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Capital Punishment, International Law, and Human Rights

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Abstract

In this paper, the authors examine the relevance of international law and human rights for capital punishment practice throughout the world. The paper focuses particularly on the death penalty in the United States, and the authors explore whether actual capital punishment practice in the US is consistent with international law and deferential to human rights. That is, the paper does not limit itself to the death penalty in theory (e.g., is it right to kill a human being?), but also considers whether the death penalty as it is actually carried out in the US (i.e., rarely and selectively) meets the standards of international law and respects human rights.

Keywords: Death Penalty, Capital Punishment, International Law, Human Rights.

Introduction

One line of attack against the death penalty in the United States is that capital punishment violates international law, or is at least inconsistent with the values posited within key international documents. For example, the Center for Constitutional Rights (2017) sees capital punishment as “a denial of the most basic human rights” and a violation of “one of the most fundamental principles under widely accepted human rights law—that states must recognize the right to life.” Groups such as Amnesty International, Human Rights Watch, the International Commission of Jurists, Human Rights Advocates, Murder Victims’ Families for Human Rights, The International Federation for Human Rights, World Coalition Against the Death Penalty, The International Justice Project, Reprieve, and The Advocates for Human Rights all label the death penalty a human rights violation.

The United Nations (UN) appears to agree, for the UN High Commissioner for Human Rights approved a resolution which stated that the “abolition of the death penalty

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contributes to the enhancement of human dignity and to the progressive development of human rights” (UN, 1997, p. 12). So, too do many of our allies.

There are several significant issues with these arguments. First, they are often based on documents that are not treaties. From a strictly *positivistic perspective*, many would argue articles of international law that do not arise from treaties are not binding on the US, because they are not directly relevant for the Constitutionality of the death penalty in the US. Article VI, Clause 2 of the US Constitution states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

This “Supremacy Clause” of the Constitution states clearly that treaties made or made under the authority of the US become part of the “supreme law of the land” and thus hold “judges in every state” and “every state” to follow the treaties. Simply stated, if the US wrote or signed and ratified any treaty that called for the abolition of the death penalty or that said the practice was immoral and should be illegal, then any practice of capital punishment by states would be illegal under the Supremacy Clause.

Proponents of *customary international law* instead argue that other sources of international law are not only also relevant but also are binding on the US. Customary international law refers to “international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties” (Cornell, 2018). Article 38(1)(b) of the International Court of Justice Statute (incorporated into the UN Charter by Article 92) acknowledges that customary international law is a legitimate source of international law and is established by illustrating *state practice* (i.e., actual actions of countries around the world) and *opinion juris* (which is the idea that a state/country subjectively feels bound by the law). The problem with the second element is that legal scholars often obviously disagree about whether laws that pertain to issues other than non-degradable rights (such as the right not to be in slavery, victimized by torture or genocide, etc.) actually are binding on the US. Independent countries have the right to object to an international law not created by treaties and would thus not be bound to them, unless such laws are deemed to be *jus cogens* (i.e., an international norm so compelling that no nation can ever violate it, such as the prohibitions against slavery, torture, genocide, and so on). In essence, a country must be obliged to obey to an international norm for it to bound by it!

The most significant international statements against the death penalty or that are most relevant for its practice in the US come in the form of resolutions or statements and thus are not directly relevant for the Constitutionality of the death penalty in the US, at least from a strict or *originalist view of the Constitution*. However, others argue these resolutions and statements are important to consider because they put forth principles of human rights that are consistent with the ideals and values posited in the US Declaration of Independence and the US Constitution itself.

Second, interpreting the meaning of some of the documents can be difficult, especially in cases where they conflict or contradict one another. For example, how does one mesh a treaty or resolution condemning racial discrimination with one saying capital punishment does not violate international law, especially in the face of clear evidence of significant racial disparities in death penalty practice within the US? Another example is, do the “super due process” protections (i.e., extra protections for capital defendants such as more than one defense attorney, automatic appeals and proportional reviews of sentences) in capital cases satisfy the call for due process protections within international documents if those protections fail to prevent wrongful convictions and biases based on extra-legal factors? Similarly, is arbitrariness in capital punishment outcomes in the US (e.g., sentencing and executions) sufficient to demonstrate that it is a violation of the international laws that prohibit arbitrary punishment even if the processes have explicitly been designed to eliminate arbitrariness, such as in the US?

In this paper, the authors examine key international laws and documents to determine whether capital punishment practice in the US is consistent or inconsistent with them, and in what ways. We begin with a quick review of capital punishment practice around the world as well as the United States.

1. Capital Punishment around the World

The Death Penalty Information Center (2019) reports that only 56 countries around the world retain the death penalty and have used it in recent years. Another 29 countries retain it but have used it in recent history. The largest number of countries (106) in the world have abolished the death penalty for all crimes, and another seven countries have abolished it for ordinary crimes but retain it for some crimes against the state (e.g., treason). Abolition is thus the norm in the world.

A review of a map illustrating the countries that retain the death penalty shows that the US is in the company of only one European nation, many African countries, virtually the entire Middle East, and some countries in Asia. Table 1 shows those countries that retain the death penalty versus those that do not. Most US allies have abolished the death penalty.

