IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2019/0057**

ON APPEAL FROM:

THE HIGH COURT OF JUSTICE **[2019] EWHC 60 (Admin)**
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
(Burnett LCJ and Garnham J)

BETWEEN :

MAHA EL GIZOULI

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

PROFESSOR CHRISTOF HEYNS

Intervener

STATEMENT OF CASE OF THE INTERVENER PROFESSOR CHRISTOF HEYNS

A. Introduction and Summary

1. This appeal raises questions of considerable legal and practical importance regarding the legal obligations of States that have abolished the death penalty ("abolitionist States") when they provide legal assistance to States that have retained the death penalty ("retentionist States") in circumstances that may lead to the imposition of the death penalty on an individual.

2. Professor Heyns is grateful for the opportunity to assist the Court with the international human rights law elements of these important issues, and in particular those that relate to the death penalty and the right to life as protected by article 6 of the International

Covenant on Civil and Political Rights ("the Covenant"), and the Second Optional Protocol to the Covenant.

3. In summary, he submits that the Covenant (and its Second Protocol) imposes a duty on State parties that have abolished the death penalty, such as the United Kingdom, not only not to execute people themselves, but also not to facilitate the imposition of the death penalty by retentionist States through mutual assistance, including where such retentionist States comply with the relevant international standards on the death penalty.

4. Under the Covenant, through the abolition of the death penalty, the United Kingdom has committed itself to ensure that the death penalty will not be imposed on anyone within its jurisdiction. "*Jurisdiction*" under the Covenant is broader than under many other treaties such as the European Convention on Human Rights, and extends to those people outside the territory of the state "*whose right to life is nonetheless impacted by its … activities in a direct and reasonably foreseeable manner*."[1] Mutual assistance that directly contributes towards the imposition of the death penalty may be provided only if appropriate diplomatic assurances that the death penalty will not be applied are provided by the State receiving such assistance.

5. Further, or in the alternative, the view is highlighted that there is an emerging norm of customary international law that the death penalty as such is a violation of the absolute right against torture and cruel, inhuman and degrading treatment of punishment, and that a norm against the facilitation of the death penalty follows from that.

B. The Intervener

6. Christof Heyns is Professor of Human Rights Law and Director of the Institute for International and Comparative Law in Africa at the University of Pretoria. He is currently a serving member of the United Nations Human Rights Committee (though he makes this submission in his personal capacity). He was the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions from 2010 to 2016.

[1] General Comment no.36 of the United Nations Human Rights Committee, published on 30th October 2018 (CCPR/C/GC/36), §63.

7. The normative core of the mandate of the Special Rapporteur, as made clear through the various resolutions of the General Assembly and the Human Rights Council,[2] is to be found in the right to life. The mandate of the Special Rapporteur includes the monitoring of the implementation of existing standards on safeguards and restrictions relating to the imposition of capital punishment.

8. Professor Heyns has worked on the human rights implications of the death penalty for many years. This work has included:

   a. Presenting three thematic reports on the death penalty to the United Nations General Assembly in his role as Special Rapporteur (A/67/275, A/69/265, and A/70/304);

   b. Helping to draft General Comment no.36 of the United Nations Human Rights Committee on the right to life, published in October 2018 (CCPR/C/GC/36) ("General Comment 36").

   c. He is a member of the Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa of the African Commission on Human and Peoples' Rights, and worked with it in the development of its General Comment 3 on the right to life.

C. The Covenant and the death penalty

9. Article 2 of the Covenant provides that "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant …*".

10. Article 6 of the Covenant provides (so far as is relevant for this appeal):

    1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[2] See, for example, the United Nations General Assembly resolution 69/182 and Human Rights Council resolutions 26/12 and 35/15.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes …

…

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

11. The central obligation imposed on States parties to the Covenant by article 6 is set out in sub-paragraph (1), namely the prohibition on the "*arbitrary depravation*" of life. According to the Human Rights Committee, "*Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law*."[3] A failure by a State party to the Covenant to "*respect and ensure*" the rights of those subject to it jurisdiction against the imposition of the death penalty in contravention of article 6 (or the Optional Protocol) are thus arbitrary depravations of life.

12. The Covenant currently has 173 State parties. It was ratified by the United Kingdom in 1976. The Second Optional Protocol of the Covenant has 87 State parties and was ratified by the United Kingdom in 1999.

