

# The Abolition of the Death Penalty in America

## International Pressure or a Changing Global Norm?

The United States contains a society fraught with deep divisions. These cleavages are part of the very nature of the democracy, and its political system was created with them in mind. Each generation has its own troubles: during the early years, it was slavery, later it was women's rights, after that it was temperance, and in more recent history, it was the nature of war. Today's struggle is over human rights, and in particular it is the death penalty. This issue is complex and many people hold very strong opinions on its implementation. Most political struggles, however, do not belong exclusively to one country. Many fads and trends sweep the world, and the recent protests against the death penalty can be seen on a global scale. In fact, many countries of the world have already abolished the death penalty, and put pressure on nations who have not done so. With the advent of international human rights courts, there are questions whether or not this penalty violates their statutes. International law is a contention between states, for it truly shows the strain between traditional state sovereignty and globalization. However, international law is still only as strong as the states backing it, showing that sovereignty is not dead, rather it is more alive than ever. The homogenization of human rights law does not point to globalization as its cause, rather to traditional methods of changing norms in society.

The conception of sovereignty entered the world stage with the Peace of Westphalia in 1648. This treaty established the notion that every state has the right to practice its own religion inside its borders, and other states cannot interfere. This idea has expanded over the centuries,

and has come to mean the right of each state to rule absolutely over and within its borders. When all states have this right, they are then equal in an international system and free to interact on an equal basis with one another. During the nineteenth century, when nationalism was the cry of the day, territorial sovereignty reigned supreme. In theory, if not in practice, states were the only bodies to hold power. However, this description of world power creates a paradox. As John Agnew says in his work Globalization and Sovereignty, “any given state must be recognized as sovereign by other states in order to qualify as such,” (Agnew 100). A state is only as powerful as other states behold it, and so technically holds no absolute power in and of itself.

Agnew answers this paradox by subscribing to a different notion of sovereignty. He says that “territories, networks and place-making have long coexisted as modalities in the workings of power,” (Agnew 99). This history of the modern world shows that population and money flows have not followed strictly territorial/national lines, they involved networks and point to point transactions. Additionally, people did not limit themselves to state associations, they identified with local cities, with religions, and with other frames of reference. These movements across borders and alter-identities did not weaken state sovereignty, the supposed end all and be all of power on an international scale. Rather, they worked together with states, and influenced state policies. The states then enforced their sovereign rights to rule using those policies. This definition of sovereignty is much closer to the ideal of globalization than past definitions and conceptions have shown.

Jagdish Bhagwati notes that globalization is the integrating of economies, societies and cultures through a global network. In his work, *In Defense of Globalization*, he mainly deals with the economic faction, spending much of his time supporting multinational corporations. He likens the new phenomenon to a positive force in the world, which can increase per capita

income on a global scale and elevate human rights standards (Bhagwati). He subscribes to the classical belief that the world is turning from a state-centric view to a more international one, with non-state actors now amassing power across traditional boundary lines. His book seems to be a direct attack on those who are mourning the supposed decline of the sovereign nation-state. However, as Agnew showed, the two concepts are not necessarily directly opposed to each other.

Jon Scholte's definition of globalization is more broad. He sees the trend as "the spread of transplanetary—and in recent times more particularly supraterritorial—connections between people," (Scholte). However, like Agnew, he also recognizes that this conception of globalization is not new, because man has been using "transworld" connections for centuries, from the ancient Greeks to modern capitalism. However, because of modern technologies, distances between individuals worldwide grow much closer (Scholte). Emails across the globe take mere seconds to deliver. Wireless telephone conversations across oceans are crystal clear. Anyone can fly anywhere else in the whole world in less than twenty four hours. This speed and ease of information flow has led to even more comprehensive mingling of ways of life. While the possibilities are endless, much of this new interconnectedness has led to common standards of human rights and justice.

As a culmination of Enlightenment thinking, the twenty-first century looks at individuals as human beings, inherent with inalienable rights (Brians). No matter what part of the world an individual lives in, human rights proponents believe he is entitled to those rights. While this idea was a prevalent theory before the trend of globalization, it was not realistic until global communications could foster implementation and easier means of enforcement. There are now certain institutions which monitor global respect for human rights. Some are in the form of treaties, such as those implemented by the United Nations and the European Union, some are

formal international courts, such as the International Criminal Court, and some are in the form of Non Governmental Institutions. NGOs are worldwide interest groups, which use grassroots measures to implement their policies. These bodies all act to protect individuals from what they see as harmful governments and powerful individuals, forming a comprehensive form of international law. However, international law does not superimpose itself upon unwilling states thereby replacing state law; it creates a common standard of conduct by which states can interact with each other and with each other's citizens in good faith.