Even though 85 countries can carry out executions, the Death Penalty Information Center (DPIC, 2019a) reports that only 23 countries are known to have carried out executions in 2017. These 23 countries represent only 27% of countries with the death penalty and 12% of the countries of the world. Together, they carried out at least 1,032 executions, but this figure does not include China, which is thought to have killed thousands more; executions numbers in China are considered a state secret. Only four countries (Iran, Saudi Arabia, Iraq, and Pakistan), carried out nearly nine of ten worldwide executions, and the US ranked eighth worldwide in the number of people it killed (DPIC 2019a). The US is clearly an outlier among the list of top executing countries, for it is the only western, industrialized nation on the list.

Truskett (2003, p. 559) writes: “The U.S. is a serious advocate of the death penalty; thus, it is among unfamiliar company and segregates itself from traditional Western allies,” finding itself in the company of the some of the least respectful nations to human rights in the world. Indeed, the United States remains “a key dissenting actor, both *de facto* and *de jure*, on the international death penalty scene” (Fitzpatrick, nd, p. 174). In fact, in 2017,

the US voted no, with only 12 other nations (and 13 abstentions), on a UN Human Rights Council resolution condemning executions for people who engage in “apostasy, blasphemy, adultery, and consensual same-sex relations.” That’s a pretty remarkable vote since none of these behaviors is actually punishable by death in the US! US officials later explained the US voted no because the resolution, which also condemned arbitrary or discriminatory imposition of death sentences, simply because the resolution was seen as favoring abolition of the death penalty itself.

Abolition of capital punishment across the world is trending, meaning that, with each passing year, the number of countries that abolish the death penalty continues to grow. Dozens of countries have abolished the death penalty since 1976, the year the Supreme Court reinstated the death penalty in the US in the case *Gregg v. Georgia*, 428 US 153 (1976); most recently, Guinea abolished the death penalty for all crimes and Kenya abolished its mandatory death penalty for murder (DPIC, 2019a).

The increasing numbers of countries abolishing capital punishment and the declining use of executions around the world could be used to argue that customary international law is opposed to the death penalty. Yet, although *state practice* is clearly consistent with this idea, the US has argued that it does not have to follow international norm against capital punishment because it is not bound by it (and thus the condition of *opinion juris* is not met). The US argues that the move against the death penalty internationally does not rise to the level of *jus cogens*.

Table 1. Abolitionist and Retentionist Countries

ABOLITIONIST FOR ALL CRIMES

Countries whose laws do not provide for the death penalty for any crime

ALBANIA	GEORGIA	NORWAY
ANDORRA	GERMANY	PALAU
ANGOLA	GREECE	PANAMA
ARGENTINA	GUINEA-BISSAU	PARAGUAY
ARMENIA	HAITI	PHILIPPINES
AUSTRALIA	HOLYSEE	POLAND
AUSTRIA	HONDURAS	PORTUGAL
AZERBAIJAN	HUNGARY	ROMANIA
BELGIUM	ICELAND	RWANDA
BENIN	IRELAND	SAMOA
BHUTAN	ITALY	SANMARINO
BOLIVIA	KIRIBATI	SAOTOME AND
BOSNIA &	KYRGYZSTAN	PRINCIPE
HERZEGOVINA	LATVIA	SENEGAL
BULGARIA	LIECHTENSTEIN	SERBIA
BURUNDI	LITHUANIA	SEYCHELLES
CAMBODIA	LUXEMBOURG	SLOVAKIA
CABOVERDE	MACEDONIA (former Yugoslav Republic)	SLOVENIA
CANADA	MADAGASCAR	SOLOMON ISLANDS

COLOMBIA	MALTA	SOUTH AFRICA
COOK ISLANDS	MARSHALL ISLANDS	SPAIN
CONGO (REPUBLIC OF)	MAURITIUS	SURINAME
COSTA RICA	MEXICO	SWEDEN
COTE D'IVOIRE	MICRONESIA (Federated States)	SWITZERLAND
CROATIA	MOLDOVA	TIMOR-LESTE
CYPRUS	MONACO	TOGO
CZECH REPUBLIC	MONTENEGRO	TURKEY
DENMARK	MOZAMBIQUE	TURKMENISTAN
DJIBOUTI	NAMIBIA	TUVALU
DOMINICAN REPUBLIC	NAURU	UKRAINE
ECUADOR	NEPAL	UNITED KINGDOM
ESTONIA	NETHERLANDS	URUGUAY
FINLAND	NEW ZEALAND	UZBEKISTAN
FII	NICARAGUA	VANUATU
FRANCEGABON	NIUE	VENEZUELA

Table 1. Abolitionist and Retentionist Countries (cont.)

ABOLITIONIST FOR "ORDINARY CRIMES" ONLY

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances

BRAZIL	GUINEA	KAZAKHSTAN
CHILE	ISRAEL	PERU
EL SALVADOR		

RETENTIONIST COUNTRIES

Countries which retain the death penalty for ordinary crimes

AFGHANISTAN	GUYANA	PALESTINIAN AUTHORITY
ANTIGUA AND BARBUDA	INDIA	QATAR
BAHAMAS	INDONESIA	SAINT KITTS & NEVIS
BAHRAIN	IRAN	SAINT LUCIA
BANGLADESH	IRAQ	SAINT VINCENT & GRENADINES
BARBADOS	JAMAICA	SAUDI ARABIA
BELARUS	JAPAN	SINGAPORE
ELIZE	JORDAN	SOMALIA
BOTSWANA	KOREA (North)	SOUTH SUDAN
CHAD	KUWAIT	SUDAN
CHINA	LEBANON	SYRIA

COMOROS	LESOTHO	TAIWAN
CONGO (Democratic Republic)	LIBYA	THAILAND
CUBA	MALAYSIA	TRINIDAD AND TOBAGO
DOMINICA	NIGERIA	UGANDA
EGYPT	OMAN	UNITED ARAB EMIRATES
EQUATORIAL GUINEA	PAKISTAN	UNITED STATES OF AMERICA
ETHIOPIA		VIETNAM
GAMBIA		YEMEN
GUATEMALA		ZIMBABWE

Table 1. Abolitionist and Retentionist Countries (cont.)