13. Article 1 of the Second Optional Protocol provides:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

D. General Comment 36 on the right to life

14. In 2018, the Human Rights Committee adopted General Comment 36, providing a detailed interpretation of article 6 of the Covenant. The relevant provisions of the General Comment 36 will be dealt with below.

15. As this Court has recognised, a General Comment published by a United Nations Committee is "*the most authoritative guidance now available on the effect"* of a right

[3] General Comment 36, §12.

in international human rights law.[4] Moreover, the International Court of Justice, speaking of the Human Rights Committee, has stated that the opinion of "*an independent body established specifically to supervise the application of that treaty*" should be given "*great weight*".[5]

E. Article 6 and the requirement of the progressive abolition of the death penalty

16. Article 6(2) has long been interpreted as affording a narrow foothold for the death penalty, in that it provides that the death penalty may be imposed by retentionist states for the most serious crimes, subject to strict procedural and other requirements. However, there is ample evidence that this was meant to be, and is, a shrinking foothold.[6]

17. According to General Comment 36, States are required by article 6 of the Covenant to be on an "*irrevocable path*" towards abolition.[7] States parties are thus required to move away from the death penalty over time, and to be progressively abolitionist. Abolition is, moreover, a one-way street – the different steps taken towards abolition cannot be reversed, without constituting an arbitrary depravation of life.

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[4] *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, Lord Carnwath, §105; approved in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, Lord Wilson, §39 (by reference to General Comment 14 of the United Nations Committee on the Rights of the Child).

[5] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, §66.

[6] According to the chairperson of the drafting group, the wording of article 6(2) was intended to "*show the direction*" in which it was hoped that practice would move, meaning that a "*constant reappraisal*" of the scope of the term would be necessary. The wording chosen reflected the expectation that the category of permissible capital offences would narrow over the years as the value attached to life and other human rights increased. See Roger Hood, "*The enigma of the 'most serious' offences",* Working Paper No. 9 (Center for Human Rights and Global Justice, New York University School of Law, 2006), p.3, and William A. Schabas, "*The Abolition of the Death Penalty in International Law*" (Cambridge University Press, 3rd ed., 2002), p.68. The understanding of article 6(2) as envisaging the withering away of the death penalty was affirmed in 1971 by the United Nations General Assembly: "*in order fully to guarantee the right to life . . . the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries*": United Nations General Assembly, Resolution 2857 (XXVI), at §3. The preamble to the Second Optional Protocol records that States parties agree that "*article 6 ... refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable*" and are "*[c]onvinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life*." This normative shift of international law away from the death penalty is reflected and reinforced by state practice: see Christof Heyns and Thomas Probert, "*The right to life and the progressive abolition of the death penalty"*, in "*Moving Away from the Death Penalty: Arguments, Trends, and Perspectives"* (United Nations, 2015), pp.214-227. When the Universal Declaration on Human Rights was adopted by the General Assembly, only eight states had abolished the death penalty in law. Today more than two thirds of all countries are abolitionist in law or in practice: see Amnesty International: "*Global Report: Death Sentences and Executions, 2018"* (ACT 50.9870/2019).

[7] General Comment 36, §§50-51.

18. According to the long-standing jurisprudence of the Human Rights Committee, "*States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it*."[8] Moreover, "*It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate and extent in which they resort to the death penalty, or to reduce the number of pardons and commutations they grant*."[9]

19. According to General Comment 36, article 6(2) of the Covenant "*strictly limits the application of the death penalty"* and should be "*narrowly construed"*.

F. The duty not to facilitate the death penalty in other countries

20. The Covenant applies to individuals who are within the territory of the State, but also to individuals who are outside the territory of the State if they are subject to its jurisdiction because they are under its power or effective control.[10] The interpretation given to the term "*jurisdiction*" by the Human Rights Committee is broader than the interpretation followed under the European Convention on Human Rights.

21. On the issue of the extraterritorial application of article 6 in general, General Comment 36 provides that:

> "*In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its ... activities in a direct and reasonably foreseeable manner*."[11]

[8] Codified in General Comment 36, §34.
[9] General Comment 36, §50.
[10] General Comment 31, §10.
[11] General Comment 36, §63.