The first attempt to create a formal international body to govern standards of law was the formulation of the International Court of Justice in 1945. This court is a body of the United Nations, and serves to settle legal disputes between states and give advisory opinions at the request of different organs of the UN. The ICJ does not have jurisdiction over individuals and is not a specific human rights body, however it does make human rights decisions upon occasion. Upon UN membership, states are not automatically under jurisdiction of this court; they must agree separately to a compulsory jurisdiction treaty or may do so on a case by case basis. According to John R. Crook, this is a reason for the relatively few numbers of human rights cases presided over by the court: states accused of human rights violations are not necessarily ready to place themselves underneath a court's jurisdiction (Crook). In order to be effective, a court must have power over a state—power to implement enforcement measures if the state does not comply. This is a weak point of international law in general (Skillen 205). Although periodic tribunals were formed to investigate and prosecute human rights violators over the years, another permanent organization was formed to try and fill in some of the wholes that the ICJ left open.

The International Criminal Court is a new institution, having come into effect on July 1, 2002. An independent court stemming from the Rome Statute of the International Criminal Court, the court has jurisdiction over all member states. It has the power to hear and decide over

The most serious crimes under international law i.e. genocide, crimes against humanity, war crimes, and aggression. It is notable that among its innovations, the Statue contains a number of provisions designed to address the plight of women and children in situations of armed conflict. In particular, the Statute recognizes rape, sexual slavery, and other forms of sexual violence as war crimes and crimes against humanity (Murphy).

Unlike the International Court of Justice, the ICC does not only deal with states: individuals can bring suits. It is truly a human rights court, whereby perpetrators can be punished and victims can be compensated for their suffering. However, although seemingly an instrument of globalization, it too very much bows down to individual states. Its laws and rulings can only be enforced if the major states backing the court take an active role. It relies on the political support of states with international clout, without which it would be for the most part ineffective. In fact, it was built with the sovereign state view of world politics in mind. It describes itself as a complement to national justice systems, with limited jurisdiction only to be implemented for the most heinous of crimes and against the most heinous of perpetrators (Skillen 214). Although it implies and promotes a universal standard of human behavior, its power relies on states, affirming notions of traditional sovereignty.

Despite this distinction, standards of international courts such as the ICC have made their way into state justice systems. In 2003, then United States Supreme Court Justice Sandra Day O'Connor said, "over time we will rely increasingly, or take notice at least increasingly, of international and foreign courts in examining domestic issues," (Curry). In a few recent US cases (especially human rights cases, such as those regarding the death penalty to the mentally ill and

to minors), justices have cited international laws in their formal decisions, thereby creating new precedents for the legal system. The trend towards the homogenization of human rights law worldwide appears to be coming from within individual states. Individuals are forming groups within their own governments, and are lobbying to implement changes. These changes can then be viewed in a natural light, which occur as a matter of course as states mature. This particular process can be seen clearly with the exit of the death penalty from the international stage and its current position of a borderline violation of human rights.

According to Article 3 of the Universal Declaration of Human Rights, all people have “the right to life, liberty, and security of person.” These terms, however, are hard to quantify. They are quite vague and can be taken to mean a number of different things. The Declaration was drafted in the immediate aftermath of WWII, and so the terms can be more easily explained using the outlook that was prevalent at the time. After the Holocaust and the Nazi crimes of genocide, the world was attempting to balance protection of individuals from such a fate and punishments for aggressors. At the time, the death penalty was the most prevalent and logical punishment for crimes of homicide (Schabas 6). Many Nazi war criminals were put to death following trials establishing their guilt. Thus, the right to life mentioned in the Universal Declaration of Human rights cannot have originally meant an exclusion from the death penalty. Traditionally, the right to life “was a right to protection of one’s life from arbitrary deprivation from the State” (Schabas 9). Thus with proper procedure, the death penalty is not viewed as arbitrary, rather it was seen as a necessity for society and for the preservation of the state. However, over the past half a century, the cultural norms have changed. As of today, more than two thirds of the countries in the world have abolished the death penalty in law or practice (statistics from Amnesty International). In the United States, fifteen states have abolished the

death penalty, and the number of people sentenced in the states where it is legally allowed has dramatically decreased. The source of these changing legal norms is up for contention.

