



Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards

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Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards

This report is concerned with the mandatory death penalty – capital punishment that is required by law, whether or not a sentencing judge thinks it fair – and it identifies grave shortcomings that affect systems of automatic execution. In certain jurisdictions, the offences that trigger death sentences are insufficiently serious to merit such a sanction in the first place. More generally, any procedure that obliges a court to impose the death penalty is inherently flawed. It makes it difficult or impossible for the law to give due weight to relevant facts: most obviously, the details that necessarily make one crime more or less serious than another.

The paper surveys recent developments all over the world, but there are certain countries that have been especially likely to impose the mandatory death penalty – those influenced by either the common law or Islamic jurisprudence – and particular attention is therefore paid to these jurisdictions. Schematically, the sections are divided as follows:

1. Mandatory application of the death penalty: an introduction and overview.
2. The mandatory death penalty under international law.
3. The mandatory death penalty according to Islamic law.
4. Conclusion.

Anyone with an interest in comparative criminal procedure and international human rights law is likely to find the contents of this paper useful, but it aims at specific, practical goals. They are:

- to persuade states with mandatory death penalty laws to suspend their operation;
- to encourage these states to go further, and abolish the mandatory death penalty outright;
- to urge all states to acknowledge and publicise the ways in which the mandatory death penalty contravenes international law; and
- to encourage retentionist states to avoid use of the death penalty in general, and to support a moratorium on executions when this comes up for reconsideration during the 71st session of the United Nations General Assembly in September 2016.

As the last of these goals illustrates, the analysis of the mandatory death penalty that follows touches on more general questions about the justifiability of capital punishment. Although it takes a clear point of view – considering executions both wrong and counter-productive – it does not, however, assume that its readers will share this opinion and it positively hopes to address many who do not. Its target audience includes anyone with a concern for fair and just legal procedures, who is prepared to consider stances towards the mandatory death penalty with an open mind.

1. Mandatory application of the death penalty – an introduction and overview

Supporters and opponents of the death penalty each invoke some well-known ethical and pragmatic arguments to back up their views. Those in favour of capital punishment generally portray it as an effective deterrent, for example, and contend that it gives due weight to the interests of victims and the law-abiding community.¹ Since the death penalty tends to be popular, they may also argue that it has democratic legitimacy.² Opponents, by contrast, are liable to assert that it is wrong in principle to empower states to kill their citizens, especially because the inevitable flaws can easily turn into irreversible errors: several countries, including the United States, China, Japan and Taiwan have condemned or executed people who were later found to be innocent.³ They may point out in addition that evidence of its effectiveness is limited or non-existent. Its 1997 abolition of the death penalty in China for basic theft was not followed by an increase in that offence,⁴ for example, while some of the countries that are currently most likely to impose the death penalty, like Pakistan and the United States, have unusually high rates of violent crime.

Mandatory death penalty provisions, though supported for similar reasons, are criticised on a narrower basis. Opponents might not believe that executions are always wrong. Their objection instead is that the automatic imposition of a death sentence after conviction ignores or underplays the differences between less and more serious cases. As a Royal Commission in the United Kingdom once observed in the context of murder:

‘Convicted people may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood.’⁵

It is important to recognise from the outset the difference between laws that authorise executions and laws that require them, and to make clear that this paper focuses specifically on the latter. Although it touches on the broader issue, it seeks to show why any rule that obliges a court to impose the death penalty after conviction is arbitrary and unjust. By making irrelevant the characteristics unique to an offender and the circumstances of an offence, it fails to make a punishment fit a crime. Since sentences are pre-ordained, it removes from both victims and defendants any meaningful opportunity to be heard. At a more systematic level, it often works against good governance, by weakening judicial discretion and reserving for the executive great control over the punishments handed down by courts.

Overview

Although punishments occupy a central place in any legal system, the very concept of justice implies that they are imposed wisely and tempered by mercy. Every major religion assumes this, and a balance

of this kind has played an important role in secular states at least since the later 18th century, when the Italian jurist Cesar Beccaria influentially proposed that many existing penalties were excessive and should be more proportionate to the crimes for which they were being imposed.

Such ideas have always had great geographical scope, given the stature of religious traditions and the spread of European laws and legal institutions during the era of imperialism. There is one specific aspect of the latter factor that deserves particular emphasis: the legacy of the British Empire, and the weight this has given British legal heritage around the world.

The effect has been paradoxical. Many of the criminal laws exported by British imperialists were very harsh, reflecting a vindictive approach to punishment that characterised the United Kingdom of the early nineteenth century – a period when it had more capital offences than anywhere else in the world. Even as the British Empire expanded, however, a belief began to spread at home that rigid capital punishment laws were unfair. (They were often counterproductive as well, because juries became more and more likely to acquit guilty defendants whom they found sympathetic, no matter how strong the evidence against them.) The British parliament then cut back dramatically on executions in 1837, retaining only murder, attempted murder and treason as capital crimes, and though hanging was theoretically mandatory for the first of those offences, sentences were regularly commuted. In the 1960s, following several controversial death sentences and miscarriages of justice, Britain then abolished the death penalty for murder entirely.⁶ In those parts of the world it once governed, however, reforms were inconsistent and piecemeal. Some newly independent colonies and protectorates would ameliorate their own capital punishment laws, but many chose to retain murder as a mandatory capital offence. As a result, many of the places most likely to sentence murderers to death automatically over the last half century have been countries in Africa, Asia and the Caribbean that were formerly subject to British law.⁷

Several countries also require the execution of people convicted of other offences. About a dozen make certain types of drug trafficking automatically punishable by death (Brunei, Egypt, Iran, Jordan, Kuwait, Malaysia, Oman, Singapore, Sudan, Syria, Thailand, United Arab Emirates and Yemen), while some have enacted legal provisions requiring execution for aggravated piracy (Botswana), genocide (Israel), kidnapping (Guinea, Malaysia), terrorism (Malaysia) and treason (Botswana, El Salvador, Equatorial Guinea and Ghana). As is discussed further in the third section of this paper, precepts of Islamic law have also been invoked in certain Muslim-majority states to authorise mandatory execution for up to five additional offences: adultery, apostasy, armed robbery/rebellion, blasphemy and sodomy.

Trends

The death penalty has been abolished by law or de facto⁸ in around two-thirds of the world's 190 or so states, and the number applying it has been declining for years.⁹ Executions took place in just 25 countries in 2015, down more than a third from the 42 that carried them out in 1995.¹⁰ Europe contains just two countries that still authorise capital punishment – Belarus and Kazakhstan – and the 47 members of the Council of Europe have committed themselves to renunciation of the death penalty by the European Convention of Human Rights and its thirteenth Protocol (which forbids its use even in wartime).¹¹ In the United States, the last bastion of capital punishment in the West,

criminals were executed in just six states during 2015, down one from the year before, and there were fewer new death sentences imposed during that year than at any time since 1973.¹²

As of spring 2016, when this report was written, there were many indications that the global fall would continue. A suggestion in April 2015 by Hungarian Prime Minister Viktor Orbán that executions should once again be ‘on the agenda’ in his country was not just unrepresentative; it drew such sharp criticism from senior European Union officials that his chief of staff made clear within a day that Hungary had no plans to restore the death penalty.¹³ Elsewhere, five countries formally abandoned capital punishment (Fiji, Madagascar, Mongolia, Republic of the Congo and Suriname), while Zambia’s president commuted the sentences of 332 condemned prisoners in July 2015 – a move that informed observers believe may have cleared its death row entirely.¹⁴ Such developments augur well for efforts at the United Nations to promote a moratorium on the death penalty’s use. A resolution to this effect introduced at the UN General Assembly on 18 December 2007 has now been approved by large majorities on four subsequent occasions, with support increasing each time. Whereas 104 countries initially favoured the measure, the total stood at 117 in 2014, while the number of opponents declined from 54 to 38.¹⁵

Some death penalty states have resisted the downward trend. The ones that have done so most dramatically are characterised by political insecurity, and their greater resort to death sentences has been largely driven by a hope that they can thereby tackle internal opposition and extremist attacks.¹⁶ Egypt and Nigeria convicted hundreds of actual or alleged terrorists of capital offences in 2014 and 2015, for example, while Tunisia’s parliament authorised the execution of terrorists following two deadly outrages in the first half of 2015. Countries destabilised by the Syrian civil war have been especially tempted to demonstrate their capacity to kill. Iran and Iraq are consistently among the world’s five most lethal death penalty states anyway, while Jordan hanged eleven men on a single day in December 2014 – ending an eight-year moratorium – before executing two convicted terrorists in direct retaliation for a decision by the so-called Islamic State to burn alive a captured Jordanian pilot. In January 2016, Saudi Arabia beheaded and shot 47 convicts on a single day, and by early March it had killed almost half as many prisoners as it had during the whole of 2015.¹⁷

One country’s accelerated use of the death penalty was especially remarkable, because it was also a major reversal. A massacre by Taliban militants of more than 140 people at a Peshawar army school in December 2014 caused Pakistan’s government to lift a 2008 moratorium on executions. Although the government initially said that this would affect only terrorism-related cases, a surge in executions then followed that was unprecedented in the nation’s history. There were 180 hangings within six months, and according to a Reuters investigation of July 2015 fewer than one in six of them involved prisoners who had been convicted of terror-related offences. By the end of the year, Amnesty International had counted 320 executions, the highest annual figure that the organisation had ever recorded in Pakistan.¹⁸

Such killings are certainly worth attention – not least because they illustrate how directly the death penalty is driven by politics – but they are only indirectly relevant to this paper’s primary subject. Executions that countries *require* by law, as opposed to those that their officials choose to carry out, are in as steep a decline as the death penalty in general. Mandatory death sentences are required in 37 countries at most, and far fewer actually carry them out.¹⁹ Those that do so regularly are in the smallest minority of all.

