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052181491X - The Abolition of the Death Penalty in International Law, Third Edition

William A. Schabas

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The Abolition of the Death Penalty in International Law

Third Edition

This is the third edition of William A. Schabas's highly praised study of the abolition of the death penalty in international law. Extensively revised to take account of developments in the field since publication of the second edition in 1997, the book details the progress of the international community away from the use of capital punishment, discussing in detail the abolition of the death penalty within the United Nations human rights system, international humanitarian law, European human rights law and Inter-American human rights law. New chapters in the third edition address capital punishment in African human rights law and in international criminal law. An extensive list of appendices contains many of the essential documents for the study of capital punishment in international law.

The Abolition of the Death Penalty in International Law is introduced with a foreword by Judge Gilbert Guillaume, President of the International Court of Justice.

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William A. Schabas

Irish Centre for Human Rights

National University of Ireland, Galway



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Dedication

Socrates
Spartacus and Jesus Christ
Joan of Arc
Danton and Robespierre
John Brown
Louis Riel
Roger Casement
Sacco and Vanzetti
Julius and Ethel Rosenberg
Ken Saro-Wiwa

What is remarkable about such a list is how it permits history to be measured by executions: the apex of Greek philosophy, the decline of Rome and the birth of Christianity, the beginnings of the Renaissance, the French Revolution, the American Civil War, the cold war. It is a gruesome yardstick indeed of human 'progress' but, like every yardstick, it must have an end. The constant attention of international human rights law to the abolition of capital punishment has brought that end into sight.

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Ni dans le coeur des individus ni dans les moeurs des sociétés, il n'y aura
de paix durable tant que la mort ne sera pas mise hors la loi.

Albert Camus, 'Réflexions sur la guillotine'

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Foreword

William Schabas's work on the abolition of the death penalty could not be more timely, offering as it does a broad overview of the legal progress in the field over the last fifty years. In 1948, the *Universal Declaration of Human Rights* proclaimed the right to life. In 1966, the United Nations *Covenant on Civil and Political Rights* established that no one shall be arbitrarily deprived of life. It went on to add that in countries where the death penalty has not been abolished, a death sentence can only be pronounced for the most serious crimes in accordance with the law in force at the time of the commission of the crime. In 1989, an additional protocol to the *Covenant*, abolishing the death penalty in peacetime, was adopted. Thus we have moved from the proclamation of a principle to its regulation, and from regulation of that principle to abolition.

European law underwent an evolution parallel to that of the United Nations. The *European Convention on Human Rights* specified, in 1950, that

Everyone'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 *Sixth Protocol* to the *Convention* abolished, in 1982, the death penalty, except in time of war or imminent danger of war.

In the Western hemisphere, a comparable progress took place. In 1948, the *American Declaration of the Rights and Duties of Man* proclaimed the right to life in terms similar to those of the *Universal Declaration*. In 1969, the *American Convention on Human Rights* regulated the death penalty in terms which were inspired largely by the UN *Covenant*. Even though no abolitionist protocol is yet in force within this system,* the *Convention* nevertheless specifies that the death penalty cannot be reestablished in States where it has been suppressed.

* Since these words were written, the *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OASTS 73, 29 ILM 1447, has entered into force.

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This final provision is particularly significant, illustrating as it does the close relationship between domestic and international law. The latter has developed because of the clear progress of the abolitionist movement, particularly in Europe. The parallel adoption and signature of international instruments on this subject has been inspired by the hope that they will lead to the abandonment of the death penalty by new States, and prevent retrogression in abolitionist States.

The debate is in fact far from resolved. Invoking Beccaria, Victor Hugo and Camus, partisans of abolition claim it to be cruel, no matter what the method of execution. They also doubt its utility, noting that criminality is no higher in abolitionist States than in retentionist States. They stress its irrevocable nature, especially in cases of judicial error, and add that the personality of the individual who is to be executed may be quite different from that of the offender at the time of the crime. Finally, they wonder how society can execute, in cold blood, a man whom it blames for having killed another.

But public opinion may remain somewhat unconvinced. Many people still accept the principle of 'an eye for an eye, a tooth for a tooth', particularly when atrocious crimes are involved. Some claim that the exemplary nature of the death penalty may play a preventive role, at least in certain cases. Others question the alternatives available in the case of dangerous repeat offenders. They fear that the victim's right to life may take second place to the right to life of the criminal.

This raises the question of whether, beyond the conventional instruments now in force, there also exist customary norms of international law concerning the death penalty.

William Schabas addresses all of these problems in this thought-provoking work. He successively analyses the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and its *Second Protocol*, international humanitarian law, the *European Convention on Human Rights* and its *Sixth Protocol*, and the Inter-American instruments. In every case, he provides a detailed study of the texts and of their *travaux préparatoires*.

He then discusses the possible emergence of customary norms, noting that common article 3 to the four *Geneva Conventions of 1949* sets out rules that, in the view of the International Court of Justice, correspond to 'elementary considerations of humanity' (*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, [1986] ICJ Reports, paras. 218 and 255). He reasons that comparable rules must also apply in peacetime. From such a perspective, the death penalty cannot be pronounced in the absence of a judgment by an impartial tribunal after a trial which respects the rights of the accused. Such sentence can only be imposed for the most serious crimes, and cannot be carried out on pregnant women, on children under fifteen years of age, and on the insane.

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These are particularly constructive conclusions. For though the death penalty has been abolished in many countries, it remains in force in several parts of the world, notably the United States, Africa and countries which follow Islamic law. It follows that the identification of minimum customary guarantees is consequently an extremely fruitful line of research.

I have taken both great personal pleasure and benefit in reading Mr Schabas's work. I hope that other readers share this same pleasure and derive like benefit.

Gilbert Guillaume, Judge
International Court of Justice
The Hague, January 1993

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Preface to the third edition

Since the first edition appeared in 1993, the debate about capital punishment in international law has been utterly transformed. The astonishing speed of events has only confirmed the original thesis of the book, that there is an inexorable trend in international law towards the abolition of capital punishment. Indeed, in the first edition I noted that according to the lists prepared by Amnesty International, slightly less than half the countries in the world had abolished the death penalty, and that ‘if the trend continues uninterrupted, sometime prior to the year 2000 a majority of the world’s states will have abolished the death penalty’. That point was reached in the summer of 1995, shortly before I prepared the second edition. The trend has continued uninterrupted into the new millennium. Now a large majority of states have abolished capital punishment, and it is banned by the new international criminal courts. Those that still retain it now fight a rearguard action in the international arena, sensing that they are becoming the new pariahs of international human rights law.

My research assistants at the Université du Québec à Montréal (1991–2000) and, subsequently, at the National University of Ireland, Galway, have made important contributions to this study: Yanick Charbonneau, Dan Connelly, Julie Desrosiers, Geneviève Dufour, Laetitia Husson, David Koller, Carmel Morgan, Alexandre Morin, Audrey Murray, Angeline Northup and Nancie Prud’homme. My colleagues at the Irish Centre for Human Rights also gave me important encouragement, and I am delighted to have the opportunity to thank them publicly. The support of my wife, Penelope Soteriou, and my daughters, Marguerite and Louisa Schabas, is and always will be, as they well know, most deeply appreciated.

William A. Schabas
Oughterard, October 2001

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