

CONTEMPLATIONS ON THE DEATH PENALTY ABOLITION UNDER THE INTERNATIONAL CRIMINAL COURT'S JUSTICE SYSTEM

BILLY ESRATIAN

Australian National University, Australia

Email: billy.esratian@anu.edu.au

Abstract

The state's choice to retain the death penalty within its penal system, traditionally, has been within the realm of its sovereignty. A dynamic, however, materialized when the International Criminal Court (ICC) took a zero-sum approach in its criminal justice system by abolishing the death penalty. Consequently, a potential erosion of what has been traditionally recognized as the state's choice arises. This article will assess the evolution of the criminal justice system in the international law context, which eventually influenced the ICC's position. Following such observation, this article will inquire whether the ICC's abolitionist approach could be universally embraced, especially in a world filled with diverse legal traditions. Finally, this article will probe the leeway within the complementarity principle, which for so long has been regarded as the retentionist states' last line of defence in preserving the death penalty when the ICC has jurisdiction.

Keywords: death penalty, International Criminal Court, legal pluralism, complementarity principle, United Nations Security Council

Received: 18 October 2025 **Revised:** 02 January 2026 **Accepted:** 13 January 2026

The state's retention of the death penalty within its criminal law system has traditionally been deliberate. It is an exercise of the state's sovereignty. The conception of the International Criminal Court (ICC), however, brings about a potential undermining of such a *status quo*, for the death penalty is not recognized under the ICC's penal system. Arguably, the complementarity principle exists to preserve the prioritization of the state's exercise of its own penal system, and by extension, its application of the death penalty. However, a closer look at the United Nations Security Council's referral power in the ICC presents yet another dynamic to the state.

In light of this, a normative evaluation on the ICC's death penalty abolition is needed to shed light on several convolving relevant issues, including legal pluralism, retributive justice, and the complementarity principle. To do so, this article employs a doctrinal methodology and theoretical approach to trace the evolution of the abolition of the death penalty within the ICC's penal system and the potential unintended consequences thereof.

1. Death penalty: A tale of two criminal justice systems

Generally, there are two main views adopted by states in the death penalty issue, namely the abolitionist, which aims to eliminate the death penalty, and the retentionist, which intends to preserve it.¹ In the international context, the reign of the retentionist view dates to the late 1940s and early 1950s. During this period, especially for war crimes, the death penalty was imposed by courts with international character as they adjudged crimes resulting from World War II.² The reign, however, did not last long. As captured by Magallona, the atrocities resulting from World War II simultaneously catapulted the emergence of a new international public order of human rights.³ Incumbent upon such order, through the adoption of the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) in the 1940s and 1960s, the international community's paradigm on the death penalty began to shift.

These two instruments lay down the non-derogable nature of the right to life, which concurrently implies the preference to persuade the international community to abolish the death penalty in each of their respective national system.⁴ Following the international human rights law (IHRL) development, by the late 1980s and early 1990s, apart from advocating for the abolition of the death penalty in the international criminal justice system, international scholars were also keen to use international fora to encourage an abolitionist approach to be applied within domestic criminal law systems.⁵

Theoretically, the notion of sovereignty should have enabled retentionist states to preserve their criminal justice systems from international pressure to convert to abolitionism.⁶ However, as Bassiouni posited, coupled with international law governing armed conflict and criminal law, IHRL effectively eroded the sovereignty barrier and penetrated the national criminal justice system.⁷ Another form of direct pressure came in

1 Maduna, P. (1996). The death penalty and human rights. *South African Journal on Human Rights*, 12(2), 193–213, p. 194. doi: 10.1080/02587203.1996.11834904

2 See Art. 27, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, August 8, 1945; and Art. 16, Charter of the International Military Tribunal for the Far East, January 19, 1946.

3 Magallona, M. M. (2017). A survey of death penalty in international law, *The Philippine Yearbook of International Law*, 16, 46–56, p. 46.

4 Article 6 of the International Covenant on Civil and Political Rights, December 16, 1966.

5 Schabas, W. A. (1997). War crimes, crimes against humanity and the death penalty, *Albany Law Review*, 60(3), 733–770, p. 744.

6 The Case of the S.S. 'Lotus' (France v. Turkey), Judgment, 1927 P.C.I.J. Series A No 10, p. 18 (7 September). <https://www.icj-cij.org/pcij-series-a>; and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. Reports 14 (Nicaragua), p. 133, para. 263 (27 June). <https://www.icj-cij.org/case/70>

7 Bassiouni, M. C. (1993). Human rights in the context of criminal justice: identifying international procedural protections and equivalent protections in national constitutions, *Duke Journal of Comparative & International Law*, 3(2), 235–297, p. 240.

the form of an extradition policy taken by abolitionist states to cooperate only if fugitives would not be transferred into states where the death penalty would be imposed upon them.⁸ Politically, in assessing whether a state is democratic, the death penalty abolition is generally depicted as an element to characterise a state's willingness to break with the perceived past terror, injustice, and repression.⁹

From these pressures, statistically, the number of abolitionist states, including *de facto* ones, has been growing. As of 2020, 160 States implemented a zero-execution policy as opposed to 30 states where execution of the death penalty was still taking place.¹⁰ Additionally, 'United Nations (UN)'-sponsored tribunals such as the 'International Criminal Tribunal for the Former Yugoslavia (ICTY)' and also the 'International Criminal Tribunal for Rwanda (ICTR)' exclude the possibility of entertaining the death penalty in their criminal justice system.¹¹ Thus, establishing a collective voice from the UN perspective that the death penalty should no longer exist in the modern world.

2. The obvious choice: International Criminal Court and its take on the death penalty

Against such a backdrop, to understand the ICC's motivation in ruling out the death penalty, assessments of the ICC's posture as an international institution and its association with the IHRL may be helpful.

