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ISLAM AND THE DEATH PENALTY

William A. Schabas*

Capital punishment is not practiced by a majority of the world's states. Anti-capital punishment domestic policies have led to an international law of human rights that emphatically prohibits cruel and inhuman punishment. International concern for the abolition of capital punishment has prompted Islamic states that still endorse and practice the death penalty to respond with equally compelling concerns based on the tenets of Islamic law. Professor William A. Schabas suggests that Islamic states view capital punishment according to the principles embodied in the Koran. Islamic law functions on the belief that all people have a right to life unless the administration of Islamic law determines otherwise. Professor Schabas emphasizes that capital punishment exists in the domestic law of all Islamic states, but the ways by which these states employ capital punishment are varied and inconsistent. Although Professor Schabas acknowledges that Islamic states correctly argue that capital punishment is an element of Islamic law, he maintains that Islamic states do not recognize the more limited role of the death penalty articulated by the Islamic religion.

* * *

INTRODUCTION

The debate about the imposition of capital punishment may be as old as the supreme penalty itself. The circumstances of its imposition and administration, as well as the wisdom of its use altogether, have preoccupied jurists, scholars, philosophers, and theologians for many centuries. This debate has been transformed, in the last half of the twentieth century, with the injection of a new element, the international law of human rights. Initially addressing the issue implicitly, with the proclamation of the right to life and the prohibition of cruel, inhuman, and degrading treatment or punishment, in articles 3 and 5 respectively of the 1948 *Universal Declaration of Human Rights*,¹ the law has steadily and inexorably developed in this area.² By the end of the twentieth century, some sixty states had ratified international treaties prohibiting capital punishment, and the issue

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¹ See G.A. Res. 217 A (III), U.N. Doc. A/810, art. 3, 5 (1948).

² See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed., 1997).

itself had become one of the pre-eminent debates in such important international forums as the General Assembly of the United Nations and the Rome Conference on the International Criminal Court.

International legal developments were, of course, nothing more than the reflection of changes in national practice. According to the latest report of the Secretary-General of the United Nations on the subject of capital punishment, issued in March 2000, seventy-four states are now totally abolitionist, thirty-eight are de facto abolitionist, and eleven are abolitionist for ordinary crimes. A total of 123 states are included in one of these three categories. By comparison, only seventy-one states are listed by the Secretary-General as being retentionist. According to the Secretary-General, forty-six states have abolished the death penalty since 1985.³

By the late 1990s, confronted with a growing trend toward abolition and a desire by many states to insist that domestic policies in the area become a question of legitimate international concern, some of the ever-shrinking minority of retentionist states launched an aggressive rear-guard campaign. Although they failed to prevent exclusion of capital punishment from the *Rome Statute* of the International Criminal Court, they succeeded in leaving their mark on the final product.⁴ A 1999 General Assembly debate was quite effectively blocked by this coalition of states favorable to capital punishment.⁵ It seems almost unquestionable that new and vigorous confrontations will soon take place along the same lines.

Within the international arena, those states taking the initiative to defend capital punishment are a disparate lot. The group includes such states as Singapore and Malaysia, who invoke "Asian values" and whose practical concerns on the matter seem closely related to the battle against traffic in narcotic drugs. Another active participant is Rwanda, a country where the death penalty has fallen into abeyance except for the very specific issue of the appropriate punishment for perpetrators of genocide. Several members of the Commonwealth or English-speaking Caribbean are very involved: they generally attribute their interest in the subject to the excited

³ See *Crime Prevention and Criminal Justice: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*; Report of the Secretary-General, U.N. ESCOR, U.N. Doc. E/2000/3 (2000) [hereinafter Report].

⁴ See U.N. GAOR, U.N. Doc. A/CONF.183/9 (1998). Article 80 was inserted as a compromise to appease States favorable to the death penalty: "Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part." On the capital punishment debate at the Rome Conference, see William A. Schabas, *Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute*, 2 PUNISHMENT & SOC'Y 263 (2000).

⁵ See Ilias Bantekas & Peter Hodgkinson, *Capital Punishment at the United Nations: Recent Developments*, 11 CRIM. L.F. 23 (2000).

state of public opinion and, in some cases, high rates of violent crime. But without any doubt, the core of the campaign that fights further progress of international law in the area of abolition of the death penalty lies with so-called Islamic states.⁶ Geographically these countries are located in the Middle East—the state with the largest Moslem population in the world, Indonesia, plays no role in the debate—and have governments characterized by repressive, undemocratic policies in a wide range of areas. This group includes two of the world's leaders in the practice of capital punishment, in a quantitative sense, namely Iraq and Iran.

