesting that it had a lot to do with President Arroyo's political situation.

"The unusual speed in a legislature constantly bogged down in gridlock raised cynical suspicions that lawmakers are in dire need of the Catholic Church's approval and support. For what, the public can only hazard a guess", the Philippine Star newspaper said in an editorial.

Eight in 10 Filipinos are Catholic and the Church wields considerable power, having helped to topple two presidents – Ferdinand Marcos in 1986 and Joseph Estrada in 2001 – in popular revolts.

³⁶⁹ Hands Off Cain, "The Philippines: President would support Bill to abolish death penalty", April 18, 2006, online: <<http://www.handsoffcain.info/news/index.php?iddocumento=8317316>>.

³⁷⁰ *Ibid.*

³⁷¹ Amnesty International USA, "The Philippines debates Abolition of the Death Penalty", May 17, 2006, online: <<http://blogs.amnestyusa.org/death-penalty/archive/2006/05/17/1p4ftb6jj3ifl.htm>>.

Mrs. Arroyo, who survived an impeachment attempt last year, depends on the support of the Church as she fights persistent allegations she cheated in the 2004 election....³⁷²

Anti-crime groups were particularly vociferous in their condemnation of the new law, expressing fears that matters would only become worse. Dante Jimenez of the Volunteers against Crime and Corruption, a prominent group whose members were relatives of hundreds of victims, commented: "This government is siding with criminals and not the victims. Now some victims of heinous crimes may resort to hired killers to get justice".³⁷³ Mr. Jimenez even went so far as to suggest that the reason for the law's rush was "...an effort to please Pope Benedict XVI, whom the president met on Monday".³⁷⁴ It was certainly true that the Holy Father voiced "well done" for the successful repeal.³⁷⁵

Whatever the controversy, Republic Act No. 9346 was enacted on June 24, 2006, section 1 of which provided for the outright prohibition of the imposition of the death penalty. This measure was understandably welcomed by abolitionist proponents throughout the world. For example, Reprieve, a human rights NGO based in London, commented that the Philippine Congress had passed legislation abolishing the death penalty, "providing a critical human rights victory in a region plagued by hapless sentencing procedures and frequent executions".³⁷⁶ In the opinion of Reprieve: "Like several other nations that in recent decades have suspended and later reinstated the death penalty, the experience of the Philippines highlights the fact that the problems posed by the institution of capital punishment are irreparable. Abolition is the only viable solution".³⁷⁷

On September 20, 2006, the Philippines became a State Party of the *Second Optional Protocol*. Its subsequent commitment to the UN Human Rights Council (regarding elections to be held by the General Assembly on May 17, 2007) stated: "4. In testimony to its firm commitment to the value and sanctity of human life and in the belief that the defence of life is strengthened by eliminating the exercise of judicial

³⁷² BBC News, "Philippines' death penalty debate", June 26, 2006, online: <<http://news.bbc.co.uk/2/hi/asia-pacific/5117128.stm>>.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ Goliath Business News, "Pope says 'well done' for outlawing death penalty", July 17, 2006, online: <http://goliath.ecnext.com/coms2/gi_0199-5593075/Pope-says-well-done-for.html>.

³⁷⁶ Reprieve, "Reprieve hails the abolition of the death penalty in the Philippines", August 6, 2006, online: <http://www.reprieve.org.uk/press_08.06.06_Philippines_abolish_death_penalty.htm>.

³⁷⁷ *Ibid.*

authorization to take life, the Philippines abolished the death penalty and will actively campaign towards its abolition worldwide.³⁷⁸ (emphasis added) Despite this seemingly inviolable commitment to abolition, the pro-death penalty forces were still not entirely defeated. The Asian Forum for Human Rights and Development recorded its consequent disquiet:

FORUM-ASIA has expressed its deep concern over the attempts in the Philippines Congress to reinstate the death penalty in the country through House Bill 4882...filed by Congressman Bienvenido M. Abante.... In a letter to the Committee on the Revision of Laws of the Philippines' House of Representatives, FORUM-ASIA argued that the death penalty would be in direct violation of the Second Optional Protocol to the International Covenant on Civil and Political Rights.... The Philippines is a State Party of the ICCPR-OP2....

According to Mr. Yap Swee Seng, Acting Executive Director of FORUM-ASIA, "The Philippines has made an international commitment to lead the trend towards the abolition of the death penalty in the Asia region. Any attempt to revive such practice would only cause a setback to the development of democracy and human rights in the Philippines."³⁷⁹

To similar effect, a group of Christian writers and students expressed their concerns about the prospect of a death penalty revival. John Frances Fuentes, news editor of the Davao Catholic Herald, pointed out: "We have tried death penalty as an antidote to crime before. During the Estrada administration we have witnessed the execution of Leo Echegaray but after that there are no signs that criminality has gone down".³⁸⁰ It was reported that, within four months of Echegaray's execution, 163 crimes that could be punishable by death were committed. Mr. Fuentes continued: "The records will tell that if death penalty was a solution after the execution of Echegaray we [should not have seen an] increasing number of death convicts and commission of crimes punishable by death but it is not the case....Apart from that, we should still adhere to the teachings of the Catholic Church to uphold the sanctity of human life."³⁸¹

³⁷⁸ Human Rights Philippines, "Commitments of the Philippines in the Human Rights Council", online: <<http://www.humanrights.gov.ph/index.php?hr=2&hmr=0&article=2>>.

³⁷⁹ Forum-Asia, "Philippines: House of representatives urged against reinstating the death penalty", September 26, 2008, online: <http://www.forum-asia.org/index.php?option=com_content&task=view&id=1989&Item>.

³⁸⁰ CBCP News, "Christian writers, youth, students condemn calls for death penalty revival", January 9, 2009, online: <<http://www.cbcpnews.com/?q=node/6700>>.

³⁸¹ *Ibid.*

I cannot seriously imagine that the efforts of Congressman Abante and his ilk will affect the reality of the Philippines being now, after a unique and remarkable struggle, firmly and legally in the abolitionist camp. It is a grand story with a happy ending.

I return to the question prefacing this Case Study: "Can anything be gleaned from this extraordinary sequence that might be of value in other jurisdictions?" When I was looking at the death penalty in other Asian States, I was fascinated by Bhutan where no executions had taken place since 1964. Capital punishment was formally abolished by royal decree in 2004, and a commentator wrote: "...the decree implies that the essence of government must be the rule of law and that law must reflect the spirituality that characterizes the Bhutanese system of governance. The royal decree also symbolizes the compassion and enlightened vision of a Buddhist monarch safeguarding the interests of not just the population of one nation but of all sentient beings".³⁸² This, for me, was a beautiful sentiment, but one that would be unlikely to have wider applicability. My preliminary assessment of abolition in the Philippines is similar. Yes, human rights NGOs, both domestic and international, were involved but, in the largest part, it was all to do with the individual Presidents and the Roman Catholic Church. Hence, far from being "...of value in other jurisdictions," the Philippines' experience may be just as unique as that of Bhutan. It may suggest the lack of any universally applicable rationale, with each State having its own reasons for how it deals with the death penalty. To test this supposition, I will turn to my next Case Study, a particularly challenging one. I will also review this "preliminary assessment" in my summary of the Case Studies.

As shown in Chapter 1, Pakistan was one of the world's five leading executioners in 2008. But, of the three Muslim nations that were part of that group, Pakistan was the only one, to the best of my knowledge, where the movement towards abolition has made some progress. (At the time of writing, Iran and Saudi Arabia seem to be otherwise entrenched). If the death penalty could possibly be abolished in Pakistan, what would be the implications for other retentionist Asian and/or Muslim States? Would there be any "universally applicable rationale" or would the reasons, again, be unique to one State?

³⁸² Kinley Dorji, "BHUTAN: Capital punishment abolished," Kuensel News, April 13, 2004, online: <<http://www.thinkcentre.org/article.cfm?ArticleID=2357>>.

Case Study #2 – Pakistan

Pakistan was one of the world's five leading executioners in 2008, but the underlying trend at that time was even more grim than that. Whilst the world execution rate had been declining in recent years, that in Pakistan had increased:

Table 1 Comparison of World and Pakistan execution rates

	Executions - World total	Executions - Pakistan
2005	2148	52
2006	1591	82/83
2007	1252	134/135+ ³⁸³

Only in 2008 did Pakistan's percentage of the world total – 36 of 2390 known executions – decline significantly. And then, in 2009, the quite astonishing news that it had carried out no executions at all (above, page 35). What is the reason for Pakistan's going against the tide in 2005/2007 and then appearing to shift direction? The answer surely lies in its history, culture and the sheer chaos of its recent years.

In a 2007 comprehensive joint report on the death penalty in Pakistan, the International Federation for Human Rights (a body comprising 155 human rights organizations throughout the world) and the Human Rights Commission of Pakistan pointed out:

While at the time of independence [1947], only two charges carried death penalty, today, 27 different charges do so, including blasphemy, stripping a woman of her clothes in public and sabotage of the railway system. This goes far beyond the scope of the expression "most serious crimes" for which death penalty should be reserved under international law, and which is interpreted as meaning that death penalty should not be awarded for crimes beyond international crimes with lethal or other extremely grave consequences.³⁸⁴

Charges carrying the death penalty also included those passed under the Islamic Hudud Ordinances in 1979: *Zina* offences, meaning sexual relations between partners not married to each other, and rape

³⁸³ Amnesty International, "World: 2007 Death penalty statistics, notes and case studies", AI Index: ACT 50/014/2008 (Public), April 15, 2008 and Access My Library, "Q&A – Pakistan: Rising Execution Rate Worries Rights Activists", April 21, 2008, online: <http://www.accessmylibrary.com/coms2/summary_0286-34347007_ITM>.

³⁸⁴ International Federation for Human Rights and Human Rights Commission of Pakistan, "Mission of Investigation: Slow march to the gallows – Death penalty in Pakistan", January 2007, at 5.

which, under these provisions, required the complainant to have four male witnesses or face the possible charge of adultery herself. There were also several enactments concerning blasphemy which will be examined in detail hereinafter. South Asians for Human Rights, an NGO, commented:

Thus in Pakistan the provision of capital punishment is not only extremely broad, but is in blatant contravention of International Law; it can, under the *zina* and blasphemy laws also be used to shun expressions of sexuality and conscience. These two laws are also problematic due to the gruesome nature of death they impose – stoning to death. Although the sentence of ‘stoning to death’ has never been implemented (it has been awarded) in Pakistan, its mere presence in the country’s criminal law is shocking.³⁸⁵

Fortunately, former President Pervez Musharraf signed into law on December 1, 2006 a bill placing rape laws under the British-influenced Pakistan Penal Code ("PPC") and scrapping the harsh conditions placed on complainants. This bill also dropped the death penalty for those having sex outside of marriage, they thereafter facing five years of imprisonment and a 129 Euros fine.³⁸⁶ But the blasphemy offences were not being lessened in their severity; quite the reverse in fact.

It was during the dictatorship of General Zia ul-Haq that the blasphemy laws were introduced, part of his Islamisation program. In 1980, section 298-A was inserted into the PPC, making the use of derogatory remarks in respect of persons revered in Islam an offence, punishable with up to three years imprisonment. This was followed in 1986 by the addition of section 295-C which provided: "Use of derogatory remarks etc. in respect of the Holy Prophet: whoever by words, either spoken or written, by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet (peace be upon him), shall be punished with death, or imprisonment for life, and shall also be liable to fine." Apparently this excessive measure was not enough for some. Amnesty International reported the following development:

In October 1990, the Federal Shariat Court (FSC) ruled that "the penalty for contempt of the Holy Prophet...is death and nothing else" and directed the Government of Pakistan to effect the necessary legal changes. (Decisions of the FSC are under article 203-D of the

³⁸⁵ South Asians for Human Rights, *Report on the Death Penalty in Pakistan*, 2006.

³⁸⁶ Hands Off Cain, "PAKISTAN-Retentionist", February 2009 online: <http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=Pakistan>.

constitution binding on the government which may, however, appeal against such decisions to the Shariat Appellate Bench of the Supreme Court whose decision is final.) The government of Prime Minister Nawaz Sharif did not file an appeal against the FSC decision; the death penalty is thus the mandatory punishment available for blasphemy.³⁸⁷

Commenting on the abusive employment of these expanded sanctions, Amnesty International said:

Ever since the new sections of the Pakistan Penal Code relating to religious offences against Islam, including section 295-C, were introduced in the 1980s, they have been extensively abused to harass members of the religious minorities such as Christians and Ahmadis, as well as members of the Sunni majority. Hundreds of people have been charged under these sections: In all the cases known to Amnesty International, these charges have been arbitrarily brought, founded solely on the individuals minority religious beliefs or on malicious accusations against individuals of the Muslim majority who advocate novel ideas. The available evidence indicates that charges were brought as a measure to intimidate and punish members of minority religious communities or non-conforming members of the majority community and that the hostility towards minority groups appeared in many cases compounded by personal enmity, professional envy or economic rivalry or a desire to gain political advantage.³⁸⁸

In another report, Amnesty International reviewed a number of convictions for blasphemy, concluding it likely "...that none of the persons charged with blasphemy under section 295-C described in this report have committed this offence. The charges of blasphemy appear in all cases to have been brought solely for their religious beliefs, often compounded by professional jealousy, economic rivalry, political opposition or personal hostility."³⁸⁹ Specific concerns listed by Amnesty included the following: (i) charges against Christians or Ahmadis appeared to have been brought solely because of their religious beliefs; (ii) blasphemy charges were brought against Christians because of a neighbourly grudge; (iii) complaints were filed at the insistence of local clerics or Islamist party members; (iv) some allegations of blasphemy lacked any proof; (v) many lawyers and the local judiciary were biased against persons charged with blasphemy; (vi) local clergy interrupted blasphemy trials demanding the death penalty and threatening the defendants; (vii) judges and police sometimes altered charges to include blasphemy; (viii) those charged with blasphemy were not safe in police custody; (ix) there was no fair trial; (x)

³⁸⁷ Amnesty International, "Pakistan: The death penalty", AI Index: ASA 33/10/96, September 1, 1996, at 4.

³⁸⁸ *Ibid.*

³⁸⁹ Amnesty International, "Pakistan: Use and abuse of the blasphemy laws", AI Index: ASA 33/008/1994, July 27, 1994, at 8.

people charged with blasphemy received ill-treatment; (ix) the death penalty is inherently unjust and arbitrary.³⁹⁰

It seemed that former President Musharraf, as a result of considerable lobbying by Catholic and human rights groups, was prepared to amend the blasphemy laws to end abuses. He so announced at the Convention on Human Rights and Human Dignity held in Islamabad in April 2000. But the consequent pressure from Islamic fundamentalists and the threat of a national strike caused him to change his mind. The blasphemy law remained untouched, and the Asian-Pacific Human Rights Network noted: "In 2000, the National Commission for Justice and Peace recorded 15 blasphemy cases against Christians and Hindus and at least 26 against Muslims. Although no death sentences have been carried out – most being overturned by the courts – dozens of people spend years in jail waiting for appeals to come through."³⁹¹ The Human Rights Network also pointed out: "Details of offences are also rarely, if ever, made public, since under Pakistani law, the reiteration of the words that constitute the offence can, in itself, be a legal offence."³⁹²

Former President Musharraf may have failed to end the appalling abuse of the blasphemy laws, but he did appear – at first – to have been more successful in ending the death penalty for juveniles. Pakistan's imposition of the death penalty on juveniles was a clear violation of its international legal obligation as a State Party to the UN Convention on the Rights of the Child. Article 37(a) thereof provided: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." The enactment of the Juvenile Justice System Ordinance 2000 (JJSO) on July 1, 2000, during the Musharraf presidency, duly abolished the death penalty for persons under 18 at the time of the offence. However, a 13 year-old convicted after that, in 2001, was sentenced to 273 years of imprisonment. Even that excess did not satisfy some of the judges and, on December 6, 2004, the Lahore High Court purported to revoke the JJSO and sentenced a 14 year-old to death. Reporting on the aftermath of this decision, the South Asians for Human Rights NGO said:

³⁹⁰ *Ibid.* at 5-9.

³⁹¹ Human Rights Features (Voice of the Asia-Pacific Human Rights Network), "Swearing by reforms: Time to put Pakistan's blasphemy laws on trial", February 15, 2002, at 3, online: <<http://www.hrdc.net/sahrdc/hrfeatures/HRF52.htm>>.

"In February 2005, the Supreme Court of Pakistan which had admitted appeals against the Lahore High Court judgment stayed the Lahore High Court judgment. While the appeals are pending in the Supreme Court the JJSO has been temporarily restored pending a decision. However if Pakistan is to fulfill its commitment to the UN *Convention on the Rights of the Child*, the JJSO should not be revoked."³⁹³

Sadly, according to the international NGO Human Rights Watch, the execution of juvenile offenders continued to take place. It reported the execution on June 13, 2006 of Mutabar Khan, said to be 14 when found guilty of murder, and commented that "With only 29.5 percent of births registered, juvenile offenders can find it impossible to convince a judge they were children at the time of the crime."³⁹⁴

Amnesty International reported to similar effect about its own appeal concerning Khan: "The Juvenile Justice Systems Ordinance (JJSO) bans death for persons under 18. However, as Amnesty International (AI) said in its appeal over Khan's case, the law is frequently ignored. In the absence of documentation age is often hard to prove."³⁹⁵

As if the blasphemy laws and the treatment of juveniles were not bad enough, the Pakistani judicial system still presents other strongly objectionable features when it comes to the death penalty.

Firstly, there is the pronounced unfairness of the procedures involved. I.A. Rehman, Director of the Human Rights Commission of Pakistan, explained this: "The tragedy is that many people who have been hanged or are on death row have not received fair trials. They are often the victims of feudal vendettas that take place in Pakistan on a regular basis. Furthermore they are often convicted by courts or judicial tribunals which are not impartial and where police evidence is insufficient."³⁹⁶ The report of the International Federation for Human Rights and the Human Rights Commission of Pakistan reflected

³⁹² *Ibid.*

³⁹³ *Supra* note 384.

³⁹⁴ Payvand's Iran News, "UN: Five Countries Responsible for All Executions of Juvenile Offenders Since 2005", September 10, 2008, online: <<http://www.payvand.com/news/08/sep/1113.html>>.

³⁹⁵ Amnesty International, "Death Penalty Information", August 4, 2006, online: <<http://deathpenaltyinformation.blogspot.com/2006/08/pakistan-surge-in-executions-thousands.html>>.

³⁹⁶ Asia Death Penalty, "Pakistan: Thousands in 'brutal' system", October 12, 2006, online: <http://asiadeathpenalty.blogspot.com/2006_10_01_archive.html>.

similar concerns: "Capital punishment in Pakistan is also adversely affected by the weakness of the police service and the lack of independence of the judiciary. Convictions to capital punishment often occur after botched police investigations and unfair trials, where possibilities of corruption, coercion, intimidation of witnesses and of police officials, and political or social pressure, among others, happens at every stage, thus allowing for unacceptably high probabilities of miscarriage of justice."³⁹⁷

Secondly, there is the effect of the Qisas and Diyat Ordinance passed in 1990. This law entitles victims of a crime, or their heirs, to inflict injuries on the offender identical to the ones sustained by the victim. Alternatively, it allows offenders to absolve themselves of the crime by paying compensation to the victims, or their heirs, but only if the family of the victim is willing to accept it. The effect of this is predictable: "The Qisas and Diyat Ordinance adds a further element of social discrimination in an already biased process, as poorer defendants might not be able to gather the funds necessary for the required compensation. The law hence discriminates in terms of the financial capacity of the offenders. Those who cannot afford to pay to save their lives will be executed."³⁹⁸

What is perhaps not as evident is the effect of the Qisas and Diyat Ordinance on so-called "honour killings" which were criminalized in 2004.³⁹⁹ This law, in practice, allows these brutal murders to continue with impunity. Stephanie Palo explained why: "...until the Qisas and Diyat Ordinance is removed from the PPC, the perpetrators of honour killings need not fear retribution because many of these crimes are committed by or with the consent of family members. Pakistan must revoke its Qisas and Diyat Ordinance to stop these heinous murders from going unpunished and to prevent discrimination against women within Pakistan in accordance with international human rights law."⁴⁰⁰ Ms. Palo gave the example of Samia Sarwar who had been murdered by an assassin hired by her parents because she was seeking to divorce an abusive husband. As heirs under the Qisas and Diyat Ordinance, her parents then forgave the hired killer for their daughter's murder. Pakistan can thus no longer be described as

³⁹⁷ *Supra* note 384 at 6.

³⁹⁸ *Ibid.* at 37.

³⁹⁹ Pakistan, *Criminal Law (Amendment Act) 2004*.

