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DEATH PENALTY

WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW*. Cambridge: Grotius Publications, 1993. xxxii + 384 pp.

*Reviewed by Henry G. Schermers**

Only since the Second World War has international law become actively involved in the abolition of the death penalty. Prior to that war, every state was entitled to regulate this matter as it saw fit. Professor Schabas demonstrates that since WWII there has been a rapid development towards an imperative rule (*jus cogens*) in international law prohibiting the death penalty. He compares it with the laws on slavery and torture, which were both legal and accepted until about a century ago, but now are accepted as prohibited by *jus cogens*. In Schabas' view, the early human rights conventions which do not prohibit capital punishment, but place strict rules on its use, foreshadow the eventual abolition of the death penalty.

Of course, the possible prohibition of the death penalty by international law has been preceded by its prohibition in many domestic legal systems. The first jurisdiction to abolish capital punishment permanently was Michigan in 1846. Venezuela and Portugal followed in 1867, as did the Netherlands in 1870.¹ The rise of totalitarianism in Europe after the First World War was responsible for a resurgence of the death penalty, but it was also indirectly responsible for a stronger cry for its abolition after the Second World War.²

Schabas does not endeavor to address the religious, moral, political, or criminological arguments for the abolition or retention of the death penalty, these matters being the subject of an already enormous amount of literature to which he refers. He describes very competently and exhaustively the different international declarations and treaties on the right to life, the discussions leading to their adoption, and especially the ways they address and gradually place limits on the death penalty.

The book is divided in two parts, with a set of appendices. Part I describes the abolition of the death penalty at the global level, while

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1. WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 5 (1993).
2. *Id.* at 5-6.

part II discusses it at the regional level. The appendices contain the texts of virtually all relevant documents and treaties.

To illustrate the development of international law concerning the death penalty, a strictly chronological approach might initially have seemed preferable. The result would have been a discussion of Article I of the American Declaration on the Rights and Duties of Man prior to that of Article 3 of the Universal Declaration. The Universal Declaration would then have to be followed by Article 2 of the European Convention on Human Rights, which again would be followed by Article 6 of the UN Covenant on Civil and Political Rights. This approach might be misleading, however, since, although the Covenant was adopted after the European Convention, some early drafts of it preceded the European Convention and affected its drafting. It is therefore impossible to tell the story of universal and regional instruments in a strictly chronological fashion, and so in the interest of clarity and accessibility to the reader, each system is treated in turn.³

The discussion as a whole illustrates what Schabas sees as an inexorable progress towards abolition of the death penalty. In the early stages, the death penalty was regulated by excluding certain categories of individuals, such as juveniles, pregnant women, and the elderly, from capital punishment. The list of serious crimes for which the death penalty was permitted shrank, and by the 1980s treaties and protocols to abolish the death penalty entirely were rapidly gaining ground. Schabas expects that in the not too distant future abolition will be generally accepted and elevated to a customary norm of international law, perhaps even a norm of *jus cogens*.⁴

Chapter 1 of the book is devoted to the Universal Declaration of Human Rights and its recognition of the right to life. The *travaux préparatoires* of the Universal Declaration indicate that the drafters considered the question of capital punishment to fall squarely within the context of a right to life.⁵ Even though no support for the benefits of capital punishment in peacetime can be found in these *travaux préparatoires*,⁶ the founding fathers of the Universal Declaration could neither agree on an express recognition of death penalty as an exception to the right to life nor on the goal of final abolition of capital punishment. The compromise ultimately reached was the statement of the right

3. *Id.* at 22.

4. *Id.* at 18–19.

5. *Id.* at 48.

6. *Id.*

to life in absolute terms, with no mention of either abolition or retention of the death penalty.⁷

Chapter 2 contains the history and development with respect to the abolition of the death penalty of the International Covenant on Civil and Political Rights. The United Nations Commission on Human Rights extensively discussed the right to life in 1947, 1949, 1950 and 1952, and the draft of the Covenant was adopted by the Commission in 1954. The Third Committee of the General Assembly modified it in 1957, when the present text was established.⁸ Schabas offers a detailed interpretation of Article 6 of the Covenant, which concerns the death penalty. The chapter concludes with a discussion of rejected uses of capital punishment, including execution for crimes committed by those under the age of eighteen, a prohibition which was reiterated in the Convention on the Rights of the Child adopted by the General Assembly in December 1989.⁹

Chapter 3 concerns the genesis and adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty. Schabas traces the history of this protocol, which began in 1959 with a resolution proposed in the General Assembly. The debate surrounding the adoption of Article 6 of the International Covenant on Civil and Political Rights encouraged the opponents of the death penalty to continue to fight for its abolition. The campaign began with a call for a study of the death penalty and of its effectiveness as a deterrent. This research was submitted to an expert committee, which confirmed that there was little science could say in favor of the death penalty. Fortified by this support, the General Assembly and the Economic and Social Council became more demanding, leading to important legal developments in the early 1980s.¹⁰ In 1984 the "Safeguards Guaranteeing the Rights of Those Facing the Death Penalty" were drafted by the United Nations Committee on Crime Prevention and Control, and were later strengthened by several resolutions of different United Nations bodies, even though they were not incorporated in a treaty.¹¹ In 1989 the Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty was adopted, and it entered into force in 1991.¹²

7. *Id.* at 40-44.

