

## IO

# Killing Me Softly: Ending State-Sanctioned Killing

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I hear a deafening noise. I turn back — blood, a lot of blood, very red blood. In an instant, a life has been cut. A man who was speaking less than a minute earlier is no more than a blue pyjama top in a basket. One of the guards picks up a hose. The traces of the crime must be quickly wiped away. I feel a kind of nausea, which I control. In myself I feel a cold disgust.<sup>1</sup>

Upon witnessing the last execution ever to take place in France, Judge Monique Mabelly was confronted with the horror of killing a lucid and healthy human being. At the end of her account, she describes the washing away of the blood as akin to concealing a crime. In modern times, methods of execution have become increasingly sanitised and silenced. There is a shroud of secrecy that envelopes its use, and this is designed to conceal the fact that the death penalty is, at its very core, inhumane and cruel. Mabelly's reaction to witnessing a life being ended in cold-blood is understandably one of disgust. It is for this reason that Mabelly's observations were adopted by French Minister, Robert Badinter, who brought about France's abolition of the death penalty in 1981.<sup>2</sup> He remarked that '[l]ike torture yesterday, the death penalty is doomed to disappear. And it will be a victory for humanity'.<sup>3</sup>

Badinter's words are not far off the mark. We live in a world moving inexorably away from the death penalty.<sup>4</sup> The types of crimes that the death penalty applies to have decreased,<sup>5</sup> along with

the number of states that still retain it.<sup>6</sup> Despite this, the death penalty persists and its progress towards total abolition is slowing.<sup>7</sup> However, those states that retain the death penalty do not proudly wear the badge of executioner. This chapter will examine the language and justifications that states adopt on the international stage to demonstrate that the use of the death penalty is subject to increasing restriction.

By analysing the justifications given by states that still retain the death penalty, it is possible to develop an effective strategy to advocate for abolition. Every state confronts unique hurdles in removing the death penalty from its law. It is therefore necessary to take a tailored approach. While one state may struggle with the support of popular opinion in favour of executions, another may simply not possess the political stability to pursue abolition. The Australian government may use human rights mechanisms like the UN Human Rights Council's Universal Periodic Review (UPR) to bring about change. However, it must also be aware of the unique circumstances that exist in each different nation.

## Sanitised killing

This man will die, he is lucid, he knows that he can do nothing more than delay the end by a few minutes. He is like a child doing everything in his power to postpone the hour for bed. A child who knows that he will be given certain indulgences and makes the most of them. The prisoner continues to drink, slowly, in little sips.<sup>8</sup>

It is curious custom to provide a condemned person with a final meal and some last words. When carrying out an act of such cruelty, it is customary to show the person condemned some small acts of mercy. This token gesture sits in stark contrast to the entirely merciless killing that is to follow.

During my time working with the Louisiana Capital Assistance Centre, I visited a number of men on death row. The suffering they endure daily is incomprehensible. They wake each day under the

shadow of a state bent on ending their life. This horrifying inevitability led Albert Camus, in his novel *The Outsider*, to describe the death penalty as an ‘implacable ritual’, a mechanism that ‘demolished everything’. It is no small wonder that those subjected to lengthy periods of time on death row suffer from a condition known as the ‘death row phenomenon’.

Impending death is difficult to imagine; however, it undoubtedly causes severe anguish and psychological trauma. Indeed, this prolonged process of death is entirely unique to state-sanctioned killing. To be informed of your death years, sometimes decades, in advance of its occurrence, to fight vainly to free yourself from its grasp, only to be thwarted at every turn. The experience is often maddening. However, my time in Louisiana gave me perspective beyond the men who sat shackled behind thick glass. I met prison wardens who interact with the condemned men for many years. They have the most difficult task of all: to shepherd the condemned man to his death and in some cases to witness the killing itself. I also met jury members who recommended the death sentence. They carry an unfairly heavy burden for the rest of their lives. The ripple effects of capital punishment go further than simply the condemned and their immediate family.