Why the shift?

The trend against mandatory death penalty provisions is too widespread to have a single explanation, but one legal development has been especially significant. Courts across a number of jurisdictions have come to recognise in recent years that the practice of automatic execution undermines principles that are intrinsic to the very notion of law. The consistent application of rules and the notion that punishments ought to be measured assumes that judges enjoy a degree of discretion in assessing the material in any given case. This is made harder, if not impossible, by legislation that absolutely forbids any consideration of convicts' personal characteristics and the circumstances of their crimes.

Jurists all over the world have been addressing this issue for the best part of half a century, and every continent has now been affected by their work. In a series of decisions in the mid-1970s, the US Supreme Court ruled that a law obliging juries to sentence people to death after conviction contravened the due process guaranteed to all defendants by the US Constitution, and in particular its ban on 'cruel and unusual punishment', a term which had to be interpreted according to 'the evolving standards of decency that mark the progress of a maturing society'.²⁰ Seven years later, India's highest court found that similar principles of fairness and consistency were inherent in the Indian constitution. It struck down a law requiring the execution of one particular category of murderer – life-sentence prisoners convicted of a killing in jail – on the basis that this contravened constitutional guarantees of equal treatment and punishments 'according to procedure established by law'. It was arbitrary, because there was no sensible reason to differentiate between serving prisoners and prisoners who killed after their release, and 'a travesty of justice', in that it required courts to tell a convict 'that he shall not be heard why he should not be sentenced to death'. No equitable judicial system, the Indian Supreme Court pointed out, could know in advance that such a plea would be worthless. 'A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair.'²¹

India's Supreme Court has more recently affirmed this view in resounding terms – characterising the mandatory death penalty as a 'relic of ancient history' best suited to 'lawless... military regimes'²² – and similar decisions have been reached by other courts all over the world. The Eastern Caribbean Court of Appeal ruled in 2001 that the mandatory death penalty laws of St Vincent and St Lucia violated constitutional prohibitions on 'inhuman or degrading punishment or other treatment',²³ and equivalent findings were soon being made about other Caribbean constitutions by the Privy Council, the region's most authoritative tribunal. In its most far-reaching decision, the Privy Council concluded that 'to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity'.²⁴ Reverberations from that case, which led to abandonment of the mandatory death penalty in almost every Caribbean nation, then set off another legal earthquake in east Africa. The mandatory death penalty regime in Kenya has been precarious since conflicting decisions over its constitutionality by the Court of Appeal between 2010 and 2013²⁵ – and though sentencing guidelines issued in early 2016 by the Chief Justice have implicitly reaffirmed its current lawfulness under

domestic law, automatic death sentences have been decisively struck down by the senior judiciary in two other states. Both the Constitutional and Supreme Court of Uganda, and the High Court and Supreme Court of Appeal in Malawi have ruled that they violate the guarantees afforded by their constitutions to a fair hearing, equal protection and the separation of powers.²⁶

The fact that senior judges across so many jurisdictions have acknowledged deep flaws in systems of mandatory execution, though remarkable, is not surprising. Their responsibility and experience in the actual operating of courts makes them particularly likely to appreciate the value of legal consistency, and arbitrariness is one of the most distinct features of automatic capital punishment laws. Although supporters might portray such laws as ‘tough’, they are in fact just rigid – requiring courts not just to assume the very worst of convicts, but to ignore actual evidence that might portray them in a better light. No matter how despicable a criminal might be, denying him or her any right to put forward mitigation amounts to profound abuse of the judicial system. This helps explain why the recent African decisions mentioned paid regard not just to legal developments in the Caribbean, but also to the most symbolic and groundbreaking case of modern South African history: a 1995 ruling that execution was cruel, inhuman and degrading, and contrary to the principles of fairness that its post-apartheid constitution guaranteed.²⁷ An observation made by the Supreme Court of Bangladesh more recently also merits recollection in this context. As it pointed out in a 2010 decision that found mandatory death sentences to be unconstitutional, courts are ‘degraded’ every time they are forced to ‘rubberstamp’ a pre-determined punishment.²⁸

It is just as notable that the states least troubled by mandatory execution also have the weakest rules against judicial unfairness or cruelty. Singapore’s Court of Appeal rejected a recent challenge, for example, on the basis that the country’s constitution lacked any prohibition on ‘inhuman’ punishment and therefore imposed fewer limits on mandatory death sentences than was the case elsewhere.²⁹ Other retentionist states are even less likely to guarantee the fairness of trials and punishment. In the two countries most likely to require death sentences – Saudi Arabia and Iran – there is simply no legal avenue for challenging courtroom procedures on the basis that they are arbitrary or cruel.

There are signs of change even in hardline jurisdictions, however. Legislators themselves have sometimes recognised in some states that judges are in the best position to assess a convict’s level of blameworthiness, and to extend their sentencing discretion accordingly. Singapore’s government moved to reform its mandatory death penalty laws in November 2012, for example, and judges may now spare certain drug couriers, as well as people convicted of murder who are not found to have intended to cause death.³⁰ The authorities in neighbouring Malaysia said at around the same time that they too were considering reforms, and the country’s acting law minister then announced in November 2015 that she hoped soon to introduce legislation that would abolish the mandatory death penalty entirely.³¹ In the Americas, the only three countries to retain automatic death sentences are also shifting position. The government of Barbados has said it plans on abolition, and some officials in Trinidad and Tobago, which historically has been one of the most vocal proponents of the mandatory death penalty, have indicated a desire to give judges greater sentencing discretion in capital cases. There was a backward development in Guyana, where a 2016 statute – rushed through parliament in two weeks and passed by a majority of one – now requires judges to order the execution

of certain terrorists, but even in that country, another law has considerably expanded the punitive options available in murder cases.³²

Conclusion

As courts have repeatedly emphasised, a mandatory death penalty rule is objectionable no matter how grave the crime committed. Its injustice arises because it effectively blinds a court to mitigation, and this flaw is not eliminated by the category of offence concerned: this is why in Bangladesh, for example, the mandatory death sentence was struck down even though it was applicable only to people convicted of the murder of a woman or child after rape.³³ Public approval for executions is also beside the point. As was observed by a judge of South Africa's Constitutional Court in 1995, the very reason that entrenched rights are made enforceable by a judiciary is 'to protect those who are the marginalised, the dispossessed and the outcasts of our society. They are the test of our commitment to a common humanity...'³⁴ Criminals convicted of heinous offences are unpopular, but a society committed to the rule of law must ensure that unpopularity does not determine their punishment. In order to protect against this risk, arguments for mercy should always be given a hearing – and if this hearing is to be meaningful, it must allow a judge to accede to the arguments in appropriate cases. A sentencing regime that prescribes execution in advance contravenes these principles. It denies convicts the dignity that even they are due, and it also pays insufficient respect to the judges who are best placed to assess guilt. The convict in any given case is thereby denied the chance of mercy from the person or people most qualified to know if it is merited.

There are also sound practical reasons that justify reform. As Malaysia observed when it first announced its current review of the mandatory death penalty, a state that applies such rules can have great difficulty arguing for clemency when its own citizens find themselves in similar trouble abroad. And all the problems of principle are compounded immeasurably by the risks of wrongful conviction, which can of course have irreversible consequences in this context. Capital trials are only as reliable as the people who conduct them (to paraphrase one American academic, the death penalty is often imposed not 'for the worst crime, but for the worst lawyer'³⁵), and in the United States, dozens of demonstrably innocent individuals have been sentenced to death in recent decades. Informed observers estimate that the total error rate there may be as high as five per cent.³⁶ The quality and fairness of policing, the availability of legal aid and the operation of the rules of evidence may all result in direct or indirect discrimination leading to apprehension, charging and conviction, particularly when related to race or gender.³⁷ Even in China, a country not renowned for the transparency of its legal system, courts have been making mistakes too serious to conceal. Several well-publicised cases in recent years saw defendants being wrongly sentenced to death, and sometimes executed, on the basis of evidence that proved eventually to be false. After two especially notorious convictions, alleged murder victims turned out not even to be dead.³⁸

2. The mandatory death penalty under international law

The spreading opposition to mandatory imposition of the death penalty has not only produced reform in individual states. The domestic jurisprudence that is emerging out of those countries' courts, combined with the collective stance of the large majority of governments, is having important effects at the supra-national level – for they have given rise to patterns of state practice and trans-national decision-making that are rendering automatic executions not just exceptional and controversial, but contrary to emerging norms of international law.

A degree of historical perspective is useful to understand the change that is taking place. When states first agreed at the end of the Second World War that certain breaches of international law were punishable as crimes, many of the defendants convicted in Nuremberg and Tokyo were hanged, while most countries still permitted (or required) capital punishment at home. At the time of the United Nations' establishment in 1945, it was at least plausible, therefore, that sentences of death fell under Article 2(7) of the organisation's Charter, which excludes from UN supervision any matter that is 'essentially within the domestic jurisdiction of any state'. Several early human rights treaties, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1969 American Convention on Human Rights (AmerCHR) accordingly recognised capital punishment as an exception to the right to life.

