

## **Rights in Conflict: The Clash Between Abolishing the Death Penalty and Delivering Justice to the Victims**

### **Abstract**

The abolition of the death penalty and delivering justice to the victims of atrocity crimes are two dominant international human rights issues. Despite the prominence of both issues, the international human rights community views the abolition of the death penalty as being the more important objective. This is evidenced by the preclusion of the use of the death penalty as a punishment at international and internationalized criminal courts and tribunals despite the fact that some victims have indicated that they can only experience justice following the execution of the perpetrators of the crimes committed against them. This article addresses whether these two goals are in conflict, whether that conflict is intractable and whether it is appropriate to prioritize one objective over the other. Finally, it concludes that these two goals are incompatible, and that the victim's right to justice must give way in favour of the right to life.

**Keywords:** Right to Life; Death Penalty; Victims' Rights; Criminal Punishment; International Human Rights Law; International Criminal Law; Public International Law

## 1 Introduction

The abolition of the death penalty and delivering justice to the victims of atrocity crimes have become two of the dominant international human rights issues over the course of the last twenty-five years. The debate about the permissibility of the death penalty is seen as being at the core of the right to life, which has alternatively been described as ‘the supreme right’, ‘the primordial right’ and ‘the foundation and cornerstone of all the other rights’.<sup>1</sup> Simultaneously, delivering justice to the victims of atrocity crimes has been described as the most important purpose served by international and internationalized criminal courts and tribunals.<sup>2</sup> This article addresses three questions: are these two goals in conflict; if so, is that conflict intractable; and is it appropriate to prioritize one of these human rights objectives over the other?

Despite the prominence of both of these issues, the abolition of the death penalty is seen as being more important than providing the victims with justice. This is evidenced by the preclusion of the use of the death penalty as a punishment at international and internationalized criminal courts and tribunals, notwithstanding the fact that some victims believe that they can only experience justice if the perpetrator of the crimes committed against them is put to death. This apparent conflict creates a situation in which the

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<sup>1</sup> William A. Schabas, *The Abolition of the Death Penalty in International Law* (3<sup>rd</sup> Ed., Cambridge University Press, Cambridge, 2002), pp. 8-9; quoting *General Comment 6*, Human Rights Committee, U.N. Doc. HRI/GEN/1/Rev.1 (1982), p. 6; Bertrand G. Ramcharan, ‘The Concept and Dimensions of the Right to Life’, in Bertrand G. Ramcharan (ed.), *The Right to Life in International Law* (Martinus Nijhoff, Dordrecht, 1985), p. 12; Inter-American Commission of Human Rights, *Diez Años de Actividades, 1971-81*, (Organization of American States, 1982), p. 339.

<sup>2</sup> Laurel E. Fletcher, ‘Refracted Justice: The Imagined Victim and the International Criminal Court’, in Christian de Vos, Sarah Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge University Press, Cambridge, 2015), p. 302.

achievement of one goal makes it impossible to fulfill the other. Victims of atrocity crimes have repeatedly made clear that the punishment of the perpetrators of the crimes committed against them plays an important role in allowing them to experience a sense of justice. Further, some victims have also asserted that the only punishment that will allow them to feel that sense of justice is the execution of the accused. Foreclosing the possibility of using the death penalty as a punishment the international human rights community creates a situation in which some victims will never experience a sense of justice. This is significant, as it is believed that delivering justice to the victims plays an important role in peace building and reconciliation in former conflict-stricken areas. Promoting peace and reconciliation is at the very heart of the United Nations' mission and every effort should be made to facilitate the achievement of those goals.<sup>3</sup> By outlawing capital punishment, and thereby preventing some victims from experiencing a sense of justice, the international human rights community accepts that guaranteeing the right to life takes precedence over the promotion of peace that can be achieved through encouraging justice.

## **2 The Death Penalty**

The international movement to abolish the death penalty first gained notoriety in 1948 following the introduction of the Universal Declaration of Human Rights ("Universal Declaration"). This timing is consistent with an increased focus on the individual as the beneficiary of international law and the growing prominence of

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<sup>3</sup> Article 1 of the Charter of the United Nations.

individual rights following the Second World War.<sup>4</sup> Article 3 of the Universal Declaration specifically recognizes every person's right to life.<sup>5</sup> Although the completed draft of the Universal Declaration does not directly link the abolition of the death penalty to the right to life, the drafting history of the Universal Declaration demonstrates that it was very much within the drafters' contemplation. The Soviet Union submitted a proposal during the negotiations of the Declaration to include a clause in Article 3 explicitly banning the use of the death penalty during times of peace.<sup>6</sup> Additionally, an early draft of the declaration sought to make the right to life derogable if the individual had been convicted of a crime punishable by the death penalty.<sup>7</sup> Both sections were debated, and both defeated, but not before demonstrating the close connection between the right to life and the abolition of the death penalty.<sup>8</sup>

The European Convention on Human Rights ("European Convention") was introduced two years later and also addresses the link between the right to life and the death penalty. In fact, the European Convention adopted one of the provisions left out of the Universal Declaration, namely, the ability of States to derogate from the right to life

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<sup>4</sup> William A. Schabas, 'International Law and the Death Penalty: Reflecting or Promoting Change', in Peter Hodgkinson and William A. Schabas (eds.), *Capital Punishment: Strategies for Abolition* (Cambridge University Press, Cambridge, 2004), p. 36.

<sup>5</sup> Article 3 of the Universal Declaration of Human Rights.

<sup>6</sup> Amendment to Article 3 of the Draft Declaration (E/800), Union of Soviet Socialist Republics, Doc. No. A/C.3/265 (12 October 1948), in William A. Schabas (ed.), *The Universal Declaration of Human Rights: The travaux préparatoires* (Vol. 3, Cambridge University Press, Cambridge, 2013), p. 2208.

<sup>7</sup> Draft Declaration of the International Rights and Duties of Man, Inter-American Juridical Committee, Doc. No. E/CN.4/2 (8 January 1947), in William A. Schabas (ed.), *The Universal Declaration of Human Rights: The travaux préparatoires* (Vol. 1, Cambridge University Press, Cambridge, 2013), p. 98.