It is for this reason, and this reason alone, that states sanitise the way in which they deal with death. The purpose of offering a last meal, or the opportunity for last words, is to appease the conscience of those who must perpetrate and witness such a horrifically violent act. Perhaps one of the earliest examples of sanitised killing can be found in the advent of the guillotine. It was lauded by French revolutionary philosophers and politicians as ‘the great equalizer’. Kings, nobles and peasants alike met their end in the same fashion. No man was required to deliver the killing blow, the natural force of gravity brought the blade down. The process can be over extremely quickly, with the body immediately pushed into a basket and the blood washed away. However, one need only read the account of Mabelly at the beginning of this chapter to under-

stand what a confronting sight a decapitation must have been. The massive amounts of blood, the deafening sound of a blade slicing through bone and strong neck muscles. No matter how quick or painless the method was, it still had a powerful and visceral impact. For this reason, states attempt to silence the impact of the killing.

## Silenced killing

Yet, once again, the mechanism demolished everything: they killed you discreetly and rather shamefacedly but extremely accurately.<sup>9</sup>

Today, some states have sanitised execution entirely bloodlessly, and even the United States attempted to silence it completely through the use of lethal injection. This process is achieved through what is known as a three-drug cocktail: one to sedate, another to paralyse, and finally a drug that stops the heart. The use of a paralytic in the process is of particular relevance. Once the body goes in to cardiac arrest it can experience convulsions, and this can appear to be agonising for the condemned. However, in reality, the paralytic is for the peace of mind of those witnessing the killing. It helps support the view that the condemned is going peacefully. It is a fascinating insight into the psychology of denial. To me, it is indicative of our deeper recognition of the wrong being committed. That we try so persistently to soften the act of killing is simply a projection of our human nature crying out in protest.

However, even today lethal injection is falling out of favour due to botched executions and pharmaceutical companies refusing to supply the drugs required. In 2016, Pfizer stopped supplying the lethal poisons to US authorities. Some states are even looking at a new method of nitrogen poisoning, introducing an invisible, odourless gas that supposedly brings about death without pain or distress.<sup>10</sup> To argue that death can ever be meted out without pain or distress is absurd. This sort of rhetoric is designed by states to persuade the community into believing that executions are

humane. However, when a community is informed of the realities of capital punishment, and not distracted by the smoke and mirrors of ‘humane executions’, it becomes clear that they refuse to support the practice.<sup>11</sup>

Conversely, countries that have abolished the death penalty find that their populations support abolition by an increasing majority with each following year.<sup>12</sup> It is for this reason that secrecy and misinformation is one of the most pressing issues in securing global abolition. It is no coincidence that the death penalty persists in the most autocratic nations. The restriction of free and transparent information not only prevents the community from understanding the way in which the system operates, but also restricts international scrutiny. The most stark example can be found in China, where the death penalty is treated as a state secret. Little is known about the number of people executed in China each year. The lack of transparency is a serious concern and raises fears that their system of capital punishment constitutes serious human rights abuse. However, when confronted on the international stage regarding the death penalty, even China is eager to highlight the steps it is taking towards restricting the death penalty. This conciliatory approach is widespread among retentionist states and is part of a larger trend, moving away from the use of the death penalty.

### **International trends**

There is a definite trend developing on the international stage that suggests the death penalty is almost universally subject to ongoing restriction. It is exceedingly rare for a state to expand its application of the death penalty, and even more so to increase its use. This trend is apparent through the reports that states deliver as part of the UPR procedure. It is also clear from the language that states use to justify the application of the death penalty. This language often suggests that the death penalty is a temporary measure, or a means to an end, with the final goal being abolition.

Despite China's surreptitious use of the death penalty, it has taken action to limit the application of capital punishment.<sup>13</sup> China recently announced that it had abolished the death penalty for 13 economic crimes. This is far more than simply a step in the right direction, and demonstrates the nation's acknowledgement of the need to restrict state-sponsored executions. China's restrictive approach to the death penalty is representative of a trend occurring in the vast majority of retentionist states. In justifying the maintenance of capital punishment to the international community, retentionist states rarely rely on tired justifications, such as the death penalty's deterrent effect or cultural necessity.<sup>14</sup> The language that they adopt indicates a tentative acceptance of human rights standards.

