



The Death  
Penalty Project

**INTERNATIONAL  
LAW AND  
ABOLITION  
OF THE  
DEATH PENALTY**

## The Universal Declaration of Human Rights and the right to life

The use of capital punishment has been an issue addressed by international human rights law since the earliest days of the United Nations. The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, and an instrument widely recognised as the gold standard for human rights, affirms the right to life and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. There was considerable debate about whether or not to include an express prohibition of capital punishment, but the General Assembly opted to remain silent on the subject. This compromise reflected the realities of the time: the fact that most of the Member States at the time continued to apply the death penalty coupled with an understanding that the death penalty was inherently incompatible with the right to life and the prohibition of torture, and that there was a trend towards its abolition.

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## Subsequent treaties aiming to restrict the use of the death penalty

Human rights treaties, both universal and regional, adopted subsequent to the Universal Declaration, and inspired by it, have imposed limitations on the use of capital punishment or prohibited it altogether. Today, international law severely restricts the death penalty and points towards its total abolition.

The Convention on the Rights of the Child forbids the death penalty without exception, although the relevant provision only applies to punishment

for crimes committed when the offender was under the age of eighteen. Optional Protocols to the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights, prohibit capital punishment in all circumstances, although to a very limited extent exception may be made for the death penalty in time of war. In the case of the abolitionist Second Protocol to the International Covenant on Civil and Political Rights, which has 89 States parties, denunciation of the treaty is impossible.

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# The importance of General Comment 36

The texts of the international human rights treaties that concern capital punishment are supplemented by a substantial body of case law developed mainly by the United Nations Human Rights Committee, the European Court of Human Rights and the International Court of Justice. In addition, the Human Rights Committee has issued authoritative pronouncements on the subject, the most important of them being its General Comment 36, issued in November 2018. Authoritative analysis of the treaty provisions can also be found in expert reports issued by special procedures of the Human Rights Council, principally those of the special

rapporteurs on extrajudicial, summary or arbitrary executions and on torture and other cruel, inhuman or degrading treatment or punishment. Every five years the Secretary-General issues a detailed report on the situation of capital punishment globally that summarises recent legal developments. The United Nations General Assembly adopts a biennial resolution calling for a moratorium on capital punishment as well as other constraints on the practice.

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## Regional obligations to restrict the use of capital punishment

Regional human rights systems have also contributed to the body of international law governing capital punishment. Relevant treaties, declarations, reports and judgments have been issued by institutions of the Council of Europe, the Organisation of American States, the African Union, the League of Arab States, the Organisation for Security and Cooperation in Europe, the Association of Southeast Asian Nations, the Commonwealth and the Francophonie. The international legal obligations concerning capital punishment vary somewhat depending upon the practice of a given state as well as the treaties to which it is a party.

## Global progress made towards abolition

Some 110 states have now abolished capital punishment in their domestic law. The vast majority of these states are parties to one or more of the abolitionist treaties, in addition to their more general obligations under human rights treaties. Consequently, almost all of the states that have abolished capital punishment in their domestic criminal justice legislation are prevented by international law from reintroducing the death penalty. The American Convention on Human Rights explicitly prevents states that have abolished the death penalty from reintroducing it. The International Covenant on Civil and Political Rights does this implicitly, according to the authoritative Human Rights Committee.

International law also prohibits states that have abolished the death penalty from facilitating its imposition by other countries, for example by transferring or extraditing suspects or providing evidence and other forms of cooperation that may contribute to convictions where the death penalty is a possible result. In effect, this is a corollary of their more general obligation not to expel individuals to countries where there is a real risk of torture, ill-treatment and violation of the right to life (non-refoulement).

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### States that have stopped using the death penalty

About 60 states have not used the death penalty for at least ten years although they retain the relevant legislation and may in fact continue to pronounce sentences of death without carrying them out.

This is known as *de facto* abolition. History has shown that many of the states that are now

abolitionist in law had actually ceased using the death penalty before taking this step, often as a result of an official moratorium. Recent UN reports show that these states almost never revert to the practice of capital punishment once a decade without an execution has passed. A few states have actually ratified one of the abolitionist treaties even though their national laws still allow for capital punishment. An arguable case can be made that in those states where the death penalty has not been imposed for at least a decade, general legal obligations under human rights treaties protecting the right to life and the prohibition of torture prevent them from imposing capital punishment.