This position now could hardly be more different. Some two-thirds of the world's states have not executed anyone for at least a decade, and more than half have formally abolished the death penalty entirely.³⁹ Many parties to the ICCPR, and the overwhelming majority of signatories to the ECHR and AmerCHR, have also emphasised their opposition to capital punishment by ratifying optional protocols⁴⁰ to the treaties that commit them to its abolition. The shift since the Second World War is symbolised by a paradoxical legacy of the Nuremberg and Tokyo tribunals: they were not only the first international bodies authorised to impose death sentences, but also the last. The International Criminal Court was denied capital sentencing powers by a large majority of the states that participated in its establishment, and though a few retentionist countries formally objected,⁴¹ this decision accurately reflects the trajectory and current state of international law. As noted in the previous chapter, a resolution in the UN General Assembly proposing a moratorium on the death penalty's use has steadily gained ground, attracting the support of 117 out of 193 UN members when last voted on in 2014.

It is not just application of the death penalty that is falling into disrepute, however. Laws that oblige courts to impose death sentences have also been causing concern to the global community – and trans-national institutions, just like courts and legislatures at the national level, have consequently become more and more likely to perceive their flaws. Evidence of this emerges clearly from recent publications by senior UN officials who have responsibility in this field. A 2012 report by the Special Rapporteur on extrajudicial, summary and arbitrary executions observes that, 'although at least 29 States retain a mandatory death sentence for specific offences, there is growing State consensus that it is unlawful as an arbitrary deprivation of life: at least 18 States have rejected it since 2008.'⁴² The High Commissioner for Human Rights wrote in 2014 that 'the mandatory use of the death penalty

is not compatible with the limitation of capital punishment to the “most serious crimes”, and he concluded that states should therefore ‘abolish the mandatory death penalty, where it still exists’.⁴³ In a particularly authoritative report published in April 2015, analysing changes to the death penalty’s application over the previous five years, UN Secretary-General Ban Ki-moon observed that:

‘... A mandatory sentence fails to take into account the defendant’s personal circumstances and the circumstances of the offence. Consequently, it does not permit distinctions to be made between degrees of seriousness of the particular crime for which the penalty is imposed. Hence, it is not compatible with the limitation of capital punishment to the “most serious crimes”.’⁴⁴

The concerns expressed in these reports rest upon rules about criminal procedure that are both well-established and fundamental to internationally prevalent ideas about justice. They were long ago guaranteed by the ICCPR, the ECHR and the American Convention on Human Rights (either directly, or in associated protocols), and most are echoed by more recent regional treaties including the African Charter on Human and People’s Rights, the Arab Charter on Human Rights, and the ASEAN Human Rights Declaration. Many of the protections overlap, but they can usefully be separated into the following six categories:

1. The right to life, and the prohibition on its arbitrary deprivation. (ICCPR Art 6(1); AmerCHR Art 4; ECHR Art 2(1); AfricanCHPR Art 4; ArabCHR Art 5; ASEAN charter Art 11.)
2. The principle that death sentences are appropriate for only the most serious crimes. (ICCPR Art 6(2); AmerCHR Art 4(2); ArabCHR Art 6; cf ECHR Protocol 13.)
3. The right to humane treatment and the associated prohibition of punishment that is cruel, unusual, inhuman or degrading. (ICCPR Art 7; AmerCHR Art 5(1), 5(2); ECHR Art 3; AfricanCHPR Art 5; ArabCHR Art 8; ASEAN charter Art 11.)
4. The general obligation to respect human dignity. (ICCPR Art 10; AmerCHR Art 5(2); AfricanCHPR Art 5; ArabCHR Art 20; cf ECHR Protocol 13.)
5. The duty of states to provide a procedure for reviewing court decisions, and to allow capital offenders to seek amnesty, pardon or commutation of death sentences. (ICCPR Arts 6(4), 14(5); AmerCHR Art 4(6); ArabCHR Art 6; ECHR Protocol 7, Art 2.)
6. The right to be heard fairly in court. (ICCPR Art 14(1); AmerCHR Art 8(1); ECHR Art 6; AfricanCHPR Art 7(1); ArabCHR Art 13(1).)

A number of authoritative international tribunals have considered how these rules should affect death penalty cases, and their applicability to mandatory death penalty systems has come under particularly intense scrutiny in recent years. The sophisticated body of jurisprudence that has developed as a consequence now informs most work in this field – including the reports by UN officials mentioned above – and it is now possible to say with some confidence that any system of criminal justice that obliges courts to execute is a violation of international law.

The first country to have its domestic rules in this area seriously challenged before an international body was St Vincent and the Grenadines, in a complaint brought in the late 1990s before the United Nations Human Rights Committee (UNHRC), a body that interprets the International Covenant on Civil and Political Rights. Asked to give a view that it was wrong to execute criminals without

even hearing their personal and factual submissions, 11 of the UNHRC's 16 legal experts agreed in 2000 that carrying out a mandatory death sentence would violate the right to life.⁴⁵ In subsequent cases concerning Trinidad, Guyana and Zambia, the UNHRC went further. Called upon to consider whether the mandatory death penalty could be imposed for homicide if the prosecution had not proved a specific intention to kill, the UNHRC found unanimously that any execution in such circumstances would violate the principle restricting application of the death penalty to only the most serious crimes.⁴⁶ And since its split decision about the right to life in 2000, its approach towards this specific guarantee has grown more rigorous. On a number of occasions (most recently in a case concerning Ghana in March 2014), it has ruled without any dissent that the mandatory death penalty is also an arbitrary violation of Article 6(1) of the ICCPR.⁴⁷

The Inter-American Commission of Human Rights, which interprets the American Convention on Human Rights as well as the American Declaration of the Rights and Duties of Man, has been compelled to similar conclusions. In two cases resolved in 2000, it found the mandatory death penalty laws then applied in Grenada and Jamaica to be violations of the right to life, the right to humane treatment, and the right to a fair trial.⁴⁸ In a case on the American Declaration that set out its reasoning in detail, *Edwards v Bahamas*, the Commission explained that any such system was arbitrary because 'the decision to sentence a person to death is not based upon a reasoned consideration of a particular defendant's case, or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment'. Its automatic nature might produce additional human rights violations – obliging courts, for example, to impose death sentences even though a defendant had been charged with a political offence, or was pregnant. It also precluded effective review by a higher court, and by refusing to acknowledge the personalities of people who were judged, it was necessarily degrading and denied convicts the dignity they merited as human beings. For all those reasons, it constituted a violation of the general right to due process.⁴⁹

The deliberations and conclusions of the Inter-American Commission were approved in 2003 by the African Commission on Human and People's Rights, when it accepted 'that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender'.⁵⁰ They have also been adopted and amplified by the Inter-American Court on Human Rights,⁵¹ the judicial organ of the inter-American human rights system. Twenty of the 23 parties to the American Convention on Human Rights have agreed that individuals can take complaints against them to the Court, and two rulings against Barbados have led that country's government recently to confirm that it will soon be abolishing the mandatory death penalty for murder.⁵²

The consistency of all these developments is striking. Although analyses of international law are always liable to inspire disagreement, even fierce controversy, there is little authoritative dispute in this field. Almost every legal expert to have considered challenges to mandatory execution provisions since the turn of the century has taken the same stance, in fact, finding such rules to be actually or potentially unlawful. They have reached such conclusions not just in all of the three of the regional bodies that currently exist to resolve human rights disputes (in America, Europe and Africa), but also in the UNHRC, which contains lawyers, judges and academics from all over the world. This does not exclude the existence of alternative perspectives, of course, and countries, cultures and communities

are bound to express a wide variety of views on any contentious subject, but the coalescing consensus on mandatory execution is both clear and important. Any international agreement is a ‘living instrument’ (to quote a phrase often used to describe the ECHR) that needs continuous analysis if it is to remain vital, and people everywhere deserve the benefits that fair procedures promote – an antidote to corrupt and politicised trial procedures, and a remedy to miscarriages of justice. The emerging jurisprudence, which is generating a coherent understanding of the risks posed by arbitrary capital punishment laws, ought therefore to be both welcomed and strengthened.

