

@The death penalty in wartime: arguments for abolition

By Antonio Marchesi¹

At present, 52 countries have totally abolished the death penalty while 16 have abolished it for all but exceptional offences, such as wartime crimes. Nineteen countries retain the death penalty in their legislation but have not executed anyone for the past 10 years or more. One hundred and three countries retain and use the death penalty for ordinary crimes.²

In recent years, although retentionist countries continue to be a majority, the world has been moving towards abolition faster than ever before in history. Some countries have reached total abolition in one stage, while others have proceeded in two stages, first deciding to abolish the death penalty only for ordinary crimes and later moving on to total abolition. The second stage seems, however, to be a lengthy process. It took Austria 18 years, Denmark 45, Finland 23, the Netherlands 112, New Zealand 28, Norway 74, Portugal 110, Sweden 51;³ and a number of countries have remained stuck at stage one for a long time.

Is this slowness simply due to lack of interest in an issue that seems to have little practical relevance in times when peace prevails? Or are there substantial reasons for not extending abolition to all crimes, including crimes committed in wartime?

This paper considers whether there are any special arguments for retaining the death penalty in wartime which would justify limiting abolition to ordinary crimes. It also includes a brief review of the subject from the point of view of international law. An appendix provides a summary of existing provisions on the death penalty for exceptional offences in the legislation of states where this penalty has been abolished for ordinary crimes.

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² Amnesty International, "List of Abolitionist and Retentionist Countries", June 1993 (AI Index: ACT 50/04/93).

³ *Loc. cit.*

1. ARGUMENTS FOR AND AGAINST THE RETENTION OF THE DEATH PENALTY FOR WARTIME OFFENCES

In 1991, during a debate in the House of Lords of the United Kingdom concerning a proposal to abolish the death penalty in the Armed Forces Bill, speakers both for and against the proposal stated that rules aimed at governing special situations should not differ from general rules unless there is "good reason" to the contrary. In other words, once the principle of abolition has been accepted within the legal order of a state, the existence of exceptional situations to which that principle does not apply must be adequately demonstrated.

The second Optional Protocol to the International Covenant on Civil and Political Rights, discussed below, is apparently consistent with this line of reasoning: it imposes upon states which ratify it an obligation to abolish the death penalty totally, allowing for the retention of the death penalty in wartime only as an exception and then only through the introduction of a specific reservation to this effect, to be made at the time of ratification of or accession to the Protocol.

In line with this approach, we will not consider any of the general arguments for and against the death penalty as such,⁴ but only the pros and cons of *exceptions* to a generally abolitionist approach.

a. The death penalty for wartime crimes and the right to life

Most international treaties and resolutions consider the issue of capital punishment in the context of the right to life. Abolitionists - people favouring the abolition of the death penalty - consider the death penalty to be a violation of that fundamental right in all cases, whether it is imposed for ordinary or for exceptional offences (the right to life belonging to a core of basic human rights which can never be derogated from). Retentionists, on the other hand, believe that the death penalty is a legitimate exception to the enjoyment of the right to life.

Whichever position is adopted, no element differentiating the case of exceptional crimes from that of ordinary crimes emerges in the context of the right to life. It is true that those who favour retention in special circumstances such as wartime argue that it is particularly difficult to accept that the life of someone who has betrayed country and fellow citizens should be treated as inviolable or "sacred". This sort of objection, however, while understandable in some cases, is not convincing. Once the *principle* that the death penalty

⁴ For a discussion of the arguments for and against the death penalty, see Amnesty International, *When the State Kills... The Death Penalty v. Human Rights*, Amnesty International Publications, London, 1989.

violates the right to life is accepted, the circumstances in which this violation may take place, however exceptional, are inevitably irrelevant.

b) Does the death penalty have a unique deterrent effect in wartime?

The general debate on the death penalty is also based on practical considerations such as whether or not it deters crime more effectively than other punishments. Those favouring total abolition insist that capital punishment has never been shown to have a unique deterrent effect, in peacetime or in wartime. Others believe that, in wartime as in peacetime, it does not cease to be an ultimate deterrent. Others still do not rule out the possibility of a unique deterrent effect in some cases but point out that it is extremely uncertain in view of the wide range of individual reactions, and that the likelihood of being discovered and punished, both in time of peace and in wartime, appears to be far more important in terms of deterrence than the harshness of the penalty.

Insofar as exceptional circumstances such as wartime are concerned, some supporters of the death penalty argue that capital punishment could turn out to be particularly useful in very unstable situations where the threat of imprisonment is of little use. But it has been pointed out that those who are willing to help the enemy in wartime are usually motivated either by blind idealism or by blind hatred, while those who desert - another category of offence which is frequently punishable with death in wartime - tend to act out of fear. The threat of the death penalty is presumably of little impact upon either category of offenders as they are often not inclined to be rational about the consequences of their deeds. Also, since in wartime the risk of death is higher for everybody, capital punishment may easily cease to have whatever unique deterrent effect it might conceivably have in peacetime.