⁴⁰⁰ Stephanie Palo, "A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to Go Unpunished in Pakistan", Rutgers Law School – Newark, online: <http://works.bepress.com/stephanie_palo/1/>.

functioning under the rule of law. Justice has been privatized as a result of the Qisas and Diyat Ordinance, and the consequent situation could hardly be more dire:

...in Pakistan, a murder is no longer a crime against the state or its people. It has become a private issue between two families, thus releasing the State from its primary responsibility of providing protection and justice to its citizens. One of the fundamental tenets of punishment, that it is due to the society in order to protect it as a community, as well as to preserve the rule and the meaning of the law, has been eliminated. It has now been reduced to a mere settlement between individuals, or between families and clans. Such privatisation of justice means a general pollution of the rule of law, and damage to the legal framework. The State withdraws from one of its main responsibilities as it no longer is the guardian of the rule of law through the exercise of justice.⁴⁰¹

Thirdly, the failure of the Pakistani judicial system, allowing the forces of hatred, bigotry and social discrimination to prevail, has led to a marked brutalization of society. The horror stories are so numerous and so apparently unending that it is scarcely possible to comprehend daily life within such a maelstrom. Think only of the attempted killing in Lahore early in 2009 of the visiting Sri Lankan cricket team. Years before Zia Mian had attempted an analysis of this downward slide by referring to Albert Camus's famous remark that bloodshed had a similar intoxicating effect to alcohol.⁴⁰² In Mian's view, Pakistan was at risk of becoming intoxicated by bloodshed, and he gave the example of a 14 year old girl in a Catholic school in Sukkur who had allegedly written a blasphemous answer on a test. There were calls for the death of both the student and the school principal. Mian commented: "The terrifying thing about the Sukkur case is that students have now attacked the school, throwing stones, breaking windows, yelling slogans demanding the principal's death. Having watched their state, their political leaders and their parents drown their sorrows in blood, the children of Pakistan too, it seems, are growing thirsty for blood."⁴⁰³

And yet... and yet, in the midst of all this hopelessness, signs of possible change began to appear. A lead editorial in the Pakistan Daily Times in January 2007 unequivocally proclaimed the need for change:

⁴⁰¹ *Supra* note 384 at 35.

⁴⁰² Zia Mian, "Pakistan Grows Drunk on Blood", Jinn Home Page, September 29, 1995, online: <<http://www.pacificnews.org/jinn/stories/columns/pacific-pulse/950929-blood.html>>.

⁴⁰³ *Ibid.*

Pakistan is among the top killers under law in the world. It has approximately 7,400 convicts awaiting execution. Worse, in recent years, instead of relenting in terms of lowering the crime rate because of the deterrent effect of the death penalty, the hangings have actually increased....

There is very strong evidence to prove that death is no deterrence. Pakistan is clearly a testing ground for those who would abolish death as punishment. The Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions says: (1) States should move towards de facto, and eventually de jure abolition of the death penalty; and (2) Until then the death penalty should only be used for the most severe crimes. There is nothing wrong with this advice.⁴⁰⁴

(emphasis added)

In February 2008, a new Government was elected and, only two months later, on April 18, 2008, Pakistan ratified the International Covenant on Economic, Social and Cultural Rights and signed both the *ICCPR* and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. Iqbal Haider, Co-Chairperson of the Human Rights Commission of Pakistan (HRCP), understandably welcomed this landmark accomplishment: "...the ratification and signature of these three crucial UN human rights instruments are indeed (a) significant step forward by the present elected Government of Pakistan in fulfilling its pledges and commitment to promote human rights of the people of Pakistan in accordance with international human rights law...."⁴⁰⁵ Mr. Haider emphasized that implementation of these very important UN human rights conventions was an equally important task for the present Government, and he hoped it would follow and abide by these UN instruments, in their letter and spirit.

Although Pakistan did not sign the *Second Optional Protocol*, there are a number of significant references to the death penalty in Article 6 of the *ICCPR* that it had signed (above, page 13). Hoping to build on this momentous step, Human Rights Watch, on June 15, 2008, addressed a special plea to Prime Minister Yousuf Raza Gilani. It pointed out that more than 7000 individuals, including 40 women, were currently sentenced to death, adding: "The number of persons sentenced to death in Pakistan and executed every year is among the highest in the world, with a sharp increase in executions in recent

⁴⁰⁴ Daily Times, "EDITORIAL: Death penalty and increasing crime in Pakistan", January 30, 2007, online: <http://www.dailytimes.com.pk/default.asp?page=2007%5C01%5C30%5Cstory_30-1-2007_pg3_1>.

⁴⁰⁵ Haider, Iqbal. "HRCP welcomes the ratification and signatures of the three core UN human rights instruments by Pakistan", April 18, 2008, online: <<http://hrpcblogger.wordpress.com/2008/04/21/hrcp-welcomes-the-ratification-and-signatures-of-three-core-un-human-rights-instruments-by-pakistan/>>.

years.... Most of those sentenced to death are poor and illiterate. Some face discrimination as members of religious minority communities. Many were held without due process of law and faced trials that did not meet international fair trial standards."⁴⁰⁶ Human Rights Watch called on Prime Minister Gilani "...to announce an immediate moratorium while your government establishes a commission to review the application of the death penalty...".⁴⁰⁷ There was a precedent for such a move: "...when Benazir Bhutto was elected prime minister in 1988, one of her first acts was to commute all death sentences to life imprisonment."⁴⁰⁸ Quite amazingly in my view, (although I do not know if he was responding to the NGO or was otherwise motivated), the Prime Minister, on June 21st, less than a week later, announced to the National Assembly that he would be recommending to the President that, in honour of the recently slain Mrs. Bhutto's birthday, all death sentences would be commuted to life imprisonment.⁴⁰⁹ This proposal was approved by Cabinet on July 3rd, and the abolitionist forces were beginning to sound optimistic:

The commutation is expected to benefit the majority of Pakistan's condemned prisoners, except those charged with terrorism or plotting to assassinate the president, I.A. Rehman, director of the Human Rights Commission of Pakistan (HRCP) told IPS (news).

The final approval of the commutation – the largest in modern times – rests with President Pervez Musharraf. "There are indications the president will approve the proposal", added Rehman, quoting a well-informed confidential source.⁴¹⁰

Musharraf was forced to resign in September, and he was succeeded by Asif Ali Zardari, the widower of Benazir Bhutto. Upon taking presidential office, Mr. Zardari promised that he would commute the death sentences of 7,024 convicts to life imprisonment as a tribute to his assassinated wife.⁴¹¹ Between the time of the Prime Minister's recommendation and the new President's promise, 15 hapless prisoners were

⁴⁰⁶ Human Rights Watch, "Letter to Pakistan's Prime Minister to Abolish the Death Penalty", June 15, 2008, online: <<http://www.hrw.org/en/news/2008/06/15/letter-pakistans-prime-minister-abolish-death-penalty>>.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Los Angeles Times, "Pakistan announces plan to clear death row to commemorate birthday of slain Bhutto", June 21, 2008, online: <<http://articles.latimes.com/2008/jun/21/world/fg-bhutto22>>.

⁴¹⁰ Beena Sarwar, "DEATH PENALTY – PAKISTAN: Reprieve Call Could Save Thousands", July 4, 2008, online: <<http://ipsnews.net/news.asp?idnews=43074>>.

⁴¹¹ Asian Human Rights Commission, "PAKISTAN: World Day against the Death Penalty, death row inmates moved to ordinary prisons but there is much more to be done", October 9, 2008, online: <<http://www.ahrchk.net/statements/mainfile.php/2008statements/1720/>>.

hanged.⁴¹² Inevitably, the commutation proposal faced severe opposition: "Human rights activists and NGOs are predicting stiff opposition to the government's plans to push through commutation....Fierce opposition has already been expressed by the religious party Jamiat-Ulema-Islam headed by Maulana Fazlur Rehman who is opposed to the power vested upon the president to grant reprieves. Opposition has also come from Pakistan's Chief Justice, Abdul Hameed Dogar...."⁴¹³ An ostensibly formidable problem for commutation was the Law Ministry's legal opinion to the Prime Minister claiming that it would be contrary to law to allow it:

In its legal advice, formally given to the prime minister when the government was considering the proposal of converting death penalty awarded to 7000 civilians into life term, the Law Ministry had noted that it would be a violation of the Islamic laws, contrary to the rulings of the Supreme Court and in disregard of the grief and agony of those whose loved ones have been murdered....

...in the ministry's recorded view that it had given on government files and offered to the highest authorities only recently, the president has no right to commute death sentences awarded under Hudood and Qisas. Similarly, even some categories of capital punishment given in murder cases, registered under Tazir (man made law) could not be pardoned or commuted to life term without the consent of the heirs of the victim.⁴¹⁴

I said "ostensibly" because Law Minister Farooq H. Naek subsequently announced, contrary to his Ministry's legal opinion, that the President could pardon convicted terrorist Sarabjit Singh.⁴¹⁵ However, just as it seemed that the movement towards commutation was gaining momentum, President Zardari signed into law on November 8, 2008 a new capital offence for those found guilty of terrorism using the internet and computers. This decision was strongly criticized by the National Commission for Justice and Peace of the Catholic Church (NCJP) and HRCP. Their respective statements were reported as follows:

"We are unable to understand the mentality and strategy of the government that what it wants to do. First they condemn death penalty and sign UN human rights instruments and then they impose death penalty without consulting the parliament."...

⁴¹² Ebrahim, Zofeen. "Pakistan mulling commutation of death sentences", October 10, 2008, online: <<http://southasia.oneworld.net/todayshadlines/pakistan-mulling-commutation-of-death-sentences>>.

⁴¹³ *Ibid.*

⁴¹⁴ The International News, "Naek turns a blind eye to his own ministry's view", October 8, 2008, online: <http://www.thenews.com.pk/daily_detail.asp?id=139905>.

⁴¹⁵ *Ibid.*

"The NCJP", says the secretary, "demands that no law should be promulgated with the punishment of death penalty and already condemned to death prisoners' punishments should be commuted to other punishments".

According to the HRCP, the government's decision to include capital punishment in the ordinance can do nothing but increase the sense of distrust that the population already feels toward Pakistan's judicial system.⁴¹⁶

In its World Report 2009, Human Rights Watch voiced a similar concern about Pakistan's direction:

"Despite commitments to reduce the number of offences for which the death penalty is applicable, Zardari actually increased their number in November by adding "cyber-terrorism", to the list of crimes punishable by death. Pakistan's Law Ministry appears to be stalling the commutation of death sentences and blocking proposals to limit the applicability of the death sentence."⁴¹⁷ But a different perspective on the situation was provided by the Asia Death Penalty NGO on January 30, 2009 when it reported on the Interior Ministry's having sent a commutation proposal to President Zardari for approval.⁴¹⁸

Given the fluid and turbulent circumstances of Pakistan today, I have no idea whether the intended commutation will happen or whether it will be defeated by the retentionist forces and the pressure of events. Although the lack of executions in 2009 was certainly encouraging, Amnesty International did caution: "However, at least 270 people were sentenced to death during 2009 and more than 7,000 prisoners remained on death row, the largest known number of condemned inmates in the world."⁴¹⁹ Noting the remark of Piers Bannister that "It all depends who's in power" ⁴²⁰ suggests that it would be pointless to speculate about what happens next. Will the announced commutations be implemented? Will executions re-commence? We cannot know. But I do believe that the editorial writer of the Daily Times of Pakistan was correct when he/she pointed out: "Pakistan is clearly a testing ground for those who would abolish death as punishment." (above, page 108).

⁴¹⁶ Help AsiaNews, "Pakistani Church against death penalty for cyber terrorists", November 8, 2008, online: <<http://www.asianews.it/index.php?l=en&art=13702>>.

⁴¹⁷ Human Rights Watch, "World Report 2009", online: <<http://www.hrw.org/en/node/79280>>.

⁴¹⁸ Asia Death Penalty, "Abolition proposal to Pakistan's president", January 30, 2009, online: <<http://asiadeathpenalty.blogspot.com/2009/01/abolition-proposal-to-pakistans.html>>.

⁴¹⁹ *Supra* note 3 at 13.

⁴²⁰ *Supra* note 47.

If abolition in the Philippines was all to do with "the individual Presidents and the Roman Catholic Church" (above, page 100), the steps in that direction in Pakistan were entirely political, with the conservative Muslim establishment being generally opposed. In both cases, public opinion, while not definitively measurable, appeared to be in favour of the death penalty. Against that, the various human rights NGOs, both local and international, were a steady force lobbying for abolition. So let me now turn to the most documented death penalty situation in the world, again one of the five leading executioners: the U.S.A. Let me examine the extent to which politicians, religion, public opinion and human rights NGOs have played a part in successful abolition campaigns within the 50 State jurisdictions; and, also, the presence of other factors that might be unique to the U.S.A.

Case Study #3 – United States of America

As stated in Chapter 1, the number of executions carried out in 2008 within the U.S.A. was 37. Not only was this the smallest number of executions since 1995 it was also a sentence carried out in only nine States. Moreover, 18 of the 37 executions took place in Texas alone. The number did increase in 2009 to 52 executions but Amnesty International explained that this "...reflected the first full year of executions as the US Supreme Court stayed all executions for periods of 2007 and 2008 while it considered the constitutionality of lethal injection".⁴²¹ Again, nearly half of the executions took place in Texas: 24 of 52. Hood and Hoyle have commented: "Indeed, since 1977, 83% of all executions have been carried out in just nine states (Texas, Virginia, Oklahoma, Missouri, North Carolina, South Carolina, Georgia, Alabama, and Florida), and over one-third in Texas alone."⁴²² Hence, although 35 States, the Federal Government and military jurisdictions remain retentionist, the actual employment of the death penalty is fading quite quickly. This conclusion is corroborated by the continuing decline in the number of death sentences. For 2009, Amnesty reported: "The total of 106 death sentences estimated by the US Death Penalty Information Center as having been passed across the USA during the year would represent the seventh straight year of decline and the lowest annual total since executions resumed

⁴²¹ *Supra* note 3 at 16.

⁴²² *Supra* note 2 at 116.

in 1977."⁴²³ The trend is accordingly unmistakeable, but how many years will it take to achieve total abolition?

The hitherto defining moment of the abolitionist movement was the decision of the Supreme Court in *Furman v. Georgia*.⁴²⁴ The number of executions in the U.S.A. was already declining rapidly before this decision, falling to only 21 in 1963, 15 in 1964 and a mere two in 1967. In that last year, the Supreme Court ordered a moratorium on the use of the death penalty until its increasingly challenged constitutionality could be determined.

The dramatic decision in *Furman*, in which the Supreme Court declared all existing death penalty statutes to be unconstitutional, must have seemed to the abolitionists of the day the triumph of their cause. But it was not to be. Had the Court determined capital punishment to be "cruel and unusual" punishment, in violation of the Eighth Amendment, that might have truly represented the end of the American death penalty. But only two on the bench, Justices Brennan and Marshall, wrote opinions calling for complete abolition of the death penalty. The latter, in particular, had commented inspiringly that, by banning capital punishment, "(w)e achieve a major milestone in the long road from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."⁴²⁵ The other three of the 5-4 majority more restrictively determined that capital punishment in the particular circumstances of William Henry Furman's case would violate his Eighth Amendment rights, as well as the Fourteenth Amendment equal protection clause. This was because the punishment was being inflicted in a discriminatory manner. Justice Douglas had concluded:

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

⁴²³ *Supra* note 3 at 16.

⁴²⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴²⁵ *Ibid.* at 371.

A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year or those who were unpopular or unstable should be the only people executed. A law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishment.⁴²⁶

However, in finding the death penalty to be unconstitutional because of the manner in which it was being applied under the existing statutes, the stage was being set for the retentionist-minded States to rewrite those statutes. In fact, 36 of the previously 38 retentionist States – only Kansas and New York not doing so – redrafted their statutes by endeavouring to provide the safeguards and reviews required by the Supreme Court. Would these pass muster?

As the post-*Furman* revised statutes came into effect, appeals challenging their constitutionality began to accumulate. Five of these appeals were argued before the Supreme Court on the same day, March 31, 1976.⁴²⁷ In three of them, a 7-2 majority approved the new statutes, and the other two were struck down by a 5-4 majority. Illustrative of the Court's reasoning in support of the three statutes is Justice Stewart's opinion in *Gregg v. Georgia*:

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily.... The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channelled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.⁴²⁸

⁴²⁶ *Ibid.* at 256-257.

⁴²⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁴²⁸ *Gregg v. Georgia*, *supra* note 427 at 206-207.

The two rejected statutes, those of North Carolina and Louisiana, had not, in the Court's determination, met its *Furman* concerns because, amongst other deficiencies, they both provided for mandatory death sentences in prescribed circumstances. The Court, on the other hand, viewed the Eighth Amendment as requiring "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁴²⁹

It would be fair to conclude that, following the announcement of these five decisions, the States had a reasonably clear idea as to what a constitutionally acceptable statute would look like. Professor Julian Killingley has pointed out: "The decisions in these five cases announced on 2 July 1976 ushered in what has become known as the modern era of the death penalty in America."⁴³⁰ It could no longer be argued (at least for the foreseeable future) that the death penalty, in itself, constituted "cruel and unusual" punishment contrary to the Eighth Amendment. So the abolitionists, to secure tangible gains, had to focus more on narrowing the scope of the punishment and reducing the category of persons to whom it could be applied. Here we see again the usefulness of Marc Ancel's "incremental approach" (above, page 9). But this practical response to *Gregg et al* did not mean that the ultimate campaign for abolition in the U.S.A. was spent. On the contrary, the abolitionists, as will be discussed hereinafter, may have been bruised but they were far from defeated. The campaign for abolition continues powerfully to the present day.

In terms of reducing the offences for which capital punishment was available, the first challenge after *Gregg* concerned the constitutionality of Georgia's death penalty for the offence of rape. In *Coker v. Georgia*,⁴³¹ the Supreme Court, by a 7-2 majority, held that being sentenced to death for rape was grossly disproportionate. Justice White opined "that the Eighth Amendment not only prohibited punishments that were barbaric but also those that were excessive in relation to the crime committed."⁴³²

⁴²⁹ *Woodson v. North Carolina*, *supra* note 427 at 304.

⁴³⁰ Julian Killingley, *Constraining America's Death Penalty: The Eighth Amendment and Excessive Punishment*, in Jon Yorke, ed., *Against the Death Penalty: International Initiatives and Implications* (University of Surrey: Ashgate Publishing Company, 2008), at 143.

⁴³¹ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴³² *Ibid.* at 591-2.

Unfortunately, how far the requirement for proportionality between offence and penalty would go became rather murky after the Supreme Court's decision in *Harmelin v. Michigan*.⁴³³ Although this case concerned the sentence of mandatory life imprisonment, not the death penalty, the majority did observe that, although there was a test for gross proportionality in capital cases, "its precise contours are unclear."⁴³⁴ What these "precise contours" might involve was revisited in *Kennedy v. Louisiana*,⁴³⁵ an appeal to the Supreme Court of a man sentenced to death for raping his 8-year old stepdaughter. In another 5-4 decision, the Court held that the Eighth Amendment bars States from imposing the death penalty where the crime did not result – and was not intended to result – in the child's death. The majority opined that there was no national consensus supporting the death penalty for child rape as only six States provided for it. It was not a proportional punishment for the rape of a child. Justice Kennedy, writing for the majority, said:

...the death penalty should not be expanded to instances where the victim's life was not taken.

...we conclude that in determining whether the death penalty is excessive, there is a distinction between intentional first degree murder, on the one hand, and non-homicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public", *Coker*...they cannot compare to murder in their "severity and irrevocability."⁴³⁶

Hence, this decision, handed down on June 25, 2008, marked a significant victory for those working to expand Eighth Amendment protections. In the meantime, there had been parallel successes in the efforts to reduce the category of persons to whom the death penalty could be applied.

The first of a series of cases concerning categories of offenders was *Ford v. Wainwright*.⁴³⁷ Ford had become insane during the period of his incarceration on death row. Could he still be executed? Such persons had been executed in the past so it was a question of the evolving interpretation of "cruel and

⁴³³ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

⁴³⁴ *Ibid.* at 998.

⁴³⁵ *Kennedy v. Louisiana*, 554 U.S. ____ (2008).

⁴³⁶ *Ibid.* at 26-27.

⁴³⁷ *Ford v. Wainwright*, 477 U.S. 399 (1986).

unusual" punishment. In the landmark decision of *Trop v. Dulles*,⁴³⁸ Chief Justice Warren had pointed out that the words of the Eighth Amendment were not static in their scope: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴³⁹

These important words were applied in *Ford* with a 5-4 majority concluding that "The Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane."⁴⁴⁰

Two years after the categorical exemption of the insane in *Ford*, the Supreme Court ruled, in *Thompson v. Oklahoma*,⁴⁴¹ that a person convicted of murder when he was only 15 years old could also not be executed. Curiously, the Court then decided in *Stanford v. Kentucky*,⁴⁴² only a year later, that those who had committed capital offences when they were 16 or 17 would not be faced with "cruel and unusual" punishment if they were to be executed. This was at the time of an equally disappointing decision, *Penry v. Lynaugh*,⁴⁴³ in which the Supreme Court – 5-4 yet again – held that persons who were mentally retarded should not be categorically exempted from execution.

Happily, Chief Justice Warren's "evolving standards of decency" were evidenced by the overturning of both *Stanford* and *Penry* in the 21st century. In 2002, the Supreme Court revisited *Penry* in *Atkins v. Virginia*,⁴⁴⁴ concluding that standards had evolved since this 1989 decision. Justice Stevens, writing for the majority, pointed out that evolving standards could be shown not only by the behaviour of legislatures but also from the views of professional associations and religious leaders, and from polling data and "the world community".⁴⁴⁵ This precipitated a vigorous dissent, first from Chief Justice Rehnquist who commented:

There are strong reasons for limiting our enquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America. Here, the Court goes beyond these well-established objective indicators of contemporary values. It finds further support to its conclusion that a

⁴³⁸ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁴³⁹ *Ibid.* at 100-101.