<sup>8</sup> Summary Record of the Hundred and Seventh Meeting of the Third Committee, Doc. No. A/C.3/SR.107 (19 October 1948), in William A. Schabas (ed.), *The Universal Declaration of Human Rights: The travaux préparatoires* (Vol. 3, Cambridge University Press, Cambridge, 2013), pp. 2285, 2293.

when imposing the death penalty following a conviction of a crime for which capital punishment is a permissible sentence.<sup>9</sup> European sentiment against the use of the death penalty continued to progress and in 1983, Protocol No. 6 to the Convention was introduced seeking to abolish the death penalty in most circumstances. Protocol No. 6 stands for the general proposition that the death penalty ‘shall be abolished’, although it does allow for the continued use of capital punishment during times of war.<sup>10</sup> The next two decades saw the further evolution of European thought on the issue, resulting in the introduction, and ultimate ratification, of Protocol No. 13. Protocol No. 13 completely abolishes the use of the death penalty in all situations and explicitly prohibits any derogation from that general position.<sup>11</sup> Protocol No. 13 has been ratified by 44 of 47 European nations, the only remaining holdouts being Russia, Armenia and Azerbaijan.<sup>12</sup>

Article 6 of the International Covenant on Civil and Political Rights (“International Covenant”) was the first international document to substantively address the relationship between the right to life and capital punishment. It guarantees the inherent right to life enjoyed by every person and identifies limits on the use of capital punishment.<sup>13</sup> Pursuant to the International Covenant, capital punishment should only be imposed following a conviction for the most serious crimes and children under age 18 and pregnant women should not be subjected to it.<sup>14</sup> Further, capital punishment should

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<sup>9</sup> Article 2 of the European Convention on Human Rights.

<sup>10</sup> Articles 1 & 2 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty.

<sup>11</sup> Articles 1 & 2 of Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty.

<sup>12</sup> Chart of signatures and ratifications of Treaty 187, <[www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p\\_auth=jZw8o6I1](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=jZw8o6I1)>, accessed 13 April 2017.

<sup>13</sup> Article 6 of the International Covenant on Civil and Political Rights.

<sup>14</sup> *Ibid.*

not be applied in a manner that would be contrary to other international commitments.<sup>15</sup> As a result of these provisions, the International Covenant serves as a halfway measure with regard to the death penalty. The States Parties were not willing to commit to outlawing the death penalty, but did see the utility of placing limits on it under certain circumstances.

The General Assembly of the United Nations (“General Assembly”) signaled its intent to pursue the abolition of the death penalty when it introduced the Second Optional Protocol to the International Covenant on Civil and Political Rights on 15 December 1989. The Second Optional Protocol is specifically aimed at abolishing the death penalty and those states choosing to ratify it are bound not to execute anyone within its jurisdiction and to take all necessary measures to abolish the death penalty.<sup>16</sup> Unfortunately, less than half of the world’s nations have thus far ratified the Second Optional Protocol rendering it ineffective in much of the world.<sup>17</sup>

The relative lack of ratifications of the Second Optional Protocol does not present the full picture of how the nations of the world view the death penalty. Although only 84 countries have ratified the Second Protocol, at least 104 nations have banned the practice within its own jurisdiction.<sup>18</sup> Further, of the remaining countries that still legally permit the death penalty, only 23 actually executed anyone in 2015, and 87% of all executions

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<sup>15</sup> *Ibid.*

<sup>16</sup> Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.

<sup>17</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Status of Ratification Interactive Dashboard, United Nations Human Rights Office of the High Commissioner, <indicators.ohchr.org>, accessed 4 March 2017.

<sup>18</sup> Amnesty International, *Global Report Death Sentences and Executions 2016*, 11 April 2017, <[www.amnestyusa.org/sites/default/files/death\\_penalty\\_2016\\_report\\_embargoed.pdf](http://www.amnestyusa.org/sites/default/files/death_penalty_2016_report_embargoed.pdf)>, accessed 25 April 2017, p. 4.

occurred in just four countries.<sup>19</sup> By contrast, in 1977 only 16 countries had abolished the death penalty.<sup>20</sup> There is a clear trend amongst the nations of the world towards the *de facto* or *de jure* abolition of the death penalty.

The move towards abolishing the death penalty as an acceptable punishment is no more evident than in international criminal law. The Statutes of all of the modern international and internationalized criminal courts and tribunals limit punishment to terms of imprisonment, fines and the forfeiture of any assets derived from their criminal activity.<sup>21</sup> In fact, none of the Statutes mention the death penalty at all. This absence represents a change from the Charters of the Nuremberg and Tokyo Tribunals, both of which permitted the imposition of capital punishment.<sup>22</sup> This departure has been attributed to developments in the law during the period between the establishment of the post-Second World War Tribunals and the Yugoslavia Tribunal, and most notably, the introduction of the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>23</sup> The mounting international disfavour for the death penalty can also be

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<sup>19</sup> *Ibid.*

<sup>20</sup> Amnesty International, *Death Sentences and Executions Report 2015*, 6 April 2016, <[www.amnesty.org/en/documents/act50/3487/2016/en/](http://www.amnesty.org/en/documents/act50/3487/2016/en/)>, accessed 25 April 2017, p. 6.

<sup>21</sup> Article 77 of the International Criminal Court Statute; Article 24 of the International Criminal Tribunal for the former Yugoslavia Statute; Article 23 of the International Criminal Tribunal for Rwanda Statute; Article 19 of the Special Court for Sierra Leone Statute; Articles 38 and 39, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004; Article 24 of the Special Tribunal for Lebanon Statute; Article 24 of the Statute of the Extraordinary African Chambers.

<sup>22</sup> Article 27 of the Charter of the International Military Tribunal; Article 16 of the International Military Tribunal for the Far East Charter.

<sup>23</sup> Virginia Morris and Michael Scharf (eds.), *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Vol. 1, Transnational Publishers, Inc., Irvington-on-Hudson, NY, 1995), p. 274; M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia*, (Transnational Publishers, Inc., Irvington-on-Hudson, NY, 1996), p. 698.

found in a series of United Nations General Assembly resolutions issued between 2007 and 2014 in which the General Assembly called for a moratorium on the death penalty with a view towards its abolition.<sup>24</sup> In 2015, Secretary-General Ban Ki-moon left no doubt about the United Nations position on capital punishment when he referred to the death penalty as a cruel and inhumane practice and declared that it ‘has no place in the 21<sup>st</sup> century.’<sup>25</sup>

The growing consensus in favour of abolishing the death penalty was also evident during the negotiations of the Rome Statute. States Parties to the Second Optional Protocol and other regional treaties outlawing the use of capital punishment, argued that the inclusion of the death penalty in the Statute would prevent them from supporting or cooperating with the Court.<sup>26</sup> Had the death penalty been authorised at the International Criminal Court, both domestic and international law would have prevented those states from transferring suspects to the Court. The Human Rights Committee has found that a state party that has abolished the death penalty has an obligation to protect the right to life ‘in all circumstances’ and they may not extradite suspects if ‘it may reasonably be

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<sup>24</sup> General Assembly Resolution 62/149, *Moratorium on the Use of the Death Penalty* (A/RES/62/149); General Assembly Resolution 65/206, *Moratorium on the Use of the Death Penalty* (A/RES/65/206); General Assembly Resolution 67/176, *Moratorium on the Use of the Death Penalty* (A/RES/67/176); General Assembly Resolution 69/186, *Moratorium on the Use of the Death Penalty* (A/RES/69/186).