2.1. The International Criminal Court and the United Nations system

As referred in the Preamble of the Rome Statute of the International Criminal Court dated July 17, 1998 (Rome Statute), the ICC, although it is intended to be an independent international court, cannot be separated from the UN as a system. This notion is exemplified, for instance, through the referral power granted to the United Nations Security Council (UNSC),¹² and more fundamentally, through the embodiment of various norms enshrined within the UN Charter within the ICC's system.¹³

Assessing the relationship of the ICJ with the UN, Judge Cançado Trindade posits that, as the UN's principal judicial organ, the ICJ cannot

8 Schabas, W. A. (1998). International law and abolition of the death penalty. *Washington and Lee Law Review*, 55(3), 797-846. p, 799.

9 *Ibid.*

10 United Nations Human Rights Council. (2020). UN Doc. A/HRC/45/20. *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General.*

11 See Article 24(1) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993; and Article 23(1) of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, November 8, 1994.

12 Article 13(b) of the Rome Statute.

13 See *inter alia* Article 2; Article 8(2)(b)(iii); Article 13(b); Article 16 of the Rome Statute.

insulate itself from previous positions taken by the UN.¹⁴ Judge Trindade further notes that in determining whether the ICJ should side to support the abolition of the death penalty, a visit to multiple junctures where the UN was confronted with such an issue is necessary, and argues that the form of justice that goes in line with the progressive development of international law that the UN endorses is the abolition of the death penalty.¹⁵ Such a position can also be linked to the establishment of several UN-backed international courts with an abolitionist view, such as the ICTY and the ICTR. Mirroring through such a relationship, from an institutional standpoint, it is natural for the ICC, just like the ICJ, which possesses a degree of dependence on the UN system, to associate itself in determining certain aspects with the position previously taken by the UN, in particular regarding the abolition of the death penalty within its criminal justice system. After all, as discussed above, ICC embodies the UN Charter's purposes and principles.

2.2. The International Criminal Court and international human rights law

By reflecting upon Article 1 of the UN Charter, an analogy may be made as to what kind of purposes and principles the ICC aims to incorporate in its system. The UN, in this regard, envisages the human rights promotion as one of its purposes and principles, as well as one of the values on which its organs must promote.¹⁶ This, therefore, entails the urge for a closer observation of human rights instruments within the ambit of the UN, namely the ICCPR, to better comprehend what kind of human rights the ICC adopts in its criminal justice system.

By comparing the ICCPR with the Rome Statute, one can argue that various rights inscribed within the ICCPR indeed found their way to the Rome Statute, including *inter alia* rights against self-incrimination, the non-retroactive principle, and the presumption of innocence.¹⁷ Stepping further than that, Roy S. Lee concludes that the ICC even took a higher standard for its criminal justice system than that which reflects the human rights instruments thresholds.¹⁸ In this regard, Lee describes that the ICC's criminal justice system applied an expansive interpretation of the aforementioned human rights instruments and therefore elevated certain rights and stances.¹⁹

In line with such reasoning, the ICC's sentencing system took an even stricter stance than the existing IHRL threshold. Traditionally, the

14 Jadhav Case (*India v. Pakistan*), Judgment (Separate Opinion of Judge Trindade), 2019 I.C.J. Reports 418, p. 490, para. 90 (17 July). <https://www.icj-cij.org/case/168>

15 *Ibid.*

16 Article 13(1)(b); Article 55(c); Article 62(2); Article 76(c) of the Charter of the United Nations dated June 26, 1945 (UN Charter).

17 See the comparison between Article 55(1)(a) of the Rome Statute with Article 14(3)(g) of the ICCPR; Article 24(1) of the Rome Statute with Article 15(1) of the ICCPR; and Article 66(1) of the Rome Statute with Article 14(2) of the ICCPR.

18 Lee, R. S. (2002). Assessment of the ICC Statute, *Fordham International Law Journal*, 25(3), 750-766, pp. 758-759.

19 *Ibid.*

existence of the death penalty in the criminal justice system is an issue that belongs to the sovereignty of each state. In this regard, IHRL instruments, albeit providing a particular preference to abolish the death penalty, do not necessarily compel states by virtue of treaty obligation to relinquish the death penalty completely in their national justice system.²⁰ Under ICCPR's General Comment Number 36, conditions on which the death penalty may be rendered cover crimes *inter alia* of the most serious in nature, of extreme gravity, and involving intentional killing.²¹ Conversely, crimes which yield no intentional, nor direct killing, cannot be justified as grounds to impose the death sentence.²²

Notwithstanding that certain crimes under the ICC's jurisdiction meet the said minimum yardstick to render the death sentence, in responding to such a stance, the Rome Statute firmly does not recognise the death penalty.²³ The maximum sentence that the Court can render for the charges brought by the prosecutor is 30 years of imprisonment, which may be extended to life imprisonment contingent on the gravity of the crime.²⁴ From the analyses above, one can argue that the ICC is inseparable from the UN as a system, and its abolitionist stance is meticulously catered to reflect the position taken by the UN and preference given in the eyes of IHRL.

3. Debunking the myth of universalism and answering the call for legal pluralism

ICC's death penalty abolition presents a dilemma to be reconciled: whether such a zero-sum approach is suitable in a world filled with diverse legal traditions. David Kennedy implies that it may be wise to leave the world just the way it is, which is, legally speaking, fragmented and diverse, rather than forcing it to be governed under one legal regime.²⁵ This concept is closely associated with legal pluralism.²⁶ In dissecting the ICC's abolitionist view of the death penalty, legal pluralism lends alternative, imperfect yet genuine contemplations that merit a closer look.