⁴⁴⁰ *Supra* note 437 at 410.

⁴⁴¹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁴⁴² *Stanford v. Kennedy*, 492 U.S. 361 (1989).

⁴⁴³ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁴⁴⁴ *Atkins v. Virginia*, 56 U.S. 304 (2002).

⁴⁴⁵ *Ibid.*, Opinion Note 21.

national consensus has developed against imposing the death penalty on all mentally retarded defendants in international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable. Believing this view to be seriously mistaken, I dissent.⁴⁴⁶

And then, rather more colourfully, from Justice Scalia:

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so called "world community", and respondents to opinion polls.... I agree with the Chief Justice, that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community", whose notions of justice are (thankfully) not always those of our people.⁴⁴⁷

This spirited rejection of the views of others, albeit from the minority, was illustrative of the deep divisions within American society in contemplating the death penalty. I shall return to this important issue later (below, pages 127 to 136). For now, I note that the same division was evidenced even more starkly in 2005 when the Supreme Court reconsidered *Stanford* in *Roper v. Simmons*.⁴⁴⁸ In the now familiar 5-4 decision, Justice Kennedy found: "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."⁴⁴⁹ Just as had Justice Stevens before him, he referred to international law and opinions, stating:

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.⁴⁵⁰

Justice Scalia again mounted a seething dissent, declaring that "...the basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand."⁴⁵¹ Justice O'Connor, although taking the position that an international consensus did not

⁴⁴⁶ *Ibid.* at 347-348.

⁴⁴⁷ *Ibid.* at 346.

⁴⁴⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁴⁹ *Ibid.* at 568.

⁴⁵⁰ *Ibid.* at 589.

⁴⁵¹ *Ibid.* at 624.

dissuade her from finding that the Eighth Amendment did not forbid execution of 17 year old murderers in all cases, disagreed with Justice Scalia "...that foreign and international laws have no place in our Eighth Amendment jurisprudence."⁴⁵² In her opinion, "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency."⁴⁵³ All in all, *Roper* was an encouraging decision. Following that, Iran was the only country in the world known to have executed juvenile offenders in 2008,⁴⁵⁴ and Iran and Saudi Arabia were the only two in 2009.⁴⁵⁵

What other categories of offenders could be exempted from capital punishment? There are several that have engendered considerable abolitionist activity.

Prominent in attracting both national and international attention is what is referred to as the "death row phenomenon", the fate of prisoners who have spent excessive time on death row. In certain countries, these prisoners would have their death sentences commuted after a stipulated period. In Zimbabwe, the Supreme Court has prohibited execution of prisoners who had been on death row for six years and three months.⁴⁵⁶ The Judicial Committee of the Privy Council, in a decision arising from a Jamaican appeal, expressed "...an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years."⁴⁵⁷ Their Lordships concluded that death sentences should be commuted after five years on death row. The Supreme Court of India has ruled that eight years between sentencing and execution violated the Indian Constitution.⁴⁵⁸ However, despite the high proportion of prisoners on the U.S.A. who have been on death row for more than twelve years, these international decisions have had little influence. Justice Thomas had typically commented in *Knight v. Florida* that "...were there any such support in our own jurisprudence [for invalidating death sentences based on the death row phenomenon], it would be unnecessary for proponents of the claim to rely on the European

⁴⁵² *Ibid.* at 604.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Supra* note 4 at 16.

⁴⁵⁵ *Supra* note 3 at 7.

⁴⁵⁶ *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General* [1993] 1 Zimb LR 239.

⁴⁵⁷ *Pratt and Morgan v. Attorney General for Jamaica* [1993] 4 All E.R. 769, at 783.

⁴⁵⁸ Jane Marriott, *Walking the Eighth Amendment Tightrope: 'Time Served' in the United States Supreme Court*, in Yorke, ed., *supra* note 429 at 176.

Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."⁴⁵⁹ In any event, when it comes to the "death row phenomenon", the Eighth Amendment is something of a two-edged sword. It does indeed prohibit "cruel and unusual punishments" but it also provides for adherence to "due process". An elaborate and inevitably time-consuming appeal system can certainly be argued as required for "due process" (see discussion of the Troy Davis case – below, pages 126 and 127).

Other categories of prisoners advanced for exemption from the death penalty are those suffering from mental illness (as opposed to being insane), the elderly and the severely disabled. The Supreme Court has not accepted any of these categories to date but, frankly, "evolving standards of decency" would surely ensure their ultimate success. Would even an ardent retentionist have felt satisfied, for example, by the execution of the 76 year-old Clarence Ray Allen in 2006, legally blind, confined to a wheel chair and the victim of a recent heart attack?⁴⁶⁰ For what purpose did this execution proceed?

I have provided an overview of the significant Supreme Court decisions concerning capital punishment. The trend is pronounced: towards the evolving interpretation of the Eighth Amendment as restricting the number of capital offences and the persons to whom the death penalty would be applicable. Will this lead to the complete abolition of the death penalty by the Supreme Court? It is possible but, at this time, appears to be unlikely. I will consider this further in Chapter 5 (below, page 129). In the meantime, I will turn my attention to the political side of things by analyzing political events that are indicative of success in the campaign for abolition. For this purpose, I will consider recent developments in two States, Illinois and New Mexico.

Anthony Porter, a convict who had spent 15 years on death row in Illinois, was spared from execution – two days before the scheduled date – when his lawyers showed that he may have been mentally retarded. A group of student journalists took up his case, uncovering evidence that later led to his complete

⁴⁵⁹ *Knight v. Florida*, 528 U.S. 990 (1999) at 990.

⁴⁶⁰ *Supra* note 430 at 156.

exoneration and the conviction of another person for the same crime. They also identified another innocent man awaiting execution and a further 12 who had been released because they were deemed to have been wrongfully convicted. By this time, the Illinois House of Representatives had appointed a Commission to review the administration of the death penalty. In the face of the ongoing revelations of error in the system, Governor George Ryan announced a moratorium on executions pending the Commission's report.⁴⁶¹

The report was issued in 2002, with a small majority of the Commissioners declaring themselves in favour of the abolition of the death penalty in Illinois, but all agreeing that, if it were to continue, "there would have to be sweeping reforms of legal, administrative, and criminal justice procedures."⁴⁶² The Commission was quoted as having pointed out:

...the death penalty itself is incredibly complex.... There are few easy answers. The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever sentenced to death.⁴⁶³

Governor Ryan, who had first been elected to the post in 1998 as a supporter of the death penalty, changed his mind after reviewing the Commission's recommendations. Most dramatically, a few days before leaving office, on January 11, 2003, the Governor commuted all the death sentences in Illinois, affecting 167 inmates. Furthermore, he pardoned four death row inmates convicted of murder, "all of whom said that confessions were beaten out of them by police in Chicago."⁴⁶⁴ He explained that "Because the Illinois death penalty system is arbitrary and capricious – and therefore immoral – I no longer shall tinker with the machinery of death."⁴⁶⁵ This momentous decision was described by the BBC News World Edition as an "unprecedented move, the most radical since the death penalty was reintroduced in 1976".⁴⁶⁶ It was inevitably controversial with NGOs such as the National Coalition to

⁴⁶¹ *Supra* note 2 at 116-117.

⁴⁶² *Ibid.* at 119.

⁴⁶³ *Ibid.* at 120.

⁴⁶⁴ BBC News, "Governor clears Illinois death row", January 11, 2003, online: <<http://news.bbc.co.uk/2/hi/americas/2649125.stm>>.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

Abolish the Death Penalty applauding the move and incoming Governor Rod Blagojevich and certain victim family members expressing immense concern.⁴⁶⁷ Governor Ryan was even nominated for the 2005 Nobel Peace Prize, but today he is listed as Federal Inmate Number 16627-424, convicted of various corruption charges.⁴⁶⁸

Despite Governor Ryan's total commutation of all death sentences at the time, the death penalty remains in effect in Illinois. The Illinois Coalition to Abolish the Death Penalty (ICADP) was founded in 1976 with the ultimate goal of abolishing the Illinois capital punishment system. The Coalition recently reported on a poll conducted by Lake Research Partners that showed "more than 60% of voters prefer a sentence other than death for murder."⁴⁶⁹ This NGO is lobbying hard for the successful passage of Bill HB 262, introduced by Representative Karen A. Yarbrough, which would amend Illinois law to abolish the death penalty. However, although the ICADP is pressing for 2010 to be the year for abolition in Illinois, it does not seem that likely to be achieved. The perpetuation of former Governor Ryan's moratorium on executions seems to have rendered the debate a less pressing one.

The campaign for abolition in New Mexico has so far been more successful than that in Illinois. On March 18, 2009, Governor Bill Richardson signed a bill repealing the State's death penalty (with life without the possibility of parole instead). New Mexico thereby became the second State to have banned executions since the Supreme Court had reinstated the death penalty in 1976, New Jersey having been the first in 2007.⁴⁷⁰ Governor Richardson, just like Governor Ryan, had come to office as a supporter of capital punishment. But the reality of more than 130 death row inmates having been exonerated in the past ten years, including four in New Mexico, caused him to change his position. He issued a statement:

Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Federal Bureau of Prisons, "Inmate Locator", online:

<<http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=IDSearch&needingMoreList=false&IDType=IRN&IDNumber=16627-424>>.

⁴⁶⁹ Illinois Coalition to Abolish the Death Penalty, "Poll indicates support for the Death Penalty is eroding in Illinois: Public Opinion Shifting Toward Abolishing Death Penalty," July 12, 2010, online: <<http://www.icadp.org/content/poll-indicates-support-death-penalty-eroding-illinois-public-opinion-shifting-towards-abolis>>.

⁴⁷⁰ CBS News, "New Mexico Abolishes Death Penalty", March 18, 2000, online: <<http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml>>.

crime.... Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution that keeps society safe.⁴⁷¹

The bill to abolish the death penalty had been introduced into the New Mexico legislature some 12 years before repeal. Lobbying for the bill had been the New Mexico Coalition to Repeal the Death Penalty, described as "a collaboration of faith committees, the families of the murder victims, Death Row exonerees and 'other people of conscience'".⁴⁷² The ultimate success of the campaign for repeal was attributed by the Rev. Dr. Holly Beaumont, the legislative advocate for the New Mexico Conference of Churches, to "the multi-layered nature of the coalition...".⁴⁷³ She said that faith-based death penalty opponents had remained resolute over the years: "We weren't going away, and the legislature knew that we would be back again".⁴⁷⁴ So that was clearly one cause of the success, but Governor Richardson pointed out other factors. On April 15, 2009, he had attended a celebration of repeal, with other State representatives, including Archbishop Michael Sheenan, at the Colosseum in Rome. He thereafter met with the Pope, and spoke at a news conference organized by the Sant' Egidio Community, an international lay Catholic organization opposed to capital punishment. Himself a Catholic, Governor Richardson explained at the news conference the influence of the Roman Catholic Church in the campaign "...indicating that discussions with Archbishop Sheenan had influenced his own considerations."⁴⁷⁵ On a more mundane level, however, he noted the financial cost of imposing the death penalty. Ms. de Leon commented:

In doing so he highlighted one of the most striking recent developments in the death penalty debate: economic arguments against capital punishment have become as important as religion or ethics, and they are now regularly invoked by opponents of capital punishment. Because life without parole is cheaper for the state than the death penalty, the repeal of capital punishment, they say, will allow more resources to be channeled to survivors of the victims of crime.⁴⁷⁶

⁴⁷¹ CNN.com, "New Mexico governor repeals death penalty in state", March 18, 2009, online: <<http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty>>.

⁴⁷² de Leon, Elaine. "Money, Morality, and Repealing the Death Penalty", April 24, 2009, online:

<<http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/>>.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

Certainly, in the financially strapped times in which we live, the cost of retaining the death penalty has become increasingly important as a factor in favour of abolition. In Maryland, for example, the Urban Institute estimated that "...the average cost to taxpayers for reaching a single death sentence is \$3 million, about \$1.9 million more than the cost of a non-death penalty case".⁴⁷⁷ Despite this economic reality, Maryland Governor Martin O'Malley, a Catholic, urged repeal on moral grounds, "...characterizing capital punishment as 'an issue that touches the very soul of who we are as a republic, who we are as a people' and as 'one of the defining moral quandaries of our times.'"⁴⁷⁸ He asked the legislature: "Will we be a society guided by the fundamental civil and human rights bestowed on humankind by God?"⁴⁷⁹ In the result, Maryland's death penalty statute was not repealed but was amended to become one of the most restrictive in the U.S.A. Death penalty cases were thereafter limited to those with DNA or biological evidence, a videotaped confession or a videotape linking the suspect to a homicide. The Citizens Against State Execution (CASE) accepted this reform bill because "it moves our state in the direction of more justice...",⁴⁸⁰ an example of an NGO not letting the perfect be the enemy of the better.

Similar moral and financial arguments were brought to bear earlier this year in Montana. The legislative struggle there was watched with greater interest than usual in Canada because of the presence on Montana's death row of Ronald Smith, an Albertan. In fact, he is the only Canadian on death row in the U.S.A., and has been awaiting his fate for an almost unimaginable 27 years. Abolition looked favourable in the early stages of the repeal bill's passage but, on March 30, 2009, the judiciary committee of Montana's House of Representatives rejected it by a 10-8 vote.⁴⁸¹ According to the Montana Abolition Coalition, the last three executions in the State were in May 1995, February 1996 and August 2006. Given such limited employment of capital punishment and the near-success of repeal, it is to be hoped

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Randy Boswell, "Canadian's hopes dashed as Montana keeps death penalty", March 30, 2009, online: <<http://www.nationalpost.com/news/story.html?id=1445379>>.

that Smith and the one other death row inmate in Montana will be spared. Unfortunately, as I will next illustrate, the right thing does not always happen.

Jason Getsy was one of three teenagers recruited in 1995 by 35 year old John Santine to kill a business rival Charles Serafino. They did shoot him but he survived; his 66 year old mother was not so lucky and died from the shots. All four were charged with murder. Two of the teenagers pleaded guilty and were sentenced to life imprisonment. Getsy was tried and was sentenced to death for "murder for hire". But Santine, although convicted of murder, was acquitted of "murder for hire" and sentenced to life imprisonment.

The Ohio Supreme Court upheld Getsy's death sentence in 1998 whilst expressing concern that Santine did not receive the death penalty even though he had initiated the crime. This decision was overturned in 2006 by the U.S. Court of Appeals for the Sixth Circuit who voted 2-1 to overturn Getsy's death sentence. The majority made the logical case that because "murder for hire requires at least two participants: the hiring party and the person hired...if the jury convicts only one of multiple defendants charged with the crime of murder for hire, this is a fatally inconsistent verdict requiring reversal."⁴⁸² Sadly, what appeared to be unassailable logic was reversed by the full Court of Appeals for the Sixth Circuit in 2007 when, by a vote 8-6, Getsy's death penalty was reinstated. Merritt, Circuit Judge, one of the dissenting judges, had pointed out: "...Getsy, a teenage boy, was convicted of receiving "murder for hire" money from Santine, and Santine was acquitted of paying the "murder for hire" money to Getsy. Thus the two verdicts are inconsistent and irrational, and the verdict against Getsy should not be allowed to result in his execution."⁴⁸³ Boyce, F. Martin, Jr., another dissenting judge, added in a separate opinion that "this case brings into stark relief why the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair".⁴⁸⁴

⁴⁸² Amnesty International Urgent Action, "Man facing execution in Ohio for 1995 murder", July 24, 2009, AI Index: AMR 51/086/2009.

⁴⁸³ *Getsy v. Mitchell*, 495 F.3d 295 (2007) 318.

⁴⁸⁴ *Ibid.* at 325.

On July 17, 2009, the Ohio Adult Parole Authority reported that it had voted 5-2 in favour of recommending to Governor Ted Strickland that he grant clemency to Jason Getsy. Despite this, the date of execution was set for August 18th and Getsy, in consequence, became the subject of an Amnesty International Urgent Action campaign, involving its supporters from all over the world urging Governor Strickland to exercise clemency. Disappointingly, the Governor decided to allow the execution to proceed, noting that "Although my decision is inconsistent with the recommendation of the majority of the members of the Parole Board, I appreciate and respect their thoughtful consideration and review of this difficult case."⁴⁸⁵ A last minute hearing by the Supreme Court allowed the execution to proceed. The only ray of light in this dismal sequence was that the most recently appointed member of the Court, Justice Sotomayor, voted with the minority in the characteristic 5-4 split decision.

Jason Getsy was executed on August 18, 2009.

A world-wide lobbying campaign had failed to save the life of Jason Getsy. Yet another Amnesty International campaign, this time on behalf of Troy Davis, had a major success on the same day as the Supreme Court had rejected Getsy's final appeal, an ironic outcome that left abolitionists uncomfortably ambivalent.

Troy Davis was convicted of the 1989 murder of a police officer in 1991, and has been on death row in Atlanta, Georgia ever since. He has consistently proclaimed his innocence and this claim has been buttressed by the following: "7 out of 9 witnesses have recanted or contradicted their testimony, no murder weapon was found and no physical evidence links Davis to the crime."⁴⁸⁶ The disturbing thought that Troy Davis might indeed be innocent has, understandably, precipitated unusually widespread campaigning on his behalf throughout the world. Prominent individuals such as the Pope, Archbishop Desmond Tutu, former President Jimmy Carter, Harry Belafonte and Susan Sarandon (who had played Sister Helen Prejean, a prominent abolitionist, in the movie "Dead Man Walking") have all voiced their

⁴⁸⁵ Amnesty International Urgent Action, "Execution in Ohio", August 19, 2009, UA 200/09 Update 1.

⁴⁸⁶ Amnesty International USA, "Support Clemency for Troy Davis", 2007, online:

<<http://takeaction.amnestyusa.org/siteapps/advocacy/ActionItem.aspx?c=jhKPIXPCIoE&b=2590179&aid=12970>>.

concern.⁴⁸⁷ The European Parliament, on October 22, 2008, called for Georgia to commute Davis's sentence. Finally, on August 17, 2009, the Supreme Court, in a welcome 6-2 vote, granted Troy Davis's request for a new hearing. Justice Stevens, for the majority, ordered a federal judge to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at trial clearly establishes petitioner's innocence."⁴⁸⁸ If Troy Davis (after 19 years on death row) really is innocent, he must be jubilant.

It is difficult to draw from these diverse scenarios any real pattern as to the ingredients for successfully pursuing abolition. I have described Supreme Court decisions, political leadership and the ancillary considerations, the influence of religious views and the campaigns of NGOs, both local and international. Does it take all of this in combination or can the more critical components be identified? In a pertinent and useful essay, Professor Hugo Adam Bedau examined the various "constituencies" likely to be involved in the death penalty debate and policy and considered the influence that each might bring to bear.⁴⁸⁹ My summary of his analysis is as follows:

- Prison guards and officials

Professor Bedau identified three prison wardens who had written books opposing capital punishment, Lewis E. Lawes of Sing Sing prison in 1924, Clinton Duffy of San Quentin Prison in 1962, and Don Cabana of Parchman Prison in 1996. Apart from this, there was a notable paucity of commentary from those directly involved in the administration of the death penalty, leading Professor Bedau to comment that "...it is troubling that there seem to be so many employed in this job who take it in their stride."⁴⁹⁰

- Prosecutors

It was Professor Bedau's overall view that, as long as prosecutors had to seek election, they would oblige the public by delivering what they thought it wanted, a commitment to capital punishment. Only in more

⁴⁸⁷ CNN.com., "Justices grant Georgia inmate's request to delay execution", August 17, 2009, online: <<http://edition.cnn.com/2009/CRIME/08/17/georgia.scotus.troy.davis/index.html>>.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Hugo Adam Bedau, *Abolishing the death penalty in the United States: an analysis of institutional obstacles and future prospects*, in Peter Hodgkinson & William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), at 186.

⁴⁹⁰ *Ibid.* at 187.

abolition-prone jurisdictions would prosecutors be on record against its use. Federally, Professor Bedau noted that former Attorney-General Ramsey Clark had argued, forty years ago, for repeal of all federal capital statutes, but "(t)here is no immediate prospect of any Attorney-General in the near future resuming a leadership role in the federal government for abolition."⁴⁹¹

- Trial juries

In almost all U.S. States, it is the jury that makes the final decision in a capital case. An otherwise eligible juror would not be allowed to sit on such a jury if he or she were ascertained to be categorically opposed to the death penalty. But even those remaining on the "death qualified" jury only sentence to death about 10% of the estimated 2000-4000 "death eligible" murder defendants each year. The recent Capital Jury Project described by Professor Bedau concluded that capital trial juries were not functioning well, with the attendant consequence of "widespread failures."⁴⁹²

- Trial judges

Unsurprisingly, a trial judge aspires to be perceived as neutral in a capital case, both with regard to the defendant's innocence or guilt and to whether a guilty one should be sentenced to death or life in prison. The reality, according to Professor Bedau, is that trial judges are elected in most States and, in consequence, the "...neutrality they might have under a different system tends to dissipate under ours".⁴⁹³ Professor Bedau considered it unlikely that any trial judge would publicly protest the procedural deficiencies in the capital offence administration although, somewhat encouragingly, he did mention New York District Court Judge Jed S. Rakoff who, in July 2002, ruled the federal death penalty unconstitutional because enforcing it "posed an undue risk of executing innocent people."⁴⁹⁴

⁴⁹¹ *Ibid.* at 188.