The developing consensus that automatic death sentencing regimes are wrong does not, at first sight, have any legal significance beyond the countries that share this view. Although opposition to a practice can evolve into international law if a sufficiently large majority of states behave consistently as though their behaviour is obligatory, certain scholars and legal authorities suggest that a dissenting state will not be bound if it persistently and openly expresses its objection to the rule.⁵³ Even if this claim is correct, however, it is very well established that some principles customarily observed among nations are so fundamental that they cannot be ignored, and these principles – known as ‘peremptory norms’⁵⁴ – are arguably violated by mandatory execution procedures. Unfair systems of capital punishment are certainly capable of contravening such norms, and the case that established this – a ruling by the Inter-American Commission that the United States could not lawfully refuse to follow an emergent international rule against the execution of juvenile offenders – made observations that could apply to mandatory death sentences as well. After observing that ‘nearly every nation state’ had rejected the death penalty claim in question, by means of treaties and domestic legislation, it noted that:

‘... The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards.’⁵⁵

The countries that violate peremptory norms will always contain state officials and judges who deny their domestic applicability, of course. Within the United States, there was a minority view within the Supreme Court (personified by the late Justice Scalia) that the international prohibition on executing juveniles had no relevance to US jurisprudence, just as there was an attempt a few years later to deny any weight to the global repugnance against killing mentally ill criminals.⁵⁶ Those arguments failed in the United States, however, and though there will be similarly insular standpoints elsewhere, any country exercising influence on the international stage is bound to take serious account of the decline of the mandatory death penalty simply because its scale and trajectory is so clear. Those that aspire to contribute to the future of international law should also be concerned if they are falling out of step with the rest of the world. This is especially important given the speed of change in this field. Its momentum recalls earlier movements in world opinion that led to seismic legal shifts: the widespread acknowledgment in the early 1970s that apartheid wasn’t just objectionable but criminal, for example, and the more recent acceptance among governments that deliberate damage to the environment can give rise to various violations of international law. Countries that uphold the mandatory death penalty can doubtless sustain their aberrant behaviour for some time. They will find themselves increasingly distant from the legal mainstream, however, and their stance is likely to diminish their persuasive authority. It certainly cannot reverse the consensus that has emerged against the application of such penalties.

3. The mandatory death penalty according to Islamic law

An overview

Support for the death penalty is disproportionately common in countries associated with Islam. When the 193-strong UN General Assembly last voted in 2014 for a moratorium on its use, almost half of those opposed (16 out of 38 members) had political and legal systems that expressly claimed to be ‘Islamic’ or populations that were primarily Muslim.⁵⁷ As this might suggest, such states are also more likely than most to favour the mandatory death penalty. Only two countries that automatically execute serious drug-traffickers do not have Muslim majorities, and at least 18 of those that do oblige courts to impose death sentences for certain types of homicide.⁵⁸ Many explicitly credit Islam as inspiration for their penal laws and invoke its jurisprudential traditions as the basis for mandatory execution provisions. Convicted apostates (people who abandon the faith, either openly or through un-Islamic acts like sorcery) face automatic execution (often by beheading) in almost a dozen states, and a conviction for blasphemy is equally lethal in at least half that number. Ten or 11 jurisdictions require persons found guilty of adultery to be stoned to death, and many threaten male homosexuals with the same or a similarly lethal fate.⁵⁹

Although the approach towards criminal justice in such countries is often very harsh, however, it is often backed by pragmatic arguments like those heard in secular states. Mandatory death sentences in particular are typically praised not just for being divinely inspired, but also as an effective deterrent or a vindication of victims’ rights. And though some capital procedures can be traced back to the seventh-century origins of Islam – those that mandate stoning for adultery and beheading for apostasy, for example – others, like the capital murder provisions inherited from British colonial administrators and the rigid drug-trafficking laws popular in opium-producing regions, have a relationship to religion that is tangential, at most.

People who support such punishments often insist that they are essentially Islamic,⁶⁰ but fluid political factors have played an important and relatively recent role in increasing their practical significance. Until the Cold War’s thaw in the late 1980s, international opposition to the abolition of capital punishment was organised primarily by Communist states, and it was only as Islamic revivalism surged during the late 1980s and 1990s that Muslim governments began regularly to express public support for stern physical punishments. Most are even more concerned today not to be outflanked by popular religious movements, but policies have always been more flexible than the literal terms of canonical texts might imply. During the negotiations that led to establishment of the International Criminal Court in 1998, for example, Muslim-majority states took a lead in pushing for the new tribunal to be given a power to execute, even though the crimes over which it has jurisdiction (genocide, crimes against humanity and war crimes) were not defined until the mid-20th century.⁶¹

What is meant by Islamic law?

Uncertainty is readily exploited in this field, both by Muslim revivalists and their opponents, and a few preliminary observations are therefore useful. The principles of Islamic law, which date back more than 1,300 years, rest on various sources. The Qur’an and written traditions about the Prophet Muhammad (‘*hadiths*’) are of cardinal importance, while consensual legal interpretations and

established arguments derived from analogy or rationality are also given great weight. The interaction between these sources makes up what Muslims call the *sharia*.

Although no Muslim doubts the validity of some of these sources – most obviously, the tenets laid down in the Qur'an – the *sharia*'s precise content has always been the subject of controversy. There are many profound disagreements about the authenticity of *hadiths*, for example. There are thousands of them, often inconsistent and sometimes in diametric opposition to each other, and this can easily cause sects, communities and even individual believers to hold dramatically different ideas about God's will. The concern to comprehend what God actually meant has meanwhile spurred thousands of scholars over the centuries to propose their own ideas about divine law, efforts collectively known in Arabic as *fiqh*, which can be translated as 'understanding' or, more loosely, as jurisprudence. The disputes and scholarship typically rest on esoteric aspects of theology, but they are linked to another basic and important contextual fact. '*Sharia*', though often used as a synonym for Islamic law, has always had broader connotations. It metaphorically sets out the divinely ordained route to salvation (literally, it is 'the path to water'), and it therefore imagines justice in an ideal form. The *sharia* laid down by God is therefore nominally distinct from human (and necessarily imperfect) efforts to understand it – *fiqh* – as well as the practical steps of state officials to enact laws, or judge wrongdoing. Legislation and discretionary judgments are both described differently – by the words *qanun* and *tazir*, respectively – and even the most pious Muslim would acknowledge that they are often pragmatic or expedient. This makes for subtle distinctions, but ones that are not just semantic. A critique of *sharia*, even if measured, can easily be misconstrued or caricatured as a denial of divine justice. Any argument that seeks to persuade should therefore address interpretations of Islamic law, rather than the *sharia* as such.

Mandatory death sentences and Islamic law

The Qur'an itself stipulates fixed punishments for just four crimes – adultery, false accusations of adultery, theft and *hiraba* (a form of aggression that was defined long ago to mean violent disorder or highway robbery) – and it also affirms that physical assaults, up to and including murder, are subject to the retaliatory principle first enshrined in the Old Testament: 'an eye for an eye and a tooth for a tooth'. Although the verses concerned authorise several corporal sanctions, including amputation and flogging, the Qur'an nowhere indicates that believers *must* impose the death penalty. The only time it even permits a judge to consider the option is in cases of *hiraba*, where it is laid down as one of three possibilities, and a homicide victim's next-of-kin is authorised to insist on a criminal's death, by refusing compensation and withholding forgiveness.

The second source of Islamic law, the oral traditions enshrined as *hadiths*, is more contentious, as has already been noted. Efforts to authenticate and prioritise them early in the history of Islamic scholarship have given rise to a conventional and conservative jurisprudence, however, which potentially validates several additional fixed penalties. It includes a rule that anyone found intoxicated should be whipped – a penalty unmentioned by the Qur'an – and another stipulating that married adulterers merit stoning to death, not just the hundred lashes that the holy book prescribes for adultery. Certain scholars also elevated apostasy, including abuse of the Prophet Muhammad and sodomy from grievous sins to mandatory capital crimes, though neither is actually made punishable in the Qur'an.⁶²

There are several potential conflicts between these ancient rules and modern international law. A number of them arise from the inconsistencies between trial procedures developed more than a thousand years ago and the standards of fairness that most people today properly expect in a courtroom. Others are caused by the risk of improper discrimination. Adultery prohibitions, even if apparently gender-neutral, are almost everywhere more frequently enforced against women,⁶³ while rules against apostasy or blasphemy openly privilege or penalise people according to the religious beliefs they manifest – whereas equal treatment is a prerequisite of human rights protection, and discrimination (both direct and indirect) is clearly forbidden by a growing number of international cases and treaties.⁶⁴ A simpler problem, but also a starker one, arises from the misdemeanours capable of attracting a mandatory death sentence in Islamic tradition – adultery and sorcery, for example. International law has for at least half a century stipulated that capital punishment may only be imposed for ‘the most serious crimes’. These words, set out in the ICCPR, reiterated in regional human rights treaties, and affirmed repeatedly by international tribunals and jurists, are obviously open to a degree of interpretation. Assuming a commitment to international law, it is impermissible to regard them as purely subjective, however. If governments were entitled to define ‘most serious’ just as they pleased, chaos would ensue. The least arbitrary guidance available – derived from Human Rights Committee deliberations and surveys of contemporary state practice – suggest that ‘the most serious crimes’ is in fact apt to describe only those actions that deliberately cause death.⁶⁵ Illicit sex and black magic may be considered grossly offensive in some societies (or sections of those societies), but offensiveness alone does not impart the gravity that international law requires for imposition of the death penalty.

The contradiction between international and Islamic law on this matter is made more acute in certain states by another risk that might lead to very arbitrary consequences. States that invite victims or next-of-kin to choose between retaliation, compensation and mercy (following Qur’anic advice in this regard) potentially allow violent criminals to escape punishment entirely. In such jurisdictions, judges might therefore be obliged to order the execution of sorcerer-apostates and adulterers, at the same time as they are denied an exclusive power to punish murderers at all.

