UNIVERSALITY OF HUMAN RIGHTS: THE CASE OF THE DEATH PENALTY

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THE ISSUE OF THE UNIVERSALITY OF HUMAN RIGHTS

Forty-five years after the adoption of the Universal Declaration of Human Rights the international community met in Vienna to elaborate the human rights agenda for the next twenty-five years. The second United Nations World Conference on Human Rights was intended to focus on the implementation of the human rights standards that had been adopted since the Universal Declaration, but found itself challenged instead by a number of Asian countries on the very issue of the universality of these rights, which they argued reflected Western values and not their own.

Paragraph 5, *inter alia*, of the Vienna Declaration and Programme of Action,[1] reaffirmed the universality of human rights using the English language in such a way that only a non-native-English speaker could appreciate:

> Paragraph 5: All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural

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This article expands upon the author's presentation on Friday, November 1, 1996, at the International Law Weekend (organized by the American Branch of the International Law Association, the American Society of International Law, and other similar associations) at a panel of the same name organized by Christiane Bourloyannis-Vrailas, of the U.N. Office of Legal Affairs.

1. *The Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, U.N. Doc. A/Conf. 157/24 (Part 1), at 20-46 (1993).

> systems, to promote and protect all human rights and fundamental freedoms.

What was the content behind the Asian challenge? The response to the Asian challenge set forth in the Vienna Declaration was obscured in the deliberate imprecision of the language. In two earlier attempts to comprehend the nature of the Asian challenge, I came to the following conclusions.[2] First, that the Asians were in agreement with the West on certain "minimal standards of civilized behavior," for example:

> there should be no torture, no slavery, no arbitrary killings, no disappearances in the middle of the night, no shooting down of innocent demonstrators, no imprisonment without careful review. These rights should be upheld not only for moral reasons. There are sound functional reasons. Any society which is at odds with its best and brightest and shoots them down when they demonstrate peacefully, as Myanmar did, is headed for trouble. Most Asian societies do not want to be in the position that Myanmar is in today, a nation at odds with itself.[3]

And second, that the disagreements resided in an area that I termed the "private sphere" which relates to the personal life of the individual. These rights have traditionally been covered by religious law and they still are in many countries.[4] This private sphere, which deals with issues such as religion, culture, the status of women, the right to marry, to divorce, and to remarry, the protection of children, the question of choice as regards family planning, and other issues which are still highly controversial in the West, such as sexual preference, abortion, and euthanasia, is a domain in which the most serious challenges to the definition of human rights arise and, more particularly, to the universality of such rights.[5]

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2. *See* Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740-52 (1994) [hereinafter Cerna, *Universality of Human Rights*]; Christina M. Cerna, *East Asian Approaches to Human Rights*, 89 ASIL PROC. 146 (1995), and 1995-1996 BUFF. J. INT'L L. 2 [hereinafter Cerna, *East Asian Approaches*].

3. Kishore Mahbubani, *An Asian Perspective on Human Rights and Freedom of the Press*, *quoted in* Cerna, *Universality of Human Rights*, *supra* note 2.

4. Religious law, or Shari`a, is prominent in many Islamic states; Judaic law is prominent in Israel; Canonic law is prominent in the Holy Sea, and penetrates the legal thinking of many states with large Christian populations.

5. *See* Cerna, *Universality of Human Rights*, *supra* note 2, at 746.

So where does the death penalty fit into this discussion of the universality of human rights? The goals behind the imposition of the death penalty are basically two: retribution and deterrence. Society exacts its pound of flesh from the perpetrators of the most atrocious crimes set forth in the criminal law and which generally involve the violent, premeditated taking of life; this is retribution writ large, and is profoundly entrenched in Western conceptions of justice. *Lex talionis*, the principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer, as an eye for an eye, a tooth for a tooth, is part of the Judeo-Christian baggage which informs our notions of morality and of what is right.[6] If an offender has taken a life, it is considered just that he forfeit his life; there is symmetry and equality between the punishment and the offense.

So my first point is that I would place the death penalty into the area I termed the "private sphere." Unless one believes in such religiously-charged definitions of justice it is not immediately or necessarily clear or self-evident what should be done with a wrongdoer who commits a homicide. Some countries seek to provide a form of compensation for the victim's relatives in the form of monetary damages provided by the state (or the labor of the perpetrator) which gives them something tangible beyond the vaguer satisfaction arising from the imprisonment or execution of the wrongdoer. My point here is that if we remove the religious connotations from the concept of justice we are left with more pragmatic attempts to seek to compensate the victim. Justice, having removed God and the concomitant absolutes from the equation, is more difficult to define in human or human rights terms.

