

# ABOLITION OF THE DEATH PENALTY AS A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (JUS COGENS)

On the Occasion of the 8<sup>th</sup> World Congress Against the Death Penalty



Francisco de Goya "What a cruelty!"

Berlin, 15-18 November 2022

1 This 8<sup>th</sup> World Congress Against the Death Penalty occurs in the year of the 15th anniversary of the UN General Assembly's first vote on the Resolution on the moratorium against the death penalty. In 2007 the resolution received 107 votes in support and there have been a subsequent rise to 123 in 2020. During this period Amnesty International recorded that the abolitionist countries in the world had increased from 144 to 170. This is a clear demonstration of a global trend solidifying the legal standards for a world free of the death penalty.

2 Following this rate of change we have reached a significant moment in the history of the death penalty. The temporary exception in ICCPR article 6(2) which allows for the application of the punishment for the 'most serious crimes,' is now starkly brought into focus through article 6(6) which states '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment.' This is a time-sensitive feature which allows us to question the retentionist member states' claims they can justifiably continue to use the death penalty in perpetuity.



May 2022 Madrid. Participants at the Conference on "ius cogens and the death penalty". Photo Sofia Moro

3 Today over two-thirds of states affirm this abolitionist position. We are now within a new moment in the promotion of global synergy for abolition. All countries should join the abolitionist community, as General Comment no. 36 on the right to life:

reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights<sup>1</sup>.

1. General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para. 50, p. 12.



4 As humanity has evolved and we reflect upon the sanguinary history of sovereign power's relationship with capital punishment, we should utilise our refined interpretive tools of the ICCPR to demonstrate what is legitimate in a government's application of punishment.

5 The United Nations has provided a multi-faceted review to achieve this assessment. The UN has clearly signalled and created mechanisms for the aspiration of global abolition, in that:

- The international legal mechanism for abolition is articulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.
- Article 6(2) is often misunderstood. It is not a licence to execute but rather a necessary imposition of restrictions on the use of capital punishment by those States that still cling to the barbaric practice.
- The ECOSOC Safeguards (and amendments) identifying minimum standards in the capital judicial processes should be observed and be interpreted to provide impetus for governments to consider national abolition.
- The Secretary General's Quinquennial Report on the death penalty assesses state compliance with the Safeguards and identifies practices inconsistent with treaty standards.
- The Human Rights Council's High-Level Panel discussions on the question of the death penalty considers dialogues on pertinent issues of the punishment and observes global trends leading towards abolition.
- The UN Special Procedures are regularly using their mandates to denounce the death penalty around the world. Reports have noted the global norms towards abolition and specific communications in capital cases identifying treaty violations.
- The concluding observations of UN committees call retentionist countries to adhere to treaty standards, highlight issues of unfairness and discrimination in capital trials, inhumane conditions on death row, and the cruelty and torture imposed through executions.
- The Universal Periodic Review has witnessed increased recommendations for retentionist states under review. Following the three completed UPR cycles, there is a corpus of recommendations for the initiation of moratoriums, de jure abolition, and the ratification of the Second Optional Protocol. Both recommending states and civil society organisations are using this peer-review mechanism to bring transparency concerning the inhumanity of the death penalty.
- The abolition of the death penalty is seen as reflective of the Sustainable Development Goals. SDG 16 provides for 'Strong Institutions and Access to Justice and Build Effective Institutions,' but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1, aims to reduce death rates, promote equal access to justice and protect fundamental freedoms. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society.



Beccaria Medal of the SiDS to Federico Mayor Zaragoza with the former President of the Spanish Government Jose Luis Rodriguez Zapatero. Photo Alfonso de la Guía.

- 6 This sophisticated UN framework aiming to rectify the problem of the death penalty demonstrates that the punishment should now be considered as a violation of the inalienable dignity and the rights of the person.
- 7 No capital judicial process can be seen to consistently maintain the legal protections necessary to satisfy fair criminal proceedings under the ICCPR article 14.
- 8 The death penalty is not a justifiable form of governmental and societal retribution, and it cannot be proven to possess a special deterrent effect for the prevention or reduction of crime over and above terms of imprisonment.
- 9 Today we have extensive empirical knowledge about the modes of execution and we know that these generally result in a cruel and inhumane way of killing. This has been seen from the phenomenon of death row to the evident failure of procedures once presented as the most humane, which have also systematically incurred inhumane production of pain and suffering, as well as in the form of “botched executions”.
- 10 Methods of execution are cruel and cannot protect the condemned from the psychological and physiological impact of the death penalty. It is inherently a cruel and inhumane invasion of the condemned person, and when it is administered there are negative impacts upon the families and the community.
- 11 In seeking to create humane ways to protect society and appropriately punish violations of the criminal law, we find ourselves in a historical moment. As a global community which advances principles of human rights we are in a position of normative legitimacy to maintain that the death penalty is a *per se* violation of human rights. There is cumulative evidence to suggest that the abolition of the death penalty is now a new global norm, a peremptory norm of general international law (*jus cogens*).
- 12 Abolition would therefore enable people within the jurisdictions of retentionist countries to benefit from this advancement in understanding. The leading research on the death penalty demonstrates:
  - (a) It is not a justifiable function of legitimate government;
  - (b) It violates human rights; and therefore,
  - (c) It contravenes the peremptory norms of general international law (*jus cogens*).
- 13 For all of the above reasons, the undersigned understand that the proscription of the death penalty from punitive systems is a demand based on the right to life and the right not to subject human beings to torture or inhuman treatment, which we consider to be rights integral to *jus cogens*.
- 14 We therefore call for a global abolition of the death penalty. The death penalty has no place in our world today.

## SIGNATURES

William Schabas, London, UK - Robert Badinter, *Paris, FR* - Jon Yorke, Birmingham, UK - John Vervaele AIDP, Utrecht, NL - Luis Arroyo Zapatero SIDS, Ciudad Real, ES - José Luis de la Cuesta, San Sebastián, ES - Sergio García Ramírez, México, MX - Juan E. Méndez, Washington, USA - Federico Mayor Zaragoza, Madrid, ES - José Luis Rodríguez Zapatero, *Madrid, ES* - Geneviève Giudicielli Delage, Paris, FR - Carolyn Hoyle, Oxford, UK - Ulrich Sieber, Freiburg in Breisgau, DE - George Werle, Berlin, DE - Anna Getos, Zagreb, HR - Raul Zaffaroni, Buenos Aires, AR - John Bessler, Baltimore, USA - Salomao Shecaira, São Paulo, BR - Sylvia Steiner, São Paulo, BR - Roberto M. Carlés, Bs As, AR - Sandra Babcock, Ithaca, USA - Alicia Gil, Madrid, ES - Ana Manero, Madrid, ES - John Bessler, Baltimore, USA - Francisco Muñoz Conde, Sevilla, ES - Fernando Velasquez, Bogotá, CO - Antonio Muñoz, Jaen, ES - Anabella Miranda, *Coimbra, PO* - Adán Nieto, *Ciudad Real, ES* - Luigi Foffani, *Modena, IT* - Juliette Tricot, *Paris, FR* - Oganit Yunam, *Beirut, LB*.