22. In line with this requirement, "*States parties that abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained*."[12]

23. It is submitted that the prohibition on the extradition by abolitionist states is only one, although the best established, manifestation of the broader requirement on abolitionist states not to facilitate the imposition of the death penalty on people under its jurisdiction in other countries in a direct and foreseeable way. The existence of such a broader requirement follows from the fact that the right to life of such people "*is impacted ... in a direct and reasonably foreseeable way*". To do so would be an "*arbitrary deprivation*" of life, in violation of article 6(1). Because they are then under the jurisdiction of an abolitionist state, that State may not facilitate the death penalty.

24. The question here is whether mutual assistance to a retentionist State, even where that State complies with the standards set in article 6 for the death penalty, impacts on the right to life of the person concerned in a sufficiently direct manner to trigger the jurisdiction of the retentionist state. The test is whether it is a "*crucial link*".

25. In the case of *Judge v Canada,*[13] the Human Rights Committee held that the deportation of an accused by Canada, as an abolitionist country, to the USA, as a retentionist country, without assurances, violated article 6.[14] The Committee justified this finding as follows (the operative consideration is emphasised): "*The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established <u>the crucial link in the causal chain</u> that would make possible the execution of the author*."[15] The

[12] General Comment 36, §34.
[13] (CCPR/C/78/D/829/1998), 13th August 2003.
[14] After a period of time in custody in Canada, the author sought to prevent his extradition to the USA, where he may have faced execution. The Human Rights Committee found a breach of article 6. At §10.3, it recognised that its decision was a development in its jurisprudence, holding that the Covenant should be interpreted as a "*living instrument"*, particularly in the light of a "*broadening international consensus in favour of abolition of the death penalty". "[T]he protection of human rights evolves*": §10.7.
[15] At §10(6).

Committee also held that there is an obligation on a State that has abolished the death penalty, not to *"expose a person to the real risk of its application"*.[16]

26. It is submitted that the provision of mutual assistance can constitute such a "*crucial link*", if such assistance makes the prosecution and the imposition of the death penalty possible. The fact that the protection of the "*supreme right*",[17] the right to life, is at stake, may furthermore contribute towards seeing a link which in other cases may not qualify as sufficiently direct.[18]

27. It may also be noted that the requirement for States not directly and foreseeably to impact on the right to life of those outside its territory also applies to actions taken within its own territory with an external effect. According to General Comment 36, *"[States] must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory ... but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory ... are consistent with article 6*."[19]

28. The understanding that article 6 prohibits mutual assistance without assurances in such cases also finds support in the wording of article 1(2) of the Second Optional Protocol – a State cannot be said to be taking "*all necessary measures to abolish the death penalty within its jurisdiction*" if it is facilitating the use of the death penalty by another State in respect of a person within its jurisdiction.

29. Moreover, a State is not progressively abolishing the death penalty if it regresses from a practice of seeking assurances prior to providing legal assistance to a retentionist state. Where a State has for decades as a general rule not provided mutual assistance concerning the imposition of the death penalty, without insisting on diplomatic assurances, it cannot reverse its course. To do so would entail a retrogressive step, contrary to the requirement that steps taken towards the abolition of the death penalty

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[16] At §10(4). The obligation not to remove the author from Canada was one way in which this obligation could be breached: "*Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out*."

[17] General Comment 36, §2.

[18] See, by analogy with the position under article 3 of the European Convention on Human Rights, *R (Ismail) v Secretary of State for the Home Department* [2016] 1 WLR 2814, at §§32 and 35.

[19] General Comment 36, §22.

will be permanent. It is the opposite of ensuring the "*progressive abolition*" of the death penalty, as required by the Covenant.

G. Reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions

30. In line with the above approach, in his reports to the United Nations General Assembly as Special Rapporteur on extrajudicial, summary or arbitrary executions, the Intervener stated that an abolitionist state may breach the right to life in international human rights law by facilitating the death penalty through international co-operation.

31. In the Intervener's 2012 report,[20] he highlighted, at §§79 and 81:

> *"States often assist one another in criminal and other matters by means other than the transfer of persons. Such assistance may include the provision of intelligence information, incriminating evidence or police assistance and investigation aid sufficient to capture the suspect; lethal drugs or materials for the execution; funds for projects such as drug control; and other forms of financial and technical support, for example to strengthen the legal system. These forms of inter-State cooperation may also raise questions of complicity where they contribute to the imposition of the death penalty in violation of international standards or issues of non-compliance with the assisting State's international legal commitments.*
>
> *...*
>
> *"The same legal principles apply here as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition."*

32. To equal effect, in his 2015 report as Special Rapporteur to the United Nations General Assembly,[21] at §95, the Intervener noted that:

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[20] *"Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions"*, 9th August 2012 (A/67/275).
[21] *"Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions"*, 7th August 2015 (A/70/304).

