Is Capital Punishment Authorized Under International Law?

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Acknowledgements
I wish to acknowledge the help provided by some friends who helped me collect the data presented and analyzed in this paper. I want also to express my gratitude to my students of the course of 'Human rights in international criminal law' in the Master of criminal science at the American University in the Emirates, who inspired me to write this paper. The debate and the discussion as well as their feedback regarding death penalty were very valuable.

Abstract
This paper studies the unclear position of international law on death penalty by highlighting the contradiction between the content of international treaties and the practice of States. The question of rise of changes in human rights standards and societal values has revived the debate to abolish capital punishment. Nevertheless, balancing between the satisfaction of most of the public opinion and the possibility of actions of States through international law and regional rights is difficult to achieve.The presentation of the various international and regional texts dealing with the death penalty, as well as the judicial advances in the matter, make it possible to highlight the current limits of the struggle for the abolition of the death penalty in the world. In fact, States ratify treaties to abolish capital punishment, but in their practice, they don't abolish it due to their attachment to their sovereign power to control their criminal judicial system, and their conviction that applying death penalty does not violate international law and cannot affect international peace and security.
Keywords: Death penalty – Genocide – Abolition – Retention – Sovereignty - Right to life — ICCPR – Rwanda – UN
DOI: 10.7176/JLPG/120-15
Publication date: April 30th 2022

1. Introduction

The right to life is the essence and the basis of the entire human rights movement. It is the foundation of all other rights as well as the condition of their existence.[1]

This right is described in the different international instruments as 'inalienable', but for one author these documents seem to be self-contradicting because they specify conditions allowing death penalty. In other words, these documents permit the taking of the human life under certain legal procedures in case of committing a serious crime, while talking about an alienable right to life.[2] So, the non-existence of an absolute right to life can be explained by the existence of the capital punishment. It is indeed a rule common to all ancient civilizations that the murderer deserves death, according to the exercise to the "right" of revenge, which rather a reflex, a reaction, or an almost instinctive response.[3]

As death penalty has become a stake of international relations, one can question its nature: does it concern human rights or rather the criminal justice of sovereign States, while both are guarantee of peace and security? Retentionists and abolitionists are engaged in death penalty debate fraught with emotions, complexities, controversies, and contention.[4] While for the abolitionists, the issue of the death penalty has clearly moved firmly into the human rights arena and is no longer accepted as simply a national criminal justice policy issue,[5] retentionists think that current world opinion, as expressed in international treaties and State practice, does not permit the viewing of abolition as an internationally accepted human right or a norm of customary international law.

Indeed, in many countries capital punishment is an integral part of criminal justice system, and it has remained to be accepted from justice through the ages.[6] This specificity depends, at least to a certain degree, on the country's

[1] Human Rights: A Symposium, 268 UNITED NATIONS EDUCATIONAL, SCIENTIFIC & CULTURAL ORGANIZATION ED. (1949).
[2] Peter J. Riga, Capital Punishment, and the Right to Life: Some Reflections on the Human Right as Absolute, University of Puget Sound Law Review [Vol. 5:23 1981 P 23-46. P. 24.
[3] J.M Carbasse, La peine de mort, Que sais-je, septembre 2000, Presse Universitaire de France. p.1
[4] Study on the question of death penalty in Africa, Working group on death penalty in Africa, African Commission on Human and People's Rights 2011 Banjul Gambia. P 8.
[5] Roger Hood, 'Capital Punishment: The USA in World Perspective' Center for Human Rights and Global Justice Working Paper: Extrajudicial Executions Series (Number 3, 2005), 6.
[6]Shantanu Iugtawat & Hirdesh Singh National Law Institute University, Bhopal. https://www.legalserviceindia.com/ articles/cap_pp.htm Retrieved on 2/1/2022.

history, culture, political system, and values and, as such, remain the exclusive domain of each State.[1]

The question of rise of changes in human rights standards and societal values has revived the debate to abolish capital punishment. Nevertheless, balancing between the satisfaction of most of the public opinion and the possibility of actions of States through international law and regional rights is difficult to achieve.[2]

The presentation of the various international and regional texts dealing with the death penalty, as well as the judicial advances in the matter, make it possible to highlight the current limits of the struggle for the abolition of the death penalty in the world.

This paper highlights the unclear position of international law on death penalty because of the contradiction between the content of international treaties (Part 1), the actual practice of States (Part 2), and the United Nations main organs (Part 3), before questioning the application of capital punishment to the crime of genocide (Part 4).

2. International Instruments

In this part, we will assess the position taken by the international treaties and covenants at the universal and regional level regarding the death penalty, and the international criminal instruments positions as well.

2.1 International Treaties

The tendency to abolish capital punishment is reinforced by the emergence of human rights, but the features of this abolition are unclear under international law.

The position of various international and regional instruments of human rights protection was not truly convincing. There is no prohibition in the original conventions. The concept of abolition of the death penalty did not emerge until long after the entry into force of these texts with the addition of protocols:

1-The 1966 International Covenant on Civil and Political Rights (ICCPR) is an international treaty concerned with right to life. article 6 of The International Covenant specifies that "*[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'*" It is significant that the right to life is to be protected by law, yet the right finds its basis in life itself, in the person himself. This is significant because the foundation of this right resides in the person and not in the law; the law does not confer a right to life, it only guarantees it. Paragraph 2 of Article 6 states that "*sentence must be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime*". The document adopts an approach, like due process analysis, to prevent a capricious or arbitrary taking of human life without protection of law.[3] Life can be taken for serious crimes, but only according to proper procedures. But the document does not specify what constitutes serious crimes; it leaves this task determination to individual countries and the domestic law.[4]

Article 6 of this instrument regulates the imposition of the capital punishment in members that still impose execution as a punishment.[5] Section 6 implicitly approves a State's choice to abolish death penalty but does not ask a State to eliminate the use of this punishment to become a party to the Covenant.[6]

2-Furthermore, the UN Human Rights Committee has recognized that State parties "*are not obliged to abolish the death penalty totally*" but only "for other than the '*most serious crimes*.[7] Likewise, the American Convention on Human Rights specifically recognizes the death penalty for severe crimes.[8]

3-Article 5 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is silent on what would constitute 'effective' penalty, and this omission has resulted in practice in the adoption of national laws prescribing various penalties. These penalties range from imprisonment or life imprisonment to death penalty.[9]

4-Little by little thereafter, the UN developed more frank position with the resolution 2857 of 20 December 1971 until the adoption of the second optional protocol to the ICCPR, on 15 December 1989, on the abolition of capital punishment which prohibits any recourse by member States. This very strict abolition has, however, an exception for crimes in time of war or of imminent threat of war.