This bloc of Islamic states quite regularly and vocally insists that its position is the inexorable consequence of Moslem law. This Paper will examine the use of “religious” arguments by Islamic states in the international debates, and then consider whether a genuine basis exists for them within Moslem doctrine.

I. ISLAMIC STATES AND THE INTERNATIONAL DEBATE

Islamic states only first emerged as a force determined to influence the debate within the 1980s, as organs of the United Nations prepared a draft protocol to the *International Covenant on Civil and Political Rights* on abolition of the death penalty. The *Covenant* itself, drafted in the 1950s and 1960s, does not prohibit capital punishment, a source of dissatisfaction for many countries whose domestic law had evolved importantly in this area. Article 6 of the *Covenant* recognizes the right to life, and then delimits its principal exception “[i]n countries which have not abolished the death penalty.” These limitations included the restriction of capital punishment to the “most serious crimes,” its outright prohibition in the case of pregnant women and juvenile offenders, and an optimistic, progressive exhortation: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”⁷ When Article 6 of the *Covenant* was being drafted by the Third Committee of the United Nations General Assembly, Arab and Islamic states played a relatively discrete role in the debates. When some Latin American countries urged that the “right to life” provision of the draft covenant expresses an explicit condemnation of capital punishment, Saudi Arabia answered that not all countries were as fortunate as Uruguay and Columbia, and that many states had not found it possible to abolish capital punishment, an issue which was far too complex for the Committee to deal with in any case.⁸ The Latin Americans insisted that their abolitionist text be put to a vote,⁹ but it was handily rejected on a roll-call vote, by fifty-one votes to nine,

⁶ See Report, *supra* note 3, at ¶ 129.

⁷ International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 6, 999 U.N.T.S. 171.

⁸ See U.N. GAOR, U.N. Doc. A/C.3/SR.811, § 20.

⁹ See U.N. GAOR, U.N. Doc. A/C.3/SR.817, § 29.

with twelve abstentions. The Arab and Islamic states in the General Assembly at the time—Indonesia, Iran, Iraq, Jordan, Morocco, Saudi Arabia, Sudan, Syria, Tunisia, Yemen—all voted against the resolution, although at no point was it ever suggested that Islamic law played a role in their position on the subject.

After the text of Article 6 was finalized by the General Assembly's Third Committee in 1957, debate on the issue of capital punishment shifted to other instances within the United Nations. A relatively innocuous 1959 resolution in the General Assembly inviting the Economic and Social Council to begin a study on the question of capital punishment was supported by Pakistan.¹⁰ Opposition to the call for the study came principally from the Soviet Union and Poland, who insisted that capital punishment was a matter of domestic jurisdiction and that it should not be the subject of United Nations studies. This same argument is now a familiar one from Arab and Islamic states, but they did not raise it in 1959. For the next two decades these states played a marginal role in United Nations debates on the death penalty, something that suggests that the issue was on the periphery of their concerns.

The first sign that things were changing was at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Caracas in 1980. Capital punishment was one of the central issues considered by the Congress.¹¹ A draft resolution called for restriction and eventual abolition of the death penalty and added that abolition would be "a significant contribution to the strengthening of human rights, in particular the right to life."¹² A controversial provision urged states that had not abolished capital punishment to "consider establishing a moratorium in its application, or creating other conditions under which capital punishment is not imposed or is not executed, so as to permit those states to study the effects of abolition on a provisional basis." In the past, opposition to these abolitionist developments had essentially taken the form of statements claiming states were "not ready" for such progressive positions. But now, for the first time since the question had been considered by United Nations bodies, there were strong voices raised in actual support of the death penalty.¹³ Egypt took the lead, challenging the draft resolution with an "amendment" that

¹⁰ See U.N. GAOR, U.N. Doc. A/C.3/L.767. The idea of such a study had originally been suggested by Sweden during the 1957 debate on Article 6 of the draft *International Covenant on Civil and Political Rights*, U.N. GAOR, U.N. Doc. A/C.3/SR.813.

¹¹ See *Comments of the Chief, Crime Prevention and Criminal Justice Branch*, U.N. GAOR, U.N. Doc. A/C.3/35/SR.74, § 40.