Take, for example, the case of a judge who errs and mistakenly sends an innocent man to the gallows. The judge has taken a life, is it *just* that he forfeit his own? It is unlikely that any society would devise such a solution.

If our notions of justice are culturally determined and informed by religious precepts, as I am suggesting that they are, then if we strip away

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6. Albert Camus, in his celebrated essay on capital punishment, *Reflections on the Guillotine*, refers to the "quasi-arithmetical" reply of society to wrongdoers, and denies that the law of retaliation is a principle.

> That reply is as old as man; it is called the law of retaliation. Whoever has done me harm must suffer harm; whoever has put out my eye must lose an eye; and whoever has killed must die. This is an emotion, and a particularly violent one, not a principle. Law, by definition, cannot obey the same rules as nature.

Albert Camus, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION AND DEATH (Justin O'Brien trans., 1960).

these preconceptions, we find that there is no inevitability or necessity in requiring the death penalty for the taking of a life.

This brings me to the second point that I wish to make.

The law presents us with a paradox. The international community has reached consensus on the abolition of torture, no country in the world allows its police or other state agents to torture as a means of obtaining information or for any other reason. It is prohibited in all criminal codes in every country in the world. Yet the same international consensus has not been reached on the abolition of the death penalty which is arguably the most extreme form of torture.[7]

The death penalty is specifically excluded from the international torture conventions. For example, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in article 1 as:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. *It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.* (Emphasis added.)

Consequently, since the death penalty is considered a "lawful sanction" in many states, the international human rights organizations seeking the abolition of the death penalty cannot attack the death penalty, per se, since it is not defined as an arbitrary deprivation of the right to life, and it is explicitly excluded from the definition of torture.

The 1985 Inter-American Convention to Prevent and Punish Torture goes a step further than the United Nations in its definition of torture. In article 2 of this treaty, torture is defined as:

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7. The International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the European Convention on Human Rights all include the death penalty as an exception to the arbitrary deprivation of the right to life. It should be noted, however, that each of these treaties has been "amended" by an additional protocol on the abolition of the death penalty which are only in force for the ratifying states parties.

> any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities even if they do not cause physical pain or mental anguish.

The OAS treaty specifically excluded lawful measures from its definition of torture, but it included a proviso: "The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, *provided that they do not include the performance of the acts or use of the methods referred to in this article.*" (Emphasis added).

The proviso explicitly allows abolitionists to challenge the death penalty by creating arguments that the manner of imposition of the death penalty, *i.e.* the suffering inherent in a slow, painful death, is tantamount to torture, or the delay in carrying out an execution due to defense driven appeals is tantamount to torture, insofar as the manner or the delay create a disproportionate amount of suffering for the wrongdoer.

In sum, we are left with the irony that the death penalty retentionist states now seek to impose capital punishment in such a way as to cause the condemned individual a minimum amount of suffering.

Last week, for example, a British pro bono lawyer contacted the Commission on behalf of an individual on death row in Missouri. Britain, which has abolished the death penalty, now provides technical assistance to United States lawyers working on death penalty cases. This lawyer was seeking to prove that "the combination and cumulative effect" of enduring a period in excess of thirteen and a half years on death row, the staying of three separate Warrants of Execution in the final days prior to the scheduled execution dates, the initiation and progression of the "Missouri execution protocol" to within one hour and forty-six minutes of a scheduled execution, and the issuance of seven Warrants of Execution in total, amounted to cruel, inhuman, and degrading treatment or punishment under the Eighth Amendment of the United States Constitution and under international human rights law.

All these stays were defense driven and hence one could argue that the delays in the imposition of the death penalty were voluntary, and

consequently could not be defined as torture.[8] In addition, they were all acts incidental to or inherent in lawful sanctions. Some courts, however, have interpreted such acts, although pursuant to law, as violative of international human rights standards.[9]

In 1993, the Judicial Committee of the Privy Council in London reversed an earlier holding and found that a delay in the imposition of the death penalty caused by the Appellant's legitimate right to appeal cannot be blamed on the prisoner. In *Pratt Morgan v. Attorney General for Jamaica* the Privy Council stated that:

> It was part of the human condition that a condemned man would take every opportunity to save his life through use of appellate procedure. If it enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it.

The logical conclusion is that it is the death penalty that should be abolished, in the same way that torture, which in earlier more barbaric times was considered a lawful and legitimate means of punishment, has now been abolished in the law. Of course, torture continues to be practiced in many countries in the world but the point is that it is not permitted in any legal system in the world. The first step is to abolish the death penalty, de jure, and then to abolish it de facto.