<sup>25</sup> Ban Ki-moon, ‘Preface’, in Ivan Šimonović (ed.), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives*, (United Nations, New York, 2014), p. 7, <[www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf](http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf)>, accessed 24 April 2017.

<sup>26</sup> Rolf E. Fife, ‘Penalties’, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY, 2001), p. 331.

anticipated that they will be sentenced to death’.<sup>27</sup> Therefore, any abolitionist State that transferred suspects to an International Criminal Court that allowed capital punishment would have been violating its obligations under the International Covenant. Further, most abolitionist states categorically refuse to extradite criminal suspects if there is a danger that the accused will be subject to the death penalty following extradition.<sup>28</sup> If states were to pursue such a policy in relation to the International Criminal Court they would run afoul of Articles 86 and 89 of the Rome Statute. Article 86 contains a general provision stating that the States Parties ‘shall... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’<sup>29</sup> Article 89 more specifically refers to orders for the arrest and surrender of individuals wanted by the Court; and it commands that such orders ‘shall’ be complied with. Therefore, a State refusing to extradite out of a fear that the accused might be executed would be in contravention of the Rome Statute. These statutory provisions requiring cooperation would have resulted in a number of states refusing to join the International Criminal Court so as to avoid placing themselves in an untenable position.

### **3 Justice for Victims of Atrocity Crimes**

While the death penalty has been falling out of favour, the international human rights community has been increasingly concerned with protecting the interests of victims of atrocity crimes. Similar to efforts to abolish the death penalty, international efforts to protect the interests of victims are also rooted in the Universal Declaration of Human

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<sup>27</sup> *Roger Judge v. Canada*, 8 August 2003, Human Rights Committee, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998, para 10.4.

<sup>28</sup> William A. Schabas, ‘Indirect Abolition: Capital Punishment’s Role in Extradition Law and Practice’, 25 (3) *Loyola of Los Angeles International & Comparative Law Review* (2003) 581-604, 583.

<sup>29</sup> Article 86 of the International Criminal Court Statute.

Rights. Article 1 of the Universal Declaration states, '[a]ll human beings are born free and equal in dignity and rights.'<sup>30</sup> Article 1 is based in Kantian philosophy and the notion that all human beings are of equal value and therefore, are entitled to equal rights.<sup>31</sup> Within the context of international criminal law, it is thought that the commission of certain types of crimes, including crimes against humanity, war crimes and genocide, act to diminish or invalidate the value of the victims of those crimes rendering them no longer equal to other members of society.<sup>32</sup> The existence of this imbalance imposes an affirmative duty on society to repudiate the victimization and reaffirm the victim's equal value in society.<sup>33</sup> Failure to comply with that duty results in society's complicity in the commission of crimes that act to reduce the inherent value of the victims.<sup>34</sup> Society can fulfill its duty to the victims by investigating and repudiating the acts of the alleged perpetrators.<sup>35</sup> Repudiation is demonstrated through the imposition of punishment, but it is only effective when just sentences are carried out.<sup>36</sup> By doing so impunity is defeated and justice is realized.<sup>37</sup>

International criminal justice institutions are the entities within the international human rights structure doing the most to protect the interests of the victims and to restore their sense of personal value as it pertains to the rest of society. The rise in the use of

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<sup>30</sup> Article 1 of the Universal Declaration of Human Rights.

<sup>31</sup> Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution', 39 *UCLA Law Review* (1991-92) 1659-1702, 1667-68.

<sup>32</sup> *Ibid.*, 1677-78; Eric Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court', 44 *Columbia Journal of Transnational Law* (2005-2006) 801-874, 837.

<sup>33</sup> Blumenson, *supra* note 32 at 838-839.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 862.

<sup>36</sup> *Ibid.*

<sup>37</sup> George P. Fletcher, 'Against Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 580-584, 581.

international and internationalized criminal courts and tribunals coincides with victims of atrocity crimes increasingly becoming the focal point of international criminal justice.<sup>38</sup> Both the courts and tribunals, and the United Nations more generally, have identified the overriding role that victims play in international criminal justice. At the International Criminal Court, Luis Moreno-Ocampo, the Court's first prosecutor, described his role as follows, '[m]y mandate is justice; justice for the victims.'<sup>39</sup> His successor, Fatou Bensouda, also emphasized the important function of her office in relation to the victims reflected by the prosecutor's responsibility to investigate and try alleged perpetrators of atrocity crimes, 'where no-one else is doing justice for the victims.'<sup>40</sup> Former International Criminal Court president, Judge Sang-Hyun Song, detailed the Court's duty to victims when he announced, we 'must not let down the countless victims around the world that place their hope in this institution.'<sup>41</sup> All of these statements are in keeping with the comments made by Kofi Annan at the opening of the Rome Conference when he urged to the delegates to develop a Statute where 'the overriding interest must be that of the victims, and of the international community as a whole.'<sup>42</sup> These statements leave no

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<sup>38</sup> Fletcher, *supra* note 2 at 307.

<sup>39</sup> ICC Press Release, 'ICC Prosecutor visits Egypt and Saudi Arabia' (ICC-CPI-20080509-MA13), 9 May 2008, <[www.icc-cpi.int/Pages/item.aspx?name=press%20release%20media%20advisory\\_%20icc%20prosecutor%20visits%20egypt%20and%20saudi%20arabia](http://www.icc-cpi.int/Pages/item.aspx?name=press%20release%20media%20advisory_%20icc%20prosecutor%20visits%20egypt%20and%20saudi%20arabia)>, accessed 24 April 2017.

<sup>40</sup> ICC Press Release, 'Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda', 22 October 2012, <[www.icc-cpi.int/Pages/item.aspx?name=otpstatement221012](http://www.icc-cpi.int/Pages/item.aspx?name=otpstatement221012)>, accessed 24 April 2017.