"*Abolitionist States can have responsibilities with respect to the continued application of the death penalty elsewhere in a number of ways, many of which have an impact on foreign nationals. First, they can be directly responsible for the transfer of a person to a retentionist jurisdiction (whether that person is their national or not); second, they can bilaterally or multilaterally assist in the legal process leading to a death sentence; and third, they can have responsibilities arising from the defendant being their own national*."

33. He also noted that:

"*The same legal principles apply [to the provision of assistance] as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition."*(§102)

H. Other analogous international organisations and states

34. The above submissions find support in the approach of other analogous international organisations and States to their obligations under international human rights law:

a. In its "*General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*", the African Commission on Human and Peoples' Rights provided, at §23, that, "*Those States which have abolished the death penalty in law shall not reintroduce it, nor facilitate executions in retentionist States through refoulment, extradition, deportation, or other means including the provision of support or assistance that could lead to a death sentence"* (emphasis added);

b. The European Union has a strong and unequivocal opposition to the death penalty in all times and in all circumstances.[22] Pursuant to Article 2(2) of the EU Charter of Fundamental Rights, the death penalty may not be imposed or executed. The European Union has interpreted its obligations as extending to a commitment to "*[e]nsure that the actions, such as legal, financial or other technical assistance to*

[22] EU/Council of Europe Joint Declaration on World Day Against the Death Penalty, 10th October 2012.

third countries do not contribute to the use of the death penalty."[23] It has also recognised through its regulations that the trade in certain goods which could be used for capital punishment is inconsistent with the right to life in the Charter of Fundamental Rights of the European Union;[24]

c. The United Nations Office on Drugs and Crime has issued guidance in respect of its legal obligations when it provides assistance in international cooperative counter-narcotics projects. This guidance recognises that, "*Even training of border guards who are responsible for arrest of drug traffickers ultimately sentenced to death may be considered sufficiently proximate to the violation to engage international responsibility."*[25]

d. French and German authorities only agreed to provide evidence to prosecute French national, Zacarias Moussaoui, for his involvement in the 11th September 2001 attacks on the United States following the provision of assurances that the material would not directly or indirectly be used against Mr Moussaoui nor any third party towards the imposition of the death penalty.[26] Equally, as the evidence in this appeal explains, seeking an assurance from the USA prior to providing legal assistance was not only consistent with the expectation in the "*Overseas Security and Justice Assistance Human Rights Guidance"*, but it was also "*consistent with all past practice when dealing with US MLA requests"*.[27]

35. It follows that, in providing the USA with information that is necessary to enable the prosecution and possible imposition of the death penalty on the Appellant's son, the United Kingdom risks breaching article 6 and the Second Optional Protocol, unless assurances are obtained that remove the possibility that the Appellant's son will face the death penalty in the USA.

I. Other instances of extraterritorial jurisdiction in the Human Rights Committee

[23] Council of the European Union, "*EU guidelines on death penalty*", Document No. 8416/13, 12th April 2013, Annex, p.9.
[24] Commission Implementing Regulation (EU) No. 1352/2011 of 20th December 2011 amending Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.
[25] "*UNODC and the Promotion and Protection of Human Rights*" (2012), at p.10.
[26] William A. Schabas, "*Indirect abolition: capital punishment's role in extradition law and practice*", Loyola of Los Angeles International and Comparative Law Review, vol. 25, No. 3 (2003), at 603.
[27] Appendix Volume 2, p.480, §8.

36. As set out above, States are required under the Covenant not directly and foreseeably to impact on the right to life of those outside its territory when taking actions within its own territory with an external effect. This is also reflected by the wider Human Rights Committee jurisprudence on extraterritorial jurisdiction:

a. According to the Human Rights Committee, the United Kingdom[28] and the USA[29] exercise jurisdiction when carrying out bulk content and meta-data surveillance, including by fibre-optic cables, regardless of the location of the person subject to such surveillance. The Human Rights Committee has expressed concern that those subject to surveillance had "*no access to effective remedies in case of abuse"*, in apparent breach of articles 2, 5(1), and 17 of the Covenant. The UK and the USA should take measures to ensure that any interference with the right to privacy complies with the principles of the ICCPR "*regardless of the nationality or location of the individuals whose communications are under direct surveillance."*