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[1] Steven Freeland, International Criminal Justice and Death Penalty, in *"The Right to Life and the Value of Life: Orientation in Law, Politics and Ethics".* Chapter 9 pp. 193-232, Ashgate UK 2010.

[2] La peine de mort en droit international et européen : une abolition aux contours imprécis par Emilie GUILLEMINAULT | Les blogs pédagogiques (parisnanterre.fr) Soumis le 17/3/2009. Retrieved on 16 June 2021.

[3] Peter J. Riga, Id at 26.

[4] Id.

[5] Article 6 (1): "Every human being has the inherent right to life….No one shall be arbitrarily deprived of his life," Article 6 (2): A "sentence mat be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime,: Article 6 (4): "Anyone sentenced to death shall have the right to seek pardon of commutation of the sentence," Article 6 (5): A "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

[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*."

[7] Human Rights Committee, General Comment No. 6, The Right to Life, UN Doc. HRI/GEN/1, at 5, para. 6 (1982).

[8] Jens David Ohlin, Applying death penalty to crimes of genocide, AJIL, vol. 99 2005, p 753.

[9] Faustin Z. Ntoubandi, "What a specific actions does the Genocide Convention require from States? August 1, 2013. What Specific Actions Does the Genocide Convention Require from States? | The Sentinel Project. Retrieved on 7/6/2021

5-European Convention on Human Rights (ECHR) was prepared at a time when most European States still applied the death penalty, and the execution of Nazi war criminals was still recent which explains why the convention is cautious about capital punishment. The ECHR presents the death penalty as an exception to the right to life without being too restrictive:

Article 2 "1. *Every one's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*."

The second paragraph of Article 2 lists the other exceptions to the right to life. The ECHR is the only international instrument for the protection of human rights which contains the other exceptions to the right to life-other than capital punishment.[1] The right to life is therefore not absolute in the ECHR, as it may be subject to limitations provided for by article 2 itself.[2]

The Convention expressly reserves the right of States to execute a death penalty under two conditions:

1-*which is decided by a court, 2- that the crime of this sentence has been punished by the law.*

6-Protocol No. 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), while contemplating abolition, nonetheless allows States to retain death penalty for crimes committed during times of war or an imminent threat of war.[3]

7-As for the 1994 Arab Charter of Human Rights which proclaim the right to life, recognizes the legitimacy of the death penalty in articles 10, 11, and 12 in the case of 'serious violation of general law', but prohibits capital punishment for political crimes and exclude it for crimes committed under the age of 18 and for both pregnant women and nursing mothers for a period of up to 2 years following childbirth'.[4]

8-In the international scene or in the United Nations, Islamic and Arab States have always been among the most retentionists of death penalty, defending its use in the name of obedience to Islamic law and the strictures of the Shari'a.[5]During a debate at the 1994 General Assembly session, the Sudanese delegate noted that *" Capital punishment was a divine right according to some religions, in particular Islam…..Capital punishment was enshrined in the Koran and millions of inhabitants of the Muslim world believe that it was a teaching of God."*[6]

Several national courts have held that capital punishment may be justified in extreme situations, or at the very least that the practice cannot be condemned in those situations, as "this punishment is not prohibited by public international law" and "proportionality is an ingredient is to be taken into account".[7]

All these examples suggest that the legality of the death penalty under treaty law is informed, at least in part, by the seriousness of the offense to which it is applied.

2.2 International Criminal Justice

The death penalty, which had given rise to lengthy debates within the International Law Commission (ILC) during its work on the draft code of crimes against peace and security of humanity, once again sparked heated discussions during the negotiations that preceded the adoption of the ICC Statute.

In accordance with the principle of complementarity between the ICC and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting, and punishing individuals, in accordance with their national laws, for crimes falling under the ICC jurisdiction. That means the court would clearly not be able to affect national policies in this field, and not including the death penalty in the Statute would not in any way have legal bearing on national legislations and practices about death penalty.[8]

Abolitionists succeeded to exclude the death penalty as provided for in article 77 of the ICC Statute. Yet the victory of the abolitionists is not complete[9] as, under the title of the application of penalties by States and international law, article 80 of the ICC Statute provides that nothing in the Statute affects the application by States of penalties provided for by their domestic law.[10]

Any argument to maintain or oppose the death penalty, although based on ethical or philosophical

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[1] Ioanna Nakou, La peine de mort en droit international, Université de Lille 2, Master of droit communautaire et droit international, Septembre 2000. P 27

[2] Ibid, p 28

[3] Protocol No. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, April 28, 1983, Arts 1, 2, Europe. TS No. 114 (entered into force March 1, 1985).

[4] Charte Arabe des Droits de l'Homme, supra note 54, at 212-14

[5] William A. Shabas, International Law and Abolition of the Death Penalty, Washington and Lee Law Review, Vol 55, Issue 3. Summer 6-1 p 807

[6] UN. GAOR General Comm., 94 Sess., 5th meeting. Supra 13 at 4, UN Doc. A/BUR/49/SR. 5 (1994).

[7] William A. Schabas, International Law and Abolition of the Death Penalty, Washington and Lee Law Review, Vol 55, Issue 3. Summer 6-1 p 807.

[8] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 1183/13 (Vol. III), at 63 (2002).

[9] Emmanuel Decaux, 'La peine de mort, nouvel enjeu des relations internationales, annuaire français de relations internationales'. AFRI 2004, disponible sur http://www.afri-ct.org/IMG/pdf/decaux2002.pdf.