<sup>41</sup> ICC Press Release, 'ICC launches commemorations for 17 July – International Criminal Justice Day' (ICC-CPI-20120706-PR822), 6 July 2012, <[www.icc-cpi.int/Pages/item.aspx?name=pr822](http://www.icc-cpi.int/Pages/item.aspx?name=pr822)>, accessed 24 April 2017.

<sup>42</sup> UN Press Release, 'UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be that of Victims and World Community as a Whole' (SG/SM/6597 L/2871), 15 June 1998, <[www.un.org/press/en/1998/19980615.sgsm6597.html](http://www.un.org/press/en/1998/19980615.sgsm6597.html)>, accessed 24 April 2017.

doubt as to the important part delivering justice to the victims plays at the International Criminal Court.

The International Criminal Court is not alone amongst international and internationalized criminal courts and tribunals in prioritizing the delivery of justice to the victims. Former President of the International Criminal Tribunal for the former Yugoslavia, Antonio Cassese, once stated that the Tribunal was established ‘for the victims of crimes’ and he described protecting victims as ‘the *raison d’être*’ of the Tribunal.<sup>43</sup> In 2011, the president of the International Criminal Tribunal for Rwanda referred to ‘seeking justice for the victims’ as the driving force behind the Tribunal’s goal of ensuring that similar atrocities never reoccur.<sup>44</sup> At the opening of the eighth plenary meeting of the Extraordinary Chambers in the Courts of Cambodia, President Judge Kong Srim remarked on the importance of reconfirming their commitment to the Extraordinary Chambers’ mission, ‘in order to expeditiously and effectively deliver justice to all victims’ in Cambodia.<sup>45</sup> Emmanuel Ayoola, former President of the Special Court for Sierra Leone believed that the mission of the Special Court was ‘to bring justice

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<sup>43</sup> Antonio Cassese, ‘The International Criminal Tribunal for the former Yugoslavia’, 4 *European Human Rights Law Review* (1997) 329-339, 331.

<sup>44</sup> International Criminal Tribunal for Rwanda, *Sixteenth annual report 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 and 31 December 1994* (A/66/209, S/2011/472) para. 89.

<sup>45</sup> Opening Speech by the Plenary’s President Judge Kong Srim, During the 8<sup>th</sup> Plenary of the Extraordinary Chambers of the Courts of Cambodia (ECCC) on 13<sup>th</sup> September 2010, 13 September 2010, <[www.eccc.gov.kh/en/documents/public-affair/opening-speech-plenary39s-president-judge-kong-srim-during-8th-plenary-extra](http://www.eccc.gov.kh/en/documents/public-affair/opening-speech-plenary39s-president-judge-kong-srim-during-8th-plenary-extra)>, accessed 24 April 2017, p. 3.

to the victims of the war in Sierra Leone.’<sup>46</sup> The Office of the Prosecutor at the Special Tribunal for Lebanon identifies ‘bringing justice to victims’ as one of the three parts of its mandate and the President of the Tribunal asserted that all of the organs of the Tribunal are working towards ‘vindicat[ing]...the rights of the victims and the punishment of the authors of very serious misdeeds’.<sup>47</sup> Further, in 2011, the prosecutors of all of the existing international criminal courts and tribunals released a joint statement underlining the importance of effectively and expeditiously completing their missions ‘on behalf of the victims in the affected communities’.<sup>48</sup> Clearly, numerous different organs of the international and internationalized criminal courts and tribunals prioritize delivering justice to the victims of atrocity crimes even in the absence of an explicit statutory requirement to do so.

While many international and internationalized courts and tribunals identify providing justice to the victims of atrocity crimes as their most important function, they all fail to substantively address what justice for the victims means in this context. Attempts have been made to fill that gap through assertions that justice for the victims means the right to an effective remedy designed to eliminate the effect of the harm caused by the commission of the crime.<sup>49</sup> A crucial component of the right to a remedy is

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<sup>46</sup> *Second Annual Report of the President of the Special Court for Sierra Leone*, <[www.rscsl.org/Documents/AnRpt2.pdf](http://www.rscsl.org/Documents/AnRpt2.pdf)>, accessed 12 September 2017, p. 3.

<sup>47</sup> *First Annual Report of the Special Tribunal for Lebanon*, <[www.stlsl.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010](http://www.stlsl.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010)>, accessed 12 September 2017, paras. 166, 246.

<sup>48</sup> Joint Statement, Sixth Colloquium of International Prosecutors, 15 May 2011, p. 1, <[www.rscsl.org/Documents/Press/OTP/Colloquium\\_Joint\\_Statement.pdf](http://www.rscsl.org/Documents/Press/OTP/Colloquium_Joint_Statement.pdf)>, accessed 24 April 2017.

<sup>49</sup> Luke Moffett, *Justice for Victims Before the International Criminal Court*, (Routledge, New York, 2014), pp. 30-31; citing Dinah Shelton, *Remedies in International Human Rights Law* (2d ed., Oxford University Press, Oxford, 2005), pp. 7, 35-6.

the prosecution and punishment of perpetrators.<sup>50</sup> As the Trial Chamber of the Yugoslavia Tribunal explained, one purpose of punishment is to ‘reflect...the calls for justice from the persons who have been victims of suffered because of the crimes’.<sup>51</sup>

Victims of atrocity crimes consistently indicate that the perpetrators of those crimes should be tried and punished for their actions as retribution for the crimes committed.<sup>52</sup> A 2015 study conducted in Kenya, Uganda, Côte d’Ivoire and the Democratic Republic of Congo found that victim participants want the accused to be convicted and punished for their alleged crimes.<sup>53</sup> Individuals affected by atrocity crimes in the Central African Republic overwhelmingly felt that the perpetrators of atrocity crimes should be held accountable, and advocated in favour of a variety of punishments ranging from the very general ‘punishment’, to imprisonment, summary execution, and the rather oblique statement that the perpetrators of atrocity crimes ‘should confront justice’.<sup>54</sup> A survey conducted in 2002 of a randomly selected group of Rwandans found that 96.8% of respondents believed it was important to try those responsible for committing crimes during the genocide, and 92.3% felt that the purpose of trials was ‘to

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<sup>50</sup> Valentina Spiga, ‘No Redress Without Justice: Victims and International Criminal Law’, 10 *Journal of International Criminal Justice* (2010) 1377-1394, 1392-3.

<sup>51</sup> *Prosecutor v. Dragan Obrenović*, 10 December 2003, International Criminal Tribunal for the former Yugoslavia, Sentencing Judgment, IT-02-60/2-S, para. 45, <[www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf](http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf)>, accessed 12 September 2017.