3.1. Legal pluralism and the reconceptualization of the universality of human rights

Human rights argument have been utilised to propel the convergence of legal order and to dismiss practices by states that are deemed to be rogue and in contradiction to the aforementioned human rights value, including the

20 Article 6 of the ICCPR.

21 United Nations Human Rights Committee. (2019). UN Doc. CCPR/C/GC/36. *General comment No. 36 on article 6: Right to life*.

22 *Ibid.*

23 Article 77 of the Rome Statute.

24 Article 77(1) of the Rome Statute.

25 Kennedy, D. (2007). One, two, three, many legal orders: Legal pluralism and the cosmopolitan dream, *N.Y.U. Review of Law and Social Change*, 31(3), 641-659, pp. 641-646.

26 *Ibid.*

death penalty. The legitimacy of this argument is formidable, as it is indeed a historical fact that the UDHR, one of the principal driving forces behind the development of the IHRL, was adopted without controversy.²⁷ UDHR also paved the way to the establishment of numerous binding international conventions.²⁸ Some scholars even deemed that norms contained within the UDHR had crystallised into an indication of customary international law.²⁹ Domestically, norms within the UDHR are even reflected in national constitutions in various states.³⁰

Kennedy, however, notes that by framing certain norms to bear a degree of universalism, such as the canon of human rights norms, a potent consequence may arise, which is a counter-vision on the idea that human rights norms stemmed from the collective effort of the international community.³¹ After all, the civil and political rights within the UDHR were in fact derived from liberal national constitutions ranging from the United States to European states.³² Similarly, in criticising the unification of legal based order and universal rights, Kahn advises that such an effort will only be perceived as a Western project.³³ Kahn suggests that, beyond the perceived hegemony of the global order of law, opposing views persist and consist of values represented by a spectrum of states and legal traditions outside of the western hemisphere that cannot be easily dismissed.³⁴

Such diverse values and traditions are the foundation for each state's legal system, hence forming its respective sovereignty under international law. To this end, Nicaragua judgment ease's report specifies that a state's subscription to any doctrine cannot be equated with a breach of customary international law.³⁵ ICJ further dictates that a state's freedom in choosing its political, social, economic, and cultural system is the essence of sovereignty on which the whole international law rests.³⁶ The notion of equality

27 United Nations General Assembly. (1948). UN Doc. A/PV.183. *Hundred and eighty-third plenary meeting, held at the Palais de Chaillot, Paris, on Friday, 10 December 1948*.

28 See for example the reference to the UDHR in the preambles of the ICCPR; and the International Covenant on Economic, Social and Cultural Rights, dated 16 December 1966.

29 Robbins, M. (2005). Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement, *California Western International Law Journal*, 35(2), 275–302, p. 281.

30 Hannum, H. (1996). The Status of the Universal Declaration of Human Rights in National and International Law, *Georgia Journal of International and Comparative Law*, 25(1), 287–397, p. 289.

31 Kennedy, D, *supra* note 26, p. 649.

32 Henkin, L. (1995). Human Rights and State Sovereignty. *Georgia Journal of International and Comparative Law*, 25(1), 31–45, p. 40. It is also worth to note the history on the development of the economic, social, and cultural rights within the corpus of IHRL which were primarily advocated by non-western bloc. For further discussion, see Qureshi, W. A. (2018). Stemming the bias of civil and political rights over economic, social, and cultural rights. *Denver Journal of International Law and Policy*, 46(4), 289–314.

33 Kahn, P. W. (2000). Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order, *Chicago Journal of International Law*, 1(1). Article 4, p. 18.

34 *Ibid*, p. 5 and 8.

35 Nicaragua, *supra* note 6.

36 *Ibid*.

among states is precisely how modern law ought to be.³⁷ To this end, legal outcomes within the sphere of international law must gravitate towards identifying claims of right, rather than focusing on a global order structured by assertions of power, especially asymmetric power.³⁸

In advocating legal pluralism, however, this article wishes not to go as far as engaging in a debate upon the legitimacy of the normative values of rights which are prescribed by conventions or customary international law. Instead, it attempts to challenge the operative clause of a certain right, which is being forced to be the sole understanding of such normative value. The scope of such an operative clause is what this article argues to straddle within the confines of a state's sovereignty to choose, and therefore should not be determined universally.

The right to life, for example, carries a universal nature in its normative framework.³⁹ However, when it comes to the operative level of how states translate such a right within their criminal justice systems, the outcomes differ from state to state. These include states' position to retain or abolish the death penalty. Such a variety of outcomes should not be disregarded, as the divergent state practices in defining a particular international norm to cater to its national system is the essence of the ICJ's ruling in *Nicaragua* when it interprets states' sovereignty.⁴⁰

3.2. Legal pluralism as a tool to develop international law

Proponents of universalism relentlessly strive to bring about the convergence of different legal traditions into one global order. In some cases, it is convenient, yet in others, it is problematic, as history has shown that maintaining interactions between legal traditions is necessary for the law to endure and remain relevant.