Out of the 91 retentionist states taking part in the UPR, only 19 spoke positively about the perceived benefits of the death penalty. This sits in stark contrast to the 78 states which, rather than attempting to justify the retention of the death penalty, highlighted the fact that it was subject to ongoing restriction.<sup>15</sup> For example, Barbados relied on the fact that the death penalty has been in abeyance for over 30 years as evidence that spoke louder than an official moratorium.<sup>16</sup> Similarly, Bangladesh stated that it was not able to impose a moratorium 'at this stage', showing tacit support for ending executions in the future. A number of other countries, including Vietnam, stated that the death penalty will be abolished when conditions allow.<sup>17</sup>

Not only is the language that states use suggestive of a progressive approach to the continued restriction of the death penalty, but 22 states have overtly accepted the existence of moratoriums.<sup>18</sup> This amounts to nearly a quarter of the states that have not yet abolished the death penalty entirely. Some states, such as Mongolia, Madagascar, the Democratic Republic of the Congo, Niger and Tanzania have taken steps to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>19</sup> This

protocol requires a party to abolish the death penalty entirely and take steps to ensure that it cannot be reintroduced.

Statements that are far less overt in supporting abolition are also widespread in the UPR. Russia continues to maintain a total moratorium and has stated that it is working towards abolition.<sup>20</sup> Similar progressive commitments have been made by a number of other states, including Iraq, which hoped that security and stability would be 'paving the way for the abolition of capital punishment'.<sup>21</sup> It becomes immediately apparent from analysing the language of retentionist states that a large proportion of them view the death penalty as either a transitional measure, an obstacle to be overcome, or a totally dysfunctional practice.

The importance of identifying the comments made by states in the international arena is vital to the development of international law. UN Secretary-General Ban Ki Moon recently recognised that when reviewing states comments in the UPR '[e]ven States that are not subject to conventional obligations with respect to capital punishment have participated in the universal periodic review as if they were subject to international norms concerning the death penalty'.<sup>22</sup>

International norms can be found not only in international treaties, but also through customary international law. The latter is an important type of international norm as it allows the binding of states to certain international standards that are not part of their assumed treaty obligations.

Determining the existence of customary law requires the establishment of two factors, state practice and *opinio juris*. State practice is objective and must be consistent among states; however, it need not be universal. *Opinio juris* is the requirement that the states act according to a belief in a legal obligation. Whenever a state, in the context of the UPR, claims that it adheres to certain human rights standards, it contributes to the ultimate, universal acceptance of that standard. The importance of the role played by

state practice is an area of much academic discussion. When one considers that only 19 states advocate for the use and expansion of the death penalty within the UPR, coupled with the positive trend towards abolition that has been achieved with each passing year, it becomes apparent that the world largely embraces the restriction and ultimate abolition of capital punishment. While it cannot be said that total abolition is a customary norm, there is certainly a strong case to argue that the restriction of the death penalty has now become a customary norm.

### Ending the silence

Identifying the comments made by states on the international stage is not only important in developing customary law, but also in the formation of effective advocacy. A great deal can be learnt about the various hurdles confronted by states in achieving abolition. For example, recommendations made by nation states in the context of the UPR to abolish capital punishment are among the most frequently rejected. This is often due to many states making sweeping recommendations for other states to ratify the Second Optional Protocol, or abolish the death penalty entirely. One of the most recalcitrant death penalty states, Iran, recently received 27 recommendations regarding capital punishment; 24 of those recommendations called for total abolition, and were all rejected outright. However, the three that were accepted were far more incremental. They proposed that Iran should adhere to certain minimum standards when imposing the death penalty; in particular, to cease its application to children and to the crime of apostasy.<sup>23</sup>

Another example of this kind of development came with Belgium's recommendation to Kuwait. Belgium recommended that as long as Kuwait imposed the death penalty it should ensure it 'is only imposed for the most serious offences'. Kuwait applies the death penalty to a number of non-fatal crimes, and by seeking



this restriction Belgium sought to ensure that Kuwait's acceptance was more likely. Ultimately, Kuwait did accept the recommendation and thereby demonstrated that it recognised the need to limit the application of the death penalty in that way.

States that retain the death penalty do so for a number of reasons. They may rely on political expediency, popular support or social necessity. Each of these justifications may be overcome through transparency, public education, and pressure from the wider international community.