[10] Anne-Marie La Rosa, Juridictions Pénales Internationales, la Procédure et la Preuve.

considerations, is in fact essentially a political action reflecting the concept of individuals of how society must be protected and developed. The real dilemma is to choose between respecting a human right against execution or respecting State's legitimate policy reasons for retaining the death penalty to maintain public order.[1] Is it possible to reconcile both? Some States, to adapt their legal framework to the new threat of terrorism, have not hesitated to adopt anti-terror laws and to establish the death penalty to punish the perpetrators of terrorist acts.[2]
This trend also believes that claiming to adapt to signed abolitionist international conventions is a form of hegemony, legal globalization, an attack on the cultural and religious specificities of peoples and audacity to the national sovereignty of States by interfering with matters falling essentially within the domestic jurisdiction of the State provided for in Article II, paragraph 7, of the United Nations Charter.[3]

3. The International Legal Framework and the Practice of States

The idea of criminal jurisdiction goes right to the heart of sovereignty. One of the definitions of the sovereign powers is the State monopoly of force, embodied in the power of the police to arrest and to detain, and in the power of the courts to judge and punish. States are extremely reluctant to voluntarily cede such power.[4] That is the reason why States wish to control their criminal law system in their own countries, particularly for serious crimes and those with political context or consequences, and it means that the power of the State to resort to death penalty constitutes the expression of its sovereign power. In the next section we will highlight the position of Western powers and other countries in relation to the application or the abolition of death penalty.

3.1 Security Council Permanent Members

As some claim that it will be necessary to wait for the United States to abolish death penalty to hope that abolition will prevail in the world, the French group "*Ensemble Contre la Peine de Mort*"[5], thinks that abolition is progressing without, and perhaps despite, the United States.[6] In fact, the cultural conceptions of criminal justice are radically different between Europe and United States.[7] It should be noted that three permanent members of the Security Council apply the death penalty.

The United States Constitution gives the State the right and the moral capacity to take the life of an individual human being. This view is supported by the wording of the document, statements of Supreme Court Justices, and United States Supreme Court opinions.[8]

In the United States, the death penalty was considered unconstitutional for a short period of time. It was unconstitutional because it was imposed arbitrarily and without proper procedural safeguards for the defendant, not because of the need to comply with international law.[9] The United States ratified the ICCPR on 8 June 1992 with a reservation to article 6 on the right to life but did not accede to the Second Optional Protocol to the ICCPR on the abolition of the death penalty.[10]

It is worth mentioning that the US sentences the death penalty for genocide in its domestic criminal law No. 1091. Obligations of the United States under the Genocide Convention are found in the Criminal Code, title 18 beginning at section 109. Genocide is defined in that section as '*having the specific intent to destroy, in whole or in part, a national ethnic, racial, or religious group. The code offers severe punishment for anyone who commits genocide within the United States*.'[11]

The situation was similar for China and Russia, which applied the death penalty in their criminal legislation, although Russia had abolished the death penalty in practice since 1999.

For the United Kingdom, the last death sentence was hanging in 1964, before the abolition of the death penalty for murders, in 1969 in Great Britain and in 1973 in Northern Ireland. Although the death penalty was not subsequently applied, it remained enshrined in law for certain crimes until 1998.

3.2 Other States' Practice

The regional framework, particularly European, is more protective. Within the Council of Europe, in addition to

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[1] Jens David Ohlin, Applying death penalty to crimes of genocide, AJIL, vol. 99 2005, p 750
[2] Henri Bandolo Kenfack, La dignité humaine et la question de l'abolition de la peine de mort à l'ère de la menace terroriste. La Revue des Droits de l » homme no. 17/2020 https://doi.org/10.4000/revdh.8131 P. 1. Retrieved on 3/1/2022
[3] Id.
[4] Emmanuel Decaux, 'La peine de mort, nouvel enjeu des relations internationales, annuaire français de relations internationales'. Op. cit.
[5] *(Together Against Death Penalty).*
[6] Id.
[7] Michel Taube et Flora Barre, La peine de mort, est-elle un enjeu de relations internationales ? in Revue internationale et stratégique 2006/4 (No.64) pp. 21-28, p. 25.
[8] Peter J. Riga, Capital Punishment, and the Right to Life, Id at 29.
[9] See Furman v. Georgia, 408 U.S 238 (1972).
[10] Kristina Ash, U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, Northwestern Journal of International Human Rights Volume 3 | Issue 1 Article 7 Spring 2005 at 23 pp 1-46
[11] United States Code, 2009 Edition. Title 18 - CRIMES AND CRIMINAL PROCEDURE From the U.S. Government Publishing Office, www.gpo.gov

right to life guaranteed by article 2 of the ECHR, Protocol No. 6 to the Convention signed on 28 April 1983 and entered into force on March 1st abolished the death penalty in peacetime in all Western European States.[1] One author stated that "*it may not be too much to say that abolition of death penalty has become an implicit condition of membership of the European Community*".[2]

Latin America has followed the abolitionist movement.[3] Since 1990 the African continent was moving toward abolition of capital punishment, but the northern part still utilizes this punishment.[4] Asia and the Middle East are also known for applying the death penalty in addition to Iran, China, and Iraq.[5]

The International Crimes Tribunal of Bangladesh (ICTB) is created in 2009 to prosecute core crimes of international law committed during the 1971 Bangladesh Liberation War.[6] It is true that Bangladesh is a member of the 1966 ICCPR and a signatory of Rome Statute, but article 77 is only prohibiting death penalty to the ICC's jurisdiction and does fix any limits on the State's domestic judiciary.[7] The ICTB has rendered 62 death sentences, the most recent one was on august 27, 2019, for crimes against humanity.[8]

As for Israel, first, under a law passed in 1954, the Jewish State abolished the death penalty for ordinary crimes. This law maintains the legality of death penalty for such crimes such as genocide, crime against humanity, mass crime, treason, and crime against Jewish people. Then, Israel sponsored resolutions of the UN General Assembly calling for a moratorium on the application of the death penalty, including, most recently, the fifth and sixth resolution,[9] which proves its commitment to the abolition of the death penalty. However, it refused to ratify the protocol of the ICCPR which provides for the abolition of death penalty.