ABOLITIONIST IN PRACTICE

Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries which have made an international commitment not to use the death penalty

ALGERIA	KOREA (SOUTH)	PAPUA NEW GUINEA
BRUNEI DARUSSALAM	LAOS	RUSSIAN FEDERATION
BURKINA FASO	LIBERIA	SIERRA LEONE
CAMEROON	MALAWI	SRI LANKA
CENTRAL AFRICAN REPUBLIC	MALDIVES	SWAZILAND
ERITREA	MALI	TAJIKISTAN
GHANA	MAURITANIA	TANZANIA
GRENADA	MONGOLIA	TONGA
KENYA	MOROCCO	TUNISIA
	MYANMAR	ZAMBIA
	NIGER	

Source: Death Penalty Information Center.

<https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>

2. Capital Punishment in the United States

Of the 53 government jurisdictions in the US that could have the death penalty (50 states, federal government, Washington, DC, and the US military), 30 retain the death penalty (28 states, federal government, and US military) (DPIC, 2019b). Thus, the death penalty is illegal in 19 states and Washington, DC. This means the death penalty is legal in 57% of US jurisdictions and illegal in 43%. Another four states have moratoria imposed by the governors of those states. These states are shown in Table 2.

Only nine states have averaged at least one execution per year since 1976. These states include Texas, Virginia, Oklahoma, Florida, Missouri, Georgia, Alabama, Ohio, North Carolina, and South Carolina (DPIC, 2017d); yet, North Carolina has not carried out a single execution since August 2006! And only one state has averaged at least ten

executions per year since 1976—Texas. From 1976 to 2016, Texas executed 538 people; yet the state suffered from 70,080 murders during this time (Disaster Center, 2017).

Texas, which leads the nation every year in terms of the number of people it executes each year, and which has accounted for 37% of all the executions in the US since 1976, averaged only 13.1 executions from 1976 through 2016. During these same years, the state averaged 1,709 murders per year. So, even in Texas, only about 0.8% of killers are executed.

Table 2. States with and without the Death Penalty

STATES WITH THE DEATH PENALTY (31)		
Alabama	Louisiana	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	South Dakota
California	Montana	Tennessee
Colorado	Nebraska	Texas
Florida	Nevada	Utah
Georgia	New Hampshire	Virginia
Idaho	North Carolina	Washington
Indiana	Ohio	Wyoming
Kansas	Oklahoma	ALSO
Kentucky	Oregon	- U.S. Gov't
		- U.S. Military
STATES WITHOUT THE DEATH PENALTY (19) (YEAR ABOLISHED OR OVERTURNED IN PARENTHESES)		
Alaska (1957)	Michigan (1846)	Vermont (1964)
Connecticut (2012)	Minnesota (1911)	West Virginia (1965)
Delaware (2016)	New Jersey (2007)	Wisconsin (1853)
Hawaii (1957)	New Mexico (2009)	
Illinois (2011)	New York (2007)	ALSO
Iowa (1965)	North Dakota (1973)	Dist. of Columbia (1981)
Maine (1887)	Rhode Island (1984)	
Maryland (2013)		
Massachusetts (1984)		
DEATH PENALTY STATES WITH GUBERNATORIAL MORATORIA (4)		
Colorado (2013)	Pennsylvania (2015)	Washington (2014)
Oregon (2011)		

Source: Death Penalty Information Center.

<https://deathpenaltyinfo.org/states-and-without-death-penalty>

Ten states and Washington, DC abolished the death penalty since 1976; incredibly, eight of these states abolished the death penalty this century, all since the year 2007. And all of the four gubernatorial moratoria were imposed since 2011. A review of these data

show that abolition of capital punishment in the US is trending, meaning that, with each passing year, the number of states that abolish the death penalty continues to grow. Further, even in states that retain the death penalty, only a handful actually use it. This infrequent use of executions may signify arbitrariness, making it relevant for international law, as will be shown later in this paper.

Generally speaking, the use of capital punishment in the US is also declining. The number of death sentences and the number of executions has significantly declined since the late 1990s, when capital punishment practice peaked in the US.

Research illustrates why, relative to murder, executions are so rare. Part of it is because of what scholars refer to as “super due process,” the term used to describe the additional protections granted to those charged with capital crimes (such as automatic appeal to the state Supreme Court, proportionality review of their sentences, specific requirements in some states for capital defense attorneys, etc.). These protections were aimed at eliminating arbitrariness and bias, which would ideally make the practice consistent with the US Constitution as well as international law.