¹² U.N. Doc. A/CONF.87/C.1/L.1. Sponsored by Austria, Ecuador, the Federal Republic of Germany, Sweden. It was revised following informal discussions. See U.N. Doc. A/CONF.87/14/Rev.1, § 111; U.N. Doc. A/CONF.87/C.1/L.1/Rev.1. The resolution is reproduced as an Annex to the Congress Report. See U.N. Doc. A/CONF.87/14/Rev.1, at 58-60.

¹³ See U.N. Doc. A/CONF.87/14/Rev.1, §§ 99-100.

added preambular paragraphs to the resolution stressing the importance of general deterrent in providing for penalties, including capital punishment, and referring to "the importance of providing for capital punishment in order to instill the necessary fear in the hearts of people"¹⁴ Faced with stiff opposition and inadequate time to complete the discussions, the sponsors withdrew the revised draft resolution.¹⁵

The frustrating session of the Congress in 1980 stirred new abolitionist initiatives. European states, led by Germany, began to moot the idea of an abolitionist protocol to the *International Covenant on Civil and Political Rights*. Such an instrument, they suggested, would enable states that had already ratified or acceded to the *Covenant* to go beyond the limitations on the death penalty set out in Article 6 and proclaim its abolition altogether. In 1981, the General Assembly decided to seek submissions from member states, with a view to a full debate on the subject at its 1982 session.¹⁶ One of the respondents to this appeal, Pakistan, noted ominously that abolition of the death penalty was inconsistent with Islamic law.¹⁷ This constitutes, according to my research, the first sign of religious arguments in international debates on the death penalty. Soon the matter would be a common feature of the debates. In the 1982 General Assembly discussion on the question of an optional protocol, several countries with a strong Moslem population voted against the resolution, and in many cases they cited the fact that Islamic law permitted the death penalty as the justification for their vote.¹⁸ Some of them abstained for the same reason.¹⁹ Mauritania explained its affirmative vote as being a mistake, because "it was well known that the Islamic Republic of Mauritania was in favor of capital punishment."²⁰ Kuwait said there could be no question of abolishing the death penalty, which was part of the Kuwaiti religion.²¹ Two years later, when the matter returned to the General Assembly, Saudi Arabia, the United

¹⁴ U.N. Doc. A/CONF.87/C.1/L.9. The amendment is reproduced as an Annex to U.N. Doc. A/CONF.87/14/Rev.1, at 60.

¹⁵ See U.N. Doc. A/CONF.87/14/Rev.1, § 111; see also ROGER S. CLARK, *THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION* 75 (1994).

¹⁶ See U.N. Doc. A/C.3/36/L.33/Rev.1, sponsored by Austria, Costa Rica, Dominican Republic, Ecuador, Federal Republic of Germany, Italy, Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Sweden, Uruguay.

¹⁷ See U.N. Doc. A/37/407, Add.1.

¹⁸ Afghanistan (U.N. Doc. A/C.3/37/SR.37, § 59); Iran (U.N. Doc. A/C.3/37/SR.67, § 49); Iraq (U.N. Doc. A/C.3/37/SR.67, § 53); Jordan (U.N. Doc. A/C.3/37/SR.67, § 48); Kuwait (U.N. Doc. A/C.3/37/SR.67, § 47); Libyan Arab Jamahiriya, (U.N. Doc. A/C.3/37/SR.67, § 52); Oman (U.N. Doc. A/C.3/37/SR.67, § 45); Somalia (U.N. Doc. A/C.3/37/SR.67, § 50); Sudan (U.N. Doc. A/C.3/37/SR.67, § 46).

¹⁹ Pakistan (U.N. Doc. A/C.3/37/SR.67, § 67); Tunisia (U.N. Doc. A/C.3/37/SR.67, § 67).

²⁰ U.N. Doc. A/C.3/37/SR.67, § 84.

²¹ See *id.*

Arab Emirates, Yemen, Kuwait, and Morocco expressed their support for capital punishment.²² In 1985, Saudi Arabia joined a consensus in the Commission on Human Rights concerning drafting of the protocol, but also declared that it would maintain the right not to abolish the death penalty, as this would run counter to Islamic law.²³

Work on the protocol continued to progress. Of course, it was never intended to be anything more than a purely optional instrument, available to those states that chose to take the extra abolitionist step. But advocates of capital punishment became increasingly vocal in support of the supreme sanction and in their hostility to any developments that moved the law forward in this area. By 1988, the debate on an actual draft had advanced to the General Assembly, where it was considered by the Third Committee. Several states in favor of capital punishment, almost all of them countries with a significant Moslem population, expressed their opposition.²⁴ Several speakers made explicit reference to Islamic law and the Koran. Saudi Arabia argued that the death penalty was the only fitting sanction for those who took life, as provided for in Islamic law.²⁵ Jordan maintained that the death penalty had a positive, deterrent effect.²⁶ Iraq and Morocco implied that there was a hidden agenda behind the protocol, and that it was aimed at embarrassing or exerting pressure on states that had not abolished the death penalty. They hastened to point out that these states constituted the majority of the members of the United Nations.²⁷ A few Islamic countries preferred to abstain.²⁸