<sup>52</sup> Ernesto Kiza and Holger-C. Rohne, ‘“Victims’ Expectations Towards Justice in Post-Conflict Societies: A Bottom-Up Perspective’, in Ralph Henham and Mark Findlay (eds.), *Exploring the Boundaries of International Criminal Justice* (Ashgate, Burlington (VT) 2011), p. 96.

<sup>53</sup> Human Rights Center, *The Victims’ Court?: A Study of 622 Victim Participants at the International Criminal Court*, 2015, <[www.law.berkeley.edu/wpcontent/uploads/2015/04/VP\\_report\\_2015\\_final\\_full2.pdf](http://www.law.berkeley.edu/wpcontent/uploads/2015/04/VP_report_2015_final_full2.pdf)>, accessed 24 April 2017, p. 3.

<sup>54</sup> Patrick Vinck and Phuong N. Pham, *Building Peace Seeking Justice: A Population-Based Survey on Attitudes About Accountability and Social Reconstruction in the Central African Republic*, 2010, <[www.law.berkeley.edu/wp-content/uploads/2015/04/Building-Peace-Seeking-Justice-August-2010.pdf](http://www.law.berkeley.edu/wp-content/uploads/2015/04/Building-Peace-Seeking-Justice-August-2010.pdf)>, accessed 25 April 2017, pp. 3, 29.

punish those who have done wrong’, although for some, punishment was a secondary consideration to reparations in the form of compensation and forgiveness.<sup>55</sup> In a 2004 study conducted in Iraq, the majority of those interviewed advocated in favour of summary justice in the form of execution or torture without trial.<sup>56</sup> These studies may be an imperfect measure of victims’ opinions, and demonstrate a diversity of attitudes amongst different victims, but they all generally support the notion that victims have a strong desire to see the perpetrators of the atrocity crimes committed against them punished for their actions.

In some instances simply punishing the perpetrators of atrocity crimes is not enough to satisfy the victims’ needs. Victims interested in punishing the perpetrator as retribution for his or her crimes are often unhappy with the length and types of sentences imposed following conviction.<sup>57</sup> This was reflected in a survey of victim participants in the *Duch* trial at the Extraordinary Chambers in the Courts of Cambodia. There, one of

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<sup>55</sup> Timothy Longman, Phuong N. Pham and Harvey M. Weinstein, ‘Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda’, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press, Cambridge, 2004) pp. 212-13, 219; Timothy Longman and Théoneste Rutagengwa, ‘Memory, Identity, and Community in Rwanda’, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press, Cambridge, 2004) p. 173.

<sup>56</sup> Nehal Bhuta, Hanny Megally, Harvey M. Weinstein, Phuong N. Pham, Eric Stover, Paul van Zyl, Suzana Grego and Sarah Rutledge (eds.), *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, UC Berkeley School of Law, 2004, <[www.law.berkeley.edu/wp-content/uploads/2015/04/Iraqi-Voices-May-2004.pdf](http://www.law.berkeley.edu/wp-content/uploads/2015/04/Iraqi-Voices-May-2004.pdf)>, accessed 25 April 2017, p. 26.

<sup>57</sup> Janine N. Clark, ‘The Limits of Retributive Justice’, 7 *Journal of International Criminal Justice* (2009) 463-487, 471; Miklos Biro, Dean Ajdukovic, Dinka Corkalo, Dina Djipa, Petar Milin and Harvey M. Weinstein, ‘Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia’, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press, Cambridge, 2004), p. 193.

the overriding goals of the victim participants was to see that Duch was adequately punished, a goal that likely went unmet as many of the punishments recommended by victim participants, including execution, exceeded the scope of what the Chambers could lawfully order.<sup>58</sup> In a survey done in the former Yugoslavia, it was concluded that lenient sentencing, constituting any sentence other than the death penalty or life imprisonment, disappointed victims seeking retribution through punishment.<sup>59</sup>

Qualitative and quantitative studies have also shown that some victims believe that the death penalty is the only adequate punishment for certain offenders. In 2014, 13 per cent of victims of the war in the Eastern Democratic Republic of Congo believed that the only just way to punish those individuals responsible for the violence was to execute them.<sup>60</sup> A 2007 study in Northern Uganda found that 10 per cent of the people most affected by the on-going violence there felt that the leaders of the Lord's Resistance Army should be executed either with or without a trial.<sup>61</sup> Interviews conducted in Rwanda in 1998 and 2004 discovered that many of the victims interviewed felt that the

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<sup>58</sup> Elisa Hoven and Saskia Scheibel, 'Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance', 21(1) *International Review of Victimology* (2015) 161-185, 169.

<sup>59</sup> Sanja K. Ivković, and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford University Press, Oxford, 2011), p. 151.

<sup>60</sup> Patrick Vinck and Phuong N. Pham, 'Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo', Harvard Humanitarian Initiative and United Nations Development Programme, 2014, <[www.peacebuildingdata.org/sites/m/pdf/DRC2014\\_Searching\\_for\\_Lasting\\_Peace.pdf](http://www.peacebuildingdata.org/sites/m/pdf/DRC2014_Searching_for_Lasting_Peace.pdf)>, accessed 12 September 2017, p. 71.

<sup>61</sup> Phuong N. Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda and Richard Bailey, 'When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Northern Uganda', Human Rights Center, UC Berkeley School of Law, Payson Center for International Development Tulane University, International Center for Transitional Justice, 2007, <[www.ictj.org/sites/default/files/ICTJ-Uganda-Justice-Attitudes-2007-English\\_0.pdf](http://www.ictj.org/sites/default/files/ICTJ-Uganda-Justice-Attitudes-2007-English_0.pdf)>, accessed 12 September 2017, p. 35.

inability of the Rwanda Tribunal to impose death sentences resulted in the architects of the 1994 genocide being inadequately punished.<sup>62</sup> This was echoed during a series of focus group interviews conducted in 2002, during which some of the victims expressed support for executing the perpetrators of the genocide.<sup>63</sup> As one participant observed “[t]he punishment of life in prison does nothing for *genocidaires*...it is not enough for this sort of criminal.”<sup>64</sup> Further, the application of the death penalty by domestic Rwandan courts for crimes committed during the genocide has been attributed to a desire to meet the needs of the victims and their interest in seeing some of the perpetrators put to death.<sup>65</sup>

The evidence suggests that there are victims of atrocity crimes that view the death penalty as the only sufficient sentence for the crimes committed against them. This leads to the conclusion that those victims will necessarily be unhappy with the outcome of international criminal trials because even if the defendant is convicted, he or she will not be subjected to an adequate penalty. This, in turn, leads to a sense amongst victims that justice has not been done.