Yet, the rare nature of capital punishment in the US mostly owes itself to the nature of capital punishment law and practice itself. Consider the following. First, only aggravated murderers are eligible for the death penalty. Second, prosecutors have the sole discretion to seek the death penalty against accused aggravated murderers. Third, juries have the discretion to recommend sentences other than death to people convicted of aggravated murders. Fourth, judges have discretion not to impose death sentences on those convicted of aggravated murder. Fifth, the capital appeals process is very timely, stretching the average stay on death row to approximately 15 years, and revealing significant Constitutional errors in two out every three cases, leading to death sentences and/or convictions being overturned.

2.1. The real death penalty

The data and facts offered above reveal what has been called “the real death penalty” in America—not the theoretical or philosophical one that people debate—but the one that actually exists in practice (Robinson, 2011). Robinson’s (2011) review of the death penalty in the United States reveals four important realities of its practice. The “real death penalty” is: 1) Only practiced in a handful of states, and even within those, just a handful of counties. 2) Not a deterrent to murder, or at least not more of a deterrent to murder than alternative sentences such as life imprisonment without the possibility of parole (LWOP). 3) Generally, more expensive, on average, than alternative sentences such as LWOP. 4) Plagued by serious problems in implementation, including but not limited to, geographic biases, social class and race biases, and a significant threat to the factually innocent (Robinson, 2011).

One of these issues, racial discrimination is highly relevant for international law. The death penalty was historically applied to people of color—most notably African Americans—and was plagued by discrimination based on the race of the defendant. In contemporary death penalty practice, the disparities are now actually in favor of killers of color. That is, African Americans are less likely to be executed than whites. Research from across the US shows this may be due to the race of the people they kill; killers of whites

are far more likely to be sentenced to death and executed, especially if the killers are from different race groups (e.g., black killer and white victim) (Bohm, 2015).

The issue of innocence is highly problematic, for there can be no clearer violation of the principle of human life than when an innocent life is taken by the government. Although not common, the death penalty in the US does occasionally result in the execution of an innocent person. According to Amnesty International USA, 151 innocent people have been released from death row since 1973. In addition, a study by Gross found that 4.1 percent of those sentenced to death in the US are likely innocent, and less than half of those are exonerated! At least 39 executions have been carried out with evidence of innocence or at least reasonable doubt of the conviction.

3. Relevant Questions related to International Law and Human Rights

Given the preceding discussions, at least two questions emerge as relevant for the death penalty when it comes to international law and human rights. First, is capital punishment itself consistent with and permitted by international law? Second, is capital punishment, as it is actually practiced in the US, consistent with and permitted by international law? In the following section, we will review the laws, treaties, declarations, and resolutions that are relevant to answering these questions. Then, in the section which follows, we will attempt to answer the above questions using these laws, treaties, declarations, and resolutions and applying them to America's death penalty.

3.1. Laws, treaties, declarations, and resolutions

Amnesty International (2017a) notes that four international treaties call for the abolition of the death penalty. Of those, only one has worldwide scope and the others apply only regionally. Those treaties are discussed below. Before turning to that, a brief introduction to the United Nations and a discussion of treaties versus declarations and resolutions is in order.

First, the United Nations was officially created in 1945, yet the term “United Nations” was first used in 1942 when representatives from 26 nations came together to write and sign a “Declaration by United Nations” against the foreign powers of Italy, Germany, and Japan (United Nations, 2017a). In 1945, representatives from 50 countries met in the US to write the United Nations Charter, based on documents written by four nations including the US. According to the UN (2017a): “The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories.”

The UN works in several areas, including upholding peace and security by helping nations and parties negotiate with each other and by seeking peacekeeping forces. It also delivers humanitarian aid and promotes sustainable development across the globe. Most relevant for this paper is that the UN works to promote and protect human rights—those rights laid out in the 1948 document, the Universal Declaration of Human Rights (to be reviewed later in this paper). The first right discussed in that document is found in Article 3 of the document, which reads: “Everyone has the right to life, liberty and security of person” (United Nations, 1948). The word “life” is critical to arguments pertaining to whether capital punishment respects international law.

Also relevant to this paper is that the UN upholds international law. The Preamble to the UN Charter states that its purpose is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” The fact that it mentions “other sources of international law” suggests that it is not just treaties that are relevant for the decisions of countries and states within. The US disagreed with this notion.

According to the UN (2017b), its work to preserve international law “is carried out in many ways—by courts, tribunals, multilateral treaties—and by the Security Council, which can approve peacekeeping missions, impose sanctions, or authorize the use of force when there is a threat to international peace and security, if it deems this necessary.” The UN continues: “These powers are given to it by the UN Charter, which is considered an international treaty. As such, it is an instrument of international law, and UN Member States are bound by it.” This includes the United States. Finally, “The UN Charter codifies the major principles of international relations, from sovereign equality of States to the prohibition of the use of force in international relations” (UN 2017b).

3.1.1. International Bill of Human Rights

Now, we turn to the documents relevant to international law. Most relevant for this discussion is perhaps the International Bill of Human Rights, which refers collectively to UN General Assembly Resolution 217 (which established the “Universal Declaration of Human Rights” in 1948) and two international treaties—the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966). Both treaties went into force in 1976 after enough countries ratified them. We discuss the declaration and treaties below.

3.1.2. Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948. It lists and discusses an expansive list of rights, but is not a ratified treaty and is thus not, strictly speaking, part of the “supreme law of the land” per Article VI, Clause 2 of the US Constitution. Yet, the resolution is important to consider for it posits important norms and principles of human rights consistent with American ideals and values.