Historically, it was precisely legal pluralism that fostered the development of a richer international law. Kunz theorised that modern international law initially was based on the occidental culture value system from the *Respublica Christiana* of Medieval Europe.⁴¹ Kunz further noted that the reign of such occidental value dictating the direction of international law remained true, at least not after non-occidental states emerged and formed a bloc which advocated for the recognition of their value and system before the UN.⁴² This bloc, through their differing historical experience and norms from

37 Kahn, *supra* note 34, p. 1.

38 *Ibid.*

39 Given its non-derogable nature even during state of emergency and may have attained the status of peremptory norm of international law. See Article 4(2) of the ICCPR; and United Nations Human Rights Committee. (2001). UN Doc. CCPR/C/GC/36. *General comment No. 29 on Article 4: Derogations during a state of emergency.*

40 Nicaragua, *supra* note 6.

41 Kunz, J. L. (1955). Pluralism of legal and value systems and international law. *The American Journal of International Law*, 49(3), 370–376, p. 371. <https://doi.org/10.2307/2194868>

42 *Ibid.*, p. 374.

those of their occidental counterparts, actively brought colonial issues and transformed the understanding of international law and community to be more diverse and inclusive than ever before.⁴³

Similarly, the law's convergence in the normative level is achieved through the innate sovereignty as provided by legal pluralism within the operative level. One illustration of this preposition is the way Article 3 of the UDHR was drafted, debated, and eventually adopted. The initial draft provision of Article 3 was read as follows: "Everyone has the right to life. This right can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached."⁴⁴

Tracing through the debates in the formulation of said article, multiple proposals were discussed on whether the issue of the death penalty should be incorporated explicitly within the article or not. Proponents of abolitionism argued for the incorporation of the abolition of the death penalty as a norm within Article 3, at the very least during peacetime.⁴⁵ Retentionist states, on the other hand, contended that such a formulation was not legally warranted as the UDHR itself is not intended to govern norms that should be regulated in a state's penal code.⁴⁶

Of all the proposals, Article 3 was then adopted with a different articulation than the initial draft, which is read as follows: "Everyone has the right to life, liberty, and security of person."⁴⁷ Examining the said process and outcome of the adopted Article 3, a consensus was reached by relevant delegates to exclude the issue of the death penalty as they refrained from addressing aspects that lie within the sovereignty of each state, such as the criminal justice system. The international community, in this regard, had successfully taken the legal pluralism approach and, in consequence, managed to elevate the right to life as a human right norm.

As time reveals, the right to life crystallizes in a binding convention through the ICCPR and has even attained a non-derogable characteristic, including during an armed conflict situation.⁴⁸ In short, given the assurance for each respective state that its sovereignty is warranted, legal pluralism as an approach in return induces the establishment of a working avenue where

43 *Ibid.*

44 United Nations Economic and Social Council. (1948). UN Doc. E/CN.4/AC.1/3. Draft Outline of International Bill of Rights (Prepared by the Division of Human Rights).

45 United Nations General Assembly. (1948). UN Doc. A/C.3/SR.102. *Hundred and second meeting, held at the Palais de Chaillot, Paris, dated 14 October 1948.*

46 United Nations General Assembly. (1948). UN Doc. A/C.3/SR.103. *Hundred and third meeting, held at the Palais de Chaillot, Paris, on Friday, dated 15 October 1948.* United Nations General Assembly; and United Nations General Assembly. (1948). UN Doc. A/C.3/SR.104. *Hundred and fourth meeting, held at the Palais de Chaillot, Paris, dated 16 October 1948.*

47 United Nations General Assembly. (1948). UN Doc. A/C.3/SR.107. *Hundred and seventh meeting, held at the Palais de Chaillot, Paris, dated 9 October 1948.*

48 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports, p. 240, para 25 (July 8). <https://icj-cij.org/case/95>

states can forge interactions and consensus in furtherance of international law. Similarly, this article contends that had the ICC preserved the existence of the death penalty as part of legal pluralism approach within the Rome Statute, possible conducive interactions could commence between varying legal traditions of states which intend to ratify the Rome Statute and that in the process of prosecuting a particular case, the non-existence of the death penalty within the ICC's criminal justice system cannot be used as an argument for states which fall under the jurisdiction of the ICC to exert a competing jurisdiction over said case.⁴⁹

4. Universal retributive justice or retributive justice as a universe?

Adjacent to legal pluralism, another aspect worth contemplating is the concept of retributive justice, or the condemnatory purpose of retaliatory punishment, especially towards the offender(s) of a particular crime.⁵⁰ This is because criminal sentencing is one of the main objectives of the establishment of the ICC, as it attempts to end the impunity of the perpetrator of a crime.⁵¹ Retributive justice wields immensely abundant variables within it, such as the manner of interactions between parties that are affected by a certain crime, and also the outcome of measures taken to address a particular crime.

4.1. Relativity in the retributive justice system

Within the universe of retributive justice, crime sentencing is crucial to confirm whether the objective of the law to propel the achievement of justice can be met.⁵² This article contends that the nature of criminal sentencing to accomplish the intended retributive justice should be a relative one instead of an absolute one, as criminal conduct is punishable differently from one state to another. In this regard, Raustiala argues that spatial location is a determining factor in assessing relevant legal rules and one's legal rights, wherein he refers to the concept as legal spatiality.⁵³

Similarly, particular geographies influence the behaviour, logic, and ways of being of the actors that determine the conduct of justice itself, such as judges, law enforcement officers, lawyers, and society in general.⁵⁴ In addition, multifaceted aspects such as cultural conformity and critical junctures in history could also play a role in establishing a state's choice

49 See for example the death sentencing to Saif Al-Islam Gaddafi by Tripoli Court of Appeal in 2015 in Prosecutor v. Omar Hassan Ahmad Al Bashir, Prosecution Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council, 2015 ICC-01/11-01/11, PT.Ch. I, p. 3, para. 1-3 (30 July). <https://www.icc-cpi.int/court-record/icc-01/11-01/11-611>

50 Hermann, D.H.J. (2017). Restorative justice and retributive justice: An opportunity for cooperation or an occasion for conflict in the search for justice. *Seattle Journal for Social Justice*, 16, 71-103, p. 71.

51 Preamble of the Rome Statute.

52 Hermann, *supra* note 51, p. 72.

53 Raustiala, K. (2005). The geography of justice. *Fordham Law Review*, 73(6), 2501-2560, p. 2506.

54 Sawatsky, J. (2007). Rethinking restorative justice: When the geographies of crime and of healing justice matter. *Peace Research*, 39(1/2), 75-93, pp. 75-76.

in governing its criminal justice system, including the question regarding the death penalty.⁵⁵ To this end, with myriad independent variables that serve as a trajectory for states in adhering to a certain type of criminal sentencing, ruling out the possibility of the death penalty may not necessarily accommodate the sense of retributive justice universally.

