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## NO END IN SIGHT

THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW.  
By William A. Schabas.<sup>1</sup> Cambridge: Grotius Publications. 1993. Pp.  
xxxii, 384. \$96.00.

In societies that practice the death penalty, it is the ultimate sanction for wrongdoing. Its use, however, is controversial at both the national and international levels. In *The Abolition of the Death Penalty in International Law*, William Schabas chronicles the modern history of capital punishment in the international sphere. Schabas advances two principal claims: first, that since the Second World War, limitations placed on the use of the death penalty have increased dramatically; and second, that "[t]he day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as an imperative rule of *jus cogens*, is undeniably in the foreseeable future" (p. 2). Schabas presents strong evidence that international agreements have imposed increasingly strict limits on the death penalty, but overstates the progress that has been made toward full abolition. It is true that the death penalty is less common today than it was before World War II; yet more than half of the world's countries still put people to death (p. 286), and many of those countries are strongly retentionist. Contrary to Schabas's thesis, the evidence suggests that international law will almost certainly not abolish the death penalty in the near future and, indeed, may never do so.

Schabas approaches his topic from two angles. The first is a chronological survey of important international agreements concerning the death penalty (p. 14), including an in-depth discussion of the travaux préparatoires, or legal history.<sup>2</sup> The second is a closer examination of two regional systems:<sup>3</sup> Europe<sup>4</sup> and the Americas.<sup>5</sup>

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<sup>2</sup> Schabas discusses several important documents, including the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/49 (1990) [hereinafter *Second Optional Protocol*]; the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Civil Rights Covenant*]; and the *Universal Declaration of Human Rights*, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., Supp. No. 127, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

<sup>3</sup> This Book Note, however, will focus on Schabas's discussion of abolition at the global level.

<sup>4</sup> In particular, Schabas examines Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, May 1983, Europ. T.S. No. 114, and the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>5</sup> Schabas examines the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I.L.M. 1447, the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, and the American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L/V/II.23, doc. 21 rev. 6 (1948).

Schabas begins by examining the 1948 *Universal Declaration*, which he describes as "[t]he cornerstone of contemporary human rights law" (p. 25).<sup>6</sup> Article 3 of the *Declaration* states that "[e]veryone has the right to life, liberty and the security of person."<sup>7</sup> Although the *Universal Declaration* does not mention any exception to the right to life, its drafters did consider including the death penalty as an exception (p. 26). Schabas argues that article 3 is "abolitionist in outlook" (p. 49). He offers as evidence several United Nations General Assembly resolutions that deal with the limitation or abolition of capital punishment and that refer to article 3 of the *Universal Declaration* in their preambles,<sup>8</sup> and the Secretary General's 1973 report on capital punishment, which "claimed that article 3 of the [*Universal*] *Declaration* implies limitation and abolition of the death penalty" (p. 49).

Schabas next turns to the *Civil Rights Covenant*, a document conceived at the same time as the *Universal Declaration*, but not completed until 1966 (p. 51). Article 6 of the *Civil Rights Covenant* states that the death penalty "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 . . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court."<sup>9</sup> To comply with the *Covenant*, the law must also include the right to seek pardon or commutation.<sup>10</sup> Finally, the article abolishes the death penalty for those below eighteen years of age and for pregnant women.<sup>11</sup> By 1993, 115 states had become party to the covenant, suggesting that it had come to embody a norm of international law.<sup>12</sup>

The provisions of article 6, which outline conditions necessary for legal use of the death penalty, are prefaced by the phrase "[i]n countries which have not abolished the death penalty."<sup>13</sup> Some observers, including Schabas, suggest that this phrase implies that, once abolished, the death penalty cannot be reinstated, because the paragraph

<sup>6</sup> The *Universal Declaration* is the first of five instruments that together comprise the "International Bill of Rights" (p. 25).

<sup>7</sup> *Universal Declaration*, *supra* note 2, art. 3, at 72.

<sup>8</sup> See, e.g., G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989); G.A. Res. 32/61, U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1977); G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1971).

<sup>9</sup> *Civil Rights Covenant*, *supra* note 2, art. 6, ¶ 2, 999 U.N.T.S. at 174-75.