The *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* was adopted by the General Assembly on December 29, 1989, with fifty-nine votes in favor, twenty-six votes against, and forty-eight abstentions. Almost all Arab and Islamic states voted against the text and indeed they were very much at the core of the opposition.²⁹ Interestingly, however, a few of them abstained: Algeria, Lebanon, and the Libyan Arab Jamahiriya. The *Protocol* entered into force on July 11, 1991, following its tenth ratification. As of September 2000, it had more than forty ratifications.

In 1994, Italy proposed a draft resolution in the United Nations General

²² See U.N. Doc. A/C.3/SR.44-52, 56, 57, 60.

²³ See U.N. Doc. E/1985/95, Corr.1 (in the Second Committee).

²⁴ Egypt (U.N. Doc. A/C.3/44/SR.52, § 7), Afghanistan (U.N. Doc. A/C.3/44/SR.52, § 19), Somalia (U.N. Doc. A/C.3/44/SR.52, § 20), Pakistan (U.N. Doc. A/C.3/44/SR.52, § 21), Oman (U.N. Doc. A/C.3/44/SR.52, § 18), Iran (U.N. Doc. A/C.3/44/SR.52, § 13), Indonesia (U.N. Doc. A/C.3/44/SR.52, § 14).

²⁵ See U.N. Doc. A/C.3/44/SR.52, § 12.

²⁶ See *id.* at § 16.

²⁷ See *id.* at § 11 (Iraq), § 17 (Morocco).

²⁸ Algeria, in the Third Committee (U.N. Doc. A/C.3/44/SR.52, § 10); Democratic Yemen, in the General Assembly (U.N. Doc. A/44/PV.82).

²⁹ See G.A. Res. 44/128; U.N. Doc. A/44/824; U.N. Doc. A/44/PV.82, at 11.

Assembly on the issue of the death penalty.³⁰ States who spoke opposing the resolution included Malaysia,³¹ Bangladesh,³² Sudan,³³ Saudi Arabia,³⁴ Libya,³⁵ Egypt,³⁶ Iran,³⁷ and Jordan.³⁸ During the debate, Sudan described capital punishment as "a divine right according to some religions, in particular Islam."³⁹ Earlier that year, during the 1994 session of the United Nations Commission on Human Rights, the Special Rapporteur on the Sudan, Gaspar Biro, said that so-called Islamic punishments such as stoning to death for the crime of adultery, run contrary to the prohibition of torture or cruel, inhuman and degrading treatment of punishment found in Article 7 of the *International Covenant on Civil and Political Rights*.⁴⁰ He was vehemently denounced by the Sudanese representative, Abdelaziz Shiddo, who accused him of insulting religious values in a "Satanic paragraph" of his report, adding that "he must assume the responsibility" for his comments. The report, continued Ambassador Shiddo, was "flagrant blasphemy and a deliberate insult to the Islamic religion."⁴¹

Probably the most important international confrontation on capital punishment took place during the 1998 Rome Diplomatic Conference. There, Islamic states allied with countries from the Commonwealth Caribbean to fight the exclusion of the death penalty from the proposed *Rome Statute* of the International Criminal Court. In the years of work leading up to the Conference, the issue of capital punishment had been relatively unimportant, although occasionally one or another Islamic state would record its dissent with respect to the emerging trend. For example, in 1996, citing the Islamic legal code of the Shari'a, the representative of Egypt said that the death penalty should be retained as an option, perhaps where there were aggravating circumstances.⁴² There was frequent reference to Islamic law during the debates at the Rome Conference, and many states implied that

³⁰ See U.N. Doc. A/49/234, Add.1, Add.2 (1994), later revised by U.N. Doc. A/C.3/49/L.32/Rev.1 (1994).

³¹ See *id.* at §§ 34-36.

³² See U.N. Doc. A/C.3/49/SR.34, §§ 47-49.

³³ See U.N. Doc. A/C.3/49/SR.36, §§ 57-59.

³⁴ See U.N. Doc. A/C.3/49/SR.43, §§ 43-44.

³⁵ See U.N. Doc. A/C.3/49/SR.43, § 53.