4.2. Various models of retributive justice

In states with an Islamic legal system, the criminal justice system embraces *inter alia* the *qisas* concept.⁵⁶ *Qisas* draws its criminal law procedure under both the proportionality punishment system and, among others, the perspective of the deceased's family as a means to achieve retributive justice.⁵⁷ In this regard, the main premise of a crime resulting in the loss of life, such as murder, is punishable by death, as it results in a similar outcome as the crime concerned, unless the victim's family forgives the perpetrator.⁵⁸

While from the perspective of the abolitionists, such type of criminal sentencing may not be an ideal system, it still is founded under one of the cardinal rules of Islamic criminal law that the enforcement of certain types of punishment, including those which are governed under *qisas* system, and by extension, the death penalty, serve the corresponding purposes of deterrence as well as the protection of the society which ultimately leads to the desired retributive justice within such society.⁵⁹ To strip the system away or to offer criminal sentencing that does not accommodate the underlying principle of the system would mean denying the states or people who are entrenched deeply in the values of the Islamic legal system from seeing justice served.

Another model where the application of retributive justice deviates from the ICC's sentencing practice is in the United States. It is well-enunciated that the United States is among the pioneers in instituting the codification of human rights at the international level, which also incorporated the right to life from within.⁶⁰ However, when it comes to the interpretation of such a right in conjunction with its criminal justice system, the United States never rules out the possibility of imposing the death sentence. In *Gregg v. Georgia*, the Supreme Court of the United States invokes both the historical context and the sense of retributive justice that may be achieved through the sentencing of the death penalty.⁶¹ Anckar notes that the position taken

55 Bae, S. (2011). International norms, domestic politics, and the death penalty: Comparing Japan, South Korea, and Taiwan. *Comparative Politics*, 44(1), 41-58, p. 43.

56 Khan, S. (2018). The role of *Qisas* and *Diyaat* in facilitating honor killings. *RSIL Law Review*, 2(1), 38-56, p. 40.

57 *Ibid*, p. 14 and pp. 60-61.

58 *Ibid*.

59 *Ibid*, p. 18.

60 United Nations Economic and Social Council. (1947). UN Doc. E/259(SUPP). *Commission on Human Rights: Report to the Economic and Social Council on the 1st session of the commission held at Lake Success, New York, from 27 January to 10 February 1947*.

61 *Gregg v. Georgia*, 428 U.S. 153 (1976).

by the United States in retaining the death penalty is particularly important as it is also tacitly linked to explaining the prevalence of retentionist states in the Americas from a geopolitical standpoint.⁶²

Beyond the Americas, Anckar also observes that the death penalty remains popular in the Middle East, North Africa, and portions of Asia.⁶³ Schabas, in particular, also notes that in international fora, Singapore and Malaysia invoked Asian values as an argument to retain the death penalty.⁶⁴ Such observations corroborate the preliminary discussion that geographical and cultural context may play a role in determining how justice is carried out.

In another example, questions on the suitability of applying abolitionist values universally were raised by the delegate of Rwanda, as they were involved in the formulation of the ICTR.⁶⁵ During the discussion, the delegate of Rwanda objected to the ruling out of capital punishment in the ICTR's criminal justice system as it may create an uncondusive situation requisite for the national reconciliation, given the fact that Rwanda's national penal code provides the possibility of sentencing to the death penalty.⁶⁶

From these observations, the death penalty as another means to achieve retributive justice endures in various parts of the globe despite the trend of abolitionism. Such persevered practice to retain the death penalty is understandable as it is often inextricably linked with delicate variables which influence the conduct and the very fibre of states concerned, such as their underlying legal and societal traditions, as well as the historical context which shapes them.

5. Complementarity principle: Common denominator or tyranny of the might?

The ICC is conceived to serve as a “*back-up court*” when the national court is deemed to be unable or unwilling to try the case.⁶⁷ This concept is more commonly known as the complementarity principle. This very concept wherein the ICC maintains the primary emphasis of jurisdiction on the national court of each of the respective states, along with other favoured provisions towards the national system, is arguably what draws more states to join the Rome Statute.⁶⁸

By connecting the complementarity principle to the death penalty issue, one may find that such a principle works as the common denominator to accommodate the interests of the retentionist states. Historically, it was

62 Anckar, C. (2014). Why countries choose the death penalty. *Brown Journal of World Affairs*, 21(1), 7–25, p. 19.

63 *Ibid.*

64 Schabas, W. A. (2000). Islam and the death penalty. *William & Mary Bill of Rights Journal*, 9(1), 223–237, p. 224.

65 United Nations Security Council. (1994). UN Doc. S/PV.3453. 49th year: 3453rd meeting, dated 8 November 1994.

66 *Ibid.*

67 Article 1 and Article 17(1)(a) of the Rome Statute.

68 Lee, *supra* note 19, p. 758.

acknowledged that there exists no conclusive consensus on the death penalty issue and that the complementarity principle serves to tackle the deadlock, as the national justice system will presume the primary responsibility in accordance with their national laws, in case of competing jurisdiction with the ICC.⁶⁹ Hence, subject to the state's ability and willingness thresholds, whatever the outcome may be out of such national proceedings, including the possibility of the use of the death penalty as a punishment, there will be no intervention whatsoever from the ICC.