#### **4 Abolishing the Death Penalty Versus Justice for Victims**

There is uncertain value in relying on individuals’ opinions about whether the death penalty should be imposed in particular situations. At its root, human rights law is

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<sup>62</sup> Wendy Lambourne, ‘Transformative Justice, Reconciliation and Peacebuilding’, in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, Friederike Mieth (eds), *Transitional Justice Theories* (Routledge, Abingdon, 2014), p. 25; J. E. Alvarez, ‘Crimes of Hate/Crimes of State: Lessons from Rwanda’, 24(2) *Yale Journal of International Law* (1999) 365-480, 407.

<sup>63</sup> Timothy Longman, *Memory and Justice in Post-Genocide Rwanda* (Cambridge University Press, Cambridge, 2017), p. 282.

<sup>64</sup> *Ibid.*

<sup>65</sup> Alvarez *supra* note 60 at 406.

designed to protect the individual from the State.<sup>66</sup> It is intended to insulate certain rights from infringement regardless of whether the majority, as reflected through public opinion, supports interference with those rights.<sup>67</sup> Applying rights at the whim of public opinion would deprive human rights of all practical meaning. The relevant relationship to consider when examining whether human rights are properly respected is the one between the entity seeking to take a particular action and the person against whom that action is being taken. To that end, any decision to levy a death sentence should be evaluated in terms of whether the entity wishing to inflict it can do so without violating the right to life of the person against whom the sentence has been imposed. Public opinion about the appropriateness of the use of the death penalty in a particular situation has no bearing on whether its application complies with the right to life. This is particularly true in the context of international criminal law because a determination has already been made that there are no instances in which the death penalty can be applied while simultaneously upholding the right to life.

However, an argument can be made that the victims' opinions about whether the death penalty should be imposed is relevant in international criminal law. The victims have a direct interest in the punishment of those perpetrators that committed crimes against them because whether the victim experiences justice following a trial is dependent on the victim's perception about the fairness of the punishment being meted out. The importance of the victim's opinion is reinforced in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Basic Principles"), adopted by the United Nations General Assembly in 1985. Section 6(b) of the Basic

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<sup>66</sup> Schabas *supra* note 4 at 328.

<sup>67</sup> *Ibid.*

Principles states that the needs of victims should be facilitated by:

Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.<sup>68</sup>

The importance of considering the opinions of the victims was made operative in Article 68 of the International Criminal Court's Statute. Article 68(3) allows the victims, at the discretion of the Trial Chamber, to present their views and concerns about those matters that concern their interests.<sup>69</sup> There is no limitation in Article 68, or in Article 75 pertaining to sentencing, preventing the victims from expressing opinions about the length or type of sentence they wish to see imposed following a conviction. These provisions make clear that victims have a right to be heard on those issues that arise during trial that impact their interests.

Because delivering justice to the victims has been identified as one of the main purposes of international criminal trials, and one way that justice is delivered is through the severity of the punishment levied against the perpetrators of atrocity crimes, it logically follows that the Court should consider the opinions of the victims with regard to the length and type of sentence they believe will allow them to experience a sense of justice. The prohibition of the death penalty creates a situation in which, even if those victims are given the opportunity to be heard, their opinions will be summarily disregarded as they are advocating for a punishment that cannot be imposed. Those victims that connect their own ability to feel as if justice has been served to the imposition of the death penalty are unable to experience justice from a criminal justice

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<sup>68</sup> General Assembly Resolution 40/34, *Annex to Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, (A/RES/40/34), Section 6(b).

<sup>69</sup> Article 68(3) of the International Criminal Court Statute.

system that refuses to impose the death penalty. This calls into question whether international criminal justice can meet its two important stated aims of abolishing the death penalty and delivering justice to the victims.

The death penalty is thought to provide the victims with justice in two ways: through revenge and closure.<sup>70</sup> Neither of these reasons is adequate to justify the use of capital punishment in international criminal law. The former, revenge, runs counter to many of the other goals of international criminal trials and has been dismissed as doing nothing more than compounding injustice.<sup>71</sup> Revenge has been defined as an ‘arbitrary, narcissistic exercise of violence’ providing accountability only to those seeking revenge.<sup>72</sup> Antonio Cassese grouped the desire for revenge together with ethnic and nationalistic hatred, and collectively described them as the seeds of armed conflict, working together to threaten national and international peace.<sup>73</sup> Revenge is viewed as part of a cycle of violence: conflict leads to victimization, which results in revenge, in turn producing more violence.<sup>74</sup> This cycle needs to be interrupted to promote the goals of peace and reconciliation. The imposition of justice is thought to break this cycle as it

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<sup>70</sup> David T. Johnson, ‘Does Capital Punishment Bring Closure to the Victims?’, in Ivan Šimonović (ed.), *Death Penalty and the Victims* (United Nations Human Rights Office of the High Commissioner, New York, 2016), pp. 81-2; Marilyn Peterson Armour and Mark S. Umbreit, ‘Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Solution’, 96(1) *Marquette Law Review* (2012) 1-131, 4.

<sup>71</sup> Office of the UN High Commissioner for Human Rights Press Release, ‘Zeid urges Maldives to retain long-standing moratorium on death penalty’, 9 August 2017, <[www.ohchr.org/EN/NewsEvents/Pages.aspx?NewsID=20353&LangID=E#sthash.vC3qeUDV.dpuf](http://www.ohchr.org/EN/NewsEvents/Pages.aspx?NewsID=20353&LangID=E#sthash.vC3qeUDV.dpuf)>, accessed 13 April 2017.

<sup>72</sup> Clark *supra* note 57 at 469; *quoting* John Borneman, ‘Reconciliation After Ethnic Cleansing: Listening, Retribution, Affiliation’, 14 *Public Culture* (2002) 281-304, at 288.

<sup>73</sup> Antonio Cassese, ‘Reflections on International Criminal Justice’, 61(1) *The Modern Law Review* (1998) 1-10, 10.