³⁶ See U.N. Doc. A/C.3/49/SR.43, §§ 57-60.

³⁷ See U.N. Doc. A/C.3/49/SR.43, §§ 61-62.

³⁸ See U.N. Doc. A/C.3/49/SR.43, §§ 70-71.

³⁹ U.N. Doc. A/BUR/49/SR.5, § 13.

⁴⁰ See U.N. Doc. E/CN.4/1994/48.

⁴¹ Statement by H.E. Mr. Abdelaziz Shiddo, Minister of Justice and Attorney-General of the Republic of the Sudan and Leader of Sudan Delegation to the 50th Session of the Commission on Human Rights, Commenting on the report of Dr. Gaspar Biro, Special Rapporteur on Human Rights situation in the Sudan under agenda item (12), Geneva, Feb. 25, 1994; see also U.N. Doc. E/CN.4/1994/122, § 58-64.

⁴² See U.N. Doc. L/2805.

countries from "the North" were attempting to impose their own values in criminal justice. A specific proposal was tabled by Arab and Islamic countries that would have allowed the international court to impose capital punishment.⁴³ Nevertheless, there was never more than a small minority of states favorable to including the death penalty in the *Rome Statute*. Even many states that enthusiastically and unashamedly use capital punishment in their domestic systems, such as the United States of America, readily admitted that because of widespread abolitionist sentiment it would be impossible to include the death penalty within the sentencing scheme of the Court.

II. ISLAMIC LAW DOCTRINE ON THE DEATH PENALTY

A stereotypical presentation of Islam suggests that it is a conservative, misogynistic, and retributive religion. Even those with only a superficial acquaintance with the subject know better, of course. As in all religions, there are progressive and reactionary currents of thought. Even so-called "Islamic" states differ widely on many aspects of religious doctrine. Thus, in the international debates it is troubling to hear blunt pronouncements affirming that "Islam favors capital punishment," as if this view meets with unanimous and unqualified support throughout the Moslem world.

The suggestion from some Islamic states that religious law forbids abolition of the death penalty constitutes an important obstacle to universal abolition. Abolitionists would hope to be able to rely upon the humanitarian trends within all of the world's religions to bolster support for their cause. Indeed, such authorities can also be found within Islamic texts. Despite popular impressions to the contrary, Moslem penal law is characterized by a strong undercurrent of clemency and sympathy for the oppressed. Punishment is ordered to be free of any spirit of vengeance or torture.⁴⁴

Islam professes the basic principle that everyone has the right to life. However, this principle, stated in the Koran, allows for an exception. Killing is only allowed when a court of law demands it: "Do not kill a Soul which Allah has made sacred except through the due process of law." Therefore, this exception authorizes the administration of capital punishment when Islamic law dictates. Intriguingly, the Islamic law position would seem to be the same as that found in the Fifth

⁴³ See *Proposal Submitted by Algeria, Bahrain, Comoros, Egypt, the Islamic Republic of Iran, Iraq, Kuwait, the Libyan Arab Jamahiriya, Nigeria, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, the United Arab Emirates and Yemen*, U.N. Doc. A/CONF.183/C.1/WGP/L.11 (1998), revised by U.N. Doc. A/CONF.183/C.1/WGP/L.11/Corr.2 (1998).

⁴⁴ See N. Hosni, *La Peine de Mort en Droit Egyptien et en Droit Islamique*, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 407, 416 (1987).

Amendment to the United States Constitution and such international instruments as the *European Convention on Human Rights*.⁴⁵

Islamic law arose out of various sources, but more specifically from the teachings of the prophet Muhammad. It developed in a formal sense during the seventh and eighth centuries (670-720 AD).⁴⁶ Its two most important elements are the Shari'a and the *Fiqh*. Shari'a refers to the sacred laws and ways of life proscribed by Allah. The Koran and the Sunna or Sunnah comprise the Shari'a. These are considered the most important sources of Islamic law. The Koran is considered to be the primary source of guidance because it is regarded as the spoken word of Allah.⁴⁷ The Sunnah refers to the words and actions of the Prophet.⁴⁸ The Shari'a is said to deal with ideology and faith, behavior and manners, and practical daily matters. It is a comprehensive body of norms covering "every aspect of life including international, constitutional, administrative, criminal, civil, family, and religion."⁴⁹ The *Fiqh*, or Islamic jurisprudence, on the other hand, refers to "the legal rulings of the Muslim scholars derived from the Shariah."⁵⁰ The *Fiqh* is a second important source of guidance for Islamic law.