Since the creation of the State of Israel, the death penalty has been applied only twice.[10] The most famous is the hanging and cremation of Adolf Eichmann, high placed under the Nazi regime Third Reich, responsible for the logistics of the "final solution", found in Argentina and executed on June 1, 1962, following a trial conducted by the Israeli justice.[11] His conviction by the Israeli District Court, affirmed by the Israeli Supreme Court the next year[12] under Israeli law (the 1951 Nazi and Nazi Collaborators (Punishment Law) for war crimes, crime against the Jewish people (the definition of which was modeled on the definition of genocide in the 1948 Genocide Convention) and crimes against humanity. His body was cremated, and his ashes scattered in international waters, to ensure that there could be no future memorial to his life and that no State would serve as his final resting place.[13]

The Israeli District Court of Jerusalem held that: *" In view of the repeated affirmation by the United Nations in the resolution of the General Assembly of 1946 and in the Convention of 1948, and also in view of the Advisory Opinion of the ICJ, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term ex tunc; that is to say the crimes of genocide which were committed against Jewish people and other peoples during the period of the Hitler regime were under international law. It follows, therefore, in accordance with the accepted principles of international law, that the jurisdiction to try such crimes is universal."*[14]

With respect to Article VI of the 1948 Genocide Convention, the Court noted: *"Article 6 of the 1948 Genocide Convention, like all other article which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or the States concerned.....It is certain that [the obligation arising from Article 6 of the 1948 Genocide Convention] constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention. Moreover, even with regard with the conventional application of the Convention, it is not assumed that Article 6 is designed to limit the jurisdiction of countries to crimes of genocide by the principle of territoriality. In the [1948 Genocide Convention] the members of the United Nations…. Contended themselves with the determination of territorial jurisdiction as a*

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[1] Victor Mayer-Schonberger, Crossing the River of No Return: International Restriction on the Death Penalty and the Execution of Charles Coleman, 43 Oklahoma Law Review 677 (1990). supra note 97, at 679

[2] Quoted by Christy A. Short, Id at 749.

[3] William A. Schabas, Abolition of Death Penalty, supra note 8, at 296.

[4] William A. Schabas, supra note 8, at 297

[5] Id.

[6] Marissa Kardon Weber, The Domestic Stronghold of Capital Punishment for Atrocity Crimes in the 21st Century. Vol 23, issue 10, November 2019. American Society of International Law,The Domestic Stronghold of Capital Punishment for Atrocity Crimes in the 21st Century | ASIL Retrieved on 3 june 2021

[7] Id.

[8] Chief Prosecutor vs MD. Abdus Samad @ Musa @ Firoz Kha, Case no. 04 of 2018. Judgement (August 27, 2019).

[9] Resolutions A/RES/69/186 and A/RES/71/187 Moratorium on the application oof the death penalty, adopted on 18 December 2014 and 19 December 2016 respectively.

[10] The most famous one was in 1962, Adolph Eichmann was hanged for his participation in the Shoah.

[11] Le Débat sur la Peine de Mort relancé en Israël. Published on 5/11l2018. Retrieved on 26/9/2021Le débat sur la peine de mort relancé en Israël (france24.com)

[12] Attorney-General of the Government of Israel v Eichman (1961) 36 ILR 5.

[13] Id.

[14] Israel, District Court of Jerusalem, *Eichmann case*, Judgment, 12 December 1961, §§ 12 and 19.

compulsory minimum… but there is nothing…… to lead us to deduce any rule against the principle of universal jurisdiction with respect to the crime in question. The reference in Article 6 territorial jurisdiction… is not exhausted. Every sovereign State may exercise its existing powers within the limits of customary international law."[1]

4. The Positions of the United Nations Organization

The Former United Nations General-Secretary Ban Ki-Moon, who encouraged the retentionists countries to ratify the Second Optional Protocol to the ICCPR in 2014, had took other contrasted positions regarding the death penalty. We think it is important to highlight that difference with other UN main organs, that have taken clear positions in favor of the abolition the death penalty.

4.1 The General Assembly

The UN General Assembly adopted a series of resolutions in 2007, 2008, 2010, 2012, 2014, 2016 and 2018, in which it urged States to respect international standards that protect the rights of those facing the capital punishment, to progressively restrict its use and reduce the number of offences which are punishable by death.

The number of countries voting in favor of abolishing death penalty has risen from 104 in 2007 to 121 in 2018 and 123 in 2020.[2] The reality is that as only 32% of State practice complete abolition, and the movement to completely abolish capital punishment has failed to satisfy the requirement that State practice be general.[3]

4.2 The International Court of Justice (ICJ)

To the question whether death penalty fit within the contour of customary international law, we will examine the position of the International Court of Justice in this regard.

To suggest that the death penalty is unlawful under customary international law, one needs to apply the classic description of what constitutes a rule of customary international law, as stated by the International Court of Justice in the *North Sea Continental Shelf Cases*.[4] It will appear that the argument that capital punishment is illegal cannot prevail.[5] The ICJ confirmed that customary international law is derived from sufficient evidence of both 'settled practice' of States, as well as *opinion juris*,[6] which is described as: a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[7]

In the *Asylum Case*, the Court declared that a customary rule must be "in accordance with a constant and a uniform usage practiced by the States in question". The Court held that even if a local rule of customary international law concerning the qualification of offences in matters of diplomatic asylum did exist between Latin American States, this rule "*could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939*".[8] However, given the considerable trend towards abolition, some authors think that the illegality of capital punishment might more accurately be described as an 'emerging norm of 'international law.[9]

The ruling of the International Court of Justice in *LaGrand Case* is certainly among the most important developments defining the treaty obligations of signatories to the Vienna Convention.[10] The ICJ seems to have created a clear precedent in favor of the binding force of provisional measures. [11] When the Court found that US in breach of its consular obligations, it took provisional measures and issued an order in which it called on the United States to take all measures at its disposal to prevent the execution of Mr. Walter LaGrand. In their dissenting opinions, Judges Pasha and Winiarski considered it to be a flagrant and unacceptable interference in the internal affairs of a sovereign State as provided for in Article 2, paragraph 7, of the United Nations Charter.[12]