Areas of common ground

Laws never equate precisely to practice, and rules requiring punishment are even more unreliable as proof of how often penalties were actually imposed. In fact, the same process that led Muslims to define crimes more than a thousand years ago was accompanied by the establishment of stringent evidential requirements, which necessarily obstructed convictions. Accused adulterers who denied their guilt, for example, could be condemned only if four individuals testified that they had seen the actual act of penetration: testimony that, for obvious reasons, was vanishingly rare. Trial records are scarce in Islamic history, but the Muslim civilisation that was most scrupulous about documenting judicial decisions, the Ottoman Empire, is only known once to have ordered the stoning to death of an adulterer in its five-century history.⁶⁶

This points towards some important compatibilities between Islamic and international law principles.⁶⁷ The Qur’an sets great store by reliability and certainty in human affairs. One consequence has been to foster conservatism, but Islam’s commitment to predictability and unbreakable laws has also produced legal precepts that even state officials are theoretically obliged to

obey. In respect of capital punishment specifically, the faith can easily support procedures similar to those that Western societies call due process. According to one Qur'anic injunction, believers must not 'take life which God has made sacred, except by right. This is what He commands you to do: so that you may use your reason.'⁶⁸

Several principled safeguards have arisen out of this concern for predictable, reasonable and fair institutions. They are often ignored, as is the case with legal procedures everywhere, but they offer points of contact with international law that merit emphasis.

THE IMPORTANCE OF EVIDENCE

All the crimes for which Islamic jurisprudence imposes fixed penalties are counterbalanced by very rigorous evidential rules.⁶⁹ A good faith effort to observe them lessens the chances of conviction, and though this does not exclude the possibility of discretionary sanctions, this should operate to limit the applicability of fixed punishments considerably. The safeguard is strengthened further by the great importance that tradition attaches to certainty in serious criminal cases. According to a saying attributed to the Prophet Muhammad, a judge should always strain to find doubt (*shubha*) in cases where the sentence is mandatory ('Ward off the fixed punishments from the Muslims on the strength of *shubha* as much as you can')⁷⁰ and any court that purports to apply Islamic law is therefore obliged to do its utmost to avoid death sentences. The Federal Shariat Court of Pakistan had regard to this principle in 1986, when it made the following undertaking: 'not only the maximum benefit of every reasonable doubt will be extended to the accused, but an effort, too, will be made not to inflict a [mandatory penalty] as long as it may be avoided by all legitimate and established means.'⁷¹

THE VALUE OF PENITENCE AND MERCY

There are powerful arguments that any accused who demonstrates remorse ought to be excused from execution. The Qur'an states this unequivocally about adulterers and a similar rule evolved more than a thousand years ago for perpetrators of *hiraba* (if repentance precedes arrest) and apostasy (except in cases involving abuse of the Prophet Muhammad).⁷² The importance attached to improvement in a defendant's character is augmented by the high regard shown for pity and forgiveness in Islamic jurisprudence. Both qualities are praised throughout the Qur'an, and one of its most commonly cited verses introduces the Prophet Muhammad as a 'mercy to all peoples'.⁷³ Even the retaliatory principle that can sound so ruthless to modern ears, mandating an eye for an eye and a tooth for a tooth, actually dwells most of all on compassion: immediately after it authorises revenge, victims' relatives are encouraged to forego that right and accept compensation or extend forgiveness instead. This point was emphasised by Bangladesh's Supreme Court in its 2010 decision that ruled unconstitutional the mandatory death penalty for certain types of murder.⁷⁴

PURPOSIVE INTERPRETATION

All the considerations so far mentioned gain additional force thanks to a long-established principle that uncertainty in deciding a legal question should be resolved in whichever way does most to promote the public good (*maslaha*). An associated idea emphasises a purposive approach to

interpretation, on the basis that God should be taken to have structured his laws to safeguard five specific human interests: life, religion, intellect, family and property.⁷⁵

Supporters of capital punishment could argue that both the public good and purposive interpretations justify exemplary deterrence, and neither principle can in any event plausibly be said to rule out the death penalty in all circumstances. It is hard to square a respect for the interests named with *mandatory* executions, however. Even if the sanctity of human life is reduced to a neutral factor, a system that requires capital sentences in all situations potentially ignores the mental condition, intellectual potential and family circumstances of a convict. It also ignores the possibility of inept or corrupt criminal justice systems. More generally, it fails to secure the most basic benefit that a legal system offers the community in which it operates. This benefit is not ruthless punishment; it is consistency and fairness in the application of laws.

The absence of consensus

The contentiousness of capital punishment in Islamic countries is also worth noting, especially because assumptions about ‘the Muslim world’ are so easy to make. Only 13 of the world’s roughly 50 Muslim-majority states actually carried out executions in 2013 and 2014.⁷⁶ Several are in fact abolitionist (like Albania, Azerbaijan, Djibouti, Guinea-Bissau, Kosovo, Kyrgyzstan, Senegal, Turkey and Uzbekistan), while at least 24 have not executed anyone for at least ten years. Those 24 include not just avowedly secular countries (for example, Burkina Faso, Guinea, Kazakhstan, Mali, Niger, Sierra Leone and Tajikistan), but also several that recognise Islam as the state religion (Algeria, Comoros, Maldives, Morocco and Tunisia) and at least one that claims strict fidelity to the *sharia* (Brunei). Active death penalty states are meanwhile erratic (at best) in their respect for safeguards traditional to Islamic jurisprudence – like its approach to evidence, doubt and repentance – and their execution methods often derive from colonial custom and historical accident rather than religion. Although beheadings are notoriously favoured in some states, firing squads and the gallows are also used in several.

In respect of the mandatory death penalty, the picture is even less consistent. It has no place in the legal systems of most Muslim-majority states; it is enforced in practice by an even smaller number; and the highest court in one country, Bangladesh, ruled in 2010 that automatic death sentences violated both the constitution and the Qur’an. The great divergence of views is particularly significant because of the emphasis that Muslim jurists, especially within Sunni communities, traditionally place on consensus as a source of Islamic law. This principle exists because concerted efforts to recognise and resolve problems help to generate the consistency that is central to any legal system worth the name. Widespread disagreement among Muslims about the application of its traditional punishments is a sign, therefore, that ought to carry weight. It undermines the very purpose for which Islamic law exists, by generating unpredictability and transforming rigid rules into arbitrary punishments.

The risks are easily illustrated. Certain Muslim judges, confronted by laws that apparently deny them the right even to consider mercy, have preferred in recent years to distort reality rather than apply the harsh rules to the evidence. Two courts in northern Nigeria, for example, have acquitted pregnant single women of adultery, by noting that both had previously been married and finding that God could cause gestation to last for up to seven years.⁷⁷ A self-confessed convert from Islam in

Afghanistan was cleared of apostasy in 2006, on the basis that his admission itself proved him insane.⁷⁸ Such cases recall 18th-century England, where merciful juries often preferred to acquit guilty defendants than apply cruel statutes, and they illustrate that a rule requiring death sentences after conviction does not uphold the law so much as corrode it. By increasing the already onerous burden of judgment, it threatens the integrity of the entire judicial process. Judges are supposed to act upon evidence – but if they are forbidden from acknowledging morally relevant facts, they are liable instead to ignore it.

The justifiability of a moratorium

The conservative approach to legal interpretation that prevails in many parts of the Muslim world places significant obstacles in the way of reforming mandatory execution rules. If those hurdles are to be overcome, it will take boldness and imagination among both jurists and politicians. Formal steps to avoid actual application of the penalties are relatively feasible, however. At least one state has already taken partial steps in this direction: Iran, where in 2002 the then head of the judiciary formally suspended the stoning to death of adulterers. The policy has had only a limited effect (local judges have occasionally tried imposing the sentence since then, while legislators retained it, albeit ambiguously, in a revised penal code passed in 2013⁷⁹), but the factors underpinning it remain relevant: an appreciation that most of the world thinks stoning barbaric, and an awareness that its imposition therefore discredits Islam and subverts Iran's international credibility. An older precedent, more likely to appeal to Sunnis, offers additional support for flexibility in this field. It is said of Caliph Umar, the second successor to the Prophet Muhammad, that he ordered a halt to the amputation of thieves during a famine, despite a verse in the Qur'an clearly stating that they should have their hands cut off as an exemplary punishment.⁸⁰ Application of the rule would have been unjust, he reportedly reasoned, in circumstances where it would have disproportionately affected poor people who were stealing only in order to survive.

There are no insurmountable obstacles, therefore, between a respect for Muslim legal tradition and a moratorium on capital punishment. Indeed, Islamic jurisprudence incorporates a general doctrine of necessity (*darura*), which allows any law to be suspended insofar as this is required to avoid evil consequences.⁸¹ A government wanting to rely on this doctrine to stay executions would need support from senior jurists, to be sure, but its applicability is eminently arguable. Capital punishment imposes responsibilities that are hard to discharge at the best of times, and a country's economic or social difficulties can easily jeopardise the administration of justice in general. In such circumstances, it may well be imperative that death penalty laws be put on hold. Sacred as God's *sharia* is to Muslims, strict punishments applied arbitrarily by human beings, even if religiously inspired, do irreparable harm. Piety offers no good reason to downplay this concern. As has become apparent on countless occasions, an urge to punish that is not controlled by safeguards is always most likely to target vulnerable individuals and minorities.