<sup>10</sup> See *id.* art. 6, ¶ 4, 999 U.N.T.S. at 175.

<sup>11</sup> See *id.* art. 6, ¶ 5, 999 U.N.T.S. at 175.

<sup>12</sup> The United States joined the *Civil Rights Covenant* with a reservation claiming the right to execute anyone, with the exception of pregnant women, subject only to its own laws. S. REP. NO. 23, 102d Cong., 2d Sess. 11-12 (1992). The principal concern of the United States was to retain the right to execute those under the age of eighteen. Other than the United States, only Bangladesh, Barbados, Pakistan, Iran, and Iraq have executed individuals for crimes committed while under the age of eighteen (p. 161, citing AMNESTY INT'L, WHEN THE STATE KILLS 38-39 (1989)).

<sup>13</sup> *Civil Rights Covenant*, *supra* note 2, art. 6, ¶ 2, 999 U.N.T.S. at 174-75.

that permits the death penalty subject to certain conditions would no longer apply (p. 103). This interpretation supports Schabas's thesis of steady progress toward abolition: to reinstate the death penalty would be "incompatible with the Covenant" (p. 103).<sup>14</sup>

Regardless whether the *Civil Rights Covenant* is an abolitionist document, it certainly places important restrictions on its signatories' use of the death penalty. The required procedural safeguards for capital punishment cases include "the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal" (p. 109).<sup>15</sup> The United Nations Human Rights Committee has ruled that death sentences must be reversed in cases in which these procedural guarantees were lacking.<sup>16</sup> These and other limits on the death penalty were further strengthened by the General Assembly's adoption of the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*.<sup>17</sup> The *Safeguards* echo article 6 of the *Civil Rights Covenant* in restricting the use of the death penalty.<sup>18</sup> Schabas considers the *Safeguards* to have elevated the norms of article 6 to the status of customary international law (p. 161).<sup>19</sup>

In 1989, after considerable debate, the General Assembly adopted the *Second Optional Protocol* (p. 170). The protocol calls for the abolition of capital punishment and potentially represents the final step in the abolition of the death penalty in international law. It entered into force in July, 1991 and had fourteen signatories as of February 1, 1993 (p. 170).

With this chronicle, Schabas successfully demonstrates that there has been an evolution over the last fifty years from the basic recognition of the right to life in the *Universal Declaration* to the establish-

<sup>14</sup> Schabas does report, however, that "[a] Committee of Experts of the Council of Europe felt that it is 'not clear' whether the Covenant prohibits reintroduction of the death penalty in a country where it has already been abolished and noted that this did not appear to be the intention of its drafters" (p. 103).

<sup>15</sup> Schabas takes this language from the *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 94, U.N. Doc. A/37/40 (1982).

<sup>16</sup> See, e.g., *Reid v. Jamaica*, U.N. GAOR Hum. Rts. Comm., 45th Sess., Supp. No. 40, at 85, 91-92, U.N. Doc. A/43/40 (1990) (ruling that the guarantee of a defense was not met where the complainant had been allowed to communicate with his attorney for the first time only on the day of the trial); *Pinto v. Trinidad & Tobago*, U.N. GAOR Hum. Rts. Comm., 45th Sess., Supp. No. 40, at 69, 73-74, U.N. Doc. A/43/40 (1990) (holding that a defendant must be permitted a different court-appointed attorney on appeal if he so requests).

<sup>17</sup> E.S.C. Res. 1984/50, U.N. ESCOR, 21st plen. mtg., Supp. No. 1, at 33, U.N. Doc. E/1984/84 [hereinafter *Safeguards*].

<sup>18</sup> In addition to the restrictions included in article 6 of the *Civil Rights Covenant*, the *Safeguards* forbid the execution of new mothers and impose a standard of clear and convincing evidence that leaves "no room for an alternative explanation of the facts." *Safeguards*, *supra* note 17, ¶ 4.

<sup>19</sup> International law can arise out of custom, conventions, or "the general principles of law recognized by civilized nations." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38.

ment of a set of norms that restrict the circumstances under which the death penalty can be administered.<sup>20</sup> Although the book's discussion of the legal status of these norms is limited, he makes the plausible claim that many of them have achieved the level of customary law (pp. 291-93).