Rome Statute itself, however, provides a leeway from said complementarity principle, which may compromise the endeavour of retentionist states to preserve their national justice system. Such leeway comes not from within the ICC *per se*, but rather from the external force as enabled by the anatomy of the Rome Statute. As previously elaborated, the ICC does not necessarily stand alone. There are certain degrees of dependence on the UN to ensure the effectiveness of its roles and functions.⁷⁰ To this end, the United Nations Security Council (UNSC) is given a power by the ICC to refer a situation to the office of the prosecution, regardless of whether the situation concerned warrants a jurisdiction of the ICC by virtue of membership in the Rome Statute or not.⁷¹

5.1. *Pacta sunt servanda* revisited: The might of the United Nations Security Council referral power

The UNSC's referral power serves as a shortcut to establish jurisdiction and symbolise a conformity of the function of the ICC with the primary function of the UNSC.⁷² However, such a mechanism is not without issues. Towards states that have not ratified the Rome Statute, the UNSC's referral authority tacitly disregards the *pacta sunt servanda* principle within the constraints of the Rome Statute. The *pacta sunt servanda* principle encompasses the fundamental norm that obligations arising out of a treaty bind only states that have expressed their will to be bound by said treaty. Historically, *pacta sunt servanda* manifests in all legal systems throughout all periods of history, cultures, judicial orders of all sovereigns, and in all religions.⁷³ It is among the oldest principles of international law.⁷⁴ In a more contemporary context, the principle is governed under the Vienna Convention of 1969 on the

69 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. (1998). UN Doc. A/CONF.183/SR.9. *Summary record of the 9th plenary meeting*, p. 7, para 53.

70 Article 17 of the Rome Statute.

71 Article 13(b) of the Rome Statute.

72 To the extent that both institutions were established *inter alia* to reaffirm purposes and principles enshrined within the UN Charter.

73 Gormley, W. Paul. (1970). The codification of *pacta sunt servanda* by the international law commission: the preservation of classical norms of moral force and good faith. *Saint Louis University Law Journal*, 14(3), 367-428, p. 374.

74 Popescu, D. N. (2009). The principle *pacta sunt servanda*: Doctrine and practice. *Lex ET Scientia International Journal*, 16(1), 128-137, p. 133.

Law of Treaties, and further elaborated by the ICJ in *Gabčíkovo-Nagymaros* wherein it postulates that apart from the first element of *pacta sunt servanda* which dissects the nexus between states' membership of a treaty and legal obligation arising out of it, another element which scrutinises the good faith principle, must also be observed as it highlights the pertinence of intention of any party which wishes to conclude a treaty.⁷⁵

Following said line of reasoning, conversely, state's decision not to ratify a particular treaty means that such a state does not intend to be bound by provisions inscribed within the treaty and therefore is not subject to *pacta sunt servanda* principle within the confines of said treaty. In an ideal world, this should also apply to states that are not parties to the Rome Statute. Ironically, however, it is also the principle of *pacta sunt servanda* which serves as the basis for the UNSC to derive its authority from the UN Charter to issue binding decisions towards members of the UN, including decisions regarding the referral of a situation to the ICC against member states of the UN which are not party to the Rome Statute.

In this regard, the ICJ opines that whenever the UNSC decides to act under Chapter VII of the UN Charter, its resolution is equipped with a binding nature and therefore enforceable towards members of the UN.⁷⁶ The ICJ further notes that to interpret otherwise means to deprive the UNSC of conducting its essential function and powers as prescribed by the UN Charter.⁷⁷ Invariably, it is noteworthy that in the past, UNSC's resolutions granting the ICC to exercise jurisdiction over states which are not party to the Rome Statute invoked Chapter VII of the UN Charter. Examples describing this argument persist in the stance that the UNSC took in Sudan in 2005 and in Libya in 2011.

In Sudan, following the Report of the International Commission of Inquiry on Darfur regarding the alleged violations of international humanitarian law and IHRL post 1 July 2002, the UNSC adopted Resolution 1593, which bestowed the ICC to exercise jurisdiction.⁷⁸ One of the key developments following the investigation by the prosecutor of the ICC involved the issuance of arrest warrants against Omar Al Bashir, who, at the time the arrest warrants were issued, was the sitting President of

75 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 I.C.J. Reports 7, p. 78-79, para. 142. (25 September). <https://www.icj-cij.org/case/92>

76 Article 25 of the UN Charter; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16 (Namibia), p. 52, para. 115 (21 June). <https://www.icj-cij.org/case/53>; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reports 174, p. 178 (11 April). <https://www.icj-cij.org/case/4>

77 Namibia, *Ibid.*

78 United Nations Security Council. (2005). UN Doc. S/2005/60 (2005). *Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council*; and United Nations Security Council. (2005). UN Doc. S/RES/1593. *Resolution 1593 (2005) / adopted by the Security Council at its 5158th meeting, on 31 March 2005*.

Sudan, for the alleged war crimes, crimes against humanity, and genocide committed in Darfur from March 2003 to, at least, 14 July 2008.⁷⁹ While in Libya, in the wake of the non-international armed conflict in 2011, the UNSC adopted the 1970 Resolution, which entails a referral of the situation to the ICC.⁸⁰ Such a referral was then welcomed by the ICC through the opening of an investigation and issuance of arrest warrants upon several actors in the conflict, mainly from the government forces, such as Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi.⁸¹ Subsequently, Saif Al-Islam Gaddafi was charged with two counts of crimes against humanity, namely murder and persecution, while charges against Muammar Mohammed Abu Minyar Gaddafi and Abdullah Al-Senussi were terminated.⁸²

From the above instances, two viewpoints can be inferred that depict the intricacy and potentially disruptive nature of the UNSC's referral power to the equilibrium of international law.