With these remarks in mind, it is clear not just that Muslim-majority states should support the global shift against mandatory execution laws, but also that Islamic legal tradition is potentially perfectly consistent with the international norms emerging in this field. Although many Muslims would be reluctant to deny that fixed punishments have their place, because conservative interpretations of Islamic law hold them to be God's will, there is simultaneously a very widespread acceptance in

Muslim communities that their application can wait. A popular view holds that it is not even possible properly to enforce God's criminal sanctions in a corrupt modern world, and that flawed legal systems that pretend otherwise are themselves violating the *sharia*. Some optimists go even further, anticipating an ideal Muslim future in which the *sharia* has been so perfectly realised that there are no longer wrongdoers to punish at all.

These outlooks, no matter how utopian, have practical significance. In September 2016, the UN General Assembly is due to re-examine the death penalty. Its call for a suspension of executions, made five times in the last decade with ever-growing majorities, will undoubtedly succeed, but support will not come from abolitionist countries alone. Retentionist states are certain to vote for the resolution, as many did in 2014, and the capacity of Islamic jurisprudence to accommodate a moratorium means there is no compelling religious reason for Muslim countries to do any different. They were unlikely to oppose the resolution even in 2014. More than 20 voted in favour, while 13 chose to abstain and only 16 voted against. Today, with violent insurrectionists attempting to destabilise Muslim societies all around the world, it is more important than ever that states representing or purporting to uphold Islam back a moratorium – in the interests of comity, but also to minimise inconsistencies, arbitrariness and cruelty within their own judicial systems.

4. Conclusion

Any law that obliges courts in some situations to impose death sentences is objectionable. It transforms what should be discretionary into a duty – because judges are denied the right to reach independent decisions – and the effect in capital cases is that legislators and governments grant themselves power over life and death. This is objectionable in that it destabilises the proper relationship between branches of government. It also attaches insufficient importance to the personal rights of a prisoner. Although it is entirely proper to deprive convicts of many freedoms and privileges, the most basic aspect of a capital trial – an opportunity to plead for one’s life – ought never to be removed entirely.

This is not to say that there should be no external input on the sentencing process at all. Shifting politics and popular expectations form the backdrop of any judicial system, and it is both inevitable and proper that both have some effect on the treatment of offenders. Sentencing guidelines are therefore desirable, insofar as they help different courts act consistently while taking some account of changing public concerns. Any regulatory measure should always ensure, however, that consideration is given to the characteristics of an offender and the circumstances of his or her crime. These facts, which judges are best placed to determine, invariably have moral relevance. They should therefore be reflected in every criminal’s punishment, and if death is even to be contemplated as a sanction, this is absolutely essential.

These principles explain why mandatory death sentences are impermissible under domestic law in the vast majority of nation states and, as this suggests, they find great support at the level of international law. Any law that requires a judge to impose a death sentence will potentially breach one or more of the following provisions, laid down in the ICCPR and various regional instruments, and regularly reiterated by authoritative international tribunals and officials:

- the right to life, and the prohibition on its arbitrary deprivation;
- the principle that death sentences are appropriate for only the most serious crimes;
- the right to humane treatment and the associated prohibition of punishment that is cruel, unusual, inhuman or degrading;
- the general obligation to respect human dignity;
- the duty of states to provide a procedure for reviewing court decisions, and to allow capital offenders to seek amnesty, pardon or commutation of death sentences; and
- the right to be heard fairly in court.

As a consequence of decisions handed down in recent years by a large number of international bodies, including the UN Human Rights Council, parties to agreements such as the ICCPR are now clearly bound by these obligations not to authorise, impose or apply the mandatory death penalty. The significance of the principles goes further, however. Although they found their first formal expression in treaties that were negotiated and voluntarily assumed, the principles themselves reflect profound, almost universal sentiments. In this way, the gathering consensus against mandatory

executions resembles the attitude of states to the execution of juvenile offenders – a widespread repugnance – and just as it is now clearly established that a ban on those executions transcends its appearance in treaties, a prohibition on the mandatory death penalty is emerging as a rule binding on all states: a peremptory norm of international law.

Those countries that still oblige judges to sentence some convicts to death are therefore seriously out of step with most of the world, and should take urgent steps to rejoin the international community. This requires that governments and domestic judges both pay heed to the principles at stake. There are various ways in which this might be done. In the two types of jurisdiction that are most likely to maintain mandatory death penalty rules – those influenced by English common law and those that follow Islamic jurisprudence – legislation could require judges to pay particular heed to mitigating factors. Mercy also has a high theoretical value in both legal systems, and steps could properly be taken to ensure that it is also given more practical effect. More generally, any legal official who is confronted by an issue capable of more than one interpretation should be encouraged to resolve the uncertainty in a way that is consistent with international law.

It is finally crucial that all sides accept a degree of compromise. Although opponents of the death penalty are bound to hope for its global abolition, there are formidable obstacles standing in the way of this goal. At the same time, there are measures short of abolition that would bring retentionist states closer to the international consensus. Only a minority of those that retain the death penalty in law still carry it out in practice, after all, while mandatory executions take place in an even smaller number – only Saudi Arabia among Muslim-majority countries regularly executes adulterers and apostates, for example. States that face internal difficulties in the way of abolishing mandatory death sentence rules might usefully be encouraged, therefore, simply to put the application of those rules on hold. In any event, whatever sentences may be handed down by a country's courts, the actual executions themselves should always be suspended. For this reason, all states should support a moratorium on use of the death penalty when it falls to be reconsidered by the UN General Assembly in September 2016.

Having regard to these considerations and the matters set out in detail in earlier sections, this paper concludes as follows:

- all states with mandatory death penalty laws should suspend their operation;
- such states should also go further, and abolish the mandatory death penalty outright;
- all states should acknowledge that mandatory death penalty contravenes international law; and
- retentionist states should avoid use of the death penalty in all circumstances, and should support a moratorium on executions when this comes up for reconsideration during the 71st session of the UN General Assembly in September 2016.