But other arguments should also be considered in assessing the deterrence argument in relation to wartime crimes. A death sentence, in order to be effective as a deterrent, must presumably be carried out speedily: this, however, involves a reduction of judicial safeguards and a consequent increase in the risk of executing an innocent person. Besides, it must be pointed out that those who favour total abolition on moral grounds would not change their mind, either in general or specifically in relation to wartime crimes, even if a unique deterrent effect of the death penalty were actually proved. For those who favour abolition on grounds of principle, this sort of practical argument is never a valid reason for retention.

c. The death penalty and the maintenance of military discipline

In wartime it may be argued that the death penalty is useful or necessary not only to deter crime but also to maintain the discipline of soldiers at a time of great tension and strain.

However, in the first place, no particular relationship between military effectiveness and the death penalty has ever been proved. On the contrary, it appears likely that entirely different elements such as the desire to defend one's country are far more important in determining a soldier's will to fight than the knowledge that the death penalty is provided for traitors, deserters and other wartime offenders.

In the second place, safeguarding the discipline of soldiers is a purpose which has little to do with the idea of justice, either in general or in individual cases. Is it not unacceptable in principle and dangerous in practice to let the choice of putting someone to death be strongly influenced by elements of a general nature such as military effectiveness?

d. Retribution

In the debate over the death penalty for exceptional offences, retentionists often base their position on the moral idea of "paying for a crime" (which for a very serious crime can - it is said - be achieved only by death) rather than on practical arguments such as deterrence. The idea of "paying for a crime" is sometimes closely combined with an implicit or explicit sense of revenge. In wartime, the preponderance of emotional reactions over rational answers is particularly strong and may favour such a position.

However, rational answers should prevail. In the first place, even in the context of the theory of retribution, the abolition of the death penalty does not necessarily make certain crimes appear less serious. A hierarchy of punishments is still possible, and sentences to long terms of imprisonment are not light sentences. In the second place, in criminal policy, another goal, that of the rehabilitation of offenders, has by now been long accepted. This goal necessarily carries an abolitionist position in relation to the death penalty.

e. The "death penalty in self-defence" analogy

Arguments in favour of the death penalty for exceptional offences such as wartime crimes are sometimes given on the basis of an analogy with self-defence. Those who justify the use of lethal arms against the enemy should - it is said - if they are to be consistent, justify the use of lethal arms against "internal enemies" also. In other words, abolitionist trends in internal law must proceed together with (and not proceed faster than) pacifist trends at an international level.

Conditions for resort to criminal punishment and to self-defence are, however, clearly different. While self-defence may be justified in the case of a state or of an individual responding immediately (that is, when the aggression is actually taking place) to the aggression of another state or of another individual respectively, there can be no justification under the heading of self-defence for a premeditated and cold-blooded response of execution by a state against an "aggression" (the crime) by an individual which will normally have taken place much earlier.

f. Arbitrary use of the death penalty in wartime

In exceptional circumstances such as wartime the risk of arbitrary imposition of capital punishment increases. It is precisely in exceptional situations, characterized by strong collective emotions, that the death penalty may lend itself more easily to abuse. Also, it is not infrequent, in time of armed conflict, for a "traitor" to become a "hero" relatively quickly; but the use of the death penalty makes adaptation to any new evaluation of historical facts impossible.

Abolitionists further point out that in time of war the possibility of a judicial error and the risk of killing an innocent person may increase. The reasons for this include the fact that wartime procedures tend to be summary (with trials often held behind closed doors without any adequate appeal), that executions are often carried out quickly after sentencing and that feelings of rancour or revenge may influence the witnesses and the judges - who tend to be less independent from the executive branch than in peacetime.

g. The opinion prevailing among the armed forces

The armed forces have a special knowledge and experience of war and states of emergency. Some of those who favour retaining the death penalty in wartime suggest that special weight be given to the prevalence of retentionist views among their members. There are, however, at least two good reasons against this approach. In the first place, if it is accepted that capital punishment is an issue of human rights, then it would be running against a basic tenet of civilization to allow the retention of the death penalty to be decided by a majority of the population or by the majority of a sector of the population such as the armed forces. In the second place, it should be remembered that emotions - and, often, lack of proper information - strongly influence the results of opinion polls, whether conducted among the general population or among specific groups. Such polls often vary considerably within a brief period of time, and the answers can vary depending on how the questions are asked.