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[1] Israel, District Court of Jerusalem, *Eichmann case*, Judgment, 12 December 1961, §§ 22, 23 and 25.
[2] Amnesty International, UN: Opposition to the death penalty continues to grow. December 16, 2020. https://www.amnesty.org/en/latest/news/2020/12//un-opposition-to-the-death-penalty-continues-to-grow/#:~:text=The%20number%20of%20states%20voting,all%2C%20Amnesty%20International%20said%20today. Retrieved on 18/9/2021
[3] Christy A. Shorty, The Abolition of Death Penalty, p 751.
[4] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands) (Judgement) 1969 ICJ, Rep 3, paragraph 77.
[5] Steven Freeland, p. 224
[6] Id.
[7] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands) (Judgement) 1969 ICJ, Rep 3, paragraph 77.
[8] Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950, pp. 277-278).
[9] Steven Freeland, International criminal justice, and death penalty Id at 226.
[10] Richard J. Wilson, International Law Issues in Death Penalty Defense , Hofstra Law Review Volume 31 | Issue 4 Article 11 2003.
[11] Kammerhofer Jorg, The binding nature of provisional measures of the International Court of Justice: the 'settlement' of the issue in the LaGrand Case (May 2, 2003), Leiden Journal of International Law, vol. 16 pp 67-83 2003. Available at SSRN: http://ssrn.com/abstract=1551749. Retrieved on 3/1/2022
[12] Article 2(7) provides that: "Nothing in the present Charter shall authorize the United Nations to intervene in matters that essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII."

They argue:

"*Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudge its final decision, after the detailed consideration to which the Court will proceed while adjudicating on the question in conformity with al1 the Rules laid down for its procedure.*"[1]

4.3 The Security Council

When it created the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), under chapter VII of the UN Charter, the Security Council voted to restrict the death penalty at the *ad hoc* tribunals, the Secretary-General report stated that the international Tribunal should not be empowered to impose death penalty.[2] Resolution 827 establishing the ICTY was adopted unanimously by the 15 members of the Security Council, including the US and China. The same question arose for the ICTR in a different legal context since Rwanda itself demanded the maintenance of the death penalty, but it would have been inconceivable to go back to the precedent of the ICTY, by introducing a double standard according to the continents. This is one of the reasons for the negative vote of Rwanda, which was a member of the Security Council at that time: resolution 955 was adopted by 13 votes to one, and China's abstention.[3]

But the Security Council has never issued a binding resolution prohibiting State members from using capital punishment.[4] Does that mean that Rwanda's use of death penalty was consistent with international law?[5] Jens David Ohlin thinks if the Security Council were to do so, it would arguably make the death penalty illegal under international law.[6]

Domestic tribunals continue to render death penalty in abundance. The abolition of capital punishment is based on legal instruments such as treaties and protocols, not customary international law, so there are no obligations for States not ratifying these instruments.[7]

4.4 The Secretary-General

The former UN Secretary-General Ban Ki-Moon had adopted contrasted positions which provoked many reactions. He considered that the question of capital punishment is a matter for each Member State,[8] when was commenting the execution of Saddam Hussein, the former Iraqi president. Most newspapers have pointed to this major "*faux-pas*" of the new Secretary-General of the United Nations. From a legal point of view, notes the Frankfurter Allgemeine Zeitung, '*Ban Ki-moon's remarks are unassailable since States do indeed have the right to have a different opinion from that of the international community. But Ban Ki-moon was representing that community. So, the Secretary-General should think twice about what he says in public*.'[9]

It is important to note that the Iraqi High Criminal Tribunal which was established to try Saddam Hussein lacked several fundamental protections to which the accused are entitled under both human rights law and the procedural standards that had been established under the system of international criminal justice that had emerged over the preceding decade.[10] When asked about the reaction of France and Germany -two abolitionist countries- which did not condemn the execution of Saddam Hussein[11] the UN Secretary-General justified their position by the fact that this death penalty was a sovereign choice of Iraqis. By recognizing the sovereignty of States on the death penalty issue, the UN Secretary reinforces the fatal presumption that he is at odds with his own organization on this central issue. One wonders if Ban Ki-Moon was aware of the UN's position, it must be said that it is not very clear.[12]

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[1] *LaGrand Case, No.* 97, (Dissenting Opinion of Judge Winiarski and Pasha) [12].
[2] Article 24 of the Statute of the International Criminal Tribute of the Former Yugoslavia.
[3] Emmanuel Decaux id.
[4] Jose E. Alvarez, Crimes of States/Crimes of hate: Lessons from Rwanda, 24 Yale Journal of Int'L Law. 365, 408 n. 215 (1999).
[5] Id.
[6], Jens David Ohlin, Applying death penalty to crimes of genocide, AJIL, vol. 99 2005, p 758
[7] Marissa Kardon Weber, The Domestic Stronghold of Capital Punishment for Atrocity Crimes in the 21st Century. Vol 23, issue 10, November 2019. American Society of International Law,The Domestic Stronghold of Capital Punishment for Atrocity Crimes in the 21st Century | ASIL Retrieved on 3 June 2021.
[8] Ban Ki-Moon et la peine de mort. DW Made for minds, https://www.dw.com/fr/ban-ki-moon-et-la-peine-de-mort/a-2870355 Retrieved on 29/8/2021
[9] Id.
[10] Steven Freeland, International criminal justice, and death penalty Id at. 214
[11] Interview by Sovanny Chhun, on Thursday, January 2006. Ban Ki-Moon était-il au courant de position de l'ONU ?,L'Obs-opinions. Publie le 4 janvier 2007. https://www.nouvelobs.com/opinions/20070104.OBS5606/ban-ki-moon-etait-il-au-courant-de-la-position-de-l-onu.html. Retrieved on 29/8/2021
[12]"Ban Ki-Moon était-il au courant de position de l'ONU ?,L'Obs-opinions. Publie le 4 janvier 2007.

The former UN Secretary-General was also accused by a Bengali journalist of adopting '*irony double standards'*[1] when he was cautioning Bangladesh against the impending two Bengali of two war criminals while rejoicing at the news that Muammar Gaddafi had been lynched. Here is what Ban Ki-Moon said about the Libyan leader's end: "*This day marks a historic transition for Libya. In the coming days we will witness scenes of celebration as well as grief for those who have lost so much*".[2]

This contrasting position of one of the top UN representatives revives the debate on this sentence. As much as abolitionists find this punishment unacceptable and violate human rights to the point of becoming a customary norm of international law, the retentionists affirm the opposite on relying on the State practice and the unclear position of international law.