The third and final point I wish to make deals with the question of whether the international community is nearer to a consensus on the issue of prohibiting the imposition of the death penalty on juveniles under the age of eighteen? The international human rights treaties explicitly prohibit the imposition of the death penalty for crimes committed by persons below the

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8. I use the terms "torture" and "cruel, inhuman and degrading treatment or punishment" interchangeably.

9. Since 1978 some prisoners in the United States have challenged their conditions of imprisonment on death row as an infringement of their rights under the Eighth Amendment. In Texas, as a result of *Ruiz v. Estelle* (1982), a class action in which the Fifth Circuit Court of Appeals found that the vastly overcrowded conditions under which all Texan prisoners were held violated the Eighth Amendment, agreement was reached, in 1986, to improve conditions for death row prisoners. Hearing of the effects of the "death row syndrome," the European Court of Human Rights decided in July 1989, in the case of *Soering v. United Kingdom*, that it would be a breach of article 3 of the European Convention on Human Rights to extradite the prisoner, Soering, who would face the death penalty in Virginia because his inevitably long wait on death row would amount to inhuman and degrading treatment and punishment. *See* ROGER HOOD, THE DEATH PENALTY, A WORLD-WIDE PERSPECTIVE (Clarendon Press 1996). The above-mentioned *Soering* case (1989) can be found in 11 E.H.R.R. 439 and *reprinted in* 11 HUM. RTS. L.J. 335 (1990).

age of eighteen, unlike their tolerance of the death penalty generally. Consequently, has this norm, prohibiting the execution of persons for crimes committed under the age of eighteen, achieved universality?[10]

The Inter-American Commission on Human Rights had the opportunity to consider this issue in a case brought before it against the United States in 1985.[11] The petitioners, James Terry Roach and Jay Pinkerton, had been sentenced to death for crimes which they were adjudged to have committed before their eighteenth birthdays.

Since the United States is not a party to the American Convention on Human Rights, the Commission applied the American Declaration on the Rights and Duties of Man, an instrument comparable to the Universal Declaration of Human Rights, which is considered to have binding legal force within the inter-American system.

The petitioners alleged that the United States had violated article I (the right to life), article VII (special protection of children) and article XXVI (prohibition against cruel, infamous and unusual punishment) of the American Declaration by executing persons for crimes committed before the age of eighteen. The facts in the case were not in dispute between the parties.

The petition for James Terry Roach was filed on December 4, 1985. The Commission requested the United States Secretary of State and the Governor of the State of South Carolina to issue a stay of execution pending the Commission's examination of the case. The requests were denied and after the United States Supreme Court denied certiorari in the case, Roach was executed on January 10, 1986.

The petition for Jay Pinkerton was filed on May 8, 1986. The same appeals were made requesting a stay of execution to the United States Secretary of State and to the Governor of Texas. The requests were again denied as was Pinkerton's writ certiorari by the United States Supreme Court on October 7, 1985. Pinkerton was executed on May 15, 1986. On February 23, 1987, the United States Supreme Court announced that in its

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10. *See, e.g.*, article 6(5) of the International Covenant on Civil and Political Rights: "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." *See also* article 4(5) of the American Convention on Human Rights: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

11. *See* Case 9647, Inter-Am. C.H.R., OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987). The case was reported in 8 HUM. RTS. L.J. 345 (1987). For a general introduction to the functioning of the Inter-American Commission on Human Rights, see Cecilia Medina, *Procedures in the Inter-American System for the Promotion and Protection of Human Rights. An Overview*, 6 SNL 83 (1988).

next term it would take up the case *Thompson v. Oklahoma*, for the first time considering the constitutionality of the execution of juvenile offenders.

The issue as framed by the Commission was whether the absence of a federal prohibition within United States domestic law on the execution of juveniles who committed capital crimes under the age of eighteen violated human rights standards applicable to the United States under the inter-American system. Article I of the American Declaration protects the right to life but is silent on the issue of capital punishment. Article 4(5) of the American Convention on Human Rights specifically prohibits the imposition of the death penalty on persons who were under the age of eighteen at the time the crime was committed. However, since the United States had not ratified the American Convention, it is not bound by its provisions.

The petitioners had argued that the United States is bound by a norm of customary international law which prohibits the imposition of the death penalty on persons who committed capital crimes before the age of eighteen. They alleged that this customary norm could be derived from widespread state practice which had been codified in certain treaties. They asserted that "the greater the number of parties to a treaty, the greater the inference that it rises to the level of customary international law."[12]

The United States, in response, argued that no such customary norm existed and that it could not be considered legally bound by a conventional norm without its consent (i.e. expressed through ratification of a treaty).