### **Australian advocacy**

Australia plays a vital role in ensuring that the Asia-Pacific region continues to move away from the death penalty. As a nation that has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, Australia has an obligation to ensure that it not only abolishes the death penalty domestically, but to also advocate for its global abolition. Australia must take the initiative in ensuring that its closest neighbours adhere to international human rights standards. There are a number of ways in which this can be achieved. First, the government must take a clear and consistent approach in its opposition to of the death penalty. Second, the government should inform and educate Australians about the use of the death penalty abroad. And finally, it should take a strong and unambiguous stance internationally, in advocating for abolition not only for Australian citizens but for all persons at risk of execution wherever they might be.

The Australian government has a chequered history advocating against capital punishment. While Bob Hawke's impassioned plea to Malaysia for the lives of Barlow and Chambers in 1986 was clear and unambiguous, it was also highly charged. By declaring the process 'barbaric', Hawke created political tensions between the two states that took years to mend. Such divisive language may also have the unintended result of bolstering support for the death penalty in the target State. The danger of such heavy-handed

advocacy was recognised by Australia at the time of Van Nguyen's execution in Singapore. The legal team for Van took a soft, low-key approach in the hope that Singapore could save face and not be seen as pressured by Australia to commute the death sentence. However, this too drew criticism for not going far enough, resulting in a last-minute desperate bid for public support when diplomatic and legal avenues had failed.

To further complicate Australia's position, in 2007 Prime Minister John Howard overtly supported the executions of the Bali bombers, creating not only an inconsistency in principle, but also a level of exceptionalism that suggested racist and colonialist undertones. Australia continued its trend to incoherent advocacy during the campaign for the lives of Andrew Chan and Myuran Sukumaran in 2015. Prime Minister Tony Abbott's clumsy threat to the effect that relations between Indonesia and Australia would be prejudiced, should the executions go ahead, seriously damaged the campaign for Chan and Sukumaran. Further, his attempts at moral suasion by suggesting that an exchange may be due for the billions of dollars in tsunami aid donated by Australia to Indonesia caused an uproar in Indonesia and a groundswell of popular support for the executions grew.

The Australian government should not only plead for the lives of its own citizens respectfully, but it should also be consistent by encouraging other nations to cease executions entirely.

However, Australian advocacy against the death penalty is not only hindered by its sometimes inconsistent approach to diplomacy but also by the lack of popular support. Days before Van Nguyen's execution in 2005, a Roy Morgan poll showed that 57% of Australians approved of the death penalty applying to convicted Australian drug traffickers abroad. A similar poll was conducted by Roy Morgan in relation to Chan and Sukumaran, finding that 52% of Australians supported the sentence being carried out. While the ethics behind conducting such polls days before the scheduled

executions were decidedly dubious, the polls were demonstrative of a trend away from the death penalty.

Nevertheless, it still seems that a majority of Australians support the use of capital punishment overseas, despite its abolition at home decades ago. It appears that the Australian public has slowly forgotten the collective disgust felt following the last execution of Ronald Ryan in 1967, or lack knowledge of its nature and extent in countries beyond Australia's borders. As the death penalty becomes a distant memory, so too does our first-hand experience of its unfairness and cruelty. It is for this reason that the Australian government should ensure the public are fully informed as to how the death penalty operates overseas. This would allow Australians to make an informed decision as to the fairness or ineffectiveness of such a punishment. Australia must encourage states to impose the death penalty transparently to enable adequate information to be provided, and for education and public debate to take place. These steps are vital to ensuring that the death penalty's progress towards abolition continues.<sup>24</sup>

The right approach to advocating for abolition must recognise that 'familial difference over capital punishment may turn out to be less one of temperament than of timing'.<sup>25</sup> When one analyses the justifications given by states, it becomes clear that retentionist states are not so much ideologically tied to executions as they are hampered by inertia. It is for this reason that recommendations must seek incremental progress, rather than simply towing ideological lines and calling for total abolition.