Islamic penal law consists of four systems or categories. In the first, that of Haad or Houdoud, important crimes deemed to threaten the very existence of Islam are punishable pursuant to penalties set by the Koran itself, or by the Sunna or Sunnah. Islamic jurists consider that these sanctions are set and immutable, and conclude that the judge is left with no discretion. Houdoud crimes consist of adultery, defamation, theft, robbery, rebellion, drunkenness, and apostasy. Several Houdoud crimes are punishable by death, specifically robbery, adultery, and apostasy.

The second system, *Quissas*, concerns intentional crimes against the person. Its fundamental premise is the *lex talionis*, that is, "eye for eye, tooth for tooth," and is set out in the Koran, in verse 5.32 (further developed by verse 17.33). Actually, the *lex talionis* appears as early as the Code of Hammurabi.⁵¹ Even then, it was a

⁴⁵ European Convention on Human Rights, Bel.-Den.-Fr., art. 2 § 1, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953).

⁴⁶ See Joseph Schacht, *Problems of Modern Islamic Legislation*, 12 *STUDIA ISLAMICA* 99 (1960), reprinted in *ISLAMIC LAW AND LEGAL THEORY* 515 (Ian Edge ed., 1996).

⁴⁷ See J.N.D. Anderson, *Law as a Social Force in Islamic Culture and History*, 20 *BULLETIN OF SOAS* 13-40 (1957) (stating that the purpose of punishments as established by Allah is to deter).

⁴⁸ See A.J. Wensinck, *The Importance of Tradition for the Study of Islam*, 11 *THE MOSLEM WORLD* 239 (1921), reprinted in *ISLAMIC LAW AND LEGAL THEORY*, *supra* note 46, at 133.

⁴⁹ Anderson, *supra* note 47.

⁵⁰ *Id.*

⁵¹ See PAUL SAVEY-CASARD, *LA PEINE DE MORT: ESQUISSE HISTORIQUE ET JURIDIQUE* 4-14 (1968).

progressive penal reform aimed at enhancing the principle of proportionality, although it is now seen as a basis for retribution. According to the Koran, it is the victim or his or her heirs who are to inflict the punishment, although they do this under the supervision of public authorities. The victims of such crimes may pardon the offender, in which case the penalty set by *Quissas* will not be imposed.

In such cases, two other systems of crime and punishment become relevant. These are *Diya*, which prescribes restitution or compensation for the victim, and *Tazir*, by which public authorities set their own punishment and in which the judge has wide discretion. Under *Tazir*, public authorities may provide for capital punishment, but no religious text requires them to do so.

Under Islamic law, execution should be public in order to enhance its alleged effect of general deterrence.⁵² It is to be carried out with the sword, as a general rule, except in the case of adultery, where lapidation is employed.⁵³

Although essentially all Moslem or Islamic countries retain the death penalty in their domestic law, practice varies considerably from one to another. Some, like Iran and Iraq, are enthusiastic practitioners,⁵⁴ while others, such as Tunisia, conduct executions in only the rarest of cases. The religious argument is invoked frequently, yet the diversity of practice would suggest there is little consensus even among Moslems as to the scope of capital punishment. For example, Sudan has taken the position that offenders may be executed for crimes committed while under the age of eighteen, "in accordance with provisions of Islamic law."⁵⁵ Yemen, on the other hand, recently banned the juvenile death penalty, although it was argued that this step was taken "despite Islamic law."⁵⁶ The Libyan Arab Jamahiriya recently informed the United Nations Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, Ms. Asma Jahangir, that "the aim of the Libyan society is to

⁵² See Hosni, *supra* note 44, at 420; see also Exodus 21:14, 22:18.

⁵³ See A. Wazir, *Quelques Aspects de la Peine de Mort en Droit Pénal Islamique*, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 421, 428 (1987).

⁵⁴ See *Interim report on the situation of human rights in the Islamic Republic of Iran, prepared by the Special Representative of the Commission on Human Rights in Accordance with General Assembly Resolution 51/107 and Economic and Social Council Decision 1997/264*, 52nd Sess., Agenda Item 112(c), U.N. Doc. A/52/472, ¶ 19 (2000); *Report on the situation of human rights in the Islamic Republic of Iran, prepared by the Special Representative on the Commission on Human Rights, Mr. Maurice Copithorne, pursuant to Commission resolution 1996/84 and Economic and Social Council decision 1996/287*, 50th Sess., Provisional Agenda Item 12 ¶¶ 27-29, U.N. Doc. E/CN.4/1997/63 (1997); *Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1993/71*, 53rd Sess., Provisional Agenda Item 10, U.N. Doc. E/CN.4/1994/7, ¶¶ 369-70 (1993).