The Commission reviewed the elements necessary for the formation of a norm of customary international law: consistent state practice and opinio juris, and then cited the rule set forth by the International Court of Justice to the effect that a customary rule does not bind states which protest the norm.[13]

The Commission concluded that the petitioners' argument was unconvincing. It found that a norm of customary international law, even if it were held to exist, would not be binding on the United States because the United States had protested the norm. The Commission found evidence that the United States had protested the norm in light of the fact that the Carter Administration had proposed a reservation to the American Convention on Human Rights when it transmitted this Convention (and three others) to the United States Senate for ratification. The proposed reservation, as regards

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12. See an article by one of the petitioners' lawyers on the case, Professor David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT'L L. & POL'Y 346-52 (1988).

13. *See* Case No. 9647, Inter-Am. C.H.R., OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987), at para. 52.

the *Roach* case, stated: "U.S. adherence to Article 4 is subject to the Constitution and other laws of the U.S."[14]

For a norm to be binding on a state which protested the norm it must have acquired the status of *jus cogens*, the Commission continued.[15] The Commission found that in the member states of the OAS a universal norm of *jus cogens* is recognized which prohibits the state execution of children. The norm, it stated, is accepted by all the states of the inter-American system, including the United States.[16] The Commission found evidence for the recognition of this norm in the response of the United States Government to the petition which affirmed that: "[a]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty."[17]

The Commission found that the case arose, not because of doubt concerning the recognition of an international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority. Specifically what is at issue here is the United States law and practice, as adopted by different states, to transfer adolescents charged with heinous crimes to adult criminal court where they are tried and may be sentenced as adults.[18]

Since the federal government did not preempt the issue, the states, under the United States constitutional system, were free to exercise their discretion as to whether or not to allow capital punishment and to determine the minimum age at which a juvenile may be transferred to adult criminal court where the death penalty could be imposed. Thirteen states and the District of Columbia had abolished the death penalty in 1987, and the others which permitted capital punishment had retained death penalty statutes which 1) prohibited the execution of persons who committed capital crimes under the age of eighteen, or 2) allowed for juveniles to be transferred to adult

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14. President's Message on Four Treaties Pertaining to Human Rights, S. Exec. Doc. C, D, E, & F, 95th Cong., 2d Sess. 12, 17 (1978).

15. Inter-Am. C.H.R., OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987), at para. 54. The concept of jus cogens is included in article 53 of the Vienna Convention on the Law of Treaties which states: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

16. *Id.* at para. 56.

17. *Id.*

18. *Id.* at para. 57.

criminal court where they could be sentenced to death. The Commission concluded that

> [w]hereas approximately ten retentionist states have now enacted legislation barring the execution of under-eighteen offenders, a hodgepodge of legislation characterizes the other states which allow transfer of juvenile offenders to adult court from age seventeen to as young as age ten, and some states have no specific minimum age.[19]

It was this diversity of state practice within a federal system which the Commission found violative of articles I (the right to life) and II (the right to equality before the law) of the American Declaration. The fact that some states had abolished the death penalty, whereas another state, Indiana, potentially allowed it to be applied to juveniles as young as ten years of age, was impermissible in the view of the Commission, when the most fundamental human right, the right to life, was at stake. The violation was not one committed by the States of South Carolina or Texas, but rather the federal government:

> For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards the most fundamental right — the right to life — results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.[20]

The United States Government rejected the Commission's decision in this case, which it considered not legally binding, but the United States

19. *Id.* at para. 58.

20. *Id.* at para. 63.

Supreme Court, in its 1988 decision in *Thompson v. Oklahoma*, held that the execution of juveniles under the age of sixteen violated the prohibition against cruel and unusual punishment in the Eighth Amendment.

By way of conclusion, I wish to reiterate an earlier point. The international consensus on the abolition of torture marked a sign in the progress of civilization. Such a similar international consensus needs to be reached on the issue of the abolition of the death penalty. The obstacles to such a consensus are to be found in our outmoded, religion-burdened concepts of justice. The attempts of nongovernmental human rights organizations to achieve the abolition of the death penalty by means of arguments suggesting that the manner in which it is imposed or the delay in its imposition is tantamount to torture is ludicrous when the imposition of the death penalty itself is the most extreme form of torture imaginable, but is excluded from the definition of torture by means of a legal fiction. Similarly, it is equally barbaric to impose the death penalty on capital offenders who committed atrocious crimes under the age of eighteen, but it is wishful thinking to argue that this prohibition has achieved the status of a norm of customary international law. We need to look at crime and punishment in a new way that does not rely for a concept of justice on the law of retaliation.