Schabas further claims that abolition is inevitable. He points to an abolitionist trend that has persisted for the last fifty years, evidenced by the increasing number of abolitionist states<sup>21</sup> and the changing tone of international agreements. In 1948 the *Universal Declaration* established the right to life; in 1966 the *Civil Rights Covenant* suggested that abolition was the goal of the international community<sup>22</sup> and codified procedural protections for those accused of capital crimes; in 1984 the *Safeguards* further emphasized these procedural requirements, possibly elevating them to the level of international law; finally, in 1989 the *Second Optional Protocol* explicitly forbade the use of the death penalty by its signatories.

The trend Schabas identifies, however, may already have run its course. Further progress toward abolition is unlikely without major changes in the attitudes both of individual countries and of entire regions. Additionally, with the exception of the *Second Optional Protocol*, which was resisted by retentionist states, none of the documents Schabas examines represents a serious threat to the use of capital punishment. In other words, abolitionists have, until recently, been waging a battle against an unmotivated adversary. Retentionists had little reason to oppose the adoption of measures that clearly allowed them to continue to use capital punishment. Only since the adoption of the *Second Optional Protocol* have retentionists truly begun to defend their use of capital punishment, making the road toward abolition considerably steeper and, perhaps, impassable.

An international prohibition of the death penalty would require, first and foremost, a dramatic increase in the number of abolitionist states.<sup>23</sup> As resistance to international pressure for abolition mounts,

<sup>20</sup> As Schabas observes:

More and more categories of individuals who may never be subjected to the death penalty are being identified. International law is setting higher and higher standards for procedural requirements which are essential to any trial in which the death penalty may be imposed subject to law. . . . These developments are, in effect, a form of partial abolition of the death penalty (pp. 20-21).

<sup>21</sup> See ROGER HOOD, *THE DEATH PENALTY* 159-60 (1989).

<sup>22</sup> Schabas argues that the drafters of the *Civil Rights Covenant* had abolition as their goal (p. 80), though an alternative interpretation is that they had the more modest goal of establishing an exception to the right to life without suggesting that capital punishment is desirable.

<sup>23</sup> Customary law can arise only out of a "common and widespread" practice, MARK E. VILIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 13 (1985), while a treaty obviously must be ratified by a large number of states in order to have universal application. The fact that more than half of the states in the world still use capital punishment makes it clear that the third source of international law, "the general principles of law recognized by civilized nations," *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* art. 38, does not apply to the death penalty.

the prospects for such an increase are reduced.<sup>24</sup> For example, the nature of arguments in defense of the death penalty has changed. Rather than claiming that capital punishment is a temporary measure "pending the evolution of their societies"<sup>25</sup> or invoking deterrence arguments, retentionist states are now arguing that the death penalty is simply not a violation of human rights<sup>26</sup> and lies entirely within the realm of domestic law.<sup>27</sup>

Schabas also fails to recognize the importance of regional and cultural differences. In order to achieve the status of customary law, a norm must be embraced not only by a large number of countries but also by several of the regions of the world.<sup>28</sup> A cursory tally of abolitionist and retentionist states reveals that the vast majority of abolitionists are concentrated in Europe and Latin America.<sup>29</sup> In other regions, the "growing trend" (p. 285) toward abolition has not taken root.<sup>30</sup> The emergence of customary law would require abolition in these other regions on a scale comparable to what has occurred in Europe since the Second World War. At the very least, a majority of the countries in several of these regions would have to renounce the death penalty.<sup>31</sup> Schabas offers no evidence that African, Asian, Caribbean, or Middle Eastern countries will suddenly race toward abolition.

The Islamic states present a striking example of the challenges facing abolitionists in retentionist regions of the world.<sup>32</sup> Islamic states have often been ardent retentionists and have recently begun to express their disapproval of abolition more forcefully. For instance, an Egyptian representative described the *Second Optional Protocol* as "a racist, imperialist idea which certain countries were seeking to impose on the 115 countries which still had the death penalty."<sup>33</sup> The resistance of Islamic countries is further bolstered by religious arguments. Thus, during debate over the *Second Optional Protocol*, the Sudanese

<sup>24</sup> See Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 29 BROOK. J. INT'L L. 273, 274 (1993).