2. INTERNATIONAL LAW

International law does not contain a general prohibition of the death penalty. However, in a general comment on Article 6 of the International Covenant on Civil and Political Rights, the Human Rights Committee set up under the Covenant has held that Article 6, concerning the right to life, is worded in terms which "strongly suggest ... that abolition is desirable." Abolition has been adopted as an objective by the United Nations General Assembly and is pursued, in practice, at the level of international law, by the adoption of a series of internationally agreed restrictions and safeguards on the use of the death penalty.⁵

Recently, a limited obligation to abolish the death penalty has been introduced by the adoption of the second Optional Protocol to the International Covenant on Civil and Political Rights and, on a regional level, by the Sixth Protocol the European Convention on Human Rights and the optional Protocol to the American Convention on Human Rights to Abolish the Death Penalty.⁶ These three protocols are binding upon states which ratify or accede to them.

In the instruments which establish restrictions on the use of the death penalty, no specific mention is made of exceptional offences such as wartime crimes. Wartime crimes may be considered in the light of the category of "most serious crimes" to which the use of

⁵ See *When the State Kills...*, Chapter 3.

⁶ The texts of these three protocols are reproduced in the *Amnesty International Report 1990*, Appendix IX; *When the State Kills...*, Appendix 7; and the *Amnesty International Report 1991*, Appendix XI, respectively.

the death penalty is restricted under Article 6 (2) of the International Covenant on Civil and Political Rights. The only safe conclusion in this context is that it is a violation of Article 6 (2) of the Covenant to impose a death sentence upon a person found guilty of any wartime crime which is not generally considered to be particularly "serious".

The three optional protocols cited above contain specific provisions concerning exceptional offences. Thus, Article 2 of the second Optional Protocol to the International Covenant allows a state party to indicate, upon ratification or accession, its wish to maintain the possibility of applying "the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". The Protocol to the American Convention on Human Rights has a similar provision. In somewhat different terms, Article 2 of the Sixth Protocol to the European Convention establishes that a state may "make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war". The second Optional Protocol is more restrictive: capital offences must be particularly serious, of a military nature and committed in time of war. The Sixth Protocol does not contain the first two restrictions, and the possibility of imposing the death penalty includes times in which there is an "imminent threat of war". Furthermore, in the second Optional Protocol, an explicit reservation must be made upon ratification or accession by states wishing to retain the death penalty in wartime, whereas in the Sixth Protocol the provision of Article 2 applies to all parties. All three protocols appear to rule out the possibility of resorting to the death penalty during a civil war.

Restrictions on resorting to the death penalty are provided for in the four Geneva Conventions of 1949 and the two Protocols of 1977 additional to the Conventions.⁷

With reference to international armed conflicts, Article 101 of the Third Geneva Convention and Article 75 of the Fourth Convention establish a six months' period before a death sentence may be carried out against a prisoner of war or a member of the civilian population respectively.

Article 68 of the Fourth Convention establishes that the death penalty may be imposed on a member of the civilian population in an occupied territory only for espionage, serious acts of sabotage against military installations of the occupying power, or intentional crimes causing death, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

As for non-international armed conflicts, Article 6 (4) of Additional Protocol II of 1977 states that the death penalty "shall not be pronounced on persons who were under the age of

⁷ For extracts from these instruments, see *When the State Kills...*, Appendix 6.

eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children."

APPENDIX

THE DEATH PENALTY FOR EXCEPTIONAL OFFENCES IN THE LAWS OF STATES WHICH HAVE ABOLISHED IT FOR ORDINARY CRIMES: COUNTRY-BY-COUNTRY SURVEY

Argentina

The Code of Military Justice provides for the death penalty for offences such as treason, espionage, rebellion and mutiny. The death penalty is optional for all the offences for which it is provided. Defendants are tried by a military court. In 1984, new legislation was passed providing for civilian Federal Appeal Courts to review all military court decisions. However, Article 759 of the Code of Military Justice states that any soldier who, in battle, runs away from the enemy or panics "may be put to death instantly, to punish his cowardice and to set an example to the others". In wartime the military also have the power to subject both military personnel and civilians to summary executions through the proclamation of emergency regulations as provided for by articles 131 and 132 of the Code of Military Justice.

Brazil

The death penalty was abolished in the first republican Constitution of 1891 but retained under military legislation for application in wartime. An analogous provision is included in the 1988 Constitution, presently in force.

Canada

The death penalty was abolished for capital murder by a vote of Parliament in July 1976. It is retained for a number of military offences under the National Defence Act of 1950, some of which carry a mandatory death sentence. The death penalty may be imposed only if the verdict is unanimous. The National Defence Act contains provisions for review and appeal and the execution may be carried out only if approved by the Governor General in Council. No executions have been carried out under this Act.