<sup>74</sup> Anja Matwijkiw, ‘The No Impunity Policy in International Criminal Law: Justice versus Revenge’, 9 *International Criminal Law Review* (2009) 1-37, 7.

meets the demands for revenge through retributive punishment.<sup>75</sup>

This approach only works if two things are true: first, that revenge and retribution are coextensive so that whatever retributive sentence imposed is sufficient to satisfy the victims' demand for revenge; and second, the sentence imposed is sufficient to meet the retributive purposes of sentencing. In fact, these requirements are incompatible. If one accepts that criminal sentences meet the retributive purposes of punishment, then international criminal law's prohibition on the death penalty necessarily means that retribution and revenge cannot be viewed as being equivalent. Some victims desire for revenge can only be satisfied by the execution of the perpetrator of the crimes committed against them. So long as international and internationalized criminal courts and tribunals are prevented from using the death penalty as a sentence, the expectations of some victims will not be met, leaving their demands for revenge unsatisfied. Conversely, if revenge and retribution are thought to be coextensive, then not all sentences can fulfill the retributive purposes of punishment. That is because, in some instances, those seeking revenge demand the imposition of capital punishment. Because capital punishment cannot be imposed, revenge and retribution go unmet. To the extent that retribution is meant to punish those convicted in proportion to the wrong he or she has committed, an individual perpetrator convicted of atrocity crimes will never experience true retribution in sentencing, as it is plainly impossible for such a perpetrator to serve a punishment commensurate with the harm he or she has done.<sup>76</sup> International criminal law's adherence

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<sup>75</sup> Cassese *supra* note 73 at 6.

<sup>76</sup> Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, Cambridge, 2007) p. 61; Alexander K. A. Greenawalt, 'International Criminal Law for Retributivists', 35 *University of Pennsylvania Journal of International Law* (2013-14) 969-1044, 978-79; Ralph Henham, 'Towards Restorative Sentencing in International

to an upper threshold of legitimate punishment demonstrates that, whether described as retribution or revenge, any motivation for punishment becomes illegitimate to the extent it seeks to exceed that upper limit. As these two conditions cannot be experienced together, it is doubtful that retributive punishment will be sufficient to satisfy every victims' desire for revenge.

Nor should international criminal law occupy itself with trying to satisfy the desire for revenge. Revenge is rejected as a basis for punishment as it is considered barbaric and as having no place in modern jurisprudence. Revenge is a personal means of exacting punishment whereby the victim punishes the perpetrator on his or her own behalf. Cherif Bassiouni explains that the implied social contract deprives victims of the ability to punish those who wrong them; that responsibility having been ceded to the state in exchange for protection.<sup>77</sup> Part of relinquishing the right to personally punish the perpetrators of crimes against them is accepting that society has control over the circumstances in which punishment will be imposed and the severity of that punishment. This may result in the imposition of punishments that atrocity crime victims feel do not properly represent the suffering they endured. This discrepancy results from the fact that the needs of the victims only represent one of the secondary goals that society hopes to achieve through sentencing. To the extent that the victims' desire for revenge perpetuates the cycle of violence, it conflicts with the primary sentencing goals, the preservation of

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Criminal Trials', (2009) 9 *International Criminal Law Review* 809-832, 813; Kai Ambos, *Treat on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, Oxford, 2013), p. 68.

<sup>77</sup> M. Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice', in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Robson (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese*, (Kluwer Law International, London, 2003), p. 97.

the world order and the maintenance of peace and security.<sup>78</sup> To that end, revenge also interferes with the goals that delivering justice to the victims is meant to serve. Therefore, revenge fails as a justification for punishment as it does not enhance the realization of reconciliation and peace.

However, if the victims' ability to exact revenge is limited as a result of the social contract, the question arises: can victims reclaim the right to seek revenge following the complete breakdown of social order? It is commonly thought that atrocity crimes are committed following a breakdown in the social order often signified by the collapse of the rule of law, a lack of accountability and the inversion of social norms relating to violence.<sup>79</sup> It reasonably follows that if the state breaks the social contract by failing to protect individuals from harm, those individuals may take back the rights they ceded to the State, including the ability to exact revenge against those committing wrongs against them. This reclamation of the right to seek revenge should be short-lived, and should only exist for such time that society is unable to offer redress to victims. Therefore, revenge should never act to justify punishment in the context of international criminal law as the mere fact that a trial is being held by an international legal institution suggests that the alleged perpetrators of atrocity crimes are being held accountable for their actions and the terms of the social contract have been re-established.

With regard to closure, it is dubious whether the execution of perpetrators of

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<sup>78</sup> *Ibid.* at 101.

<sup>79</sup> M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* (1996) 9-28, 25; Robert D. Sloan, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', 43 *Stanford Journal of International Law* (2007) 39-94, 41; Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', 14 *UCLA Journal of International Law & Foreign Affairs* (2009) 77-120, 83-4.

atrocities can actually provide victims with a sense of closure. Although there is no agreed upon psychological meaning for the term closure, it is thought to denote a variety of feelings; peace, relief, a sense of justice, the ability to move on, that arise out of finality.<sup>80</sup> Relatively little research has been conducted into whether crime victims experience a sense of closure following the execution of the perpetrator, and even less specifically focusing on victims of mass crimes or atrocity crimes. However, those studies that have been done suggest that victims may not experience closure following the execution of someone committing crimes against the victims' loved ones. Interviews were conducted with victims of the 1995 bombing in Oklahoma City, USA, carried out by Timothy McVeigh. It is one of the few mass atrocity crimes resulting in perpetrator being punished with the imposition of the death penalty and that has been studied with a focus on the potential closure experienced by the victims. The study found that of the 27 victims interviewed, 22 believed that closure was not possible and would not occur as a result of McVeigh's execution.<sup>81</sup> A 2014 study, conducted in the United States of statements made by crime victims to the media after witnessing the execution of the perpetrator of the crimes against them, also found that the executions were unlikely to provide the victims with closure.<sup>82</sup> In fact, the victims were more likely to report feeling negative emotions, like anger and a need for revenge, than a sense of closure.<sup>83</sup> A third study, released in 2012, found that the implementation of the harshest available sentence

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<sup>80</sup> Susan A. Bandes, 'Victims, "Closure", and the Sociology of Emotions', 72 *Law & Contemporary Problems* (2009) 1-26, 1-2.

<sup>81</sup> Jody L. Madeira, "'Why Rebottle the Genie?': Capitalizing on Closure in Death Penalty Proceedings', 85 *Indiana Law Journal* (2010) 1477-1525, 1494.

<sup>82</sup> Judy Eaton and Tony Christensen, 'Closure and its Myths: Victims' Families, the Death Penalty, and the Closure Argument', 20(3) *International Review of Victimology* (2014) 327-343, 336.

<sup>83</sup> *Ibid.*

(the study looked at both capital punishment and life without parole) can provide victims with a limited sense of justice, but that it must be supported by other factors to be truly effective.<sup>84</sup> The questionable impact that executions have on the mental state of victims indicates that a need for closure should not act as a justification for executing the perpetrators of atrocity crimes.