As previously mentioned, the International Criminal Court is a human rights court. Although they do not actively support the death penalty, they do not find it in violation of international law either. They have made decisions outlawing the death penalty to minors and to those with mental illness, but still consider it a legitimate punishment for those who are proved to possess all of their faculties. The International Court of Justice, although not a human rights court, is known to possess a similar opinion as well. These bodies do not have the power to impose their decisions upon states which do not request their judgments, and so can make no threatening or forceful gesture to those that are outside of their jurisdiction. What poses the most pressure to the United States (and other states which still impose the death penalty) is the European Convention on Human Rights, which is an international treaty to protect human rights in Europe. Protocol 13 of the treaty provides for the total abolition of the death penalty. Many European countries hold the United States in contempt for its current use of the sentence (Blinken 36) and continue to pressure it to give up what they see as a barbaric and medieval protocol. However, aside from its strong language, Europe has little leverage over the United States, and so its cultural stances cannot be seen as the reason for the American trend toward abolition. The closest international law has tread into the US's sphere is the landmark European Court of Human Rights decision, *Soering v. UK*.

In *Soering v. UK*, a man who had murdered his girlfriend's two parents had run away from Virginia and escaped to the United Kingdom. With a warrant out for his arrest, the United States soon found out he was overseas and tried to extradite him back to Virginia to stand trial. This man was also a citizen of Germany, and so knowing that he might face the death penalty

under Virginia law, Germany petitioned to extradite him as well (Germany does not have the death penalty). The man then petitioned the European Commission on Human Rights for extradition to Germany. His legal argument relied on the presumption that if he was sentenced to death in the United States,, the death row phenomenon that he would encounter was against international law. According to Patrick Hudson, the death row phenomenon is the mental condition a man is subjected to due to the long wait before execution and the conditions of the maximum security facilities themselves (Hudson 834). This interminable wait to die (in some places the wait can be as long as a decade or more) and the less than savory conditions can cause mental imbalances. Soerring argued that by extraditing him to the United States, the United Kingdom would be subjecting him to a wait which violated Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms: “No one shall be subjected to torture or to inhumane or to degrading treatment or punishment.” Although the Commission found this argument to be faulty, he appealed to the European Court of Human Rights, which found his claim to be correct. Although this decision did not deal directly with the death penalty, by turning extradition laws in to a human rights issue when *death row* is a possible outcome, Europe may now be viewed a safe haven for fugitives “fleeing from countries with the death penalty,” (Hudson 843).

By establishing global norms and then withholding individual states from holding their citizens accountable to their own laws, this case can be seen as an example of globalization eroding the sovereignty of nation states. However, this case is not the norm. The decision was made in 1989, and no further cases have been brought that bow to this trend since then. It seems a legal anomaly at the present moment. For the most part, states join with international human rights bodies which share their views. In the case of the death penalty, the United States has



refused to join such institutions which outlaw it or have made specific exceptions before signing agreements. This shows that globalized human rights laws are implemented individually by states, reflecting the gradual changing of citizens of different countries all over the world to a similar standard of proper behavior and justice. The recent abolition of the death penalty in many states of the United States shows the changing opinions of people (Bright), as with slavery and women's rights, accepted norms can become unaccepted with time.

Citizens, although they may disagree with policies, do not always act on their own. Today, there are many nongovernmental organizations (NGOs) which work to further certain agendas. One of these is Amnesty International, a global human rights organization which lobbies many governments all over the world to further their idea of a just and free global society. It organizes grass roots demonstrations and it works on media campaigns to educate people on what they see as pressing issues. Since 1987 they have been working to abolish the death penalty in the United States by garnering support among its citizens. Although a global group with consultative power in the UN, it works differently in every country, pushing for reforms within individual legal systems. Its principles cross boundaries, its methods do not.

The international community is most importantly composed of individual states. Each one has its own national character and promotes its own laws. Although states have banded together in recent years and formed international laws, those laws are only as good as the word of the states backing them. As of now, there is no international enforcement body. Any and all enforcement is done by states who wish to implement those established laws upon their citizens. International pressure, although a force to be reckoned with, does not disestablish state sovereignty. A strong state government is still the only ruler of a particular territory. Human rights, although implemented as law by international bodies, are only afforded protection by

states themselves. The death penalty is fading away, but that is but that is not due to undue pressure or a globalized standard. Sovereignty remains intact as our state system, whether the future will change that remains to be seen.