⁵⁵ *Initial report of state parties due in 1992: Sudan*, U.N. Committee on the Rights of the Child, at § 166, U.N. Doc. CRC/C/3/Add.3 (1992).

⁵⁶ Scott Peterson, *Despite Islamic Law Yemen Bans Teen Death Penalty*, CHRISTIAN SCI. MONITOR, Feb. 2, 2000, at 7.

abolish the death penalty.”⁵⁷

In 1981, the Islamic Council adopted a *Universal Islamic Declaration of Rights*, which states: “(a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law.”⁵⁸ The final phrase appears to permit capital punishment and is in any case consistent with the practice of all Islamic states. The Islamic Conference has prepared a document on human rights and Islam, in which Article 2 guarantees the right to life to “every human being” adding: “il appartient aux individus, sociétés et États de protéger ce droit contre toute violation éventuelle, et il est interdit de mettre fin à une vie quelconque, sauf lorsque cela est en accord avec la chari’a.”⁵⁹

The *Arab Charter of Human Rights*, adopted September 15, 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life in the same manner as the other international instruments. However, three distinct provisions, Articles 10, 11, and 12, recognize the legitimacy of the death penalty in the case of “serious violations of general law,” prohibit the death penalty for political crimes, and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth.⁶⁰

Reynaldo Galindo Pohl, formerly Special Rapporteur of the Commission on Human Rights on Iran, observed that “there are groups of Islamic legal scholars and practitioners who recommend the abolition of the death penalty for political crimes on the ground that it is contrary to Islamic law. They state that the number of crimes punishable by death is limited.”⁶¹ In October 1995, human rights activists from throughout the Arab world met in Tunis to consider the issue of capital punishment. The meeting, which featured specialists on religion, philosophy, and criminal law in Arab states, was a joint initiative of the Arab Institute for Human Rights and the Citizens and Parliamentarians’ League for the Abolition of the Death Penalty “Hands Off Cain,” with the support of the European Community. In a

⁵⁷ Report of the special rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 1999/35, 56th Sess., Agenda Item 11(b), ¶ 72, U.N. Doc. E/CN.4/2000/3 (2000).

⁵⁸ *Universal Islamic Declaration of Rights*, 4 EUROPEAN HUMAN RIGHTS REPORTS 433 (1982).

⁵⁹ Organization of the Islamic Conference, Secretary General, doc. OIC/POL/MD/82-83/7, Djeddah, Apr. 25, 1982.

⁶⁰ See *Charte Arabe des Droits de L’Homme*, 7 REVUE UNIVERSELLE DES DROITS DE L’HOMME 212 (1995).

⁶¹ Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Comm’n on Human Rights, Mr. Reynaldo Galindo Pohl, pursuant to Commission Resolution 1988/69, U.N. ESCOR, Hum. Rts. Comm’n, 45th Sess., 26th mtg. §36, at 12, U.N. Doc. E/CN.4/1989/26 (1989).

declaration adopted at the conclusion of the meeting, the participants affirmed their shared "commitment to the abolition of the death penalty as a strategic move." They also stated "that within the Arab civilizational and cultural background, no real impediments exist and obstruct the evolution of secular legislations in the process of setting up limits to the death penalty and abolishing it." The statement concluded with a call to Arab states to adopt the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, which constitutes an international legal commitment not to impose capital punishment.⁶²

CONCLUSION: CAN ISLAMIC LAW EVOLVE?

Conservative Islamic states fighting to retain capital punishment use religious arguments in order to force the debate into one of cultural or religious norms, where it appears that one set of moral values is being imposed upon another in a form of philosophical or cultural imperialism. The argument is disarming for many who oppose capital punishment in the "North," and seductively demagogic for those who oppose it in the "South." Of course, the Bible also contemplates capital punishment for such crimes as magic, violation of the sabbath, blasphemy, adultery, homosexuality, relations with animals, incest and rape.⁶³ Yet Judeo-Christian jurists will rarely argue that this ancient text must dictate contemporary legal practice.

Obviously, there is some basis for the claim that capital punishment is part of Islamic law. Its scope, however, is considerably more limited than certain Islamic states like to claim in international debates. Capital punishment is a mandatory penalty under the Shari'a for only a small category of crimes. It was plainly incorrect to assert, as some Islamic states attempted during the negotiations surrounding the adoption of the *Rome Statute*, that there was some principle at stake, because Islamic law in no way mandates capital punishment for the crimes falling within the jurisdiction of the International Criminal Court, namely, genocide, crimes against humanity, and war crimes.