The preamble to the document explains that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (UN 1948). It contains 30 articles which lay out human rights in the declaration. Most relevant to the death penalty is Article 3, which states: “Everyone has the right to life, liberty and security of person.” One relevant question to this analysis is thus, does the death penalty respect the right to life?

Also relevant is Article 5, which reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Another relevant question for this paper is thus, is capital punishment cruel, inhuman, or degrading?

Further, Article 7 states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such

discrimination.” Thus, another important question to address here is whether demonstrated biases in capital punishment violate human rights?

The UN General Assembly passed a resolution calling for a moratorium on executions in 2007. The vote was 104 in favor, 54 against, with 29 abstentions. Another UN resolution calling for a moratorium passed the General Assembly in 2011, and still another in 2014. The vote for the latter resolution was 117 in favor, 38 against, and 34 abstentions. That two earlier efforts in the 1990s did not pass suggests the move toward ending the death penalty worldwide has progressed significantly over time. Mendez (2012: 2) agrees, writing that “international standards and practices are now moving in that direction,” toward the conclusion that the death penalty is a violation of international law.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions also wrote that “the abolition of capital punishment is most desirable in order fully to respect the right to life.” According to Amnesty International (2017a): UN officials and Special Rapporteurs act to offer “judgments and recommendations of expert bodies set up to monitor the implementation of human rights treaties.”

Importantly, the Universal Declaration of Human Rights is not a treaty and thus creates no legal obligations for countries including the United States. Yet, scholars agree it does form the basis for international law, and the principles expressed are guiding principles for all members of the United Nations.

3.1.3. International Covenant on Civil and Political Rights (1966)

This document, ratified by the United States, contains 53 articles. Importantly, this document is a treaty, and was ratified by the US. Therefore, it becomes part of the “supreme law of the land,” as noted in Article VI, Clause 2 of the US Constitution.

Most relevant to the death penalty is Article 6 of the treaty, which states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” This part of the article does not seem to suggest the death penalty is intolerable, as long as it is not arbitrary. Relevant for this analysis, however, is the issue of the numerous studies illustrating the arbitrary nature of capital punishment in the US (Bessler, 2017; Edmondson, 2016; Hood & Hoyle, 2014; Hughes, 2016; Novak, 2014; Shatz, 2017; Steiker & Steiker, 2016; Williams, 2016).

Article 6 also states: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.” Article 6 further states that: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” These parts of the article merely impose reasonable restrictions on nations that carry out the death penalty.

Also included in Article 6 is this language concerning age: “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.”

Article 7 of the document is also relevant for the death penalty, and in particular America’s recent experiences with lethal injection! It states: “No one shall be subjected to

torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Here the relevant questions are, is capital punishment cruel, inhuman, or degrading, and is lethal injection medical experimentation?

Also relevant is Article 26, pertaining to equality. It states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Studies on capital punishment illustrating disparities in its application by extra-legal factors are relevant for this provision.

According to Truskett (2003, p. 594), “treaties ratified by the U.S. are equally as binding on America’s capital punishment system as any other principle provision of law.” Truskett (2003, pp. 594–5), however, points out that the “U.S. is not obligated under [the ICCPR] to alter the death penalty law and conform to international law and custom” because “it made provisional reservations and stipulated punishments are to be determined solely under the fifth, eighth, and fourteenth Amendments to the U.S. Constitution.”

3.1.4. The Second Optional Protocol to the International Covenant on Civil and Political Rights

This document was adopted by the UN General Assembly in 1989. According to Amnesty International (2017b), it is aimed at the abolition of the death penalty. Amnesty International (2017b) writes that it “provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.” The most significant part of the document states that “abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights” and that “abolition is desirable” and it “should be considered as progress in the enjoyment of the right to life” and it states that it is “(d)esirous to undertake hereby an international commitment to abolish the death penalty.” Article 1 of the document states: “No one within the jurisdiction of a State Party to the present Protocol shall be executed” ... “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.” The US is not a signatory to this treaty.

The UN Human Rights Committee (2004) has also encouraged nations to abolish capital punishment. According to Amnesty International (2017a), the UN Human Rights Committee was set up “to monitor implementation of the International Covenant on Civil and Political Rights.” It passed a resolution (Resolution 2005/59), adopted in April 2005, which stated that “the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.” Further, “the abolition of the death penalty is essential for the protection of [the right to life].”

3.1.5. *International Covenant on Economic, Social, and Cultural Rights (1966)*

This document contains 32 articles. It was signed by the US but has not been ratified. Therefore, it is not part of the supreme law of the land. Not does it contain any language relevant for capital punishment.

4. How the Death Penalty is Consistent and Inconsistent with International Law

Given our review of the relevant international laws pertaining to capital punishment in the United States, we now turn to the issue of how the death penalty in America is consistent and inconsistent with it. America's death penalty system is generally consistent with international law for the following reasons. First, defendants enjoy "super-due process"—signifying serious efforts are made to guard against wrongful conviction and to eliminate discrimination based on extra-legal factors such as race, ethnicity, gender, and so forth. Second, only the most serious of murderers (i.e., aggravated murderers) are eligible for capital prosecution. Third, juveniles cannot be executed. Fourth, pregnant women are not executed. Fifth, people with cognitive disabilities or "mental retardation" may not be legally executed. Sixth, mandatory death sentences are unconstitutional in the US (Amnesty International, 2005; Fitzpatrick, n.d.). Each of these is an expectation of international law, including the Universal Declaration of Human Rights.