First, at the time the situations in Sudan and Libya were referred, neither Sudan nor Libya had ratified the Rome Statute, yet both states are compelled to be constrained by provisions of the Rome Statute as the ICC exercises its jurisdiction through the referral of the UNSC. Such a manner unsettles the long-standing tenet of *pacta sunt servanda*, wherein a state's treaty obligation arises only after the expressed will to be bound by said treaty has been given. More fundamentally, it also raises a distressing question: whether the extent of decisions by the UNSC could be expanded to the level where it can establish a treaty obligation in contradiction to a state's sovereignty to choose not to be a party to a certain treaty?

Second, both Sudan and Libya are retentionist states in terms of the death penalty, and amongst the crimes charged by the ICC's office of the prosecution within these two situations are crimes punishable by death pursuant to each respective state's penal code.⁸³ By forcing the ICC's jurisdiction over those

79 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, 2017 ICC-02/05-01/09, PT.Ch. II, p. 3, para. 2 (11 December). <https://www.icc-cpi.int/court-record/icc-02/05-01/09-309>

80 United Nations Security Council. (2011). UN Doc. S/RES/1970. *Resolution 1970 (2011) / adopted by the Security Council at its 6491st meeting, on 26 February 2011*.

81 *Situation In the Libyan Arab Jamahiriya*, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 2011 ICC-01/11, PT. Ch. I, p. 41 (27 June). <https://www.icc-cpi.int/court-record/icc-01/11-01/11-1>

82 Following Muammar Gaddafi's death in 2011 and the inadmissibility of Al-Senussi case. See *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 2011 ICC-01/11-01/11, PT.Ch. I, pp. 3-5 (22 November). <https://www.icc-cpi.int/court-record/icc-01/11-01/11-28>; and *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 2014 ICC-01/II-01/I/OA6, A.Ch., p. 46, para 122 (24 July). <https://www.icc-cpi.int/court-record/icc-01/11-01/11-565>

83 Article 130 of the 1991 Criminal Code of Sudan; Article 17, Article 19, and Article 368 of the 2007 Penal Code of Libya.

crimes, the UNSC in essence had converted these two states' position from being a retentionist to an abolitionist as considerations and verdicts within the judgments rendered by the ICC in those two states excludes each state's respective penal code, at least with regards to the possibility of rendering the death penalty within the ICC's sentencing system.⁸⁴ With those two points in mind, paradoxically, both the very concept of *pacta sunt servanda*, in this regard toward states which have not ratified the Rome Statute as an international treaty, as well as the existence of complementarity principle, therefore become irrelevant for states who wish to retain the death penalty within their criminal justice system as it can be circumvented by the UNSC.

5.2. Politics of the United Nations Security Council's decision-making process

The decision-making process in the UNSC is convoluted by multifaceted considerations, and not necessarily a legal one. This, in consequence, generates inconsistencies in the eyes of the law. Additionally, the composition of the UNSC allows for a hierarchical power structure amongst its member states, mainly divided into the permanent and non-permanent members.⁸⁵ Such a power structure results in the possibility of an inconsistent outcome over an assessment of situations by the UNSC to exercise its functions, as the inherent veto right by the permanent members may halt decisions from being made.⁸⁶ Paradoxically, this potential inconsistency is natural, as, through a pragmatic perspective, Ian Hurd suggests that the nature of the UNSC should not be construed in moralistic and legalist terms; rather, it suits more within the realm of realistic political terms as the UNSC emulates the political compromise among the Great Powers.⁸⁷

An example of such inconsistency can be observed in the situation in Syria from 2012–2013, wherein, allegedly, multiple violations of international humanitarian law and IHRL occurred.⁸⁸ Essentially, if one is to reflect upon the precedent of the UNSC in Libya in 2011, the situation in Syria also warrants the referral resolution by the UNSC to the ICC. However, such a referral effort by the UNSC failed to be adopted due to the veto votes by China and Russia.⁸⁹ This further indicates that the UNSC's referral power has the potential of being utilised based more on

84 See in general Article 21, and in particular Article 21(1)(c) of the Rome Statute.

85 Article 23 of the UN Charter.

86 The terms 'concurring votes' in Article 27(3) of the UN Charter.

87 Hurd, I. (2004). Of words and wars: The Security Council's Hard Life among the Great Powers, *Seton Hall Journal of Diplomacy and International Relations*, 5(10), 69–75, pp. 69–70.

88 The recommendation to the UNSC to refer the situation to the ICC in the reports of the independent international commission of inquiry on the Syrian Arab Republic in *inter alia* United Nations Human Rights Council. (2013). UN Doc. A/HRC/22/59. *Report of the independent international commission of inquiry on the Syrian Arab Republic (22nd session)*; and United Nations Human Rights Council. (2013). UN Doc. A/HRC/24/46. *Report of the independent international commission of inquiry on the Syrian Arab Republic (24th session)*.

89 United Nations Security Council. (2014). UN Doc. S/PV.7180. *69th year: 7180th meeting*, dated Thursday, 22 May 2014.

the international geopolitical factor rather than factual findings and legal considerations.

With that said, this article is not oblivious to the fact that in the past, crucial decisions by the UNSC have contributed to international peace and security and, therefore, is not in a position to advocate for the stripping of the power to issue binding resolutions. However, from a legal-philosophical perspective, given the dynamics of the UNSC's referral authority, it also merits contemplation: whether a political entity like the UNSC should be given the avenue to intervene in the judicial organ's endeavour to pursue justice? To this end, the relationship between a political entity and the conduct of a judicial organ remains contentious. In *Lockerbie*, the ICJ had once addressed the issue by rejecting the use of the UNSC's resolutions as a basis to deem a case inadmissible.⁹⁰ Such judgment offers an illustration of how a judicial organ conveys a reluctance to be intervened by decisions stemming from a political entity.