Notes

- 1 For examples and a discussion of such arguments, see Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed, Oxford UP, 2015), 389–425 [‘Hood and Hoyle’].
- 2 For examples and a discussion of the extent to which the popularity of a penalty can and should outweigh matters of principle in this field, see Hood and Hoyle, *supra*, 426–68.
- 3 See Hood and Hoyle, *supra*, 323–34.
- 4 Liu Renwen, ‘Recent Reforms and Prospects in China’, in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, 2013) [‘Hood and Deva’], at 112.
- 5 *Report of the Royal Commission on Capital Punishment, 1949–1953*, Cmd 8932 (London, 1953), 6.
- 6 Capital punishment was effectively brought to an end in Britain by the Murder (Abolition of the Death Penalty) Act 1965, after a series of controversial convictions and executions over the previous decade: see Brian P. Block and John Hostettler, *Changing in the Balance: A History of the Abolition of Capital Punishment in Britain* (Winchester, 1997). The statute was expressly stated to be temporary, but the change was made permanent four years later and another measure extended it to Northern Ireland in 1973. High treason formally remained punishable by death until passage of the Crime and Disorder Act 1998.
- 7 See Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia and the Caribbean* (Farnham, 2014) [‘Novak’], especially 3–7; Hood and Hoyle, *supra*, 124–8, 341–8; Aimé Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Farnham, 2014), 88–112; see also Hood and Deva, *supra*.
- 8 The UN defines a death penalty state as de facto abolitionist if it has staged no executions for at least ten years.
- 9 Amnesty International states (as of March 2016) that 102 countries had abolished the death penalty and another 38 had ended its application in practice: see Amnesty International, *Death Sentences and Executions 2015* (London, 2016), available via www.amnesty.org/en/documents/act50/3487/2016/en/. The Hands Off Cain website puts the number of abolitionist states at 103, and says that ‘there are currently 161 countries and territories that, to different extents, have decided to renounce the death penalty’: www.handsoffcain.info/news/index.php?iddocument=19305217. For a comprehensive survey of the spread of abolitionist viewpoints and legislative changes, see Hood and Hoyle, *supra*. An online overview, patchily updated but useful nonetheless, can be found at www.deathpenaltyworldwide.org/search.cfm, which is maintained by the Cornell University Law School.
- 10 Amnesty International, *Death Sentences and Executions 2015* (London, 2016), available at www.amnesty.org/en/documents/act50/3487/2016/en/.
- 11 *Al-Saadoon and Mufdhi v United Kingdom* (App No 61498/08) Eur Ct HR 282 (2010), paras 118–20, available via www.bailii.org/eu/cases/ECHR/2010/282.html; Protocol Number 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187.
- 12 See Death Penalty Information Center, ‘The Death Penalty in 2015: Year-End Report’, available at www.deathpenaltyinfo.org/documents/2015YrEnd.pdf.
- 13 ‘Hungary’s Orban Ponders Return of the Death Penalty’, 28 April 2015, published online by *Deutsche Welle* at www.dw.com/en/hungarys-orban-ponders-return-of-the-death-penalty/a-18415964; ‘Hungary Says ‘Does Not Plan’ to Restore Death Penalty’, 30 April 2015, online at www.dw.com/en/hungary-says-does-not-plan-to-restore-death-penalty/a-18421298.
- 14 See www.deathpenaltyworldwide.org/country-search-post.cfm?country=Zambia.
- 15 The original resolution (A/RES/62/149) is online at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/149. The votes cast in favour and against in 2007 were 104/54, and the figures in later years have been 106/46 (2008), 109/41 (2010), 111/41 (2012) and 117/38 (2014).
- 16 For further discussion, see Amnesty International, *Death Sentences and Executions 2015* (London, 2016), 10–11, available via www.amnesty.org/en/documents/act50/3487/2016/en/.
- 17 Ashley Cowburn, ‘Executions in Saudi Arabia Reach “Frightening” Rate As 70th Prisoner in 2016 is Killed’, *Independent*, 7 March 2016, online at www.independent.co.uk/news/world/middle-east/executions-in-saudi-arabia-reaching-alarming-rate-as-70th-prisoner-is-killed-a6917226.html.
- 18 Katharine Houreld, ‘Insight: Militants in Minority in Pakistan Execution Drive; Deterrent Effect Debated’, 27 July 2015, available at <http://uk.reuters.com/article/2015/07/27/uk-pakistan-executions-insight-idUKKCN0Q00WI20150727>; Amnesty International, *Death Sentences and Executions 2015* (London, 2016), available at www.amnesty.org/en/documents/act50/3487/2016/en/.
- 19 See www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm, which estimates that between 29 and 37 countries maintain a mandatory death penalty for some specified offences. The UN Special Rapporteur on extrajudicial, summary and arbitrary executions relied on this source in his 2012 report: see A/67/275, para 64, available at www.un.org/Docs/journal/asp/ws.asp?m=A/67/275. See also Hood and Hoyle, *supra*, 337–9.
- 20 *Woodson v North Carolina*, 428 US 280 (1976), at 301, quoting from *Trop v Dulles* 356 US 86 (1958). The majority decision was followed and amplified in *Roberts v Louisiana* 428 US 325 (1976), *Lockett v Ohio* 438 US 586 (1978), and *Sumner v Shuman* 483 US 66 (1987).
- 21 *Mithu v Punjab*, AIR 1983 SC 473.
- 22 *State of Punjab v Dalbir Singh*, AIR 2012 SC 1040; see also Novak, 38–41; www.deathpenaltyworldwide.org/country-search-post.cfm?country=India.
- 23 See *Spence and Hughes v The Queen* (Criminal Appeal No 20 of 1998), Eastern Caribbean Court of Appeal (judgment, 2 April 2001), paras 43–6, 214–17. The majority decision (3–2) was upheld by the Privy Council in *R v Peter Hughes* [2002] 2 AC 259 on 11 March 2002, the same day that it issued its seminal judgment in *Reyes*.
- 24 *Reyes v R* [2002] 2 AC 235, para 43. As well as *R v Peter Hughes*, mentioned in the note preceding this one, the Privy Council simultaneously ruled against the mandatory death penalty rules of St Kitts in *Fox v R* [2002] 2 AC 284. *Reyes* was followed in *Boycie & Joseph v R* (2004) 64 WIR 37 (PC), a case from Barbados; *Watson v R* (2004) 64 WIR 241 (PC), from Jamaica; *Balson v S* [2005] 4 LRC 147 (PC), from Dominica; *Bowe v R* [2006] 1 WLR 1623, from the Bahamas, and *Coard v Attorney General of Grenada* [2007] UKPC 7.
- 25 *Mutiso v Republic of Kenya* (2010), http://kenyalaw.org/Downloads_FreeCases/76411.pdf. A differently constituted Court of Appeal refused to follow this decision three years later, characterising it as *per incuriam* (*Mwaura, Kamau and Kibia v Republic*, Criminal Appeal 5/2008 (18 October 2013), <http://kenyalaw.org/caselaw/cases/view/91626/>), and the Supreme Court’s Chief Justice then issued sentencing guidelines in January 2016 that assumed the validity of mandatory capital sentences: see Paul Ogemba, ‘Judiciary’s New Policy Spells Doom for Death Row Convicts’, *Daily Nation*, 26 January 2016, www.nation.co.ke/news/New-guidelines-spell-doom-for-inmates-on-death-row/-/1056/3048832/-/m633yiz/-/index.html; Sam Kiplagat, ‘12 Men on Death Row Challenge Mandatory Sentence’, *The Star*, 11 February 2016, www.the-star.co.ke/news/2016/02/11/12-men-on-death-row-challenge-mandatory-sentence_c1292898.
- 26 *Susan Kigula & 416 Others v Attorney General of Uganda (Constitutional Appeal No 6 of 2003)* [2005] UGSC 8, available on the Uganda Legal Information Institute website, at www.ulii.org/ug/judgment/constitutional-court/2005/8-0; *Susan Kigula & 417 Others v Attorney General of Uganda (Constitutional Appeal No. 3 of 2006)* [2009] UGSC 6, available at [www.codices.coe.int/NXT/gateway.dll/CODICES/full/afr/uga/eng/uga-2009-d-001?fn=document-frame.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/afr/uga/eng/uga-2009-d-001?fn=document-frame.htm&f=templates$3.0); *Francis Kafatayeni v Attorney General of Malawi* (Constitutional Case No 12 of 2005, unreported), decided by the High Court in 2007 and affirmed a year later by the Supreme Court of Appeal in *Twoboy Jacob v The Republic* (Criminal Appeal Case No 18 of 2006, unreported).