Even if revenge and closure do function as adequate reasons to punish those convicted of atrocity crimes, victims do not have the discretion to demand the enforcement of any sort of punishment they might want. Richard Goldstone asserts that victims are entitled to what he calls ‘full justice’, which includes the trial of the alleged perpetrator and adequate punishment following a guilty verdict.<sup>85</sup> It is important to note that Goldstone does not suggest that victims are entitled to see the perpetrators of crimes committed against them subjected to any punishment, but only to adequate punishment. This demonstrates that there are limitations on the types of punishment that victims can hope will be imposed following a conviction.

The legal prohibition against the use of torture is the most prominent of these limitations. The prohibition against torture is considered a *jus cogens* norm that cannot be derogated from, leaving no doubt that torture is an unacceptable form of punishment in international criminal law.<sup>86</sup> Further, it is forbidden in a number of different international conventions, including the International Covenant on Civil and Political

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<sup>84</sup> Armour and Umbreit *supra*. note 70 at 85.

<sup>85</sup> Richard J. Goldstone (foreword), in Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press, Boston, 1998), p. ix.

<sup>86</sup> Questions Relating To The Obligation To Prosecute Or Extradite (*Belgium v. Senegal*) (Judgment), International Court of Justice, *I.C.J. Reports 2012*, pp. 422, 458; *Prosecutor v. Furundžija*, 10 December 1998, International Criminal Tribunal for the former Yugoslavia, Judgment, IT-95-17/1-T, para. 153.

Rights, the Convention Against Torture and the Geneva Conventions.<sup>87</sup> However, the fact that torture is considered an illegitimate form of punishment has not stopped victims of atrocity crimes from suggesting that those individuals convicted of committing crimes against them should be subjected to torture as punishment for their actions. A significant number of the people interviewed in Iraq following the end of Saddam's Hussein's regime indicated that he and other former leaders should be summarily executed or tortured as punishment for their actions.<sup>88</sup> A Kurdish woman living in Sulaimaniyah said of Hussein, 'bring him to us – we want to torture him', a victim from Baghdad declared, 'I wish for him the same as what they used to do to the criminals: torture them in the public square and then hang them', and a Shi'a woman from Baghdad stated, 'I have thought of a punishment for Saddam, which is to put him in a cage...and every person that Saddam hurt can punish him as he sees fit'.<sup>89</sup> These victims clearly identify torture as an appropriate, even a necessary punishment, however, the general prohibition on torture dictates that the victims advocating in favour of this form of punishment will be disappointed. By outlawing torture, the world community accepts that the barbarity of torture outweighs the sense of justice one might derive from seeing it used as well as the contribution to reconciliation and peace such a sense of justice might also produce.

International criminal law has largely relegated the death penalty to the same category as torture. Identifying imprisonment, fines and the forfeiture of ill-gotten gains

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<sup>87</sup> Article 7 of the International Covenant on Civil and Political Rights; Convention Against Torture; Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention; Article 147 of the Fourth Geneva Convention; Article 85 of the First Additional Protocol to the Geneva Conventions.

<sup>88</sup> Bhuta, et al. *supra* note 56 at 26.

<sup>89</sup> *Ibid.* at 26, 35.

as the only legitimate punishments that can be dispensed by international and internationalized criminal courts and tribunals indicates that the international community believes that abolishing the death penalty outweighs whatever sense of justice victims might derive from executions. This is interesting, because unlike the prohibition against torture, the death penalty is still practiced in almost two dozen countries and the prohibition of the death penalty is not itself considered a *jus cogens* norm.<sup>90</sup> In fact, it is not even thought to constitute a norm of international customary law, although there is some sentiment that a regional norm exists in Europe and Latin America.<sup>91</sup> Although there is no recognised international norm of customary law against capital punishment, the majority of nations that oppose its use have been significant in preventing the death penalty from becoming an acceptable sanction in international criminal law.<sup>92</sup> Rather than relying on the development of a consensus against capital punishment, which may be a long time in coming, states have used their refusal to participate in international criminal law institutions to prevent capital punishment from entering international criminal law.

It is unlikely that there would have been sufficient support for the establishment of international criminal law mechanisms if they had allowed the death penalty to be used as a valid punishment.<sup>93</sup> This is particularly true of the International Criminal Court. Those States that have abolished the death penalty would not have joined the Court out of an unwillingness to participate in an institution that employed the death penalty and a concern that it they would not be able to meet their statutory obligations to cooperate

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<sup>90</sup> Schabas *supra* note 1 at 376; see also Schabas *supra* note 4 at 45.

<sup>91</sup> Schabas *supra* note 4 at 44; see also Steven Freeland, 'No Longer Acceptable: The Exclusion of the Death Penalty Under International Criminal Law', 15(2) *Australian Journal of Human Rights* (2010) 1-34, 19.

<sup>92</sup> Freeland *supra* note 92 at 19.

<sup>93</sup> *Ibid.* at 18.

with the Court. In light of the fact that the overwhelming majority of states have either *de facto* or *de jure* abolished the use of the death penalty, it is reasonable to suppose that an International Criminal Court that could employ capital punishment would not have been joined by the requisite 60 states and therefore never come into being. The victims of atrocity crimes may feel that the failure of international criminal institutions to utilise the death penalty results in an inadequate form of justice, but there would be no opportunity for any justice at all if those institutions had never been created in the first place.

## **5 Conclusion**

Abolition of the death penalty and providing victims of atrocity crimes with a sense of justice are two of the dominant issues in international human rights law. These two issues largely co-exist, but can come into conflict when victims tie their ability to experience a sense of justice with the execution of the perpetrators of the crimes against them. Under those circumstances, it is necessary to prioritize one of these human rights issues over the other. The difficulty lies in determining which of these important human rights ideas should take precedence. Abolition of the death penalty helps to uphold the right to life, considered by some to be the most important of all of the human rights, while furnishing the victims with justice is thought to directly lead to reconciliation and peace.

Ultimately, it is victims' rights that must give way. The victims' interests thought to be served by capital punishment, revenge and closure, are either not suitable goals of international criminal law, or are not really attainable through the imposition of the death penalty. Further, international criminal institutions largely exist because they eschew the death penalty as an available punishment. Some victims may feel that justice can only be

realized through the imposition of the death penalty. However, without international criminal institutions there would likely be no opportunity to hold the alleged perpetrators of atrocity crimes accountable for their actions. Therefore, the victims must compromise and accept that some justice, demonstrated by adequate punishment, is better than none at all.