The relationship between the ICC, as a judicial organ, and the UNSC, however, is a unique one, as both enable and reinforce one another to expand their authority and jurisdiction, principally to be universal. However, as explained earlier, the state's decision to opt to the ICC's jurisdiction is a magnanimous one and should be left to the sovereignty of states alone, at least for those which have not ratified the Rome Statute, as it deals with delicate matter linked to the legal and societal fabrics of said states, including the form of retributive justice they wish to articulate. Through the power to bypass the *pacta sunt servanda* principle and the ability to force a state to adopt an abolitionist approach through the ICC's jurisdiction, the UNSC's referral authority in this case, transcends all those considerations and thus introduces more questions than answers.

Conclusion

Reflecting on the ICC's position on the death penalty, several points are noteworthy. First, the unification effort of the international criminal justice system into the abolitionist norm may undermine legal pluralism, which, essentially, encapsulates the very fabric of international law and has served as the underlying factor empowering its development. Second, the death penalty abolition within the ICC's justice regime tends to reserve a special claim over the retributive justice concept, which inherently belongs also to other sentencing systems beyond the abolitionist paradigm. Finally, the complementarity principle wields a loophole stemming from the UNSC's referral power that may be thwarted in support of the abolitionist view.

⁹⁰ At least towards resolutions adopted after the application of a case before the ICJ. See Questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Judgment, 1998 I.C.J. Reports 9, p. 26, para. 44 (27 February). <https://www.icj-cij.org/case/88>

To be precise, this article is not intended to impede the current existing effort to universally abolish the death penalty. Instead, it aims to provide alternative standpoints in dissecting said ongoing process, as several issues remain contentious. ●

References

- [1] Ankar, C. (2014). Why countries choose the death penalty. *Brown Journal of World Affairs*, 21(1), 7-25
- [2] Bae, S. (2011). International norms, domestic politics, and the death penalty: comparing Japan, South Korea, and Taiwan. *Comparative Politics*, 44(1), 41-58
- [3] Bassiouni, M. C. (1993). Human rights in the context of criminal justice: identifying international procedural protections and equivalent protections in national constitutions, *Duke Journal of Comparative & International Law*, 3(2), 235-297
- [4] Gormley, W. Paul. (1970). The codification of pacta sunt servanda by the international law commission: the preservation of classical norms of moral force and good faith. *Saint Louis University Law Journal*, 14(3), 367-428
- [5] Hannum, H. (1996). The status of the universal declaration of human rights in national and international law. *Georgia Journal of International and Comparative Law*, 25(1), 287-397
- [6] Henkin, L. (1995). Human rights and state sovereignty. *Georgia Journal of International and Comparative Law*, 25(1), 31-45
- [7] Hermann, D.H.J. (2017). Restorative justice and retributive justice: an opportunity for cooperation or an occasion for conflict in the search for justice. *Seattle Journal for Social Justice*, 16, 71-103
- [8] Hurd, I. (2004). Of words and wars: The Security Council's Hard Life among the Great Powers. *Seton Hall Journal of Diplomacy and International Relations*, 5(10), 69-75
- [9] Kahn, P. W. (2000). Speaking law to power: popular sovereignty, human rights, and the new international order. *Chicago Journal of International Law*, 1(1), Article 4
- [10] Kennedy, D. (2007). One, two, three, many legal orders: legal pluralism and the cosmopolitan dream, N.Y.U. *Review of Law and Social Change*, 31(3), 641-659
- [11] Khan, S. (2018). The role of qisas and diyaat in facilitating honor killings. *RSIL Law Review*, 2(1), 38-56
- [12] Kunz, J. L. (1955). Pluralism of legal and value systems and international law. *The American Journal of International Law*, 49(3), 370-376. <https://doi.org/10.2307/2194868>
- [13] Lee, R. S. (2002). Assessment of the ICC statute, *Fordham International Law Journal*, 25(3), 750-766
- [14] Maduna, P. (1996). The death penalty and human rights. *South African Journal on Human Rights*, 12(2), 193-213. doi: 10.1080/02587203.1996.11834904
- [15] Magallona, M. M. (2017). A survey of death penalty in international law. *The Philippine Yearbook of International Law*, 16, 46-56

- [16] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. Reports 14 (27 June). <https://www.icj-cij.org/case/70>
- [17] Popescu, D. N. (2009). The principle pacta sunt servanda: Doctrine and practice. *Lex ET Scientia International Journal*, 16(1), 128-137
- [18] Qureshi, W. A. (2018). Stemming the bias of civil and political rights over economic, social, and cultural rights. *Denver Journal of International Law and Policy*, 46(4), 289-314
- [19] Raustiala, K. (2005). The geography of justice. *Fordham Law Review*, 73(6), 2501-2560
- [20] Robbins, M. (2005). Powerful states, customary law and the erosion of human rights through regional enforcement. *California Western International Law Journal*, 35(2), 275-302
- [21] Sawatsky, J. (2007). Rethinking restorative justice: when the geographies of crime and of healing justice matter. *Peace Research*, 39(1/2), 75-93
- [22] Schabas, W. A. (1997). War crimes, crimes against humanity and the death penalty. *Albany Law Review*, 60(3), 733-770
- [23] Schabas, W. A. (1998). International law and abolition of the death penalty. *Washington and Lee Law Review*, 55(3), 797-846
- [24] Schabas, W. A. (2000). Islam and the death penalty. *William & Mary Bill of Rights Journal*, 9(1), 223-237

Author Contribution

The author contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

Conflict of Interest: The author declare no competing interests.

Disclaimer: All claims expressed in this article are solely those of the author and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article or claim that may be made by its manufacturer is not guaranteed or endorsed by the publisher.



Copyright: © 2026 by the author. Licensee VJLS, Ho Chi Minh City University of Law, Vietnam. This article is an open-access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<https://creativecommons.org/licenses/by/4.0/>).