It seems unarguable that the crimes for which Islamic law mandates the death penalty—adultery and apostasy—cannot by any effort at interpretation be deemed to be the "most serious crimes" for which the death penalty may be imposed in accordance with Article 6(2) of the *International Covenant on Civil and Political Rights*. In interpreting the provision, the Human Rights Committee has stated that imposition of the death penalty for crimes that do not result in loss of human life is

⁶² See SOURCEBOOK ON THE ABOLITION OF THE DEATH PENALTY 233-238 (William A. Schabas ed., 1997).

⁶³ See *Exodus* 21:14, 22:18; *Leviticus* 20:15, 24:13; *Deuteronomy* 21:21, 22:11, 22:25, 29:13; *Numbers* 13:5, 17:7, 19:19, 22:23, 33:14, 33:37; see also JEAN IMBERT, LA PEINE DE MORT 7-8 (1989).

contrary to the *Covenant*.⁶⁴ During its consideration of Iran's periodic report, the Committee specifically cited imposition of the death penalty for adultery as being incompatible with the country's international human rights obligations.⁶⁵ Yet many of the vocal Islamic states have ratified that instrument without reservations concerning Article 6(2). In other words, they seem already to have accepted international norms that are at variance with Islamic law under a strict construction. Therefore, their argument by which they must obstruct the evolution of international norms on capital punishment on religious grounds is inconsistent with their previous practice in the area of international human rights.

Throughout the development of Islam and Islamic law, there have been times when theory and practice did not coincide. While it has been argued that Islamic law governs the social order of Islamic societies, this has not prevented the Shari'a from being amended or ignored when the environment dictated. This has been referred to as *darûra*, the doctrine of necessity. The doctrine of necessity dispenses Moslems from observing religious laws when the situation or environment dictates otherwise.⁶⁶

One example of this phenomenon is drawn from the realm of international relations. Islam does not recognize other non-Islamic legal systems because one of its stated goals is the spread of the Moslem faith. However, the reality of the modern international system of nations enjoying sovereign rights has prevented this from being upheld strictly. Consequently, a secular approach to "the conduct of foreign relations has been accepted by most Islamic states, whether they are completely secularized in their internal legal structure, as in the case of Turkey, or still recognizing the Shari'a as their basic law, as in Saudi Arabia and the Yemen."⁶⁷ Some of the same conservatives who have objected to any deviations from the internal law of Islam have accepted marked departures from traditional Moslem law governing foreign relations.⁶⁸ It might also be noted that Islamic leaders have often opted to cooperate with foreign governments in the selection of military technology.⁶⁹ Even the concept of holy war or *jihad*, by which religion justifies aggressive war waged against "infidels" and "enemies of the faith," is so obviously incompatible with Article 2(4) of the *Charter of the United Nations*. Interestingly, at the Rome Diplomatic Conference, the Arab and Islamic states were among the most insistent for including the crime of aggression within the subject matter jurisdiction of the International Criminal Court. Yet by the same reasoning that

⁶⁴ See U.N. Doc. CCPR/C/79/Add.25, § 8.

⁶⁵ See *id.*

⁶⁶ See Schacht, *supra* note 46, at 101, ISLAMIC LAW AND LEGAL THEORY, at 517.

⁶⁷ Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT. L. 358, 370 (1956).

⁶⁸ See *id.*

⁶⁹ See *id.* at 368.

they claim capital punishment is an inherent aspect of their religion, it might be argued that any definition of the crime of aggression should also recognize the legality of holy war. But we are unlikely to hear such an argument.

Family law provides an additional example of social reality superseding Islamic law. According to one observer, "polygamy, the marriage of minors, the right of the father to give his children in marriage without their consent, and the right of husbands to unilaterally and arbitrarily dismiss his wife, have come to be regarded as inappropriate and impractical."⁷⁰

All Islamic countries have demonstrated some degree of flexibility in the interpretation of Islamic law in these or other areas. Yet, they stubbornly refuse to acknowledge that the same approach may be undertaken with respect to the death penalty. It appears that religion is little more than a pretext to justify a resort to harsh penalties that is driven by backward and repressive attitudes in the area of criminal law.

⁷⁰ Schacht, *supra* note 46, at 106, ISLAMIC LAW AND LEGAL THEORY, at 522.