- 27 *S v Makwanyane*, (CCT3/94), [1995] ZACC 3, www.saflii.org/za/cases/ZACC/1995/3.html, per Chaskalson P at paras 21, 88, 144-6. See also the judgments of Ackermann J at para 156, Didcott J at para 190, Langa J at paras 309-12, O'Regan J at paras 323-9, 344, Sachs J at paras 388-92.
- 28 *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)* (2010) 30 BLD 194. The observation can be found at 32 of this online version: www.blast.org.bd/content/judgement/wp8283-2005shukurali.pdf.
- 29 See *Yong Vui Kong v Public Prosecutor (No. 2)* [2010] Singapore L Rep 489; see also Michael Hor, 'Singapore's Death Penalty: The Beginning of the End?', in Hood and Deva, *supra*, at 142-9.
- 30 See the Attorney-General's press release 'Revisions to the Mandatory Death Penalty Regime – Follow-Up Actions by the Attorney-General's Chambers', 14 November 2012, online at www.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC%20Press%20Release%20%20%5B14%20Nov%202012%5D.pdf. The first person to benefit from the change was the prisoner whose failed challenge to the Court of Appeal is referenced in the previous note: Amanda Lee, 'Death Penalty Lifted for Yong Vui Kong', *Today Online*, 15 November 2013, available at www.todayonline.com/singapore/death-penalty-lifted-yong-vui-kong.
- 31 See 'Possible Moratorium on Death Sentences Pending Govt's Final Decision: Nazri', *The Malaysian Insider*, 20 October 2012, online at www.themalaysianinsider.com/malaysia/article/possible-moratorium-on-death-sentences-pending-govts-final-decision-nazri; D Kanyakumari, 'Government Wants Mandatory Death Penalty Abolished', *The Star Online*, 17 November 2015, at www.thestar.com.my/news/nation/2015/11/17/death-penalty-judge-discretion/.
- 32 The Barbados government announced in March 2014 that it would abolish the mandatory death penalty for murder to bring itself into line with rulings of the Inter-American Court, but a statute to this effect passed by the House of Assembly has not yet been approved by the Senate. If legislators do not take a lead, a November 2015 ruling by the Caribbean Court of Appeal will require the country's judiciary soon to reconsider the lawfulness of mandatory death sentences: see para 10 of *Edwards and Haynes v R* [2015] CCJ 17 (AJ), online at www.caribbeancourtsofjustice.org/wp-content/uploads/2015/11/2015-CCJ-17-AJ.pdf. On the debate within Trinidad, see www.deathpenaltyworldwide.org/country-search-post.cfm?country=Trinidad+and+Tobago#f27-5. Guyana's Anti-Terrorism and Terrorist Related Activities Act 2015, s.3(1)(a), tabled on 17 December and passed on 31 December 2015, specifies that terrorists who kill 'shall be liable to be sentenced to death': <http://officialgazette.gov.gy/index.php/publications/301-extraordinary-gazette-6th-january-2016-acts-act-no-15-of-2015-the-anti-terrorism-and-terrorist-related-activities-act-2015>. The country's legislature had previously reformed its mandatory capital murder law on 14 October 2010, by granting a judge a degree of discretion except where the victim was a law enforcement official, a prison officer, a member of the judiciary, a legal officer, a witness, or a juror performing his or her duties: Criminal Law (Offences) Amendment Act 2010 (see also www.handsoffcain.info/bancadati/schedastato.php?idcontinente=21&nome=guyana).
- 33 *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)* (2010) 30 BLD 194, available online at www.blast.org.bd/judgements.
- 34 *S v Makwanyane*, (CCT3/94), [1995] ZACC 3, per O'Regan J at para 332.
- 35 Stephen B Bright, 'Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer', 103 Yale L J 1835 (1994).
- 36 See Novak, *supra*, at 11 n 15 and sources cited therein.
- 37 See for example Roger G Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (2008, OUP); Deborah L Rhode, *Access to Justice* (OUP, 2004); 'Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (United Nations Human Rights Council, 16 July 2015) A/HRC/30/18; Stephen B Bright, 'Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty' (1994-1995) 35 *Santa Clara Law Review* 433; and Christopher Slobogin, 'Mental Illness and the Death Penalty' (2000) 1 *California Criminal Law Review* 3.
- 38 See Liu Renwen, 'Recent Reforms and Prospects in China', in Hood and Deva, *supra*, at 113, citing the cases of She Xianglin, Zhao Zuohai and Nie Shubin; see also Børge Bakken, 'Capital Punishment Reform, Public Opinion and Penal Elitism in the People's Republic of China', in Hood and Deva, *supra*, at 197-200.
- 39 See n 7 above.
- 40 See the 2nd Protocol to the ICCPR (adopted in 1989), the Sixth and Thirteenth Protocols to the ECHR (adopted 1983, 2002) and the Second Protocol to the American Convention on Human Rights (adopted 1990).
- 41 On these discussions, see William A Schabas, 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute', 2 (3) *Punishment and Society*, 263 (July 2000), esp 271-80 ['Schabas, 'Life Death and the Crime of Crimes'].
- 42 A/67/275, para 64, available via www.ohchr.org/EN/HRBodies/SP/Pages/GA67session.aspx.
- 43 A/HRC/27/23, paras 40-42, 72, available via www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx.
- 44 See para 63 of the UN Secretary-General's ninth quinquennial report on the death penalty (covering the years 2009-13, but published on 13 April 2015), at www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf.
- 45 *Eversley Thompson v St Vincent and the Grenadines* (2000), Comm No 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000), esp para 8.2.
- 46 *Rawle Kennedy v Trinidad and Tobago*, Comm No 845/1999, UN Doc CCPR/C/67/D/845/1999 (2002); *Chan v Guyana*, Comm No 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006); *Webby Chisanga v Zambia*, Comm No 1132/2002, UN Doc CCPR/C/85/D/1132/2002 (2005).
- 47 *Weerawansa v Sri Lanka*, Comm No 1406/2005, UN Doc CCPR/C/95/D/1406/2005 (2009), para 7.2; *Mwamba v Zambia*, Comm No 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), para 6.3; *Dexter E Johnson v Ghana*, Comm No 2177/2012, UN Doc CCCR/C/110/D/2177/2012 (2014), para 7.3.
- 48 See *Baptiste v Grenada*, 13 April 2000, Report No 38/00, paras 69-132, online at www.cidh.oas.org/annualrep/99eng/Merits/Grenada11.743.htm; *McKenzie, Downer and Tracey v Jamaica*, 13 April 2000, Report No 41/00, paras 183-211, online at <http://cidh.org/annualrep/99eng/Merits/Jamaica12.023.htm>.
- 49 *Edwards v Bahamas*, 4 April 2001, Report No 48/01, especially paras 141-53. The case is available online at <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm>.
- 50 See *Interights (Bosch) v Botswana*, Communication 240/2001, African Court on Human and Peoples' Rights (2003), para 31, online at www.achpr.org/files/sessions/34th/comunications/240.01/achpr34_240_01_eng.pdf. The African Court cited *McKenzie, Downer and Tracey v Jamaica* (2000), *supra*.
- 51 See *Hilaire, Constantine and Benjamin v Trinidad* (2002), Series C No 94, 21 June 2002, online at www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf. This case, the first in which a mandatory death sentence system was found to violate the American Convention on Human Rights, was decided after Trinidad had withdrawn from the Inter-American Court's jurisdiction.
- 52 See *Boyce v Barbados* (2007), Series C No 169, 20 November 2007, available via the court's website at www.corteidh.or.cr/docs/casos/articulos/seriec_169_ing.pdf; *Cadogan v Barbados* (2009), Series C No 204, 24 September 2009, available at www.corteidh.or.cr/docs/casos/articulos/seriec_204_ing.pdf. Barbados undertook to give effect to the adverse judgments in March 2014, though as of September 2015, it was still pleading reasons for not having done so: www.barbadostoday.bb/2015/09/07/court-order/.
- 53 James Crawford (ed), *Brownlie's Principles of International Law* (Oxford, 2012), 28; Hugh Thirlway, *The Sources of International Law* (Oxford, 2014), 86-88.
- 54 Such a rule is also known by the Latin term *jus cogens* ('compelling law').
- 55 *Domingues v United States*, Case 12,285, Report No 62/02 (2002), para 85. The decision is available at the IACHR website at <http://cidh.org/annualrep/2002eng/USA.12285.htm>.
- 56 See eg. the dissents of Scalia J in *Atkins v Virginia*, 536 US 304 (2002) at 322-5, and *Roper v Simmons*, 543 US 551 (2005) at 622-4.
- 57 The voting figures can be found at 17-18 of www.un.org/en/ga/search/view_doc.asp?symbol=A/69/PV.73.

- 58 The 18 UN members concerned are Afghanistan, Brunei, Guinea, Iran, Jordan, Kuwait, Libya, Malaysia, Mauritania, Niger, Pakistan, Palestine, Qatar, Saudi Arabia, Sudan, Syria, UAE and Yemen. Murderers may also face mandatory execution in Burkina Faso, Chad, Equatorial Guinea, the Maldives and Somalia, though this is unclear (see www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm; www.deathpenaltyworldwide.org/country-search-post.cfm?country=Equatorial+Guinea) and the position is additionally complicated by Qur'anic verses that invite victims of violence to accept compensation and forgive their attackers, discussed further later in this paper. The two exceptions are Singapore and Laos, and there is some doubt about the situation in the latter country. See www.deathpenaltyworldwide.org/country-search-post.cfm?country=Laos.
- 59 See www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=19305152. Brunei has recently authorised similarly harsh punishments.
- 60 This claim is often echoed by people hostile to Islam, who regard it as a useful way of discrediting the faith.
- 61 See William A Schabas, 'Islam and the Death Penalty', 9 *Wm. & Mary Bill Rts. J.* 223 (2000), especially 225–30, 234; William A Schabas, 'Life, Death and the Crime of Crimes', *supra*, 271–80.
- 62 See Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge, 2005) ['Peters'], 61–2 (homosexuality); 64–5 (apostasy); on apostasy, see also Emon, Ellis & Glahn, 231–41. See also Javaid Rehman and Eleni Polymenopoulou, 'Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World' 37 *Fordham International Law Journal* 1 (2013–14), who argue that several passages of the Qur'an acknowledge homosexuality and celebrate sexual diversity.
- 63 See United Nations Working Group on Discrimination Against Women in Law and Practice, 'Background Note on Adultery' online at www.ohchr.org/Documents/Issues/women/WG/BackgroundNoteAdultery.doc; Sadakat Kadri, *Heaven on Earth* (London, 2012), 206–8, 227–39.
- 64 For a survey of the law in this field, see Stephanie Farrier (ed), *Equality and Non-Discrimination Under International Law* (Abingdon, 2015).
- 65 See the observations made in 2007 by Philip Alston, then serving as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions: A/HRC/4/20, para 53, available online via www.ohchr.org/EN/Issues/Executions/Pages/AnnualReports.aspx. See also the 2012 report of Alston's successor, Christoph Heyns: A/67/275, paras 37–67, online at www.ohchr.org/EN/HRBodies/SP/Pages/GA67session.aspx.
- 66 See Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed EL Ménage (Oxford, 1973), 263.
- 67 See Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford, 2003), esp 66–75 (right to life), 75–85 (cruel, inhuman or degrading treatment/punishment), 97–111 (fair hearing/due process), 109–11 (right of appeal); see also Anver M Emon, Mark S Ellis, Benjamin Glahn (eds.), *Islamic Law and International Human Rights Law: Searching for Common Ground* (Oxford, 2012).
- 68 Qur'an 6:151; see also 17:33. The language quoted is taken from the translation by MAS Abdel Haleem, first published in 2005 by Oxford University Press.
- 69 See Peters, *supra*, *Crime and Punishment*, 12–16, 54.
- 70 See Peters, *supra*, 22, citing Ibn Hajr al-'Asqalani, *Bulugh al-maram min adillat al-ahkam* (Cairo: Dar al-Kitab al-Arabi, n.d.).
- 71 *Ghulam Ali v The State*, PLD 1986 SC 741.
- 72 On adultery, see Qur'an 4:16; on *hiraba*, see Qur'an 5:34 & 3:159; see also Peters, *Crime and Punishment*, 27–8, 65.
- 73 Qur'an 21:107.
- 74 *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)* (2010) 30 BLD 194. The Qur'anic verse concerned is 5:45.
- 75 See Mathias Rohe, *Islamic Law in Past and Present* (Leiden, 2014), 84–5, 249–50 ['Rohe']; Wael B Hallaq, *A History of Islamic Legal Theories* (Cambridge, 1997), 89, 112, 166–70.
- 76 See www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=19305152.
- 77 Philip Ostien, *Sharia Implementation in Northern Nigeria, 1999–2006: A Sourcebook*, 5 vols (Ibadan, 2007), 5:45, 5:105.
- 78 Sadakat Kadri, *Heaven on Earth* (London, 2012), 225, 294, n 29.
- 79 See Iran's Penal Code 2013, Arts 132(3), 173, 225. No official English translation exists, but there is an unofficial, but reportedly reliable, one at www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html#7.
- 80 The verse is Qur'an 5:38; and the story about Umar is recounted in Ibn Sa'd, *al-Tabaqat al-Kubra* (Beirut, 1968), 1:223, cited in Abdullah Saeed, *Reading the Qur'an in the 21st Century: A Contextualist Approach* (Abingdon, 2014), 32, 37 n 17.
- 81 See Rohe, *supra*, 85, 248.



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