## States that continue to use the death penalty

Only about 30 states in the world continue to use capital punishment. Most of these only impose it occasionally. The vast majority of executions are conducted by four or five states. These states are nevertheless constrained in their use of the death penalty by international legal standards resulting either from treaties or customary international law. In terms of treaty law, the most important source is Article 6 of the International Covenant on Civil and Political Rights. This legal text specifies that countries which have not abolished the death penalty may only impose sentence of death for the most serious crimes in accordance with the law in force at the time of the commission of the crime.

The penalty can only be carried out pursuant to a final judgment rendered by a competent court. A person sentenced to death must have the right to seek pardon or commutation of

the sentence. Furthermore, amnesty, pardon or commutation of the sentence of death may be granted in all cases. Finally, 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. The prohibition on execution of juvenile offenders is also set out in Article 37 of the Convention on the Rights of the Child. Other principles have been held to follow by implication from Article 6 of the Covenant, including the prohibition of mandatory sentence of death and the requirement that a death sentence can only be imposed if the trial scrupulously respects internationally recognised standards of fairness, including the right to funded counsel and the availability of appeal to a higher court. The death penalty may not be imposed upon a person suffering from mental disorder or impairment.

## The International Covenant on Civil and Political Rights

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) concludes with the important statement that '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'. As a provision in an international treaty, its role is not only hortatory. It prevents States that are parties to the Covenant from claiming that Article 6 authorises the death penalty or recognises its acceptability under international law. On the contrary, the paragraph provides confirmation that the limitations on capital punishment set out, are intended to be purely temporary in nature, pending full abolition.

Only a few states that impose the death penalty are either not parties to the ICCPR, or have formulated reservations to Article 6. Nevertheless, they remain bound by

customary international law governing the death penalty. That they themselves accept the existence of legal obligations restricting capital punishment can be seen in their reports to the Human Rights Council within the context of the Universal Periodic Review. These states confirm that they recognise that the death penalty may not be imposed on certain categories of persons, that it must be reserved for the most serious crimes, that standards of fairness must be respected during trial. There is evidence that the restrictions on the death penalty set out in the Covenant, as supplemented by a resolution of the United Nations Economic and Social Council (the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty) are also norms of customary international law, binding even upon states that have not ratified the relevant treaties.

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## The problem with 'most serious crimes'

One of the most controversial issues in the application of restrictions on the death penalty concerns the requirement that it be used only for the 'most serious crimes'. The provision must be read restrictively. Because it is an international standard, it must be understood in such a way as to apply only when there is a genuine global consensus about the gravity of the crime. For this reason, it must be confined to crimes that result both intentionally and directly in death. Crimes such as attempted murder, abduction, armed robbery, corruption, and drug trafficking do not meet this standard. Moreover, the requirement of seriousness extends to the mode of participation, thereby excluding most cases of complicity.

## Other legal frameworks impacting the application of the death penalty

Going beyond the framework of international human rights law, issues relating to the death penalty may arise in other areas of international law. Since the 19th century, extradition treaties have included restrictive provisions permitting the sending state to insist upon an assurance that capital punishment will not be imposed by the receiving state. In litigation where the sending state has not required such assurances, international courts and domestic tribunals have held that refusal of extradition in the absence of such assurances may constitute a violation of the right to life or the prohibition of torture and ill-treatment set out in international human rights instruments and domestic constitutions.

The death penalty was provided for expressly at the first international criminal tribunals, following the Second World War, and many executions were imposed. However, when the modern generation

of international criminal tribunals was established starting in the 1990s, capital punishment was systematically rejected as a possible penalty. At the international criminal tribunals, including the International Criminal Court, the maximum available penalty is life imprisonment.

International humanitarian law, or the law of armed conflict, also restricts use of the death penalty. For example, in situations of international armed conflict, prisoners of war and civilians in occupied territories may only be executed under very limited circumstances.

The International Court of Justice has addressed capital punishment issues in a number of cases concerning application of the Vienna Convention on Consular Relations. The treaty requires that foreign nationals who are charged with an offence must be advised of their right to consular assistance.

The Death Penalty Project is a legal action NGO with special consultative status before the United Nations Economic and Social Council. We provide free representation to people facing the death penalty worldwide, with a focus on the Commonwealth. We use the law to protect prisoners facing execution and promote fair criminal justice systems, where the rights of all people are respected.

Read more in this series from The Death Penalty Project, and our other publications, on our website [www.deathpenaltyproject.org](http://www.deathpenaltyproject.org)

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