On the uselessness of death penalty, Albert Camus, the French Nobel Prize winning author, while in his penetrating *Reflections on the Guillotine*, wrote that, if murder is in the nature of man, "*the law is not made to reproduce or imitate such nature*".[3]

While for William A. Schabas, the abolition of death penalty can be deemed an international norm since at least as early as 1948, if a dynamic interpretation of articles 3 & 5 of the Universal Declaration on Human Rights (UDHR) is adopted,[4] other observers affirm the contrary. For example, President Chaskalson in *The State v Makwanyane and Mchunu Case,* capital punishment can be justified in extreme situations. He affirms that "*capital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman, or degrading punishment within the meaning of section 11(2) [of the interim constitution of South Africa]."*[5]

Some authors are questioning the existence of an emerging norm of customary international law prohibiting death penalty, and whether it applies -if it exists- to cases of genocide.[6] others think it is not custom.[7] In fact, customary international law is '*a general and consistent state practice of States followed by them from a sense of legal obligation'*[8]. So, to consider the abolition of death penalty a customary rule of international law, three elements should be satisfied: the State practice must be consistent, general, and the State must feel a legal obligation (*opinion juris*) to follow that practice.[9] The consistency is very important because sometimes what States say is different from how they act. For instance, some States have not executed anyone for ten years, but still maintains capital punishment.[10]As se we mentioned above, the movement to completely abolish capital punishment has failed to satisfy these requirements, only 32% of State practice complete abolition.[11]

In addition, the abolition is not considered as a peremptory norm of international law (*Jus Cogens*). An author has stated that: "*The day when abolition of the death penalty becomes .... qualified as a peremptory rule of jus cogens, is undeniably in the foreseeable future*."[12]

Imposing death penalty when it is anchored in the country's traditions should be to see that heinous crime does not go unpunished, and the victim of crime as well as the society have the satisfaction that justice has been done to it. So, retentionists resist the idea of abolition on an ideological basis and find that outlawing, unconstitutional and highly unpopular to abandon the practice.

5. Death Penalty and the Crime of Genocide

In this section we will question the application of capital punishment regarding the crime of genocide by exploring the Rwandan case.

The belief that death penalty might be necessary in certain circumstances was still strongly held. The distinguished French jurist Marc Ancel, had stated in 1962: "*Even the most convinced abolitionists realize that there may be special circumstances, or particularly troublous times, which justify the introduction of the death penalty for a limited period."* [13]

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https://www.nouvelobs.com/opinions/20070104.OBS5606/ban-ki-moon-etait-il-au-courant-de-la-position-de-l-onu.html. Retrieved on 29/8/2021

[1] Syed Badrul Ahsan, "Of Ban Ki-moon and capital punishment". The Opinion Pages (bdnews24.com)29 November 2015. https://opinion.bdnews24.com/2015/11/29/of/ban-ki-moon-and-capital-punishment. Retrieved on 6 July 2021.

[2] Id.

[3] Manash Bhattacharjee, The Imperturbable Machine: Albert Camus on Capital Punishment, Economic and Political Weekly, Vol. 48, No. 8 (FEBRUARY 23, 2013), pp. 10-12, http://www.jstor.org/stable/23391222 Retrieved on 2/1/2022.

[4] William A. Schabas, International Law and Abolition of the Death Penalty, Washington and Lee Law Review, Vol 55, Issue 3. Summer 6-1 p 807.

[5] Id

[6] Jens David Ohlin, id p 749

[7] Christy A. Shorty, The Abolition of Death Penalty: Does "Abolition" Really Mean What You Think It Means? 6 Indian Journal of Legal Studies. Vol 6, issue 2, 721, 750-51 (1999).

[8] Restatement (Third) of the Foreign Relations Law of the United States supra note 24, para 102 (2) (1987).

[9] Christy A. Shorty, id, p 742

[10] Christy A. Shorty, id, p 743

[11] Id, at 751.

[12] Schabas, Abolition of Death Penalty, supra note 8, at 1.

[13]Marc Ancel, The Death Penalty in European Countries. Report part 34. Council of Europe, 1962, p. 3

When the Allies decided to apply the death penalty at Nuremberg Trials, few objections were based on humanitarian and moral grounds, not on international law.[1]A few decades later, many States considered that the abolition of the death penalty has become a customary norm of international law. It is the reason why at the time of establishment of the International Criminal Tribunal for Rwanda (ICTR), European permanent members in the Security Council were prepared to use their right of veto to prevent the imposition of this sentence.[2]

When the International Law Commission (ILC) began drafting the code for the future International Criminal Court in 1991, a small but vocal group wanted to include the death penalty.[3] The Jordanian representative Awn Al-Khasawneh said that *"It would be premature for the Commission, which was called upon to legislate for a world that did not agree on the question of the death penalty, to adopt a clear-cut opinion on the question instead of giving the States concerned discretionary power*".[4]

He argues that discretion for individual States was appropriate in grave cases. He said that "*it would be sufficient to indicate the gravity of the crimes in question in the Code and to include a general provision stating that those crimes would be punished by a penalty that was in keeping with their degree of gravity".*[5]In this regard, Article 5 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is silent on what would constitute 'effective' penalty, and this omission has resulted in practice in the adoption of national laws prescribing various penalties. These penalties range from imprisonment or life imprisonment to death penalty.[6]

If, for some tendencies, the death penalty violates the perpetrator's right to life, for others, the genocide, a crime of an international character and of widespread effects that shake the international community to its very foundations, also deprives thousands of the same right. Is it acceptable to seek the protection of the rights of perpetrators of heinous crimes and to ignore the rights of the victims of those same crimes? Some supporters of the death penalty believe that the execution of a criminal is a part of the reparation process owed to the victim or his relatives. This vision is particularly defended in most serious crimes, as seeking vengeance is accepted as a norm of "justice".[7] So, retentionists think that genocide criminals lose their right to life because justice requires that the society imposes on criminals' losses equal to those they imposed on innocent persons. By inflicting capital punishment on those who deliberately inflicted genocide on others, the death penalty ensures justice for all.[8]

Some authors highlight the disparities between the death penalty in typical criminal contexts and the death penalty in the extreme circumstances of international criminal law. They argue that some States may feel that the unique moral gravity of genocide requires extreme measures, which constitute the only means to achieve transitional justice. Given the enormity of the crime, mere imprisonment punishment cannot be a proportional response to genocide.[9]

For Diane F. Orentlicher, both customary and conventional international law impose duties to prosecute atrocities and bring perpetrators to justice,[10] and a State's complete failure to punish repeated or notorious instances of these offenses violates its obligations under customary international law.[11] In this regard, the way to punish the perpetrators of the Rwandan genocide has generated many controversies.