⁴⁹² *Ibid.* at 189.

⁴⁹³ *Ibid.* at 190.

⁴⁹⁴ *Ibid.*

- Appellate courts

Professor Bedau commented on a study conducted of thousands of capital sentences imposed between 1973 and 1995 where "...states courts threw out 47% of death sentences due to serious flaws",⁴⁹⁵ with a subsequent federal review determining "serious error"⁴⁹⁶ in 40% of the remaining sentences. This revelation is heartening or disheartening depending upon your perspective. It does indicate that errors are being caught by the lengthy appeal process but, in the end, it mainly leads to the Supreme Court (as we have seen with Troy Davis and Jason Getsy). Professor Bedau asked the fundamental question: "How stable is the current Supreme Court's judgment that the death penalty is not in violation of the federal Bill of Rights...?"⁴⁹⁷ Because of the unlikelihood of the Senate Judiciary Committee's approving a nominee known to be "soft" on the death penalty, Professor Bedau did not seem to be too optimistic about a change. But he did suggest that "...the widespread publicity given to these flaws"⁴⁹⁸ might cause some of the Supreme Court judges to change their minds. For me, the first pertinent vote by the first Obama nominee, Justice Sotomayor, was encouraging (above, page 126).

- Chief executives

It is a daunting fact, proclaimed by Professor Bedau, that "...no president in the past century has indicated any strong opposition to executions."⁴⁹⁹ President Obama appears to be no different in this regard. A minority of State Governors have found ways to prevent the carrying out of capital punishment, the most conspicuous of whom was Governor Ryan of Illinois (above, pages 121 and 122). Of his commutation of 167 death sentences at once, Professor Bedau remarked: "...a gubernatorial assault on the death penalty unprecedented in its scope in American history."⁵⁰⁰ But overall, as we have seen with the Jason Getsy/Ohio example, he did not expect to see any important change in direction by the Governors. I think this observation may have been a valid one at the time it was written before 2004,

⁴⁹⁵ *Ibid.* at 191.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.* at 192.

⁵⁰⁰ *Ibid.* at 193.

but events are moving rapidly in this area. For example, quite unexpectedly, Governor Jeb Bush, in 2007, declared a moratorium on executions in Florida – previously a leading State executioner – following the hideous mess of Angel Diaz’s execution by lethal injection in December 2006. He appointed a study commission to review the matter, and subsequent Governor Charlie Crist continued this process.⁵⁰¹

- Legislatures

Professor Bedau was not optimistic about the role of legislatures. Prior to the 1960s, it was indeed "...generally assumed that if this mode of punishment were to be abolished it would be by piecemeal action of the several state legislatures repealing their own capital statutes."⁵⁰² But this has not come to pass; with a few exceptions, it has not been the legislatures leading the charge. His conclusion: "There seems little likelihood that the death penalty can be abolished in the United States by statutory repeal, jurisdiction by jurisdiction, in the near future."⁵⁰³

- Law enforcement personnel

As one might expect, there is no discernible position favouring abolition on the part of law enforcement personnel – although Professor Bedau did note that "...the National Black Police Officers Association has gone on record against the death penalty."⁵⁰⁴ Perhaps the most favourable indicator is a poll cited by Professor Bedau which showed "...that chiefs of police place a very low value on the death penalty as a crime-fighting tool."⁵⁰⁵

- Murder victims’ families

Professor Bedau estimated the current total of family members of murder victims to be "...well over a million."⁵⁰⁶ It is understandable that the larger proportion of this group would constitute a voice in favour of capital punishment, both in the media and through victim impact statements in court. (I

⁵⁰¹ Richard C. Dieter, *A Crisis of Confidence: Americans’ Doubts about the Death Penalty*, in Yorke, ed., *supra* note 429 at 197.

⁵⁰² *Supra* note 489 at 193.

⁵⁰³ *Ibid.* at 194.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.* at 195.

watched Sharon Tate's sister on CNN on the 40th anniversary of the "Helter Skelter" murders explaining that she used to be opposed to the death penalty but now, still having to deal with Charles Manson and his followers and their various release applications after all these years, she has changed her mind.) What is more surprising is the existence of Murder Victims Families for Reconciliation (MVFR), an organization of survivors who are opposed to the revenge of execution. There are also prominent individuals such as Coretta Scott King and Kerry Kennedy Cuomo who, despite the misery of the assassinations, campaign regularly against the death penalty.

- The Bar

The legal profession is divided over the death penalty. Professor Bedau listed as in favour the National District Attorneys Association, the National Association of Attorneys General and the Washington Legal Foundation and opposed, the National Bar Association, the National Lawyers Guild and the National Legal Aid and Defender Association. The most prominent and influential legal organization, the American Bar Association, has taken no official position on the death penalty but, in 1997, its House of Delegates "...voted overwhelmingly for a nationwide moratorium on executions until further notice, because the constitutional rights of capital defendants were so chronically violated in trial and appellate courtrooms across the nation."⁵⁰⁷

- Political parties

The Republican Party has long been in support of the death penalty whilst the Democrats have never taken a position but do embrace factions which are opposed. Professor Bedau did not consider it likely that the Democratic Party would support abolition, taking the minimal position that the "...most one can hope for at present is that the Democrats will not join the Republicans in openly embracing the executioner..."⁵⁰⁸

⁵⁰⁷ *Ibid.* at 196.

⁵⁰⁸ *Ibid.* at 197.

- Medical profession

Several medical organizations are opposed to the death penalty: Physicians for Human Rights, the American Psychiatric Association and the American Public Health Association. A big issue is the growing use of lethal injections in executions, requiring the involvement of medical professionals. Because of widespread physician opposition, supported by the American Medical Association, specially trained medical assistants not bound by the Hippocratic Oath are mainly used to administer the lethal injections.

- Academic organizations

Professor Bedau noted that, outside of their own membership, academic organizations had little influence. His conclusion: "One has the impression (for which there is no hard evidence available) that academics of every stripe generally oppose the death penalty even though they do not use their professional associations as an instrument of public persuasion on the issue."⁵⁰⁹

- Religious denominations

The powerful influence of religion in American life is certainly a fertile source for promoting the cause of abolition. According to Professor Bedau, whilst all the mainstream Protestant groups and several Jewish religious communities have been consistently opposed to capital punishment, it is the Roman Catholic Church that is "(U)ndoubtedly, the most important voice against the death penalty in the American religious community...".⁵¹⁰ When the papal encyclical, *Evangelium Vitae*, was published in 1995 calling for abolition in all but the most unusual of circumstances, it precipitated what Professor Bedau called "a major development":⁵¹¹ the official position of the Catholic Church against the death penalty in America. (Whether this position permeated amongst the parishioners is unclear). On the other hand, evangelical and fundamentalist Christian sects fully support the death penalty, many believing it to be authorized by the Bible. The only ray of hope that Professor Bedau could discern was the defection of

⁵⁰⁹ *Ibid.* at 198.

⁵¹⁰ *Ibid.* at 199.

⁵¹¹ *Ibid.*

the Rev. Pat Robertson, a long time supporter of the death penalty, to the campaign for a moratorium on its use. He suggested that this "...may herald a more cautious and reflective attitude from this direction."⁵¹²

Given these immense gulfs between the various congregations, laity and lay adherents, the American Friends Service Committee coordinated a new group called "Religious Organizations Against the Death Penalty" to try to bridge the gap. It held its first meeting in Washington in 1997 bringing together "...representatives from a broad spectrum of faiths to discuss strategies for building a more effective coalition of the many people opposed to the death penalty on religious grounds."⁵¹³ Although there is no tangible evidence of this group's success to date, Professor Bedau's final statement is an encouraging one: "Were the American religious community to speak with one voice against the death penalty, it would be rapidly abolished. Few would choose to stand (or vote, or speak) against such a demand."⁵¹⁴

The tenor of these remarks was echoed by Professor James Megivern who had concluded that "...because of the humane worldview and deep commitment to justice which characterise at least some of the religious traditions, a strong case can be made that such 'people of faith' especially represent a 'sleeping giant' that could, if awakened and organized, bring about abolition of state killing as an essential part of any commitment to human rights and a just social order."⁵¹⁵

- Civil liberties and civil rights groups

Professor Bedau was unequivocal about this: "Since the early 1960s, the most active, visible and sustained opposition to the death penalty has come from civil rights and civil liberties organizations...".⁵¹⁶ He identified three as being predominant, the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund and Amnesty International which he described as "today undoubtedly the organization whose opposition to the death penalty is most conspicuous because it is

⁵¹² *Ibid.*

⁵¹³ James J. Megivern, *Religion and the death penalty in the United States*, in Hodgkinson & Schabas, eds., *supra* note 488 at 135.

⁵¹⁴ *Supra*, note 489 at 199.

⁵¹⁵ *Supra* note 512 at 141-142.

⁵¹⁶ *Supra* note 489 at 199.

worldwide."⁵¹⁷ The umbrella for the many local, state and national organizations opposing capital punishment is the National Coalition to Abolish the Death Penalty (NCADP), founded in 1976 following the *Gregg* decision. In Professor Bedau's view, the NCADP "...promises to play an increasingly visible and influential role in the abolition movement of the immediate future."⁵¹⁸

- The media

Predictably, the newspapers of national note such as the *New York Times*, the *Washington Post* and the *Chicago Tribune* have been editorially opposed to the death penalty for a long time. This is in contrast to talk radio and phone-in programs which express – sometimes rabidly – the opposite point of view. In order to provide objective information to the media, the Death Penalty Information Center was established in 1990, aiming to educate with facts. Authors generally lean towards the abolitionist viewpoint, leading Professor Bedau to comment: "Abolitionists have long ago won the battle of words; it remains to win the hearts and minds of the public."⁵¹⁹ He also mentioned the influence of the movie *Dead Man Walking*, a depiction of Sister Helen Prejean's first involvement with an execution.

- Labour unions

They are not really a factor as Professor Bedau pointed out that the major national unions have never taken a position on the death penalty either way – "Nor are they likely to do so in the future."⁵²⁰

- International human rights organizations

Professor Bedau's opening statement appears to be conclusive: "At the greatest remove from the death penalty in American states are international human rights law and the bodies, such as the United Nations Commission on Human Rights and the Human Rights Committee, that interpret and enforce that law."⁵²¹

It did not seem to him that the divergence from international norms was presently causing any particular distress to Americans. But he did not think that this isolation would last indefinitely: "International

⁵¹⁷ *Ibid.* at 200.

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.* at 201.

⁵²⁰ *Ibid.* at 202.

⁵²¹ *Ibid.*

human rights law is bound to turn out to be more important as time passes."⁵²² I have no doubt that he is right about that.

- The general public

Although the general perception would appear to be of a U.S. population that is generally supportive of capital punishment, recent trends are reflecting a gradual decline in that support. Professor Bedau pointed out that "...polls in 2000 show the first significant decline in public support in nearly forty years – a decline that began in the late 1960s but was not noticed until 2000."⁵²³ More recent polls show this discerned trend to be a pronounced one (see Illinois poll reported above, page 122).

A Gallup Poll published in 2006 showed "...48% of the general population chose LWPD [life without parole] and 47% chose a death sentence, marking the first time in 20 years of posing this question that the Gallup Poll showed the death penalty in second place."⁵²⁴ Another poll, conducted in 2007 for the Death Penalty Information Center, concluded that the public was losing confidence in the death penalty. It attributed this to deep concern "...about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes."⁵²⁵ According to this poll, most Americans thought "...that a moratorium should be placed on all executions."⁵²⁶ Of the factors generating this evolving position, it is the risk of executing innocent people that, not surprisingly, ranks foremost. Richard Dieter, a New York attorney, provided four examples of executed persons – Larry Griffin in Missouri, Ruben Cantu, Cameron Willingham and Carlos de Luna, all in Texas – where "...new evidence has emerged that has thrown considerable doubt on their original convictions."⁵²⁷ A 2009 article in *The New Yorker* described the case of one of these four, Cameron Willingham, arguing that he had been wrongfully executed in 2004 for the alleged death by arson of his three infant

⁵²² *Ibid*

⁵²³ *Ibid.* at 203.

⁵²⁴ *Supra* note 501 at 194.

⁵²⁵ *Ibid.* at 187.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.* at 192.

daughters.⁵²⁸ This is the type of story that, if vindicated, can change hearts and minds more quickly than any amount of moral theorizing.

Dieter also pointed out the extraordinary cost of the death penalty as being another important factor contributing to public weariness with the whole process. He reported on a study by the *Palm Beach Post* in 2000 that found that the cost per execution in Florida was a mind-blowing \$24 million. Things were even worse in California, The *Los Angeles Times* in a 2005 study indicated that the additional cost of maintaining the death penalty was around \$124 million per year. With less than one execution being carried out every two years, "that meant the state was paying \$250 million per execution".⁵²⁹ The resultant economic concerns, particularly in this recessionary period, are increasingly crucial in the capital punishment debate.

In the final analysis, Dieter expected the use of the death penalty to continue to decline. For the foreseeable future, it will be "time consuming, more expensive, and still unpredictable,"⁵³⁰ with the public becoming increasingly resigned to the fact that "in the long run, the death penalty is unsustainable."⁵³¹ He concluded that "the prospects for a 'successful' death penalty seem to be rapidly receding."⁵³²

To summarize briefly the involvement of NGOs in these three Case Study situations:

- (i) The Philippines Although NGOs, both local and international, were vocal in support of abolition every step of the way, it was ultimately the individual Presidents and the immense influence of the Roman Catholic Church that carried the day.
- (ii) Pakistan Again, local and international NGOs have been conspicuously advocating for abolition. Yet, unlike the Philippines, the generally conservative religious establishment is opposed. It thus seems to be a matter of what the Government wants to do and, as explained by Piers Bannister: "The People's Party – the Bhuttos – don't like the death

⁵²⁸ David Grann, "Trial by fire", The New Yorker, September 7, 2009.

⁵²⁹ *Supra* note 501 at 196.

⁵³⁰ *Ibid.* at 201.

⁵³¹ *Ibid.*

⁵³² *Ibid.*

penalty. So executions go down when they're in power...".⁵³³ Which suggests the possibility that, regardless of NGO activities, executions might go up again.

- (iii) U.S.A. As asserted by Professor Bedau, there is no doubt of the crucial role of NGOs in the movement towards abolition. But, in this open and extraordinarily complex society, there are other important factors: court decisions, political leadership and religious views. Nonetheless, these factors are not discrete because the pertinent activities of NGOs will facilitate their direction towards abolition. In addition, as pointed out by John Holdridge, Director, ACLU Capital Punishment Project, about religious groups: "As the death penalty cannot show mercy, it denies the humanity of the condemned so religions are against it."⁵³⁴

These Case Studies were specifically selected because they reflect different circumstances and outcomes. The Philippines is now an abolitionist State. Pakistan has made some moves towards commutation of death sentences and did not carry out any executions in 2009. The U.S.A. is a tremendously complex situation involving 51 separate jurisdictions. Is there any unifying thread at all? To what extent can Hood and Hoyle's four factors (above, page 3) account for the present circumstances in each of these States?

(a) The emergence of the human rights perspective

The emergence of the human rights perspective was certainly an important part of one abolitionist campaign in the Philippines. I have earlier mentioned the phenomenon that the citizens of States emerging from totalitarian repression tend to seek protection from the power of the State "...in an embrace of freedom and democracy" (above, page 9). Hence, Corazon Aquino, upon her accession as President, moved swiftly towards a new Constitution that significantly restricted the use of the death penalty. The major force in favour of abolition, the Roman Catholic Church, took an approach that was entirely based on the sanctity of life. Archbishop Orlando Quevedo had spoken of lifting the death penalty as "...a step forward toward a culture of life...punishing criminals in a human responsible way" (above, page 90). It is difficult to ascertain whether the human rights perspective was a similar factor in

⁵³³ *Supra* note 47.

⁵³⁴ Interview with John Holdridge, Director, ACLU Capital Punishment Project (Durham, North Carolina), November 19, 2009.

Pakistan, but probably not. The conservative Muslim establishment has been consistently opposed to abolition, and there does not seem to be within Pakistan a human rights voice or voices of sufficient counterweight. In contrast, the U.S.A. has an immense array of voices for the human rights perspective; without question, it has been a most important factor in that abolitionist struggle.

(b) The developments of international treaties committed to abolition

The availability of international treaties committed to abolition has played a part in both the Philippines and Pakistan. For the former, the ability to become a State Party of the *Second Optional Protocol* in 2006 represented the culmination of the abolitionist campaign. Once that was ratified, those who sought to re-instate the death penalty were met with the surely overwhelming argument that, to do so, would be in violation of the international obligations of the Philippines (above, page 99). Pakistan, of course, has not ratified the *Second Optional Protocol* and I do not consider this to be a likely event in the foreseeable future. Nevertheless, the incoming Government in 2008 did ratify the *ICCPR*, Article 6 of which "...was the contemplation of abolition..." (above, page 13). Because of its 51 separate jurisdictions, it is even harder to assess the likelihood of the U.S.A.'s accepting an international obligation to abolish the death penalty.

(c) Mounting political pressure

Mounting political pressure, in my view, was a minor factor in the Philippines. I mentioned earlier the involvement of the European Union, Central and East European countries associated with the European Union, Cyprus, Malta and certain EFTA countries in calling for the future abolition of the death penalty in the Philippines (above, page 89). However, just as with Iran (above, page 33) and Saudi Arabia (above, page 29), I would see Pakistan, under present circumstances, as being impervious to external political pressure. Similarly with the U.S.A., the retentionist jurisdictions do not appear to have any real concern about external condemnation.

(d) The strategy of non-cooperation

Finally, the strategy of non-cooperation is not a discernible factor for either the Philippines or Pakistan but, as shown in *Kindler* (above, page 18) and *Burns* (above, page 20), it does impinge on U.S.A. jurisdictions. How significant that becomes in the overall context is difficult to assess but, as I mentioned earlier (above, page 22), I would not expect it to be that influential, being in essence another facet of external condemnation.

So my earlier conclusion that "Hood and Hoyle may have substantially accounted for past causes" (above, page 24) seems to have been borne out by the successful campaign in the Philippines where three of their four factors were evident. But my doubt that this retrospective analysis "...affords a sufficient foundation for the attainment of complete abolition" (*ibid.*) appears equally substantiated in the cases of Pakistan and the U.S.A. where, clearly, additional considerations arise. My preliminary assessment suggesting "...the lack of any universally applicable rationale, with each State having its own reasons for how it deals with the death penalty" (above, page 100), appears to be borne out. This is the fertile but challenging ground that NGOs need to examine. As an example, what would it really take to persuade Pakistan and the U.S.A. towards complete abolition? Is it even possible?

In reviewing these Case Studies, I was struck by the comments cited earlier from Professor Peter Willetts: "Most of their [NGOs'] influence is invisible except to the immediate participants, and it is therefore very easy to underestimate the impact of NGOs on UN proceedings." (above, page 76 and 77) This insight seems to me to be equally applicable in the Philippines, Pakistan and the U.S.A. campaigns. Unless the Human Rights Watch plea of June 15, 2008 actually did cause Prime Minister Gilani to announce a mass commutation (and we certainly don't know either way), it is difficult to discern a single instance of an abolitionist advance that could be credited to an NGO. Yet there they were at all times, lobbying, disseminating information, coordinating activities, filing briefs, keeping the pressure on decision-makers. Is this quasi-background role a viable model for what it will take for the final push

towards universal abolition? Or do NGOs need to become more conspicuous about what they are doing?

I will address this issue, amongst others concerning NGO effectiveness, in the next Chapter.

5. How can NGOs become more effective in the campaign against the death penalty?

In Chapter 1, I mentioned my intention to focus on "...two organizations that are heavily committed towards abolition of the death penalty: Amnesty International and the World Coalition Against the Death Penalty'' (above, page 4). I will accordingly examine the major evaluation of this work carried out by Amnesty in 2003 and then review the World Coalition's recent Congress Against the Death Penalty, held in February 2010.

5.1 Earlier NGO strategies

Amnesty International's 26th International Council Meeting, held in August 2003, had available to it a Background and Discussion Paper concerning "Review of AI Work Against the Death Penalty." It referred to the 1977 Declaration of Stockholm in which Amnesty had called for "...collective and individual work towards abolition by non-governmental organizations, the immediate and total abolition of the death penalty by all governments and a declaration by the United Nations that the death penalty violates international law." The Paper noted the immense strides made towards universal abolition, declaring: "A clear majority of nations are now abolitionist in law or in practice, for the first time in human history." But it was equally cognizant that the next steps might be more difficult, pointing out: "Resistance to abolition is coalescing around a few powerful countries and broad regions." More specifically, the Paper observed: "Nations like the USA, China and Saudi Arabia have been resistant to outside influence on this issue: each for its own reasons may prove very reluctant to relinquish the death penalty, acting as a barrier to abolition in other nations." My own analysis of China and Saudi Arabia in Chapter 2 and of the U.S.A. in Chapter 4 generally supports this conclusion. I did not think that the hitherto success of Hood and Hoyle's "four causes" would be a sufficient foundation upon which to carry the remaining retentionist jurisdictions towards abolition. It seemed to me that the reasons for adherence to the death penalty varied by State, making it unrealistic to expect that a "one size fits all" campaign could possibly succeed.