8. *Id.* at 51-52.

9. *Id.* at 125.

10. *Id.* at 137.

11. *Id.* at 137-38.

12. *Id.* at 138.

Chapter 4 treats the death penalty in international humanitarian law, and is devoted primarily to the Geneva Conventions of 1949 and the "Protocols Additional" to them. The Convention and Protocols concern the death penalty in time of war, when its use becomes more frequent and the safeguards around it less stringent.¹³ Many international instruments dealing with the death penalty in fact make an exception for wartime use.¹⁴ Prisoners of war were already protected by the 1929 Geneva Convention, but their protection was widened in the 1949 Conventions, which also protect civilians. As the Geneva Conventions only apply in regular wars, the new protocols were needed to address guerilla warfare and armed conflicts within a single state, which are not normally covered by international law.¹⁵ Again, the history and development of the conventions and protocols are carefully studied and explained.

The second part of the book concerns the abolition of the death penalty at the regional level, beginning with Chapter 5 which mainly concerns the European Convention on Human Rights and the Sixth Protocol to that Convention. The history of the Convention is discussed as well as the pertinent case law of the European Commission. The European Court of Human Rights was confronted with the problem only once, in the case of *Soering v. United Kingdom*, which is also discussed.¹⁶ Of course, ample attention is given to the history and development of the Sixth Protocol to the European Convention which prohibits the death penalty, at least in peacetime. Schabas only briefly mentions the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament in 1989, which proclaimed the abolition of the death penalty.¹⁷ The chapter ends with a quote from Albert Camus, who wrote that in a United Europe the first article of a European code should be the abolition of the death penalty.¹⁸

Chapter 6 concerns the death penalty in Inter-American human rights law. In this chapter, the American Declaration of the Rights and Duties of Man of 1948, the American Convention on Human Rights of 1969 and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 1990 are discussed. The history of the three documents is extensively treated in subchapters on the interpreta-

13. *Id.* at 179.

14. *Id.*

15. *Id.* at 180-81.

16. *Id.* at 224-27.

17. *Id.* at 248.

18. *Id.*

tion of the Declaration and the Convention. There is no interpretation of the Protocol yet as it has not entered into force.¹⁹

There is no special subchapter on the African Charter on Human and People's Rights. The Charter prohibits depriving an individual of his life "arbitrarily," but there is virtually no material available on the interpretation or application of this aspect of the Charter. Schabas resisted the urge to speculate and — I think rightly — left the Charter outside of his study.²⁰

Similarly, the Universal Islamic Declaration of Rights is not further discussed. This declaration states: "Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law."²¹ This statement should be read with the understanding that in international *fora* such as the United Nations, Islamic nations have been among the most aggressive advocates of the death penalty, and defend its use in the name of obedience to Islamic law.²²

In a concluding chapter, Schabas offers a survey of the development of the law on the abolition of the death penalty, this time in historical order. He mentions the enormous increase in the prohibition of the death penalty in national legislation after the Second World War and describes the subsequent movement towards an abolitionist norm in international documents. Even more than the earlier chapters, this conclusion shows the development of international law on the death penalty since the Second World War. As Schabas sees it, a growing limitation of the death penalty and an increasing number of restrictions on its use will eventually lead to a total prohibition of what he considers to be a barbarous punishment that should disappear with the further development of civilization.

Schabas expects that a complete prohibition of the death penalty could come early in the next century.²³ The author of this book review is less convinced of the likelihood of such a positive development. History has often shown that even the most advanced societies can be replaced by more barbarous ones, and that fundamentalists of any kind may interrupt a desirable development. The internationalization of the issue is important, however, because if it is accompanied by the increasing involvement of global institutions, it may be possible for internation-

19. *Id.* at 282.

20. *Id.* at 16–17.

21. *Quoted in id.* at 17.

22. *Id.*

23. *Id.* at 19.

al interference to prevent a relapse in certain countries. Schabas' description of the transformation of the right to life into an issue of global concern may then prove to be more valuable. It is that description which makes the book so interesting since, though it is clear that Schabas opposes the death penalty, his book does not contain arguments against it. Instead, it simply describes how global and regional institutions are gradually moving towards an absolute prohibition of capital punishment.

I would like to conclude this book review by quoting the last sentences of the foreword to the book, written by Judge Gilbert Guillaume of the International Court of Justice: "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."²⁴

24. *Id.* at xi.