In addition to these facts, Juan Mendez (2012, p. 2), who was UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, claims that the death penalty per se "has been considered a lawful sanction under international law. International law decidedly encourages abolition of the death penalty but does not require it." This suggests that, per se, capital punishment is consistent with (i.e., does not violate) international law

Yet, Amnesty International (2017) argues that capital punishment "breaches two essential human rights: the right to life and the right to life free from torture" (two rights protected by the Universal Declaration of Human Rights discussed earlier. Each of these issues will be addressed below.). Still, even Amnesty acknowledges that only three international laws "ban the death penalty outright, except during times of war." And none of them is a treaty with worldwide scope or that has been ratified by the US. They include the Second Optional Protocol to the International Covenant on Civil and Political Rights, the Protocol No. 6 to the European Convention on Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

As noted earlier, the Second Optional Protocol to the International Covenant on Civil and Political Rights says abolition of capital punishment is "desirable" and it "should be considered as progress in the enjoyment of the right to life." Yet, the document does not mandate that signatories abolish the death penalty, and the US is not even a signatory.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty was adopted by the Council of Europe in 1982. This document was motivated by a general evolution away from the death penalty in Europe and states in Article 1 that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Article 2 of the document states that the death penalty for can be crimes "in time of war or of imminent threat of war." Later, in 2002, Protocol No. 13 to the Convention for the

Protection of Human Rights and Fundamental Freedoms called for the abolition of the death penalty in all circumstances. Of course, since the US is not part of Europe, the treaty does not apply to the US, although it does give the US a strong sense of what some of our best allies think of the death penalty.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted by the General Assembly of the Organization of American States in 1990. It too calls for the total abolition of the death penalty, yet it also permits countries to retain the death penalty in wartime, at least in some cases. Article 1 says: “The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.” And Article 2 states: “No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.”

The rationale for this law is quite important. Article 4 shows that all parties recognize the right to life and will restrict the death penalty. The article also notes that “the abolition of the death penalty helps to ensure more effective protection of the right to life” and suggests that American states have the “intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas ...”. Importantly, the US has not signed or ratified this treaty.

The US did, however, sign the American Convention on Human Rights, written by the Organization of American States in 1969. Articles 4 and 5 of that document are relevant for capital punishment. Article 4, titled “Right to Life” speaks directly to the issue of the death penalty, and reads: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” The document does not call for abolition of the death penalty but says that the penalty can only be used for the most serious crimes, such as murder, and shall not be used against people under age 18, over age 70, or pregnant women.

Article 5, titled, “Right to Humane Treatment,” speaks not of the death penalty per se but instead potentially to actual conditions of death row. It states: “Every person has the right to have his physical, mental, and moral integrity respected” and “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” Today, some scholars argue that the death penalty violates part 2 of Article 5. Yet, though the United States signed this treaty in 1977, it has still not ratified it.

4.1. The right to life

Is capital punishment consistent with the call in international law to respect the right to life? Much of the world seems to think the answer is no, as most nations in the world no longer carry out executions, including nearly all of our most important allies. Although the United Nations has not taken a stand, by resolution, on capital punishment, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that “the abolition of capital punishment is most desirable in order fully to respect the right to life.”

The UN Human Rights Committee (2004) has also encouraged nations to abolish capital punishment. According to Amnesty International (2017a), the UN Human Rights Committee was set up “to monitor implementation of the International Covenant on Civil and Political Rights.” It passed a resolution (Resolution 2005/59), adopted in April 2005, which stated that “the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.” Further, “the abolition of the death penalty is essential for the protection of [the right to life].”

Incredibly, the US signed (but has not yet ratified) the American Convention on Human Rights. Recall that Article 4 posits that “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Again, the key issue for American practice is the word arbitrarily. Given that the application of the death penalty in the US is undeniably arbitrary, one could argue its applications is a violation of at least customary international law. Yet, again, this treaty has not yet been ratified, and therefore arbitrary capital punishment would not technically constitute a constitutional violation. However, the arbitrary application of the death penalty in the United States is clearly in violation of the spirit of international law.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty calls for the total abolition of the death penalty except for in wartime. Perhaps the most key phrase from that document comes from Article 4 which says that the right to life is “a right that cannot be suspended for any reason” (presumably including committing a capital murder). But again, the US has not signed or ratified this treaty, making it again irrelevant to the US Constitution. Our continued use of executions clearly violates the spirit of international law, as well.

So, of all the documents reviewed above, only the International Covenant on Civil and Political Rights (1966) is ratified by the United States, making it is part of the “supreme law of the land,” as noted in Article VI, Clause 2 of the US Constitution. Article 6 of the treaty states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” There is the word arbitrary again. Arbitrary application of the death penalty is a violation of the International Covenant on Civil and Political Rights and thus is a violation of the US Constitution because of the Supremacy Clause. One way capital punishment in the US might violate international law is if it is arbitrarily applied.