Despite its recognition of the remaining difficulties, the Paper suggested that Amnesty's focus on abolishing the death penalty on a country-by-country basis might be broadened into a more holistic approach. It proposed: "...we should perhaps recognize and act on the knowledge that the death penalty is not only a country-specific concern; it is also a defining characteristic of the human condition. Its abolition is a concrete measurement of our success in creating a new global reality, one in which the fundamental human rights for all people are respected and enforced." Although I am somewhat attracted by the suggestion of a "holistic approach" insofar as it is premised on the laudable principle that no human being should face the threat of being killed by his/her own government, it ultimately does not work for me. The unifying principle of a fundamental human rights perspective may be helpful but, in the end, all my research and analysis tells me that the task ahead is indeed to do with proceeding on "a country-by-country basis". How this practical necessity can actually be tackled forms the basis for my own abolitionist strategy proposal later in this Chapter.

The Paper concluded with the presentation of three principal concerns for discussion at the International Council Meeting:

1. What should AI do to bring about the worldwide abolition of the death penalty?
2. What should AI do to stop executions?
3. What are the strengths, weaknesses, opportunities and challenges in our work against the death penalty?

Broadly speaking, these are the questions being canvassed herein so it should be helpful to review the outcome, both immediate and long term, of the pertinent deliberations in 2003.

The Final Report of the 26th International Council Meeting was entitled "Building on Success."⁵³⁵ It generally struck an optimistic note, mentioning: "...the international movement to abolish the death penalty has never been stronger."⁵³⁶ It added that, looking at the abolitionist movement as a whole :
 "...there is growing emphasis on developing strategic alliances. Another positive trend is the increasing

⁵³⁵ Amnesty International, Circular 21, "BUILDING ON SUCCESS- Review of AI Work Against the Death Penalty: Final Report and Recommendations", April 2003, AI Index: ACT 51/003/2003.

⁵³⁶ *Ibid.* at 4.

involvement of new actors: intergovernmental organizations, religious leaders, individual governments and heads of state as agents for abolition."⁵³⁷ Hence, Amnesty saw itself "...as part of a worldwide coalition working for the common goal of death penalty abolition..."⁵³⁸ and, to this end, it sought to develop strategic partnerships with other organizations, adjusting its approach as necessary.

Amnesty's overall strategy was to consolidate gains already made, to expand the abolitionist base (i.e. moving countries from abolitionist *de facto* to *de jure*) and to develop its role as a facilitator and resource provider within the broader abolitionist movement. The rationale supporting this strategy was the following:

AI has long endorsed an incremental approach to abolition, which appears to be a sound and widely accepted strategy that should continue to guide the organization's work. The obvious implication of this approach is that strategies must be carefully tailored for the specific circumstances that exist within each retentionist jurisdiction, or within a sub region that shares common barriers to abolition. AI should recognize that the best strategies for highly resistant retentionist countries must be both pragmatic and long-term.⁵³⁹

I have not come across any data that would suggest flaws in this rationale. With respect to "an incremental approach", I had noted earlier the reduction in the number of capital offences as being more characteristic than outright abolition, referring to this process as "an incremental approach" (above, page 9). In a specific context, I had observed that the two laws passed to abolish slavery were only a beginning and that an international solution then became the objective (above, page 42), again reflecting the worthiness and workability of an incremental approach. And, when it comes to strategies that "...must be carefully tailored for the specific circumstances that exist within each retentionist jurisdiction," this is precisely my own finding (above, page 36). This resonates far more than the earlier suggestion of a "holistic approach". The path to abolition always seems to come down to "the specific circumstances." It thus becomes a matter of building on previous successes but adjusting strategies appropriately. With this approach, total abolition should be eventually achievable. As Circular 21

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.* at 5.

⁵³⁹ *Ibid.* at 7.

concluded: "The world has reach an historic vantage point, from which the end of the death penalty is finally in sight."⁵⁴⁰

That was in 2003. In February 2010, the World Coalition Against the Death Penalty convened in Geneva, focused on generating abolitionist co-operation for the final push towards universal abolition. At the first plenary assembly, Ruth Dreifuss, former member of the Swiss Federal Council, proclaimed "...the main goal, that of outlawing the death penalty as a fundamental violation of human rights."⁵⁴¹ She proposed a target date of 2015 for the global ending of capital punishment, commendably ambitious in my view but unrealistic. Even with the recommended "sensitization targeting"⁵⁴² of retentionist States, it would be hard to imagine such immense strides being made in a mere five years.

At the second plenary session, the delegates considered the need to have four key countries – Iran, U.S.A., China and Japan – "change sides"⁵⁴³ because of the strategic cultural or geographic position they held. Activists from each of these countries told of the grim conditions at home:

- Shirin Ebadi, Nobel Peace Prize laureate, told of the child executions in Iran and the continued utilization of death by stoning;
- Tianyong Jiang and Joey Lee, Chinese lawyers, claimed that half of all the world record number of executions in China were carried out to keep the government in power;
- John Van de Kamp, former California State Attorney, complained of the astronomical cost of executions while Gail Chasey, a New Mexico lawmaker, added that it had never been proven to be a deterrent;
- Maiko Tagusari, an activist with the Center for Prisoners' Rights, pointed out that the method of execution in Japan, hanging, had not changed in 140 years and that, if public opinion were informed, this could not go on.⁵⁴⁴

For two good reasons, I am not persuaded that the "four key countries" approach has merit. Firstly, I am not convinced that universal abolition would happen based on "four key countries" changing sides. Of course, the execution statistics would thereby be dramatically changed for the better (abolition in China

⁵⁴⁰ *Ibid.* at 14.

⁵⁴¹ Ensemble Contre la Peine de Mort, "Abolitionist co-operation at all levels kick-started in Geneva", February 24, 2010, online: <<http://www.abolition.fr/ecpm/french/news.php?new=1287>>.

⁵⁴² *Ibid.*

⁵⁴³ Ensemble Contre la Peine de Mort, "Universal abolition will happen when four key countries change sides", February 28, 2010, online: <<http://www.abolition.fr/ecpm/french/news.php?new=1323>>.

⁵⁴⁴ *Ibid.*

alone would reduce the total number of annual executions to significantly less than 1000). But examining each of the four suggests that they would not necessarily be followed by others. The U.S.A. is already alone among Western democracies in its adherence to the death penalty. Iran's example would be unlikely to influence retentionist Arab countries such as Iraq and Saudi Arabia. Japan, like the U.S.A., is an aberrant executioner, the only other highly developed democracy to be perpetuating such a punishment. And China is surely *sui generis*? Secondly, it was my own conclusion that attaining abolition in China, Iran and certain U.S.A. jurisdictions, three of the four named countries, will be an arduous process, one that is fraught with unknowable factors. Singling out these especially difficult situations for priority attention would not, in my view, be the most effective employment of campaign resources. There are better ways to focus purposefully, and I will present these in my own strategy proposal in the next section.

Hence, although the "four key countries" proposition is a beguiling one, to sort of slay the dragon in one fell swoop (or, rather, four), the reality for me is that Amnesty's "incremental approach to abolition" (above, page 143) remains valid. That is to say, by carefully tailoring strategies "...for the specific circumstances that exist within each retentionist jurisdiction" (*ibid.*). When it comes to examining "a sub region that shares common barriers to abolition" (*ibid.*), there may be a case for speaking of the Islamic Middle East as such a sub region, but I would still not expect abolition in Iran to influence its Arab neighbours. The challenge would be to address the "common barriers to abolition" within Islam itself – and I have canvassed this in Chapter 2 (above, pages 29 to 35).

At its conclusion, the 4th World Congress Against the Death Penalty issued a Final Declaration calling for:

- The *de facto* abolitionist states to enact legislation abolishing the death penalty in law;
- The abolitionist states to integrate the issue of universal abolition in their international relations by making it a major focus of their international policy of promoting human rights;
- The international and regional organizations to support the universal abolition of the death penalty including the adoption of resolutions calling for a moratorium on executions, by

- supporting educational activities, and increased co-operation with abolitionist NGOs that act locally;
- Abolitionist organizations and actors from retentionist states to unite their strength and determination in creating and developing national and regional coalitions, with the aim to promote locally, the universal abolition of capital punishment.⁵⁴⁵

Insofar as this reflects the ongoing and prospective role of NGOs, it seems entirely compatible with Amnesty International's conclusions of seven years before. Moreover, the points of the Final Declaration embrace Kamminga's "three broad strategies...: high level approaches, campaigning and coalition building." (above, page 71). For me, the Final Declaration nicely summarizes the practical tasks ahead, the need for increased cooperation between international, regional and local abolitionist organizations and the strategies for locally promoting universal abolition. Yet the Final Declaration also refers to the legal requirements for abolition, both in local legislation and within international relations. How can all of this be brought comprehensively and effectively together?

5.2 My strategy proposal

The realistic starting-point for me is to gauge as precisely as possible the size of the nut to be cracked. I have expressed scepticism about previously announced targets: the World Coalition's 2007 challenge to have all States that were party to the *ICCPR* ratify the *Second Optional Protocol* by December 15, 2009 (above, page 53) and the suggested date of 2015 for the global ending of capital punishment (above, page 144). Although the intent is commendable, I apprehend the likely impossibility of target accomplishment to be counterproductive. Better to examine what lies ahead and set realistic target dates (yes, they can still lean towards ambitiousness, but not excessively so).

There are four main categories of States to consider, listed below with Amnesty International's 2009 estimate of the numbers involved:

- States that are abolitionist for all crimes: 95
- States that are abolitionist for ordinary crimes: 9
- States that are abolitionist in practice: 35

⁵⁴⁵ Ensemble Contre la Peine de Mort, "Final Declaration 4th World Congress against the Death Penalty", February 26, 2010, online: <<http://www.abolition.fr/fr/depeches/1305-final-declaration--4th-world-congress-against-the-death-penalty--geneva---february-26,-2010>>.

- States that are retentionist: 58

Noticeable on this list is the far greater number of States that are abolitionist for all crimes than have ratified the *Second Optional Protocol*. I have determined the following 26 to be in this situation:

Angola, Armenia, Bhutan, Burundi, Cambodia, Cook Islands, Cote D'Ivoire, Dominican Republic, Guinea–Bissau, Haiti, Holy See, Kiribati, Kyrgyzstan, Marshall Islands, Mauritius, Micronesia, Niue, Palau, Poland, Samoa, Sao Tome, Senegal, Solomon Islands, Togo, Tuvalu, Vanuatu

What is immediately striking about these 26 is the preponderance of small countries . Is there some reason for their not having proceeded to ratification? Could it be administrative? Financial? All of these States should constitute fertile ground for NGO campaigning. In particular, three of them, Guinea-Bissau, Poland and Sao Tome, have already signed the *Second Optional Protocol*, but not ratified it.

The next category to consider is States that are abolitionist in practice, and Amnesty has listed 35 of them:

Algeria, Benin, Brunei, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Gabon, Gambia, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Togo, Tunisia, Zambia.⁵⁴⁶

It will be recalled that part of Amnesty's overall strategy was "...moving countries from abolitionist *de facto* to *de jure*" (above, page 143), and this would indeed appear to be a productive area for NGO campaigning. Obviously, there is a significant range of circumstances encompassed within the list of 35. At one extreme, South Korea seems to be a particularly encouraging situation with Amnesty pointing out that, despite 58 prisoners still on death row and the Special Bill to Abolish the Death Penalty having lapsed in March 2009, "Two new bills on the abolition of the death penalty were introduced in the National Assembly."⁵⁴⁷ On the other side, it is difficult to imagine Eritrea and Myanmar being persuadable towards legal abolition under their current regimes.

⁵⁴⁶ *Supra* note 3 at 29.

⁵⁴⁷ *Supra* note 18 at 201.

Finally, we have Amnesty's list of the 58 "Countries and territories that retain the death penalty for ordinary crimes":

Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Mongolia, Nigeria, North Korea, Oman, Pakistan, Palestinian Authority, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syria, Taiwan, Thailand, Trinidad And Tobago, Uganda, United Arab Emirates, USA, Vietnam, Yemen, Zimbabwe⁵⁴⁸

A daunting list indeed! It shows that the mere recitation of State totals can be misleading. The retentionist States include all of the most populous nations with the result that more than half of the world's population continues to live under the shadow of the death penalty. Another conspicuous fact is that 23 of the 58 retentionist States are predominantly Muslim, and I have discussed the reasons for this in Chapter 2 (above, pages 29 to 35). Moreover, recalling the remark of Piers Bannister that "...abolition is geographical" (above, page 15), a quite astonishing 10 of the 58 retentionist States are in the Caribbean. This may not be quite as dire as it sounds, however, as Amnesty has reported that only one execution has actually taken place – in Saint Kitts and Nevis in 2008 – since Cuba stopped carrying out executions in 2003.⁵⁴⁹ But it also noted: "Debate around the death penalty continued in many of the Caribbean nations with widespread public support for the resumption of hanging."⁵⁵⁰

By Amnesty's reckoning, "...in the past decade, an average of over three countries a year have abolished the death penalty in law or, having done so for ordinary offences, have gone on to abolish it for all offences."⁵⁵¹ If this pace were maintainable, it would take 34 years (i.e. 102 States/3) for there to be universal abolition. But if I were to assume that it would be maintainable, would I have fallen into the error initially broached "...of underestimating the scale and complexity of the remaining abolitionist

⁵⁴⁸ *Supra* note 3 at 29.

⁵⁴⁹ *Ibid.* at 15.

⁵⁵⁰ *Ibid.* at 16.

⁵⁵¹ *Ibid.* at 28.

struggle" (above, page 7)? And what about Alex Neve's notion of "plateauing" (above, page 24)? These are certainly valid concerns and, in the end, it comes down to an individual guess. My own hunch is that universal abolition will be achieved before 2044 (i.e. 34 years from now), but this will require a systematic and diligent effort. Nothing less will suffice than an impressive orchestration "...with a variety of individual and separate initiatives integrated into the overall effort, each reinforcing the other." (above, page 46).

A specific campaign seems to be the answer. A widely proclaimed campaign that sets realistic targets. And, by this, I mean a campaign that proclaims its ultimate objective but, just as critically, maps out how to get there. There has been a randomness to the abolitionist movement to date, lots of success certainly but lacking a game plan for "...the attainment of complete abolition" (above, page 24). What's needed, it seems to me, is a fully analyzed scenario for what remains to be done with a timed schedule for each phase of the work. I am hence looking to what I will call a campaign of milestones. Whether it should be inaugurated under the auspices of Amnesty International or the World Coalition Against the Death Penalty, I do not know (although I would personally lean towards the former, Amnesty having not been directly associated with excessively ambitious abolitionist targets). The key starting-point would be to announce the campaign on an auspicious date – as was done for Amnesty's launch of the Campaign for the Abolition of Torture (above, page 46). My proposed date is July 11, 2011, the 20th anniversary of the coming into force of the *Second Optional Protocol*.

I thus propose that, on July 11, 2011, the Campaign for the Universal Abolition of the Death Penalty be launched. Right away, there would be assets for this campaign that were simply non-existent in the campaigns against slavery and torture. Firstly, there is already firmly established an international instrument, the *Second Optional Protocol*, that, albeit voluntary, enables the complete attainment of the campaign objective. Secondly, the UN has in place "a moratorium on executions with a view to abolishing the death penalty" (above, page 3), and Amnesty has noted that "A similar resolution will be

considered at the Third Committee of the UN General Assembly in late 2010."⁵⁵² Thirdly, the abuses of slavery and torture were increasingly prevalent when those campaigns began whereas, as we have clearly seen, the use of the death penalty has been receding for many years. These are all substantial reasons to feel encouraged about the prospects for success of the Campaign for the Universal Abolition of the Death Penalty.

I have previously expressed the view: "Better to examine what lies ahead and set realistic target dates (yes, they can still lean towards ambitiousness, but not excessively so)." (above, page 146) Having now analyzed "what lies ahead", it seems to me that realistic target dates (or milestones) would be the following:

- (i) By July 11, 2016, the 25th anniversary of the coming into force of the *Second Optional Protocol*, to have achieved the landmark of the 100th ratifier.

On the face of it, this might appear to be an enormous jump from today's 72. But it is predicated on what I consider to be the realistic assumption that most, if not all, of the 26 abolitionist States that have not yet ratified the *Second Optional Protocol* could be encouraged to do so. It would then take only a handful of the 35 abolitionist *de facto* States – perhaps as few as two – to make up the desired total.

- (ii) Also by July 11, 2016, to have encouraged at least 10 of the 35 abolitionist *de facto* States to have abolished the death penalty in law.

This should be eminently achievable as it would involve an average of two States per year making the change, compared to the average of three identified by Amnesty (above, page 148).

- (iii) By July 11, 2021, the 30th anniversary, to have encouraged a further 10 of the abolitionist *de facto* States to have abolished the death penalty in law.

It is recognized that this is a more challenging proposition with the easier governmental situations having already been transformed. Nonetheless, if 35 States in 2010 were abolitionist *de facto* because they had

⁵⁵² *Ibid.* at 2.

not carried out an execution during the past 10 years, then the remaining 25 of those in 2016, if still on the list, would not have carried out an execution for at least 15 years, an even more strongly established practice. So this suggests that maintaining this rate of advancement towards the status of abolitionist *de jure* would not be unrealistic. Furthermore, States such as Cuba, which has not carried out any executions since 2003, might, by then, have been moved from the retentionist to the abolitionist in practice column, thereby adding to the potential for success.

- (iv) By July 11, 2026, the 35th anniversary, to have put a significant dint in the number of retentionist States.

At this point I do not wish to hazard a guess as to an appropriate number. I will canvass the concomitant factors in greater depth before attempting a reasoned assessment.

- (v) By July 11, 2041, the 50th anniversary, to have achieved the dream of universal ratification of the *Second Optional Protocol*.

Is it conceivable? No one knows, but I do think that a 30 year campaign, organized on the basis of milestone accomplishments, would get us there or, if not completely because of a few recalcitrants, pretty close.

The biggest single step that could be taken to set the stage for the envisaged campaign launch on July 11, 2011 would be a strongly approved resolution by the UN General Assembly when it convenes to consider the progress made in implementing its earlier moratorium. It will be recalled that the historic resolution of December 18, 2007 was adopted with 104 in favour, 54 opposed and 29 abstentions (above, page 2). This vote was a logical one as it generally approximates the number of abolitionist States (in favour), the retentionists (opposed) and the abolitionists in practice (abstained). As well as monitoring closely the debates of the General Assembly "...to consider the progress made in implementing its earlier moratorium" (above), the main challenge for Amnesty and other NGOs will be to lobby for an even more favourable vote for continuing the moratorium. There are already hopeful signs in that direction.

Resolution 63/168 approved on December 18, 2008 (the UN resolution that mandated a review of the moratorium in 2010) received 106 votes in favour, 46 against and 34 abstentions (above, page 3). Most encouragingly, Algeria, abolitionist *de facto*, was a co-sponsor of that second resolution and Somalia, listed by Amnesty as retentionist, actually voted in favour.⁵⁵³ So the lobbying task is clear, and I believe that I have adequately demonstrated that NGOs, with consultative status, already have enough muscle to be effective at the UN. I had opined: "...in my conclusion, NGOs such as Amnesty International have everything they need with which to mount the final campaign to abolish the death penalty universally." (above, page 77). Furthermore, I recall Professor Willetts's listing of the major assets of NGOs: "information, expertise, experience, reliability, integrity and prestige" (above, page 76), and I agree with his conclusion that they "...provide a formidable basis for exercising influence." (*ibid.*) Although he also viewed NGOs "...as being essential to agenda-setting; to be less important in policy formulation; and to have mixed influence in policy implementation..." (*ibid.*), I do not think this was the case at all in Amnesty's Campaign for the Abolition of Torture. Amnesty International started the campaign and saw it through to completion, winning the Nobel Peace Prize in the process (above, page 49). Similarly, with their major assets clearly identified by Willetts, there should be no realistic apprehension that NGOs would not be up to the job of executing a phased campaign to abolish the death penalty.

So, assuming that a third moratorium resolution is approved by the UN General Assembly with an even stronger affirmative vote than before, the universal environment within which to begin the final campaign could hardly be better. As explained by Aubrey Harris about the UN moratorium: "It's convincing a number of countries to look at the fact that the death penalty is 'done'. And it's being used as a legal argument as evidence of an evolving norm. There's a strengthening of international abolitionist practices."⁵⁵⁴

I have proposed that, by July 11, 2016, two objectives will have been realized: that the *Second Optional Protocol* will have been ratified by 100 States and that at least 10 of the 35 States characterized by

⁵⁵³ *Supra* note 4 at 11.

⁵⁵⁴ *Supra* note 54.