An analysis of the death penalty recommendations made by Australia throughout the UPR reveals that it is not utilising best practice to secure abolition. Of the 92 recommendations made by Australia, only 14 were accepted. Only 6 of the 92 recommendations called for specific action, the rest simply making generalised requests for total abolition or a moratorium. For example, it was recommended to, and accepted by, Guyana that it should reduce

the number of crimes to which the death penalty applied. Further, recommendations were made to Saudi Arabia and Kenya to cease applying the death penalty to children, and these recommendations were agreed to. Despite China rejecting a recommendation by Australia to limit the applicable crimes, and to apply the death penalty transparently, China continued to proceed and abolish a number of economic crimes that attracted the death penalty. Of all the recommendations made by Australia that called for specific and incremental action that was contextually relevant, only Iran refused a recommendation to cease the death penalty's application to children.

## Conclusion

The abolition of capital punishment has been central to the modern human rights movement. Simple statistics tell us that there is a great deal less capital punishment than in the past. The human rights movement is entitled to some of the credit for this. Unlike many other issues, such as racial or gender discrimination or the practice of torture, capital punishment easily lends itself to quantitative analysis.<sup>26</sup>

The death penalty is an effective, albeit grim, yardstick through which to measure the international community's respect for human rights more generally. Its measure shows that as respect for human rights increases, the death penalty becomes more and more irrelevant in the modern world. However, the punishment persists at least partly because states like Australia no longer rank the issue highly. States must use strategic advocacy to continue to save lives, both for their own citizens at risk of execution abroad, and for those living within countries that still impose the death penalty. Abolitionist states must become more proactive in their advocacy, pushing for incremental movements towards abolition, as well as encouraging more transparency.

Australia has a long way to go in becoming an effective advocate against the death penalty. Bizarrely, despite two Australians having been on death row in Indonesia, no recommendations were made by Australia on the issue during the review of Indonesia in the UPR. For Australia to overlook its closest neighbour on the world stage may have been an attempt to defer to private diplomatic negotiations; however, it reveals that Australia underestimates the effectiveness of such mechanisms of review. The death penalty thrives on secrecy, and to hope that abolition can be achieved through back channels and soft negotiations misapprehends the complexities that retentionist states face in ridding themselves of capital punishment.

Today the death penalty is viewed as a largely Asian phenomenon.<sup>27</sup> Australia is well placed to be a regional leader for abolition. An effective starting point would include making a strong case against the death penalty's application to drug offences. There are already strong statements from within the United Nations that such a severe penalty should not apply to non-fatal crimes.<sup>28</sup> And yet, owing to cultural reasons, the death penalty for drug offences is widespread.<sup>29</sup>

Furthermore, the use of mandatory death sentences is also common within Asia, despite widespread condemnation as being in violation of the prohibition against cruel and unusual punishment.<sup>30</sup> These two issues are endemic in the Asian region and should be the starting focus of Australia's abolitionist campaign. Such a policy would give Australia robust credibility on the topic of the death penalty, and allow us to lead by example in our region, protect our own citizens from incurring such punishment, and also improve the overall respect for human rights more generally. Well established organisations such as Reprieve Australia are perfectly placed as the pre-eminent authorities on death penalty advocacy within Australia, and should be supported by the Australian government, as well as looked to for guidance.

Deputy Liberal party leader Julie Bishop recently appeared before the United Nations General Assembly to petition for our first appointment to the Human Rights Council from 2018–2020. She pledged that Australia would use the position to campaign tirelessly for the global abolition of the death penalty.

Ms Bishop's focus on abolition was no doubt owed to the recent execution of Andrew Chan and Myuran Sukumaran in Indonesia. Their deaths touched the hearts of many Australians, in no small part due to their powerful rehabilitation, and their tireless and selfless work in helping others within Kerobokan prison. Since their execution, along with six others, Indonesia appears to have lost its taste for killing. The international ire that Indonesia drew from killing a number of foreign citizens was bruising. It is perhaps for this reason that no executions have taken place since April 2015. Whatever the reason, it is a sign of hope that perhaps an end to capital punishment is on the horizon in Indonesia, and the Asian region as a whole.

Prominent human rights lawyer Bryan Stevenson stated that 'the moral arc of the universe is long, but it bends towards justice'<sup>31</sup> (this is a Martin Luther King quote). For the death penalty, that arc is well past its apex, and Australia can and must do everything within its power to ensure it reaches its inevitable conclusion at the first possible moment.

## Endnotes

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