<sup>25</sup> *Id.* at 328.

<sup>26</sup> See, e.g., *id.* at 321 n.222, 345.

<sup>27</sup> See *id.* at 275.

<sup>28</sup> See VILLIGER, *supra* note 23, at 13.

<sup>29</sup> See HOOD, *supra* note 21, at 169-71. Regional norms may also achieve the status of international law. Indeed, a regional norm prohibiting the death penalty may currently exist in Western Europe. See Gino Naldi, *United Nations Seeks to Abolish the Death Penalty*, 40 INT'L & COMP. L.Q. 948, 951 (1991). Such a norm may also exist, or may be emerging, in Latin America (excluding the Caribbean, which is generally retentionist). See HOOD, *supra* note 21, at 160.

<sup>30</sup> See HOOD, *supra* note 21, at 16-31.

<sup>31</sup> Cf. VILLIGER, *supra* note 23, at 13 (noting that for customary law to emerge, "remaining inconsistent practice" would have to be "marginal and without direct legal effect").

<sup>32</sup> Schabas recognizes the importance of the Islamic states, and writes that "until the Islamic states change their outlook on the subject, it is difficult to envisage a truly universal abolition of the death penalty" (p. 298).

<sup>33</sup> Fitzpatrick & Miller, *supra* note 24, at 341 (quoting U.N. GAOR 3d Comm., 44th Sess., 52d mtg. ¶ 72, U.N. Doc. A/C.3/44/SR.52 (1989)).

delegate stated that abolition was "incompatible with the criminal code and legislation of Sudan based on the divine and sacred laws of Islam which were immutable."<sup>34</sup>

Defenders of the death penalty can now be found in all parts of the world. Zaire and India, for example, have voiced their opinion that capital punishment is not a violation of the right to life,<sup>35</sup> while the United States has stated that it objects to the long term goal of abolition.<sup>36</sup>

The obligations of the *Second Optional Protocol, Protocol No. 6*,<sup>37</sup> and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*<sup>38</sup> are explicitly abolitionist agreements and are binding on their signatories (p. 2), but there is no reason to expect the majority of states to accede to these treaties. The *Second Optional Protocol*, though intended to bind only its signatories, faced considerable resistance from supporters of the death penalty.<sup>39</sup> Abolitionist pressure clearly has begun to concern retentionists, who have recently started to resist the push toward abolition. One can expect that if observers begin to trumpet the emergence of a norm of customary law, retentionists will become even more vocal in defense of the death penalty.

Schabas deserves praise for his insight into both the drafting and interpretation of the most important international treaties relevant to the death penalty. He should also be praised for avoiding a discussion of the merits of abolition. Such a discussion is tempting in any treatment of the death penalty, but given the long history of such debates,<sup>40</sup> would have been no more than a distraction.<sup>41</sup> Schabas's announcement of the end of the death penalty is, however, premature. Although abolition of the death penalty may well be achieved in international law, it is neither likely to occur as quickly as Schabas implies, nor is it a foregone conclusion.

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<sup>34</sup> U.N. GAOR 3d Comm., 37th Sess., 67th mtg. ¶ 46, U.N. Doc. A/C.3/37/SR.67 (1982).

<sup>35</sup> See Fitzpatrick & Miller, *supra* note 24, at 321.

<sup>36</sup> See *id.* at 333.

<sup>37</sup> See *supra* note 4.

<sup>38</sup> See *supra* note 5.

<sup>39</sup> See Fitzpatrick & Miller, *supra* note 24, at 331-42 (discussing resistance to the *Second Optional Protocol*).

<sup>40</sup> The first recorded debate on the subject was in 427 B.C. See AMNESTY INT'L, *supra* note 12, at 72.

<sup>41</sup> "[A]s long ago as 1793 a Columbia College student . . . referred to abolition as 'an old thread bare subject.'" Fitzpatrick & Miller, *supra* note 24, at 274 (quoting DANIEL D. TOMPKINS, A COLUMBIA COLLEGE STUDENT IN THE EIGHTEENTH CENTURY 21-23 (1940)).