Studies consistently show that death sentences are disproportionately applied to poor people, people of color, killers of Whites, people in the South, and people living in certain counties in the US (Bessler, 2017; Edmondson, 2016; Hood & Hoyle, 2014; Hughes, 2016; Novak, 2014; Shatz, 2017; Steiker & Steiker, 2016; Williams, 2016). Yet, capital punishment practice in the US is likely *not* considered arbitrary by the international law standard, because that standard focuses explicitly on process rather than outcome. According to the International Bar Association (2017: 4-5), the Human Rights Committee (which is responsible for monitoring compliance by nations with the International Covenant on Civil and Political Rights) holds that capital punishment is not arbitrary as long as people are “informed promptly and in detail of the charges,” given a presumption of innocence, able to choose defense counsel, provided enough time to

prepare a defense, given a trial without unnecessary delay, and have “a hearing to be heard by an independent and impartial tribunal,” given the right to a “review by a higher tribunal,” and when they are given translators or interpreters if they do not speak the language of the court. American capital punishment process—super due process—meets all of these demands (except perhaps being given an impartial trial, as research from the Capital Jury Project demonstrates). Yet, American capital punishment practice is undeniably arbitrary in terms of outcomes—who is sentenced to death and who is not, for example—and it has always been this way despite protections provided and even demanded by the US Supreme Court.

As noted above, the Second Optional Protocol to the International Covenant on Civil and Political Rights calls for the abolition of the death penalty” because abolition “contributes to enhancement of human dignity and progressive development of human rights” and “should be considered as progress in the enjoyment of the right to life.” Yet, the US is not even a signatory to this treaty, logically because a majority of states continue to cling to capital punishment and a handful continue to use it regularly.

4.2. The right to life free from torture

Does capital punishment constitute torture? Further, does it amount to cruel, inhuman or degrading treatment or punishment? Recall that Article 7 of the International Covenant on Civil and Political Rights (1966) states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Given this is a binding treaty, it is important to consider whether the conditions of death row or even executions themselves are torturous, cruel, inhuman or degrading. If so, another way capital punishment would violate international law from the positivistic perspective is by violating this treaty. Recall that Article 5 of the American Convention on Human Rights—signed by the US but not ratified—also states: “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

The Center for Constitutional Rights (2017) claims that, not only does the death penalty violate international law by not respecting the right to life, but it also breaches the prohibition “against cruel, inhuman, or degrading treatment.” It also claims there is “a growing consensus that ‘death row phenomenon’ constitutes a breach in violation of the prohibition against torture under international human rights law.” Finally, it claims the penalty is “applied in a discriminatory manner, in violation of the principles of non-discrimination.” The International Bar Association (2017, p. 6) agrees that the argument that “the death penalty constitutes torture or cruel, inhuman or degrading treatment is gaining ground.”

The US signed and ratified the Convention Against Torture in 1995; the document defines torture as “any act by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as ... punishing him for an act he ... has committed or is suspected of having committed.” An analysis by the Center for Constitutional Rights (2017, p. 2) described life on death row and characterized “decades in solitary confinement with limited human contact, and the intolerable process of repeatedly coming within hours of executions” as “torture under international law.” According to the Center for Constitutional Rights (2017, p. 3), 25 states with capital

punishment “hold death row inmates in solitary confinement for 23 hours or more a day,” the average length inmates spend on death row is 14 years or more, and half of the states with the death penalty “do not allow prisoners and physical contact with family or friends for the duration of their time on death row, other than the weeks leading up to an execution.” In this way, American capital punishment may be seen as a violation of international law from the positivistic perspective.

Mendez (2012, p. 2) notes that “(r)egional and domestic courts have increasingly held that the death penalty, both as a general practice and through the specific methods of implementation and other surrounding circumstances, can amount to CIDT [cruel, inhuman, and degrading treatment or punishment] or even torture.” For example, stoning (European Court of Human Rights, UN Commission on Human Rights), and lethal gas (Human Rights Committee) have been held to constitute CIDT, but with hanging the results are mixed and lethal injection was found not to amount to CIDT by the Human Rights Committee. Yet, this was before the spate of relatively recent botched lethal injections in the US.

Mendez (2012, p. 3) also considers the “death row phenomenon” as a likely set of conditions “that produce severe mental trauma and physical suffering in prisoners serving death row sentences, including prolonged periods waiting for uncertain outcomes, solitary confinement, poor prison conditions, and lack of educational and recreational activities.” The European Court of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights concur, finding these conditions constitute CIDT.

Mendez (2012, p. 5) concludes that “there is an evolving standard in international law to consider the death penalty in all cases as a violation *per se* of the prohibition of torture and CIDT.” Given these realities, one-way American death penalty practice may violate international law in its application. To the degree that the time of delay in carrying out death sentences and/or the actual practice of lethal injection (or any other method of execution) produces suffering in inmates, that could constitute a violation of international law from even a positivistic perspective.

3.3. Other relevant questions

Another relevant question for this analysis is, if American capital punishment practice is plagued by significant biases based on extra-legal factors such as race, ethnicity, social class, gender, or some other factor, would that constitute a violation of international law? The condemnation of discrimination is a key component of major, international human rights documents. In the United Nation’s Universal Declaration of Human Rights, Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 calls for equal protection before the law for all humans while Article 10 calls for equality in public hearing by an impartial court. All three of these articles are violated by the real death penalty in the US. Statistics show that poor, black, male defendants—specifically those accused of killing white victims—are most likely to be sentenced to death (Robinson, 2011). Due to this bias, such defendants are not afforded equality before the law.