Amnesty as "abolitionist in practice" will have become abolitionist in law. Realization of these objectives will obviously require immense resources as, at a minimum, there will be 36 States to research, contact and lobby. Clearly, the research for this thesis is only a beginning for what will need to be developed in order to make a convincing case in each situation. So there is a great deal of essential research and analysis left to be done with which to underpin the Campaign. To this end, I am mindful of Piers Bannister's lament: "We're starved of resources.... If we had the resources, the campaign for abolition could proceed relatively quickly."⁵⁵⁵ There is no real answer to this given the hard-pressed, recessionary circumstances of the present. But, in the final analysis, I do think that Amnesty and the World Coalition Against the Death Penalty, if they do elect to follow the path proposed herein, will simply have to raise the necessary funds by special appeals for the one purpose or, in the case of Amnesty, make the hard choice to prioritize its huge array of involvements. At the risk of sounding Pollyannish, I am convinced that the well-handled launch of the Campaign for the Universal Abolition of the Death Penalty would capture supporters' imaginations sufficiently to ensure that donations would flow.

There are 26 States that have abolished the death penalty but not yet ratified the *Second Optional Protocol*. What could be the reason for their having failed to take – so far – the next logical step in the process? The reasons for not proceeding could be administrative, financial or mere inertia but, in any event, this needs to be ascertained. Looking at the list, it seems unlikely that many of them would have established human rights NGOs but, if they do, this should certainly be the preferred point of initial contact. After that, each situation will have to be researched, as stated above, and evaluated to determine how best to proceed (but I suspect that appeals to the respective governments will be generally unavoidable). There used to be the concern of being accused of Western interference, but I think this has diminished. As remarked by Aubrey Harris: "World opinion being against the death penalty was confirmed by the moratorium vote and by international organizations. It's more universal now, not just

⁵⁵⁵ *Supra* note 47.

Western values."⁵⁵⁶ Moreover, this first stage that I envisage would merely be requesting already abolitionist States to undertake the next (and final) step of ratifying the pertinent international instrument. This, theoretically, should not be a "hard sell".

The challenge of encouraging at least 10 of the 35 States that are viewed by Amnesty as "abolitionist in practice" to become abolitionist in law should be achievable given the information that is already available and the discernible trends. I have already mentioned the apparently favourable climate in South Korea (above, page 147), and two other situations spring readily to mind. Concerning Kenya, Amnesty reported on the August 2009 commutation of 4000 death sentences to life imprisonment, commenting: "This is the largest ever mass commutation of condemned prisoners known to Amnesty International."⁵⁵⁷ Although Kenya has continued to impose death sentences, "it has not carried out an execution since 1987".⁵⁵⁸ In the case of the Russian Federation, Amnesty noted:

The moratorium on executions in Russia was extended by its Constitutional Court in November [2009]. The moratorium was put in place in 1999, suspending executions until jury trials were in place across Russia. This was completed on January 1, 2010. In November the Russian Constitutional Court ruled that: "The introduction of jury trials does not open the way for the possible use of the death penalty. The path towards full abolition of the death penalty is irreversible," read a Court statement.⁵⁵⁹

Hence, as a start, South Korea, Kenya and the Russian Federation do appear to be promising. The exercise should involve a careful examination of all 35 situations, including of those three, to understand the extent of supportive groups available domestically. The complexity of individual situations was illustrated in my three Case Studies where the pro-abolition forces varied significantly (see above, page 136). However, it must be remembered that, in this phase, the campaign would be unlikely to be facing harsh opposition; it would be attempting to further encourage States that already "...have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions." (above, page 1) In other words, it once again should not be a "hard sell". Admittedly,

⁵⁵⁶ *Supra* note 54.

⁵⁵⁷ *Supra* note 3 at 23.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.* at 18.

there are situations that seem to be lost causes under their current regimes; I have already mentioned Eritrea and Myanmar (above, page 147). But such situations will just have to be monitored for the foreseeable future and, of course, Amnesty International already does produce annual reports on each nation's human rights performance.

There is also the uniquely difficult case of Liberia. Although Amnesty has categorized it as abolitionist *de facto*, having carried out no executions since 2000,⁵⁶⁰ the fact is that it ratified the *Second Optional Protocol* in 2005 but, in clear contravention, brought into effect in July 2009 "...the death penalty for murder committed during armed robbery, terrorism or hijacking."⁵⁶¹ Moreover, it passed three death sentences in 2009.⁵⁶² Even putting to one side the irresponsibility of so blatantly disregarding a solemn international commitment, it is hard to see how Liberia can any longer be considered as abolitionist. In the face of a new death penalty Act and three death sentences in 2009, can it honestly claim to be maintaining "...a policy or established practice of not carrying out executions" (above, page 1)? I do not have any answer to this, but perhaps both the UN and Amnesty are entitled to an explanation from Liberian President Ellen Johnson-Sirleaf.

Once the "careful examination of all 35 situations" (above, page 154) has been completed, contacts within each promising State situation, if not already in place, will have to be initiated. The ideal contacts would be a local NGO committed to abolition but, in its absence, any human rights group or civil society in general should be approachable for this purpose. The question from Amnesty or the World Coalition Against the Death Penalty should be this: "How can we help you to encourage your government to legislate abolition of the death penalty for all crimes?" I had of course concluded from the Case Studies that, although both local and international NGOs were involved in the campaigns for abolition, they were not the predominant players (above, pages 136 and 137). Indeed, I had gone so far as to note: "...it is difficult to discern a single instance of an abolitionist advance that could be credited to an NGO." (*ibid.*) So why am I suddenly suggesting that local NGOs be asked to run with this particular ball? I think

⁵⁶⁰ *Ibid.* at 22.

⁵⁶¹ *Supra* note 18 at 210.

⁵⁶² *Supra* note 3 between 16 and 17.

different considerations arise, that's why. We are not contemplating here the tremendously challenging task of influencing a retentionist State to become abolitionist; that obviously requires an enormous effort (as surely demonstrated by the Case Studies). We are instead approaching States, those that have not carried out an execution for at least 10 years and show no inclination to do so in future, to pass the legislation that would formalize their practice. The lobbying and pressure for such legislation should ideally be conducted at the national level – international intervention in such a matter might even be counterproductive. What already exists internationally is the clear objective set forth in the 4th World Congress Against the Death Penalty's Final Declaration: "The *de facto* abolitionist states to enact legislation abolishing the death penalty in law" (above, page 145). This objective could most effectively be pursued by ensuring that international NGOs support and assist local NGOs which, in my view, would be the organizations best equipped to achieve direct success.

Without doubt, it will take "diligence, perseverance and good luck" (above, page 47) to wholly achieve targets (i), (ii) and (iii), the strategies for which are laid out above. But in one sense this will be the easy part of the Campaign for the Universal Abolition of the Death Penalty. The real battle is to do with the retentionist States. Is there a possibility that Professor Radzinowicz was right when he opined: "...most of the countries likely to embrace the abolitionist cause have now done so." (above, page 7) Certainly, to look at the list of those 58 States (above, page 148) and to visualize them all as abolitionist by July 11, 2041 is a true act of faith. To start with, I have concluded from the Case Studies that there is no universally applicable rationale for how States deal with the death penalty (above, page 139). Each of the 58 situations will have to be individually analyzed with the abolitionist strategies then being developed for the discerned circumstances. As Amnesty stated: "...strategies must be carefully tailored for the specific circumstances that exist within each retentionist jurisdiction..." (above, page 143). Even though there will be common issues affecting certain of the retentionist States – such as the 23 predominantly Muslim ones or the 10 in the Caribbean (above, page 148) – I do not think this will obviate the need for individual consideration. There is also the almost overwhelming difficulty of how best to deal with the world's two most powerful nations, the U.S.A. and China, both of which seem to

have been historically impervious to external influence (but see discussion in Chapter 6). In short, there can be no illusions; targets (iv) and (v) will be tough to accomplish.

Let me start with what should really be the most straightforward region: Europe. Even here there has arisen a State situation that is inexplicable as Liberia's (above, page 155). Amnesty reported that, in 2008, Europe and Central Asia "...is now virtually a death penalty free zone following the abolition of the death penalty in Uzbekistan for all crimes",⁵⁶³ with only Belarus still carrying out executions. Then, with evident delight, the 2009 report proclaimed: "For the first time in modern history, no executions took place in Europe in 2009. Belarus, the only nation in Europe to carry out executions in recent years, did not execute any prisoners...".⁵⁶⁴ This made sense as it will be recalled that, in order to become a member of the Council of Europe, a State would have to undertake to ratify *Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (above, page 14). Commenting on Belarus's position, Hood and Hoyle had noted: "...as it is now seeking membership of the Council of Europe, will have in due course to comply by instituting a moratorium as a prelude to abolition within three years of acceding if it is to be successful."⁵⁶⁵ It thus seemed that the path was set but, unhappily, Amnesty's good news concluded with the admonition that "...although two death sentences were passed and two prisoners remain under threat of execution by shooting,"⁵⁶⁶ This sadly proved to be prescient as Andrei Zhuk and Vasily Yuzepchuk were reportedly executed in March 2010.⁵⁶⁷ Abolition is by no means a foregone conclusion even in the most seemingly benign circumstances.

What about in the most seemingly "non-benign" circumstances? It seems to me that these really do not exist and that, upon analysis, there are reasons for optimism for every one of the 58 retentionist States. A fair proportion already exhibit abolitionist leanings. For example, of the 58, 10 have not carried out any executions during the past 10 years but have not (yet) been classified by Amnesty as "abolitionist *de*

⁵⁶³ *Supra* note 4 at 5.

⁵⁶⁴ *Supra* note 3 at 18.

⁵⁶⁵ *Supra* note 2 at 25.

⁵⁶⁶ *Supra* note 3 at 18.

⁵⁶⁷ *Supra* note 3, "Updates to Death Sentences and Executions in 2009".

facto" because they appear to lack "...a policy or established practice of not carrying out executions."

(above, page 1) So this could be evolving. Moreover, of the 58, only 39 opposed the UN moratorium resolution. Yet even for those States more strongly committed to executions, I do not see a single lost cause. There always seems to be a foundation upon which to build – even if it is momentarily scant.

I have mentioned earlier "...that 23 of the 58 retentionist States are predominantly Muslim" (above, page 148), a fact that might at first blush suggest some monolithic Islamic adherence to capital punishment. But nothing could be further from the truth. The reality has been succinctly expounded by Professor Hood:

Although countries in the Middle East and North Africa, where Islam is the dominant religion retain the death penalty, several of them – Tunisia, Algeria and Morocco – have not carried out any judicial executions for over 10 years, nor have executions occurred frequently in most of the Gulf States. Abolition is being considered in Jordan, Morocco and Lebanon (all of which abstained in the moratorium vote at the United Nations in December 2008 along with five other Muslim countries, while Algeria and Somalia voted in favour). It is notable that several secular states with large Muslim majorities have already joined the abolitionist movement: such as Albania, Azerbaijan, Bosnia – Herzegovina, Kyrgyzstan, Turkey, Turkmenistan and Senegal. They may soon be joined by the Maldives. In fact, only five – a handful – of retentionist Muslim countries make regular and large scale use of capital punishment as a crime control measure: Iran, Saudi Arabia, Pakistan, Iraq and Yemen.⁵⁶⁸

It will probably come down to whether traditionalist views of Shari'ā law will continue to prevail or whether those more enlightened interpretations canvassed by Cherif Bassiouni (above, pages 30 to 32) might emerge more influentially. This is obviously a debate that will not welcome (non-Muslim) outsiders. Happily, there is evidence that the internal debate about the death penalty is already well underway, at least in Arab countries.

There have been three major conferences in recent years at which representatives from Arab countries urged their own governments to comply with the UN moratorium on the death penalty. The first was held in Egypt in May 2008, and was attended by representatives of Arab civil society, the League of Arab

States, the UN Office of the High Commissioner of Human Rights and international NGOs such as Amnesty. The outcome was a joint declaration, known as the Alexandria Declaration, in which the conference participants called upon Arab countries to comply with UN resolution 62/149. It also called upon Arab governments "...to take concrete steps to progressively abolish the death penalty, and appealed to the Arab states which have observed a *de facto* moratorium to remove this punishment from their legislation in order to prevent its circumstantial use."⁵⁶⁹ The next conference was held in Algiers in January 2009, and was attended by over 100 participants representing national human rights institutions from Algeria, Egypt, Jordan, Mauritania, Morocco and Qatar. The resultant Algiers Declaration reiterated the call for compliance with the UN moratorium and, more pointedly: "...encouraged Arab states to declare a cessation of the use of the death penalty and to establish this in law."⁵⁷⁰ An even more ambitious conference was held in Madrid in July 2009 under the heading "Towards a global moratorium on the death penalty: the case of Arab countries." It was attended by a representative of the League of Arab States, members of civil society from eight Arab countries, international and national NGOs and regional and international human rights experts and journalists. The result was the comprehensive and sophisticated Madrid Statement of July 15/16, 2009, some significant sections from which I cite as follows:

- ...3. Reiterating that we consider the use of the death penalty to be a violation of the most fundamental human right, i.e. the right to life; and that it has not succeeded in deterring or in preventing criminality in any country;
- 4. Regretting the fact that death sentences and executions continue to be carried out in numerous Arab countries;
- 5. Noting with concern the increasingly high number of crimes punished by the death penalty;
- 6. Request the Arab governments, each according to its own circumstances, to fully comply with the United Nations General Assembly resolution 62/149 and 63/168 and to support the objective of a moratorium in forthcoming UN debates;

⁵⁶⁸ Roger Hood, *Towards Global Abolition of the Death Penalty*, A Lecture delivered at the invitation of The Death Penalty Project In the Hall of the Inner Temple, January 21, 2010, at 6-7.

⁵⁶⁹ Amnesty International, "Arab Civil Society Calls On Governments To End Executions", August 2009, Index: MDE 01/003/2009 at 1.

⁵⁷⁰ *Ibid.* at 2.

- ...10. Call on Arab governments that still make use of the death penalty to progressively restrict its use and reduce the number of offences for which it may be imposed;
- 11. Encourage the full collaboration between the government bodies, but also the members of the parliament, the judiciaries, the media and the civil society members to open a real debate at the national level on the establishment of a moratorium to executions with a view to abolishing the death penalty in the future;
- 12. Urge the Arab governments to establish an immediate moratorium on the use of the death penalty, which will serve as a viable tool to guarantee justice while a large debate on the revision of criminal codes is under progress among Arab countries;
- 13. Appeal to Arab states which have observed a *de facto* moratorium to remove this punishment from their legislation in order to prevent its circumstantial use;
- 14. Underline the need to target, as an ultimate goal, the ratification of the second optional protocol to the ICCPR;....⁵⁷¹

Could the goals and supporting requirements possibly have been better expressed than this? The Madrid Statement of July 2009 suggests that the abolitionist cause in Arab countries is already moving, perhaps moving more quickly than hitherto imaginable. And remember that among the intended government recipients will be three of Hood's five retentionist Muslim countries, Saudi Arabia, Iraq and Yemen. The other two, Pakistan and Iran, have been considered in detail in earlier Chapters. For Pakistan, I noted the lack of executions in 2009 (above, page 35), perhaps an encouraging sign. And even for intransigent Iran, there is a scrap of hope. When I wrote "...that no one has any idea as to whether that [the emergence to power of the opposition forces] is a likely outcome of the continuing turmoil..." (*ibid.*), there was a possibility of change in Iran. It no longer seems so. At least for the foreseeable future, brutal repression and widespread torture appear to have carried the day. But cracks of light still appear. It was remarkable to me that international outrage over the threatened stoning to death of the alleged adulteress Sakineh Mohammadi Ashtiani caused the Iranian government to retreat (at the time of writing, it was not known whether she will be hanged instead). It is a very small victory, but nonetheless significant. When I look together at the Madrid Statement, Iranian responsiveness to an international campaign and the fact

⁵⁷¹ *Ibid.* at 3-4.

that Indonesia, the most populous Muslim nation, in 2009 had its first execution-free year since 2004,⁵⁷² I feel encouraged. I think Hood has it right: "Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may imagine."⁵⁷³ This echoes David Matas's optimism "...about eventual abolition in Muslim countries, including Iran." (above, page 35).

The other retentionist group to which I earlier drew attention were the 10 States in the Caribbean (above, page 147), noting that only one of them had actually carried out an execution since 2003. Nonetheless, Hood thought they could more accurately be classified as "thwarted" executioners, explaining:

They have been thwarted by the activities of The Death Penalty Project and other dedicated human rights lawyers who have challenged the constitutionality of the death penalty, particularly the mandatory death penalty, conditions and length of time on death row and many aspects of the procedures leading to conviction, sentence and beyond, including clemency. But so far, as in Jamaica last year, attempts to abolish capital punishment have been unsuccessful; largely because of the impact on opinion of the very high homicide rates that currently blight some of these countries. Nevertheless the death penalty is largely a symbolic sentence.⁵⁷⁴

People's fear is understandable. Hood and Hoyle recorded the almost unbelievable fact: "An opinion poll carried out by the Trinidad *Sunday Guardian* in November 2003 found that 62 per cent of respondents said they were fearful of being murdered...".⁵⁷⁵ And Amnesty reported that the astonishing number of 222 people had been allegedly killed by the Jamaican police in 2009.⁵⁷⁶ There is a climate of violence, and the public mistakenly believes that being able to repay violence with violence will somehow help. More than anywhere else, it seems that the retentionist States of the Caribbean accordingly need educational assistance. Given the incendiary connotations of colonialism, I do not know how this process could even be started, but I do know that an enormous effort has to be made to allay the risk of any return to the execution years. It is surprising how little discussion there seems to have been about appropriate abolitionist strategies in the Caribbean so "...developing national and regional coalitions, with the aim to promote locally, the universal abolition of capital punishment"

⁵⁷² *Supra* note 3 at 13.

⁵⁷³ *Supra* note 568 at 7.

⁵⁷⁴ *Ibid.* at 14-15.

⁵⁷⁵ *Supra* note 2 at 110.

⁵⁷⁶ *Supra* note 18 at 189.

(above, page 146), as envisaged by the 4th World Congress Against the Death Penalty, might be especially challenging. Again, detailed research will be essential.

Before turning to the prognosis for China and the USA, let me briefly consider two other populous nations. In the case of India, Hood has commented:

In India – with the second largest population in the world – the death penalty is in principle to be imposed in only the ‘rarest of the rare’ cases. Death sentences are imposed but the last execution took place in 2004, the first since 1997. Executions are purely symbolic: a few carried out now and then cannot be regarded as a tool of criminal justice in such a populous country.⁵⁷⁷

Amnesty reported on a judgment of the Indian Supreme Court⁵⁷⁸ in which "The judges called for credible research by the Law Commission of India or the National Human Rights Commission to encourage an informed discussion and debate on the question of the death penalty."⁵⁷⁹ They also acknowledged the UN moratorium resolution "...and the global move away from the death penalty...".⁵⁸⁰

Concerning Japan, Hood observed: "...a recent surge in the annual number of executions – 15 in 2008 – looks like coming to an end with the appointment by the newly elected Democratic Party last autumn of a Minister of Justice, Keiko Chiba, who has been a vigorous opponent of capital punishment and so unlikely to sanction executions."⁵⁸¹ This encouraging analysis was echoed by Amnesty: "No executions took place after September [2009] and the new Justice Minister, Chiba Keiko, is an outspoken opponent of the death penalty. In December a government Minister, and former police officer Kamei Shizuka, announced that the government would work towards abolition of the death penalty...".⁵⁸²

To return to the question I ducked for target (iv): what would constitute "a significant dint in the number of retentionist States" (above, page 151) by July 11, 2026? Looking at the preceding analysis and taking into account the favourable trend in Africa where a resolution had been adopted by the African Commission on Human and People's Rights in November 2008 "...calling for a moratorium on all

⁵⁷⁷ *Supra* note 568 at 7-8.

⁵⁷⁸ *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

⁵⁷⁹ *Supra* note 3 at 14.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Supra* note 568 at 8.

⁵⁸² *Supra* note 3 at 15.

executions in African countries,"⁵⁸³ I cannot doubt that the decline in retentionism will be quite pronounced. However, to err on the cautious side, I would be most surprised if there were more than 40 retentionist States then remaining. Furthermore, if the populous States of India, Indonesia and Japan were included in those becoming abolitionist, with the result that a clear majority of the human race was free of the shadow of the death penalty, it would be hard to deny the existence of a customary norm of international law. Jean-Marie Henckaerts and Louise Doswald-Beck have pointed out the requirements for determining whether a rule of customary international law has been created.

Firstly, State practice must be virtually uniform, meaning that "Different States must not have engaged in substantially different conduct, some doing one thing and some another."⁵⁸⁴ There may be endless debates about what constitutes torture but, when it comes to the death penalty, States are either executing people or they are not. There should accordingly be no issue concerning uniformity of practice.

Secondly, the State practice concerned must be both extensive and representative, recognizing that it "...does not, however, need to be universal; a 'general' practice suffices."⁵⁸⁵ This is admittedly more problematic than their first requirement because it does require a certain level of judgment. As Henckaerts and Doswald-Beck proceeded to make clear: "One reason why it is impossible to put a precise figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also *which* States."⁵⁸⁶ Consequently, if, by July 11, 2026, 157 of 197 States have abolished the death penalty in law and those 157 embrace "a clear majority of the human race," I would consider this to represent both extensive and representative State practice. "Extensive" because of the numbers involved; "representative" because those abolitionist States would include Western democracies, Caribbean nations, Islamic republics and Asian States, with no regional or political/religious grouping having been left

⁵⁸³ *Supra* note 568 at 6.