First, we should highlight, that thirteen years after the end of genocide, Rwanda abolished the death penalties for all crimes, including genocide. This abolition was one of the conditions imposed by the International Tribunal for Rwanda (ICTR) to transfer the Rwandan courts defendants who were initially to be tried by the International Tribunal for their alleged participation in the 1994 genocide.[12]

William A. Schabas argues that capital punishment was brought to Africa by colonialism and precolonial African tribes rarely executed criminals.[13] Before the death penalty became an internal part of Rwandan criminal law, the Rwandan delegation at the UN, during the establishment of the ICTR, was angry because the failure of Western countries to prevent the genocide in their country is now exacerbated by a legal system that would

[1] Jens David Ohlin, Applying the death penalty to crimes of genocide, Id. At 747.
[2] William A. Schabas, supra note 5, at 3.
[3] Id
[4] William A. Schabas, War Crimes, supra note at 746.
[5] Id.
[6] Faustin Z. Ntoubandi, "What a specific actions does the Genocide Convention require from States? August 1, 2013. What Specific Actions Does the Genocide Convention Require from States? | The Sentinel Project. Retrieved on 7/6/2021
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[11] Id, at 2540.
[12] La Croix 27/7/2007, https://www.la-croix.com/Actualite/Monde/Le-Rwanda-abolit-la-peine-de-mort-_NG_-2007-07-27-524718. Retrieved on 7/1/2022
[13] William A. Schabas, African Perspectives, supra note 11, at 33-35

permit perpetrators of this horrible crime to escape punishment.[1]Indeed, while many defendants convicted of genocide by Rwandan courts were executed, thirty thousand spectators crowded in a soccer stadium to witness their public execution,[2] the worst offenders who were tried in international tribunal received lighter sentences, which produced paradoxical results.[3] For some Rwandans, true national reconciliation wouldn't be possible without justice for genocide, and justice by their terms meant execution for the guilty ending in death penalty.[4] They believed that the architects of the genocide ought to die: "*They killed, and they have to be killed*".[5]

To consider the rationale for retention and how it might remain consistent with general principles of international law, un argument proposes that a State coming to terms with genocide may have rational reasons for resorting to the death penalty.[6].The ideal is that the system be constructed in such a way that punishments vary by degree and intensity with the severity of the crime. The crime of genocide poses an obvious difficulty for a criminal justice system (whether national or international) that seeks overall proportionality. Proportionality between gravity of the crime and the severity of the sentence should be considered. Indeed, there should be some sort of intuitive relationship between the crime and the sentence,[7] Certainly, it will not be adequate to punish someone responsible for killing thousands of civilians by a ten-year prison[8] Retentionist States do not believe so, and consequently feel it is legitimate to resort to capital punishment.[9]

The unique moral gravity of genocide can only affect one's emotions. About eight hundred thousand enemies of the State had been killed by roving militia[10], consequently, the number of victims and perpetrators was shockingly large. After the defeat of the Hutu, the Tutsi government had the difficult mission to establish a judicial program in response to the genocide.[11] So, justice for the perpetrators of the genocide was therefore a precondition for peace and security in Rwanda.[12].

The Government of National Unity embarked upon the ambitious task of trying over 100,000 detainees suspected of participating, at some level, in the genocide. However, maintaining Western standards of due process, given the limited resources of the Rwandan judicial system, would be challenging. So, they established formal trials known as *'gacaca'*, which amended the traditional dispute resolution mechanism and represented the latest hope for justice in Rwanda[13] , to achieve both justice and reconciliation.[14]The *gacaca* jurisdictions did have the potential to embody its spirit by serving the need for justice and accountability in Rwanda while fostering a culture of human rights protection in a country that has long ignored them.

For L. Danielle Tully, these trials reflect their spirit by responding to the need for justice and accountability in Rwanda, while promoting a culture of human rights protection in a country that has long ignored it.[15] Arguably, the *gacaca* jurisdictions, while not normally constituting courts, still fall within the domain of fair trial standards as established by the ICCPR.[16] While *Gacaca* trials have been severely criticized, Tully argues that "*the total destruction of genocide has made it almost impossible to meet international standards of fair trial*".[17]

Capital punishment constituted an integral part of Rwanda's internal penal response to the genocide. Because this sentence remained in force for regular crimes under Rwandan law, victims of the genocide considered it an essential element of the judicial program. To present the executions as a simple a request for revenge is to minimize the difficult task of repairing a national culture in the wake of genocide. Rwandan representative in the UN said that:" *national reconciliation of Rwandese can be achieved only if equitable justice is established and if the survivors are assured that what has happened will never happen again."*[18] Had the