The same rights are enumerated by the International Covenant on Civil and Political Rights (ICCPR). Article 2 of the ICCPR calls for states to ensure against discrimination of any individual within its territory. If measures or policies do not already exist to protect against such discrimination, the state must enact measures to remedy such abuses. Article 6 protects against arbitrary deprivation of life. Statistics demonstrate that executions are arbitrarily influenced by demographic factors like race, class, and gender (Robinson, 2011). Article 14 calls for universal equality before courts. Black defendants accused of killing white victims are disproportionately given the death penalty, calling equality before the courts into question (Robinson, 2011). Moreover, Article 26 posits: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” American capital punishment is clearly not equally applied.

According to Dieter (nd: pp. 27-8), the US has ratified three treaties that “condemn punishments meted out in an arbitrary or discriminatory way.” These include the ICCPR, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination call for equality of race in the eyes of the state when it comes to policy, and equality in race before all tribunals.

The UN’s Special Rapporteur visited the US in 1997 and the International Commission of Jurists visited the US in 1996, and concluded the US was in violation of two of these treaties: “The Mission is of the opinion that ... the administration of capital punishment in the United States continues to be discriminatory and unjust—and hence ‘arbitrary’—and thus not in consonance with Articles 6 and 14 of the Political Covenant (ICCPR) and Article 2(c) of the Race Convention” (Dieter, nd, p. 28). Further, groups like the Center for Constitutional Rights (2017) allege that racial disparities in death penalty practice (e.g., sentencing, executions) constitute a violation of this treaty, thereby making capital punishment in the US unconstitutional from the positivistic perspective.

Finally, and perhaps most importantly, there is the issue of innocence. The execution of an innocent person directly goes against a key right posed in several important human rights documents, such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights—the right to life. While it could be argued that one’s right to life is void if they have committed a serious crime, such as murder, there is no argument for the right to life to be taken away from an innocent person. The execution of an innocent person is the utmost human rights abuse in that it permanently deprives one of their right to life, as well as any other liberty. According to Dieter (nd: p. 19): “Nowhere do the principles of U.S. law and the ideals of human rights meld more completely than around the issue of innocence. The concern about mistakes in capital cases is the most powerful driving force towards a re-evaluation of the death penalty in the U.S. today.” Indeed, as stories about wrongful convictions have routinely made the news, support for capital punishment has fallen to near record lows, and the number of death sentences and executions have declined significantly for more than a decade.

So, one final issue is this: Is the conviction and execution of an innocent person a violation of international law? Many of the documents reviewed earlier posit a clear respect for human life. Yet, if a person is convicted and executed for a capital crime in the US and not done so in an arbitrary way, that person is *legally guilty* even if he or she is not *factually guilty*. Undoubtedly, this would satisfy many if not most objections to capital punishment proponents. Still, if the person is *factually* innocent, one could argue that the death penalty did not respect that person's right to life and as such may constitute a violation of international law.

Conclusion

In this paper, we reviewed the relevant international laws pertaining to capital punishment generally, as well as to its actual practice in the United States. Our review of declarations, resolutions, and treaties suggests that capital punishment in theory is permissible under international law, yet international norms (as expressed in declarations, resolutions, and treaties) are trending away from the use of the death penalty. This is one reason there are now more countries in the world that have abolished the death penalty than practice it. Further, it explains that abolition of capital punishment is growing with each passing year.

Although the death penalty does not violate international law *per se* (in spite of numerous international documents expressing the importance of the right to life), its practice is highly problematic, and it could be argued that the actual implementation of capital punishment in the US violates not only ratified treaties but also customary international law. First, one could argue that the arbitrary nature of death sentences in the US—consistently demonstrated from the 1970s to today—violates a signed and ratified treaty (Article 6 of the International Covenant on Civil and Political Rights 1966), although the US expressed reservations that make the treaty less applicable to the US. The arbitrary application of the death penalty in the US also violates Article 4 of the American Convention on Human Rights. An objection to this argument is that definition of the term “arbitrary” in international law pertains to process rather than outcome, and states in the US follow legally established practices (such as requiring jury sentencing recommendations and requiring juries to weigh legally prescribed aggravating and mitigating factors) to make the process *not* arbitrary, in spite of the arbitrary outcomes across the country.

Second, racial discrimination is impermissible in public institutions under US treaty obligations (e.g., Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination 1965), although not all scholars agree that the racial disparities found in American death penalty practice are evidence of actual discrimination. The practice of capital punishment in the US, in state after state, is found to be plagued by serious racial disparities based on the race of the victims. To the degree this reflects racial discrimination, it is in violation of Article 7 of the UN Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights 1966, and Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Third, the allegedly torturous nature of death row, and even US lethal injection experimentation, could be argued as a violation of international law and principles. Article

5 of the UN Declaration of Human Rights, Article 5 of the American Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights 1966, and Convention Against Torture all seem to forbid conditions found on death row in US prisons.

Finally, executing innocent people is clearly not consistent with the principle of protecting life that is found throughout international law. This principle is found in many of the declarations, resolutions, and treaties discussed in this paper.

The most likely challenge to the death penalty in US courts is likely from studies showing racial biases in the application of the death penalty and of the execution of innocent people. This may even lead to a finding the capital punishment in the US violates international law and thus is unconstitutional under the Supremacy Clause. Ultimately, of course, these issues will be resolved in the courts (Barry, 2017).

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