⁵⁸⁴ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005) at xxxvi.

⁵⁸⁵ *Ibid.*, at xxxviii.

⁵⁸⁶ *Ibid.*

unrepresented. Whether the possible exclusion of either or both China and the U.S.A. from the 157 would raise the issue of "specially affected States" is a difficult question. I take it from Henckaerts and Doswald-Beck that who is specially affected "...will vary according to the circumstances."⁵⁸⁷ It is my conclusion that China and the U.S.A., in these circumstances, would have no more claim to be "specially affected" than any other State. It would be a deficient international regime if two holdout retentionist States, having no obvious claim to a distinct position, could thwart the creation of a rule of customary international law arising from the clearly developed practice of the extensive and representative majority. Moreover, I will consider further the prognosis for both China and the U.S.A. in my Conclusion.

Thirdly, there is no specific time requirement necessary to create a rule of customary international law. According to Henckaerts and Doswald-Beck: "It is all a question of accumulating a practice of sufficient density, in terms of uniformity, extent and representativeness."⁵⁸⁸ In the scenario I have envisaged, this would all be in place by July 11, 2026. Nonetheless, an important caveat to this is the following one:

It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris*....

However, when there was clear evidence of contrary *opinio juris* by a number of States including specially affected ones, international case-law has held that the existence of a rule of customary international law was not proven....⁵⁸⁹

The formation of a customary international norm prohibiting the death penalty is thus by no means a certainty. In the end though, I am with Schabas in this. Such a customary norm may not exist today but "...that will not be true for very long." (above, page 56) And even if it may not be possible "...to place the norm in an exceptional category" (*ibid.*) as long as China and the USA, the foremost world powers, object, even this too will happen with time.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*, at xxxix.

⁵⁸⁹ *Ibid.* xlii.

One final legal consideration: once the Second Optional Protocol has been fully ratified and a customary norm prohibiting the death penalty clearly formed (whether ordinary or peremptory), will we be assured that the job is done? In a disquieting analysis concerning the international prohibition of torture, Jutta Brunnee and Stephen J. Toope concluded that, despite the United Nations Convention against Torture and the "...widely accepted...fundamental rule of customary international law"⁵⁹⁰ prohibiting torture, the employment of torture was, if anything, expanding. It seemed to them to be "...difficult to assert...that a practice of legality supports the anti-torture norm."⁵⁹¹ They drew this cautionary conclusion from their analysis:

The rule prohibiting torture is a fascinating example of why we argue so strenuously that the work of international law is not done with the positing of a rule in a "binding" convention. Rules are constructed, buttressed or destroyed through the continuing practice of states and other international actors. In the case of human rights norms, like the anti-torture rule, the work of non-state actors, particularly NGOs and the media, is particularly necessary and powerful.⁵⁹²

This takes us back to Lauren's astute observation about the comparative easiness of "...the general words of solemn declarations than on the specific provisions of enforceable commitments." (above, page 42). Still, ending torture is infinitely more challenging than ending the death penalty; there is even argument about what constitutes torture (e.g. the Bush era debate about "water-boarding"), but an execution is a clear, one-time event. Amnesty International has only documented a single instance of a State, party to the *Second Optional Protocol*, backsliding to renewed executions (i.e. Liberia, above, page 155). Nonetheless, there should be no resting on laurels. If universal abolition of the death penalty is achieved, NGOs should continue to be as vigilant in ensuring compliance as was advocated by Brunnee and Toope in the context of overcoming the use of torture.

⁵⁹⁰ Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 251.

⁵⁹¹ *Ibid.* at 269.

⁵⁹² *Ibid.*, at 270.

6. Conclusion

When I asked Dr. David Pevalin, who had served as a police officer in Hong Kong for four years, what chances he saw for global abolition he was sceptical. He questioned: "Where else could they possibly have more success? ...What will be the next breakthrough?"⁵⁹³ In his personal and professional experience, "China won't listen to anything that comes out of the West...It's (also) hard to see in Burma, Vietnam or Mongolia."⁵⁹⁴ In similar vein, Mark Warren told me: "There's no movement in China – it's not (at) an abolitionist point. As external activists, how do we convince these countries?" (above, page 28) But then he added, most helpfully for my purposes:

Next area for strategic comment: there's a limit to external influence. We need to know the local situation. I may be hopelessly optimistic, but I believe there's one untapped resource in every one of these incorrigible countries... We need to be a little more aware of local circumstances. And joining with civil society in those States to whatever extent we can...there are tools we have yet to develop. Let's see how much momentum the movement still has – it's been remarkable how much has been achieved.⁵⁹⁵

The refreshing reality is that things are moving quite positively in China, much to do with becoming "more aware of local circumstances" and joining with the progressive forces within that nation. I had earlier described the China Death Penalty Project (above, pages 26 and 27), noting its focus on public opinion surveys and the development of suggested reforms. The first part of the Project is complete, involving an opinion survey of nearly 4500 Chinese citizens in three different provinces. There follows a brief summary of the findings:⁵⁹⁶

- Only 26% of the respondents had any interest in the death penalty
- Only 1.3% said they had a lot of knowledge about the death penalty
- 58% were definitely in favour of the death penalty but, when asked whether China should speed up the process towards abolition, only 53% were opposed

⁵⁹³ Interview with Dr. David J. Pevalin (University of Essex), October 7, 2009.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Supra* note 77.

⁵⁹⁶ Max Planck Institute for Foreign and International Criminal Law, "Public Opinion on the Death Penalty in China", online: <http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf>.

- There was a majority in favour of the death penalty for only four crimes: murder (77%), intentional injury causing death (60%), drug dealing (54%) and sexual abuse of a girl under 14 (52%)
- There was not a majority in favour of the death penalty for any of the other 64 capital offences
- Only 25% said they would definitely favour the death penalty if it were proven that innocent people had been executed
- Only 41% would be in favour of the death penalty if there was an alternative sentence of life imprisonment with the possibility of parole
- Only 25% would be in favour of the death penalty if the alternative was life imprisonment without the possibility of parole.

Professor Hood, who served as a consultant, concluded: "The findings of this survey therefore suggest that public opinion is not likely to be so hostile to further restriction and abolition of the death penalty as has been supposed."⁵⁹⁷ It seems that the traditional view of "a life for a life" (above, page 24) might be eroding, an obviously encouraging development for abolitionists. Meanwhile, the Project itself has delivered several key outputs including:

- An International Research Centre on Death Penalty was established which will continue to produce evidence on ways to the eventual abolition of the death penalty.
- A website ... was developed and launched at the end of the project. The website is the first of its kind in China and has attracted more (than) 7000 visitors when it was formally launched in October 2009.
- Six public forums on death penalty reform attracted 1,750 participants from the general public. 1000 pamphlets listing key facts and key abolition arguments have been distributed.⁵⁹⁸

The Great Britain China Centre described another project, 2009/11, "to reduce and restrict the use of the death penalty in China by promoting judicial discretion through the training of judges in local courts and the development of strict sentencing and evidence guidelines for trial procedures."⁵⁹⁹ 116 judges are being specially trained as a pilot project. More specific steps forward were noted in the following report:

In recent years China has made several changes to how it decides and carries out the death penalty. In May, new rules were issued saying evidence obtained through torture and threats cannot be used in criminal

⁵⁹⁷ *Supra* note 568 at 19.

⁵⁹⁸ Great Britain China Centre, "Death Penalty Reform", November 18, 2009, online: <<http://www.gbccc.org.uk/death-penalty-reform.aspx>>.

⁵⁹⁹ *Ibid.*

prosecutions and said such evidence would be thrown out in death penalty cases that are under appeal.

Those new regulations made it clear that evidence with unclear origins, confessions obtained through torture, and testimony acquired through violence and threats are invalid. It was the first time Beijing had explicitly stated that evidence obtained under torture or duress was illegal and inadmissible in court.

The rulings are important for death penalty cases, where a flawed system has led to the deaths of several criminal suspects by torture in detention centers.⁶⁰⁰

On August 23, 2010, China's official Xinhua News Agency reported on a draft amendment to the criminal code proposing a reduction of the 68 capital offences by 13. Xinhua said "...the crimes to be dropped from the list of those punishable by death included carrying out fraudulent activities with financial bills and letters of credit, and forging and selling invoices to avoid taxes. Others included smuggling cultural relics and precious metals such as gold out of the country."⁶⁰¹ Another report summarized: "The amendment is the latest in a number of reforms to the death penalty pushed for by Chinese legal scholars who have complained that many people guilty of trivial crimes or unfairly tried have been executed."⁶⁰² Human rights groups greeted the news with guarded optimism, recognizing the symbolic importance of the proposed reduction whilst realizing that the actual effect on the death rate would be minimal. One report noted:

"We need to support this new move because this is the future, the abolition of the death penalty," said Teng Biao, a human rights lawyer and lecturer at the China University of Political Science and Law in Beijing. "For now, it's just one small step forward."

But like other human rights workers, Biao pointed out that the proposed changes could do little to erode China's execution rate, because death has seldom been imposed as punishment for the crimes being considered for sentence revision.⁶⁰³

⁶⁰⁰ Christian Science Monitor, "China death penalty crimes: a shorter list now?" August 23, 2010, online: <<http://www.csmonitor.com/From-the-news-wires/2010/0823/China-death-penalty-crimes-a-shorter-list-now>>.

⁶⁰¹ *Ibid.*

⁶⁰² Financial Times, "China launches death penalty rethink", August 23, 2010, online: <<http://www.ft.com/cms/s/0/bb2e6994-aec9-11d1-f8e45-00144feabdc0.html?fcamp=rss>>.

⁶⁰³ Los Angeles Times, "China may remove death penalty for some crimes", August 25, 2010, online: <<http://www.latimes.com/news/nationworld/world/la-fg-china-death-penalty-20100825,0,2444395.story>>.

Perhaps I have an overly optimistic disposition but, for me, "one small step forward" is a very big deal indeed. Combined with the simultaneous prohibition on execution of those over 75 years old and the earlier guidelines invalidating confessions obtained under torture, I have no doubt that the long march towards abolition in China has begun. Yes, I am aware of – and sympathetic with – Amnesty's concerns about the Xinhua announcement:

"Although we would welcome any reform that would in practice decrease executions in China, we are not yet convinced that these legal revisions will have a significant impact," said Catherine Baber, Amnesty International's deputy director for the Asia – Pacific.... "We are still waiting for the Chinese government to release the data that shows these proposed revisions are more than just legal housekeeping, removing crimes which have seldom been punished with the death penalty in recent years," said Baber.⁶⁰⁴

Even more to the point, I agree with Amnesty that, ultimately, assessing progress in China will depend on the publication of national execution statistics. But, for now, here we are – and it's not such a bad place to be in 2010. The growing interplay between domestic groups in China with outside individuals and organizations is remarkable. As is the swift emergence of Mark Warren's "tools that we have yet to develop" (above, page 165), e.g. the International Research Centre on Death Penalty, the website (above, page 166). And the legal steps that are already being taken. There are no doubt many years of struggle ahead but, as Teng Biao said, "...this is the future, the abolition of the death penalty" (above, page 168).

Is the campaign progressing as well in that other superpower, the U.S.A.?

It's harder to say. As Hood contrasted the two: "The United States has yet to embrace publicly, as China has done, the aspiration to abolish the death penalty in due course."⁶⁰⁵ The jurisdictional complexity of the U.S.A. certainly causes one to pause. After all, we are talking about 52 separate jurisdictions (the States, Federal and military), only 15 of which are abolitionist in law. However, the most telling statistic

⁶⁰⁴ Amnesty International USA, "Amnesty International Warns China that Death Penalty Reforms May Have No Great Impact on Executions", August 23, 2010, online: <<http://www.commondreams.org/newswire/2010/08/23-1>>.

⁶⁰⁵ *Supra* note 568 at 20.

for all of these retentionist jurisdictions may be the number of death penalty sentences actually passed.

Mark Warren had brought to my attention:

The number of new death penalty sentences in the US are going down significantly. New condemned are not being created – that's where you'll see the first cracks. The frequency of prosecutors seeking the death penalty is declining. At the very least, the worst cases are being scaled back.⁶⁰⁶

I had previously referenced this downward trend in sentences as having resulted in 2009 having "...the lowest annual total since executions resumed in 1977". (above, page 112) According to the Death Penalty Information Center, death sentences had reached a high. of 328 in 1994, declining by 63% in the following decade.⁶⁰⁷ More specifically, the Center explained: "The drop in death sentences was particularly pronounced in Texas and Virginia, the two leading states in carrying out executions. During the 1990s, Texas averaged 34 death sentences per year and Virginia averaged 6. This year [2009], Texas had 9 death sentences and Virginia one."⁶⁰⁸ As John Holdridge told me: "In the 1990s, public support for the death penalty was 80%, with over 300 sentences a year. But there's been a significant reduction – even Houston County had only one sentence last year."⁶⁰⁹ He added: "But only 50% favour the death penalty if the alternative is life (imprisonment) without parole."⁶¹⁰

In short, the many indicators seem to all point one-way, towards American abolition. As summarized by Hood:

Last year, the influential American Law Institute, which had crafted the model for death sentencing accepted by the Supreme Court in 1976, concluded "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment" that it would no longer retain a policy which supported the death penalty. Given the evidence of the low incidence of executions in all but a handful of states...given the concerns widely expressed about the wrongful convictions unearthed by "Innocence projects" and the certainty of innocence provided by DNA evidence; given the impossibility of extinguishing all arbitrariness and discrimination; given the excessive and costly delays in the

⁶⁰⁶ *Supra* note 77.

⁶⁰⁷ Death Penalty Information Center, *The Death Penalty in 2009: Year End Report*, December 2009, online: <<http://www.deathpenaltyinfo.org/>>.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Supra* note 534.

⁶¹⁰ *Ibid.*

administration of capital punishment such that the expense of continuing with a system that results in so few executions is now being questioned in many states; and given the cruelty inherent in the "death row phenomenon" and the administration of execution; it seems likely that many more states that retain the death penalty but rarely carry out executions will, in due course, follow the example of New York, New Jersey and New Mexico to abolish it.⁶¹¹

Given the current lack of American invitation to international participants to join this process (unlike in China), I think their abolitionist struggle will remain predominantly domestic for the foreseeable future. The Campaign for the Universal Abolition of the Death Penalty will have to content itself with a monitoring brief and being ready to provide specific support when circumstances warrant it. But no matter; if recent trends are perpetuated, abolition in the U.S.A. will keep advancing. That success, in Hood's opinion, "...would leave only a few 'outliers' and maybe in the end only Texas as an executing state."⁶¹² And I am not so sure that even Texas will remain an indefinite hold-out. As well as the marked decline in both executions and death penalty sentences, I note:

- The unknown effect on public opinion should it transpire that Cameron Willingham was wrongfully executed (above, page 135)
- The position of James Fry, former Dallas County Assistant District Attorney:

"Fry changed his mind about the death penalty after learning that he had prosecuted and convicted an innocent man for rape. 'For years, Texas had led the nation in the number of executions. Why don't we now strive to lead the nation in a new direction: reforming a justice system in urgent need of reform?.... For years I supported capital punishment, but I have come to believe that our criminal justice system is incapable of adequately distinguishing between the innocent and guilty. It is reprehensible and immoral to gamble with life and death.'"⁶¹³
- The activities of the Texas Coalition to Abolish the Death Penalty, "a grassroots Texas organization comprised of individuals and groups who work to end the death penalty in all cases, everywhere."⁶¹⁴

If executions take place anywhere in the U.S.A. after July 11, 2041, including Texas. I would be astounded.

⁶¹¹ *Supra* note 568 at 20-21.

⁶¹² *Ibid.* at 21

⁶¹³ *Supra* note 607.

⁶¹⁴ Texas Coalition to Abolish the Death Penalty, "About Us", undated, online: <<http://tcadp.org/about/about-us/>>.

A campaign of measurable milestones, predicted on the rationale set forth herein (above, page 149) should work or, I submit, will work if the necessary research and analysis is properly conducted. Those carefully determined targets should at the very least be met and, ideally, surpassed. There can be an end to Mark Warren's notion of "passing the torch": "The abolition movement is now institutional, but it's become generational."⁶¹⁵ One more generation of torch-bearers should suffice. "(T)his barbaric relic" (above, page 7) will have gone and, to end with Dr. Korey's inspiring phrase, "...humankind's journey to the stars" (above, page 37) will be well underway.

⁶¹⁵ *Supra* note 77.

BIBLIOGRAPHY

Legislation

1. Pakistan, Criminal Law (Amendment Act) 2004.
2. The 1987 Constitution of the Republic of the Philippines, 15 October, 1986, online: <<http://www.thecorpusjuris.com/laws/constitutions/8-philippineconstitutions/70-1987-constitution.html>>.
3. The Law Governing The Constitutional Commission Of 1986, Supreme Court E-Library, online: <<http://elibrary.judiciary.gov.ph/index7.php?doctype=Constitutions&doci=a45475a11ec72b843d74959b60fd7bd64558f9fe5f5e5>>.

Jurisprudence

4. *Atkins v. Virginia*, 56 U.S. 304 (2002).
5. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General* [1993] 1 Zimb LR 239.
6. *Coker v. Georgia*, 433 U.S. 584 (1977).
7. *Ford v. Wainwright*, 477 U.S. 399 (1986).
8. *Furman v. Georgia*, 408 U.S. 238 (1972).
9. *Getsy v. Mitchell*, 495 F.3d 295 (2007) 318.
10. *Gregg v. Georgia*, 428 U.S. 153 (1976).
11. *Harmelin v. Michigan*, 501 U.S. 957 (1991).
12. *Judge v. Canada*, UN HRC Communication No.829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).
13. *Jurek v. Texas*, 428 U.S. 262 (1976).
14. *Kennedy v. Louisiana*, 554 U.S. ____ (2008).
15. *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.
16. *Knight v. Florida*, 528 U.S. 990 (1999).
17. *Penry v. Lynaugh*, 492 U.S. 302 (1989).
18. *Pratt and Morgan v. Attorney General for Jamaica* [1993] 4 All E.R. 769.
19. *Proffitt v. Florida*, 428 U.S. 242 (1976).

20. *Roberts v. Louisiana*, 428 U.S. 325 (1976).
21. *Roper v. Simmons*, 543 U.S. 551 (2005).
22. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.
23. *Stanford v. Kennedy*, 492 U.S. 361 (1989).
24. *State v. T. Makwanyane and M. Mchuna*, Case No. CCT/3/94, Constitutional Court of South Africa, (1995).
25. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
26. *Trop v. Dulles*, 356 U.S. 86 (1958).
27. *United States v. Burns*, [2001] 1 S.C.R. 283.
28. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Secondary Material: Books

29. Alston, Philip, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005).
30. Amnesty International, *The Death Penalty* (Plymouth, New Hampshire: Clarke, Doble & Brendon Ltd., Oakfield Press, 1979).
31. Amnesty International, *The State of the World's Human Rights* (London: Amnesty International Publications, 2009).
32. Bales, Kevin, *Disposable People* (Berkeley: University of California Press).
33. Benn, Charles, *China's Golden Age: Everyday Life in the Tang Dynasty* (Oxford: Oxford University Press, 2002).
34. Brunnee, Jutta & Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010).
35. Dieter, Richard C., *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (Washington, D.C.: Death Penalty Information Center, October 2009).
36. Evans, Malcolm & Patrick Capps, eds., *International Law, Volume 1* (Farnham, England: Ashgate Publishing Limited, 2009).
37. Henckaerts, Jean-Marie & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge: Cambridge University Press, 2005).
38. Hodgkinson, Peter & William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004).
39. Hood, Roger & Carolyn Hoyle, *The Death Penalty: A World-Wide Perspective*, 4th ed. (Oxford: Oxford University Press, 2008).

40. Korey, William, *NGOs and the Universal Declaration of Human Rights* (New York, NY: PALGRAVE, 2001)
41. Lauren, Paul Gordon, *The Evolution of International Human Rights*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2003).
42. Schabas, William A., *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002).
43. Steiner, Henry J., Philip Alston & Ryan Goodman, eds., *International Human Rights in Context*, 3rd ed. (Oxford: Oxford University Press, 2008).
44. Willetts, Peter, ed., *The Conscience of the World* (Washington, D.C.: The Brookings Institution, 1996).
45. Yorke, Jon, ed., *Against the Death Penalty: International Initiatives and Implications* (University of Surrey: Ashgate Publishing Company, 2008).