Cyprus

In 1983 the death penalty was abolished for premeditated murder under the Criminal Code. It is retained under the Criminal Code for treason, instigating invasion, and piracy with violence.

In 1990 the Military Criminal Code was amended and the death penalty was abolished for 19 offences, which now carry a maximum life sentence. However, the death penalty is retained under the Military Criminal Code for six offences, including high treason, mutiny, betraying military secrets to a foreign country, collusion with the enemy and abandoning a military position. Both the President and the Vice-President have the right to commute death sentences to life imprisonment.

El Salvador

Under Article 27 of the 1983 Constitution the death penalty can be imposed only during an international war on those convicted of treason, desertion, espionage or sedition, as defined in El Salvador's Military Code. The death penalty does not apply to offences committed during civil war. Under the Code of Penal Procedure, the death penalty may be commuted by the executive.

Fiji

Fiji abolished the death penalty for murder in 1979. The death penalty is retained only for the crimes of treason, instigating foreigners to invade Fiji, and genocide.

Israel and the Occupied Territories

The death penalty was abolished for murder in 1954. It is retained for treason under the Israeli Penal Code and for war crimes under the 1950 laws on genocide and Nazi collaboration. Furthermore, the 1945 Defence Regulations provide for the death penalty for terrorist murder, attempted terrorist murder, sabotage and the use and unauthorized bearing of weapons. The death penalty is not mandatory.

In the Occupied Territories of the West Bank and Gaza the death penalty is provided for terrorist murder and attempted terrorist murder under the 1945 Defence Regulations and Military Order 378. In 1968, however, Military Orders 268 (for the West Bank) and 72 (for Gaza) ruled that local courts should not pass death sentences. Local courts in the West Bank apply the Jordanian Penal Code, and Gaza local courts apply legislation introduced by the Egyptian authorities before 1967. In Israel there is a possibility of appeal in all capital cases, and a power of commutation is provided for.

Italy

Article 27 of the 1947 Constitution states: "The death penalty is not admitted save in cases specified by military laws in time of war." The 1941 Military Penal Code in Time of War, which is still in force, retains the death penalty for a wide range of offences. Article 87 of the Constitution empowers the President of the Republic to grant pardon or to commute a sentence.

In July 1993 the Chamber of Deputies, one of the two houses of the Italian parliament, approved a bill to eliminate the death penalty from the Military Penal Code in Time of War. An analogous bill was awaiting examination by the Senate, but the parliament was dissolved in January 1994 to make way for general elections.

Malta

Since 1971 the death penalty has been retained, under the Armed Forces Act of 1970, only for offences committed by those subject to military law, such as aiding the enemy, communicating intelligence to the enemy, or taking part in a mutiny, and may be imposed only in time of war. Trial is by court-martial. The President has the power to grant pardon, and to reprove or commute death sentences after receiving the advice of the Cabinet.

Mexico

The 1917 Constitution states that the death penalty can only be imposed for a series of particularly serious offences (not all of a military nature). However, none of Mexico's states retain the death penalty in their penal codes. It is retained in the Military Code of Justice.

Nepal

In 1990 the death penalty was abolished for murder and subversive activities. It is retained for espionage and attacks on the Royal Family.

Paraguay

A new Paraguayan Constitution abolishing the death penalty came into force on 21 June 1992. Chapter 1, Section 1, Article 4 of the Constitution states: "The death penalty is abolished". The death penalty is, however, retained under the Military Penal Code of 1980 which allows for its use in time of war. Military personnel found guilty of treason or desertion in wartime may be sentenced to death, but sentences may be commuted by the Executive Power to 25 years's imprisonment.

Peru

Under Article 140 of the Constitution which came into force in December 1993, the death penalty may be imposed only for treason in time of war and for terrorism. Under the heading of treason, the military penal code introduced in July 1980 provides for a mandatory death penalty for a series of criminal acts against the state committed in time of external war. As of January 1994 there was no provision for the death penalty for terrorism in the Peruvian penal code.

Seychelles

The death penalty was provisionally abolished for murder in 1966 while Seychelles was under British colonial rule, and this choice was confirmed upon independence in 1976. The death penalty is retained only for treason.

Spain

The Constitution of 1978 abolished the death penalty except for crimes under the Military Penal Code in time of war. A new Military Penal Code, which came into force in 1986, retains the death penalty as an optional punishment for a wide range of wartime offences. As head of state, the King has the constitutional power to grant clemency.

United Kingdom

Since 1969, the death penalty has been abolished for murder. It is retained for high treason both in peacetime and in wartime and, in England and Wales, for piracy with violence. It is also retained for a number of crimes committed by military personnel in wartime such as treason and espionage. The monarch exercises the Royal Prerogative of Mercy on the advice of the Secretary of State for Home Affairs.