[1] Virginia Morris & Michael P. Scharf, The International Tribunal Criminal for Rwanda, December 1997 Hardcover, p. 71-72.
[2] Mark A. Drumbl, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials, 29 Columbia, Human Rights Review, No. 12 (1998), pp 545-549
[3] UN Doc, S/PV.3453, supra note 1 at 16 (Rwandan representative criticizing this disparity).
[4]Jens David Ohlin, Applying death penalty to crimes of genocide, AJIL, vol. 99 2005. 747-777, p 748.
[5] James C. McKinley Jr., As Crowds Vent their Rage, Rwanda Publicly Executes 22, New York Times, April, 1998, https://www.nytimes.com/1998/04/25/world/as-crowds-vent-their-rage-rwanda-publicly-executes-22.html Retrieved on 5/9/2021.
[6] Jens David Ohlin, Id, at 761.
[7] Article 7 of ICCPR, supra note 24
[8] UN Doc. S/PV.3453, supra note 1, at 16 (comments by Rwandan representative on necessity of capital punishment).
[9] Rama Mani,Id p. 98.
[10] Philip Gourevitech, "We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda", 9/1999. Ed. Picador. supra note 54, at 23
[11] Gourevitech, supra note 54, at 252
[12] Commission on Human Rights, Report about human rights in Rwanda, UN Doc. E/CN.4/1997/61, at 4-5.
[13] L. Danielle Tully, Human rights compliance and the Gacaca jurisdictions in Rwanda. 26 BC international& comparative law review 385, 402 (2003) pp 385-414, p 395.
[14] Id, at 1.
[15] Id. pp 385-414.
[16]Stef Vandeginste, Justice, Reconciliation and Reparation after Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda 1 (1999) (paper presented at the All-Africa Conference on African Principles of Conflict Resolution and Reconciliation, Addis Ababa Nov. 8-12, 1999, on file with the Boston College International & Comparative Law Review until May 2004). Supra note 5 at 25.
[17] L. Danielle Tully, id pp 385-414.
[18] UN Doc. S/PV.3453, supra note1, at 15

Rwandan government ignored the public demand for severe punishment, the country might have fallen back into ethnic violence.[1] The use of death penalty in this limited context, was a function of the extreme demands of transitional justice. The unique moral gravity of genocide gave birth to a unique set of jurisprudential consideration.[2]

The special legal rationale for retentionist policy in cases of genocide may be that the State has interest in pursuing a program of transitional justice in the wake of genocide.[3] In Rwanda, true reconciliation would be impossible without local forms of punishment, and death penalty was available under Rwandan law for severe crimes.[4]

In fact, the retentionist argument implicates novel legal issues dealing with genocide, and the State may have a group right to establish an autonomous legal system that protects individuals from horrors of genocide. The theoretical rationale for positing the group right is that the State is a legal person with rights under international law.[5] It can set a framework of reconciliation programs that meet goals of international peace and security.

International law recognizes that States have a *bona fide* need to maintain internal security.[6] Failure to repair ethnic wounds of genocide may result in continuing threat to international peace and security that constitutes the most important purpose of the UN Charter, and with no doubt is the highest objective of international law.[7] The duty to preserve international peace and security means that retentionist State can appeal the most basic principles of international law when defending the legality of its practices.[8] Does that mean applying death penalty is in conformity with international peace and security?

6. Conclusion & Recommendation

6.1 Conclusion

States ratify treaties recognizing right to life protection from arbitrary seizure of that right. However, these States do not abolish completely capital punishment. Maybe it is due to the classic weakness of international human rights law, which lies in its means of implementation.[9]

The abolitionist movement of the death penalty is more pronounced in Europe encouraged by the Council of Europe, and in its neighboring countries. Nevertheless, some political partis do not follow the movement. Indeed, after the terrorists' attacks of Paris in January 2015, Marine Le Pen the president of *Rassemblement National* (RN), far right French political party, publicly declared that she was in favor of a referendum on the death penalty in France.[10]

Despite the strong trend towards abolition, international law does not prohibit capital punishment that certain authors qualify as an emerging norm of customary international law.

While international criminal law does not apply death penalty for the crime of genocide, it provides that nothing in the Statue of the ICC affects the application by States of the sanctions provided for by their domestic law.[11] The reason is that the States wish to control their criminal law system, particularly for serious crimes and those with political context or consequences, the power of the State to resort to death penalty is the expression of its sovereign power.[12]

We can conclude by saying that as abolishing death penalty is not a customary international law, its application in case of genocide may not go against international peace and security.

6.2 Recommendations

While it is considered cruel, inhuman and a degrading punishment, the death penalty is still not prohibited by international law. As we mentioned above, in many countries, death penalty constitutes an integral part of criminal justice system and has remained to be accepted from justice through the ages. This specificity depends, at least to a certain degree, on the country's history, culture, political system, values, and religion – in certain religions it is considered as a divine right - and as such, remain the exclusive domain of each State.

When the UN General Assembly has adopted a series of resolutions, in which it urges States to respect

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[1] Id.
[2] See Richard J. Bernstein, Radical Evil: A Philosophical Interrogation, Paperback August 2002
[3] UN Doc. S/PV. 3453
[4] William A. Schabas, African Perspectives, supra note 11, at 33-35
[5] Emmerich Vattel, the law of nations, bk chapter 1, Alinea 12, at 3 (joseph chitty ed., Philadelphia, T.&J. W. Johnson 1853).
[6] Right to collective self-defense, Article 51 of the UN Charter.
[7] Article 1 of the UN Charter.
[8] Jens David Ohlin p. 776
[9] William A. Schabas, International Law and Abolition of the Death Penalty, Washington and Lee Law Review, Vol 55, Issue 3. Summer 6-1 1998 797-846 p. 817
[10] "Charlie Hebdo" : Marine Le Pen pour un référendum sur la peine de mort » Le Point, 8 janvier 2015.
[11] Article 80 of the ICC Statute.
[12] Article 2(7) of the UN Charter.

international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death, some States claim that it is form of hegemony and an attack on the cultural and religious specificities of peoples and audacity to the national sovereignty of States, and consider it a scarcely tolerable interference in the affairs of a sovereign State, prohibited in Article II, paragraph 7, of the United Nations Charter.[1]

We think that the United Nations, through the General Assembly, may either adopt a non-binding resolution or invite Member States to sign a treaty in which they are free to adopt the measures they consider appropriate to sanction the most serious crimes. This will follow the example of the 1998 Rome Statute. In fact, the article 80 of the ICC Statute, under the title of the application of penalties by States and international law, provides that nothing in the Statute affects the application by States of penalties provided for by their domestic law.

Taking this bold step on the freedom of States to adopt the measures they consider appropriate to punish the most serious crimes, under the auspices of the United Nations, without encroaching on the principle of State sovereignty, would certainly be a successful one.

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