Secondary Material: Articles

46. Advisory Council of Jurists, "ACT Standing Issues – Reports from APF Members: Philippines," undated, online: <http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/report-from-apf-members-on-acj-standing-issues/philippines_acj.pdf>.
47. Amnesty International, "Death Penalty Information", August 4, 2006, online: <<http://deathpenaltyinformation.blogspot.com/2006/08/pakistan-surge-in-executions-thousands.html>>.
48. Amnesty International, "Death Penalty in the Philippines", May 20, 2008, online: <<http://gmanews.tv/htmlfiles/death-penalty/Death-Penalty-in-the-Philippines.html>>.
49. Amnesty International, "Death Penalty in the Philippines", May 20, 2008, online: <<http://www.forum-asia.org>>.
50. Amnesty International, "Iran 'shows contempt' for human rights by rejecting UN recommendations", February 17, 2010, online: <<http://www.amnesty.org/en/news-and-updates/iran-039shows-contempt039-human-rights-rejecting-un-recommendations-20100217>>.
51. Amnesty International, "UN calls for halt to executions", December 18, 2007, online: <<http://www.amnesty.org/en.../un-calls-halt-executions-20071218>>.
52. Amnesty International UK, "Philippines: first execution in two years imminent", August 23, 2002, online: <http://www.amnesty.org.uk/news_details.asp?NewsID=13758>.
53. Amnesty International USA, "Amnesty International Warns China that Death Penalty Reforms May Have No Great Impact on Executions", August 23, 2010, online: <<http://www.commondreams.org/newswire/2010/08/23-1>>.
54. Amnesty International USA, "The Philippines debates Abolition of the Death Penalty", May 17, 2006, online: <<http://blogs.amnestyusa.org/death-penalty/archive/2006/05/17/1p4ftb6jj3ifl.htm>>.

55. Asia Death Penalty, "Abolition proposal to Pakistan's president", January 30, 2009, online: <<http://asiadeathpenalty.blogspot.com/2009/01/abolition-proposal-to-pakistans.html>>.
56. Asia Death Penalty, "Pakistan: Thousands in 'brutal' system", October 12, 2006, online: <http://asiadeathpenalty.blogspot.com/2006_10_01_archive.html>.
57. Asia News, "Philippines Bishops ask presidential candidates to say 'no' to death penalty", January 15, 2004, online: <<http://www.asianews.iht/index.php?art=255&l=en>>.
58. Asian Human Rights Commission, "PAKISTAN: World Day against the Death Penalty, death row inmates moved to ordinary prisons but there is much more to be done", October 9, 2008, online: <<http://www.ahrchk.net/statements/mainfile.php/2008statements/1720/>>.
59. Asian Human Rights Commission, "Philippines (Update) Leo Echegaray Faces Death Sentence Again on 5 February, 1999", January 26, 1999, online: <<http://www.ahrchk.net/ua/mainfile.php/1999/64/>>.
60. BBC News, "Governor clears Illinois death row", January 11, 2003, online: <<http://news.bbc.co.uk/2/hi/americas/2649125.stm>>.
61. BBC News, "Philippines' death penalty debate", June 26, 2006, online: <<http://news.bbc.co.uk/2/hi/asia-pacific/5117128.stm>>.
62. BBC News World, "Profile: Joseph Estrada", October 26, 2007, online: <<http://news.bbc.co.uk/1/hi/world/asia-pacific/1063976.stm>>.
63. Boswell, Randy. "Canadian's hopes dashed as Montana keeps death penalty", March 30, 2009, online: <<http://www.nationalpost.com/news/story.html?id=1445379>>.
64. CBCP News, "Christian writers, youth, students condemn calls for death penalty revival", January 9, 2009, online: <<http://www.cbcpnews.com/?q=node/6700>>.
65. CBCP News, "Hope floats for anti-death penalty advocates", February 23, 2006, online: <<http://www.cbcpnews.net/html/news2-feb23.html>>.
66. CBS Evening News, "Rare Look at China's Death Penalty", March 10, 2008, online: <<http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?tag=mncol;lst;1>>.
67. CBS News, "New Mexico Abolishes Death Penalty", March 18, 2000, online: <<http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml>>.
68. Charnovitz, Steve, "Nongovernmental Organizations and International Law" (2006), 100 Am. J. Int'l L. 348.
69. China Daily News, "China questions death penalty", January 27, 2005, online: <http://www.chinadaily.com.cn/english/doc/2005-01/27/content_412758.htm>.
70. Christian Science Monitor, "China death penalty crimes: a shorter list now?" August 23, 2010, online: <<http://www.csmonitor.com/From-the-news-wires/2010/0823/China-death-penalty-crimes-a-shorter-list-now>>.
71. CNN.com., "Justices grant Georgia inmate's request to delay execution", August 17, 2009, online: <<http://edition.cnn.com/2009/CRIME/08/17/georgia.scotus.troy.davis/index.html>>.

72. CNN.com, "New Mexico governor repeals death penalty in state", March 18, 2009, online: <<http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty/>>.
73. CNN.com/world, "The rise and fall of Joseph Estrada", May 2, 2001, online: <<http://edition.cnn.com/2001/WORLD/asiapcf/southeast/04/22/estrada.profile/>>.
74. Daily Times, "EDITORIAL: Death penalty and increasing crime in Pakistan", January 30, 2007, online: <http://www.dailytimes.com.pk/default.asp?page=2007%5C01%5C30%5Cstory_30-1-2007_pg3_1>.
75. de Leon, Elaine, "Money, Morality, and Repealing the Death Penalty", April 24, 2009, online: <<http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/>>.
76. Dorji, Kinley, "BHUTAN: Capital punishment abolished," Kuensel News, April 13, 2004, online: <<http://www.thinkcentre.org/article.cfm?ArticleID=2357>>.
77. Drinan, Robert F., "Zeal to end death penalty growing", National Catholic Reporter, June 16, 2000, online: <http://www.natcath.com/NCR_Online/archives/061600/061600q.htm>.
78. Ebrahim, Zofeen, "Pakistan mulling commutation of death sentences", October 10, 2008, online: <<http://southasia.oneworld.net/todaysheadlines/pakistan-mulling-commutation-of-death-sentences>>.
79. The Economist, "China's embattled dissidents: Tougher and tougher", February 13, 2010.
80. Ensemble Contre la Peine de Mort, "Abolitionist co-operation at all levels kick-started in Geneva", February 24, 2010, online: <<http://www.abolition.fr/ecpm/french/news.php?new=1287>>.
81. Ensemble Contre la Peine de Mort, "Universal abolition will happen when four key countries change sides", February 28, 2010, online: <<http://www.abolition.fr/ecpm/french/news.php?new=1323>>.
82. EWTN News, "Philippines bars executions in 2000", March 29, 2000, online: <<http://www.paulrousseau.altervista.org/mondo%20en/Filippine0300.htm>>.
83. FAMVIN: The International Vincentian Family, "Philippines Moratorium on Death Penalty for Three Years", April 7, 2001, online: <<http://famvin.org/en/archive/philippines-moratorium-on-death-penalty-for-three-years>>.
84. Federation Internationale De L'Acat, "Philippines: Abolition of the Death Penalty", October 2004, online: <<http://www.fiacat.org/en/spip.php?article140>>.
85. Fides, Agenzia, "Catholic Bishops urge President Gloria Arroyo to abolish capital punishment", October 11, 2004, online: <http://www.fides.org/eng/news/2004/0410/11_3271.html>.
86. Financial Times, "China launches death penalty rethink", August 23, 2010, online: <<http://www.ft.com/cms/s/0/bb2e6994-aec9-11df-8e45-00144feabdc0.html?ftcamp=rss>>.
87. Forum-Asia, "Philippines: House of representatives urged against reinstating the death penalty", September 26, 2008, online: <http://www.forum-asia.org/index.php?option=com_content&task=view&id=1989&Item>.

88. Gamble, John King & Charlotte Ku, "International Law – New Actors and New Technologies: Center Stage for NGOs?" (2000) 31 Law & Pol'y Int'l Bus. 221.
89. Grann, David, "Trial by fire", The New Yorker, September 7, 2009.
90. Guardian News, "China rejects UN recommendation to end death penalty and labour camps", February 11, 2009, online: <<http://www.guardian.co.uk/world/2009/feb/11/china-death-penalty-united-nations>>.
91. Goliath Business News, "Pope says 'well done' for outlawing death penalty", July 17, 2006, online: <http://goliath.ecnext.com/coms2/gi_0199-5593075/Pope-says-well-done-for.html>.
92. Haider, Iqbal, "HRCP welcomes the ratification and signatures of the three core UN human rights instruments by Pakistan", April 18, 2008, online: <<http://hrcpblog.wordpress.com/2008/04/21/hrcp-welcomes-the-ratification-and-signatures-of-three-core-un-human-rights-instruments-by-pakistan/>>.
93. Hands Off Cain, "PAKISTAN-Retentionist", February 2009 online: <<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=Pakistan>>.
94. Hands Off Cain, "The Philippines: President would support Bill to abolish death penalty", April 18, 2006, online: <<http://www.handsoffcain.info/news/index.php?iddocumento=8317316>>.
95. Help AsiaNews, "Pakistani Church against death penalty for cyber terrorists", November 8, 2008, online: <<http://www.asianews.it/index.php?l=en&art=13702>>.
96. Human Rights Features (Voice of the Asia-Pacific Human Rights Network), "Swearing by reforms: Time to put Pakistan's blasphemy laws on trial", February 15, 2002, online: <<http://www.hrdc.net/sahrdc/hrfeatures/HRF52.htm>>.
97. The Independent, "Estrada told he faces death penalty for plunder", January 22, 2001, online: <<http://www.independent.co.uk/news/world/asia/estrada-told-he-faces-death-penalty-for-plunder-703231.html>>.
98. Illinois Coalition to Abolish the Death Penalty, "Poll indicates support for the Death Penalty is eroding in Illinois: Public Opinion Shifting Toward Abolishing Death Penalty," July 12, 2010, online: <<http://www.icadp.org/content/poll-indicates-support-death-penalty-eroding-illinois-public-opinion-shifting-towards-abolis>>.
99. International Herald Tribune News, "Abductions in Philippines spark death penalty debate", November 25, 2003 online: <<http://www.gmanews.tv/story/149127/3-get-30-years-for-kidnapping-of-businessman-aide>>.
100. International Herald Tribune News, "Major death penalty case takes twist in Philippines", January 27, 2004 online: <http://www.ihf.com/articles/2004/01/27/a3_77.php>.
101. The International News, "Naek turns a blind eye to his own ministry's view", October 8, 2008, online: <http://www.thenews.com.pk/daily_detail.asp?id=139905>.
102. Lamban, Santos, "Death Penalty in the Philippines" (Philippine Alliance of Human Rights Advocates, March 2000), online: <<http://www.philsol.nl/A00a/Pahra-deathpenalty-mar00.htm>>.

103. Los Angeles Times, "China may remove death penalty for some crimes", August 25, 2010, online: <http://www.latimes.com/news/nationworld/world/la-fg-china-death-penalty-20100825,0,2444395.story>.
104. Los Angeles Times, "Pakistan announces plan to clear death row to commemorate birthday of slain Bhutto", June 21, 2008, online: <http://articles.latimes.com/2008/jun/21/world/fg-bhutto22>.
105. Manila Bulletin, "'Tooth for tooth' justice feared with death penalty commutation; Death row inmates rejoicing, says prison chaplain", April 17, 2006, online: <http://www.mb.com.ph/node/70830>.
106. Maragia, Bosire, "Almost There: Another way of conceptualizing and explaining NGOs' quest for legitimacy in global politics" (2002) 2 Non-St. Actors & Int'l. L. 301.
107. Max Planck Institute for Foreign and International Criminal Law, "Moving the Debate Forward: China's Use of the Death Penalty", April 9, 2009, online: <http://www.iuscrim.mpg.de/ww/en/pub/forschung/forschungsarbeit/kriminologie/peking.htm>.
108. Max Planck Institute for Foreign and International Criminal Law, "Public Opinion on the Death Penalty in China", online: http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf.
109. Mian, Zia, "Pakistan Grows Drunk on Blood", Jinn Home Page, September 29, 1995, online: <http://www.pacificnews.org/jinn/stories/columns/pacific-pulse/950929-blood.html>.
110. Nowrot, Karsten, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law" (1998-1999), 6 Ind. J. Global Legal Stud. 579.
111. The Observer, "Iran defiant as three more given death penalty over election protests", October 11, 2009, online: <http://www.guardian.co.uk/world/2009/oct/11/iran-defiant-over-death-penalties>.
112. Ohlin, Jens David, "Applying the Death Penalty to Crimes of Genocide" (2005) 99 A.J.I.L. 747.
113. Palo, Stephanie, "A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to Go Unpunished in Pakistan", Rutgers Law School – Newark, online: http://works.bepress.com/stephanie_palo/1/.
114. Payvand Iran News, "Iran: 'Hardened Drinker' Faces Death Penalty", August 2, 2008, online: <http://payvand.com/news/08/feb/1078.html>.
115. Payvand Iran News, "UN: Five Countries Responsible for All Executions of Juvenile Offenders Since 2005", September 10, 2008, online: <http://www.payvand.com/news/08/sep/1113.html>.
116. Philippine Alliance of Human Rights Advocates, Press Statement, "Re: House vote on Death Penalty in the Philippines", January 19, 1999, online: <http://www.philsol.nl/A99a/Pahra-19jan1999.htm>.
117. Philippine Star, "110 Solons seek stay of State executions", August 29, 2002, online: <http://www.philsol.nl/news/02/DPenalty01-jul02.htm>.
118. Philippine Star, "Anti-death penalty bill behind delay in executions", August 28, 2002, online: <http://www.philsol.nl/news/02/DPenalty01-jul02.htm>.

119. Philippine Star, "CBCP renews opposition to death penalty", July 10, 2002, online: <http://www.philsol.nl/news/02/DPenalty01-jul02.htm>.
120. Philippine Star, "Palace confirms suspension of executions by President", October 1, 2002, online: <http://www.philsol.nl/news/02/DPenalty01-jul02.htm>.
121. Philippine Star, "President set on carrying out executions", July 15, 2002, online: <http://www.philsol.nl/news/02/DPenalty01-jul02.htm>.
122. Reprieve, "Reprieve hails the abolition of the death penalty in the Philippines", August 6, 2006, online: http://www.reprieve.org.uk/press_08.06.06_Philippines_abolish_death_penalty.htm.
123. Sama-Samang Inisyatiba Ng Kababaihan Sa Pagbabago Ng Bates At Lipunan, "Women Say No to the Death Penalty", SIBOL Statement on Death Penalty, February 1999, online: <http://www.philsol.nl/A99a/SIBOL-feb99.htm>.
124. Sarwar, Beena, "DEATH PENALTY – PAKISTAN: Reprieve Call Could Save Thousands", July 4, 2008, online: <http://ipsnews.net/news.asp?idnews=43074>.
125. Schabas, William, *Islam and the Death Penalty*. William and Mary Bill of Rights Journal 9:1 (December 2000) 223.
126. Spiro, Peter J., "Globalization, International Law, and the Academy" (2000) 32 N.Y.U.J. Int'l L. & Pol. 567.
127. Symonds, Peter, "First execution in the Philippines in 23 years". World Socialist Web Site, February 6, 1999, online: <http://www.wsws.org/articles/1999/feb1999/phil-f06.shtml>.
128. The Times, "Gays Deserve Torture, Death Penalty, Iranian Minister Says", November 13, 2007, online: <http://www.foxnews.com/story/0,2933,311025,00.html>.
129. Willetts, Peter, "What is a Non-Governmental Organization?" (London: City University, 2002), online: <http://www.staff.city.ac.uk/p/CS-NTWKS/NGO-ART.HTM>.

Other Material

130. Amnesty International, *Annual Report 1974-75* (London: Amnesty International, 1976).
131. Amnesty International, "Arab Civil Society Calls On Governments To End Executions", August 2009, Index: MDE 01/003/.
132. Amnesty International, Circular 21, "BUILDING ON SUCCESS- Review of AI Work Against the Death Penalty: Final Report and Recommendations", April 2003, AI Index: ACT 51/003/2003.
133. Amnesty International, *Death Sentences and Executions in 2008*, (London: Amnesty International Publications, 2009 (March 2009, Index: ACT 50/003/2009).
134. Amnesty International, *Death Sentences and Executions 2009* (London: Amnesty International Publications, 2010).
135. Amnesty International, *International Report 2001* (London: Amnesty International Publications, 2001), Philippines.

136. Amnesty International, "Pakistan: The death penalty", AI Index: ASA 33/10/96, September 1, 1996.
137. Amnesty International, "Pakistan: Use and abuse of the blasphemy laws", AI Index: ASA 33/008/1994, July 27, 1994.
138. Amnesty International, "Philippines: Alarm bells ring for human rights as President announces about-turn on the death penalty", AI Index: ASA 35/005/2001, October 18, 2001.
139. Amnesty International, "Philippines: Death Penalty Briefing", AI Index: ASA 35/010/2002, August 2, 2002, online: <http://amnesty.org/en/library/asset/ASA35/010/2002/en/0b4c7380-d7cd-11dd-b4cd-01eb52042454/asa350102002en.html>.
140. Amnesty International, "Philippines: Executions put on hold", AI Index: ASA 35/03/00, March 24, 2000.
141. Amnesty International, *Report on Torture* (London: Amnesty International Publications, 1973).
142. Amnesty International, "World: 2007 Death penalty statistics, notes and case studies", AI Index: ACT 50/014/2008 (Public), April 15, 2008 and Access My Library, "Q&A – Pakistan: Rising Execution Rate Worries Rights Activists", April 21, 2008, online: http://www.accessmylibrary.com/coms2/summary_0286-34347007_ITM.
143. Amnesty International-British Section, *Religions and the Death Penalty*, undated.
144. Amnesty International Urgent Action, "Execution in Ohio", August 19, 2009, UA 200/09 Update 1.
145. Amnesty International Urgent Action, "Man facing execution in Ohio for 1995 murder", July 24, 2009, AI Index: AMR 51/086/2009.
146. Amnesty International USA, "Support Clemency for Troy Davis", 2007, online: <http://takeaction.amnestyusa.org/siteapps/advocacy/ActionItem.aspx?c=jhKPIXPCIoE&b=2590179&aid=12970>.
147. Britannica Concise Encyclopedia, "Ferdinand Marcos", Answers.com, online: <http://www.answers.com/topic/ferdinand-marcos>.
148. Death Penalty Information Center, *The Death Penalty in 2009: Year End Report*, December 2009, online: <http://www.deathpenaltyinfo.org/>.
149. Ensemble Contre la Peine de Mort, "Final Declaration 4th World Congress against the Death Penalty", February 26, 2010, online: <http://www.abolition.fr/fr/depeches/1305-final-declaration--4th-world-congress-against-the-death-penalty--geneva---february-26,-2010>.
150. European Commission, "Bulletin EU 4-2000, Common foreign and security policy (16/19) – Philippines", July 10, 2000, online: <http://europa.eu/bulletin/en/200004/p106016.htm>.
151. Federal Bureau of Prisons, "Inmate Locator", online: <http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=IDSearch&needingMoreList=false&IDType=IRN&IDNumber=16627-424>.

152. Great Britain China Centre, "Death Penalty Reform", November 18, 2009, online: <http://www.gbcc.org.uk/death-penalty-reform.aspx>.
153. Hood, Roger, *Towards Global Abolition of the Death Penalty*, A Lecture delivered at the invitation of The Death Penalty Project In the Hall of the Inner Temple, January 21, 2010.
154. Human Rights Philippines, "Commitments of the Philippines in the Human Rights Council", online: <http://www.humanrights.gov.ph/index.php?hr=2&hmr=0&article=2>.
155. Human Rights Watch, "Letter to Pakistan's Prime Minister to Abolish the Death Penalty", June 15, 2008, online: <http://www.hrw.org/en/news/2008/06/15/letter-pakistans-prime-minister-abolish-death-penalty>.
156. Human Rights Watch, "World Report 2009", online: <http://www.hrw.org/en/node/79280>.
157. International Federation for Human Rights and Human Rights Commission of Pakistan, "Mission of Investigation: Slow march to the gallows – Death penalty in Pakistan", January 2007.
158. Interview with Alex Neve, Secretary-General of Amnesty International Canada (Ottawa), October 6, 2009.
159. Interview with Aubrey Harris, Coordinator of the Campaign to abolish the death penalty, Amnesty International Canada (Toronto), October 4, 2009.
160. Interview with David Matas, lawyer, September 29, 2009.
161. Interview with Dr. David J. Pevalin (University of Essex), October 7, 2009.
162. Interview with John Holdridge, Director, ACLU Capital Punishment Project (Durham, North Carolina), November 19, 2009.
163. Interview with Mark Warren, human rights researcher, October 29, 2009.
164. Interview with Piers Bannister, Coordinator of the Death Penalty Team, Amnesty International (London), November 11, 2009.
165. Irish Centre for Human Rights, "China Death Penalty Project", December 1, 2007, online: http://www.nuigalway.ie/human_rights/Projects/death_penalty.html.
166. Lu Hong, *China's Death Penalty: Reforms on Capital Punishment*, EAI Background Brief No. 412, November 5, 2008.
167. Reuters, "China says no plans to abolish the death penalty", April 15, 2008, online: <http://www.reuters.com/article/latestCrisis/idUSPEK237931>.
168. South Asians for Human Rights, *Report on the Death Penalty in Pakistan*, 2006.
169. Szczepanski, Kallie, "Biography of Ferdinand Marcos", About.com, online: <http://asianhistory.about.com/od/profilesofasianleaders/p/fmarcosbio.htm>.
170. Texas Coalition to Abolish the Death Penalty, "About Us", undated, online: <http://tcadp.org/about/about-us/>.

171. United Nations Treaty Collection, November 17, 2010, online:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en.
172. World Coalition against the Death Penalty, "Status of the WCADP campaign for ratification of the Second Optional Protocol of the ICCPR aiming at abolition of the death penalty", General Assembly, Brussels, June 22, 2007.