b. States can exercise jurisdiction by failing to prevent breaches of Covenant rights outside their territory by companies incorporated within their territory. In *Yassin v Canada,*[30] no breach was ultimately found by the Human Rights Committee, but it was recognised that this may be the case, if the facts were more clearly established. The authors lived on Palestinian land close to the border with Israel. They argued that Canadian companies had made the construction of an Israeli settlement on their land possible and had profited from it. The Human Rights Committee found that jurisdiction could arise in such circumstances. At §6.5, it held: "*While the human rights obligations of a State on its own territory cannot be equated in all respects with its obligations outside its territory, the Committee considers that there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities*

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[28] "*Concluding Observations: United Kingdom (2015)"* (CCPR/C/GBR/CO/7), §24.

[29] "*Concluding Observations: USA (2014)"* (CCPR/ C/USA/CO/4), §22. Commenting on these examples of jurisdiction, Human Rights Committee members, Yuval Shany (who was the rapporteur for General Comment 36) and the Intervener suggest that the jurisdiction of the ICCPR covers "*additional situations"* to that of the European Convention on Human Rights: "*Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36", Just Security,* 4th February 2019, available online at: https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/

[30] (CCPR/C/120/D/2285/2013), 26th July 2017.

conducted by enterprises under its jurisdiction. That is particularly the case where violations of human rights that are as serious in nature as the ones raised in this communication are at stake".[31] These findings are reflected in the Human Rights Committee's concerns about the regulation by a State party of companies who are incorporated within the State but who carry out work abroad in concluding observations in respect of Canada,[32] Germany,[33] and South Korea.[34]

c. France exercised jurisdiction in changing its approach to pension rights for former French soldiers who were resident in (and citizens of) Senegal.[35] The pensions of the soldiers in Senegal were frozen; those in France were not. The Human Rights Committee found that there was discrimination on the grounds of nationality acquired after independence, in breach of article 26: §§9.4-9.5. This was described as the exercise of jurisdiction because "*formal action (administrative decision, court judgment) by a state within its national territory ... has a direct impact on persons abroad owing to the existence of a legal connection between the state and the person to whom the action is addressed*".[36]

d. Uruguay exercised jurisdiction in refusing to issue a passport to a Uruguayan national resident in Germany. This was because "*the issue of a passport ... is clearly a matter within the jurisdiction of the Uruguayan authorities"* and also because of the "*very nature of [the] right"* in question.[37]

e. In *Munaf v Romania,*[38] the Committee did not find jurisdiction to have been established. The author had been kidnapped with Romanian journalists and held for 90 days in Iraq. When he was released, he was taken to the Romanian embassy. After a few hours, he voluntarily left the embassy. He was then questioned, held in a USA detention facility, and convicted of involvement in the kidnapping. He

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[31] Two members of the Committee concurred in a separate opinion, and held, at §10, that "*a link of jurisdiction may be established"* on the basis of "*(a) the effective capacity of the State to regulate the activities of the businesses concerned and (b) the actual knowledge that the State had of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognized in the Covenant*."
[32] "*Concluding Observations: Canada (2015)"* (CCPR/C/CAN/CO/6), §6.
[33] "*Concluding Observations: Germany (2012)"* (CCPR/C/DEU/CO/6), §16.
[34] "*Concluding Observations: South Korea (2015)"* (CCPR/C/KOR/CO/4), §10.
[35] *Gueye v France* (Com. No. 196/1985), 3rd April 1989, [A/38/40(Supp) 189].
[36] Walter Kälin and Jörg Künzli, "*The Law of International Human Rights Protection"* (Oxford University Press, 2nd ed, 2009), at p.141.
[37] *Montero v Uruguay* (Com. No. 106/1981), 31st March 1983, [A/38/40(Supp) 186], at §9.3.
[38] (CCPR/C/96/DR/1539/2006), 13th July 2009.

was sentenced to the death penalty, but that sentence was eventually over-turned by the Iraqi Supreme Court. The test for whether or not jurisdiction was established was "*whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under articles 6 … , which it could reasonably have anticipated … [a State party] may be responsible for extra-territorial violations of the [ICCPR], if it is a link in the causal chain that would make possible violations in another jurisdiction … the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time*": §14.2. Romania could not have known that violations of the ICCPR "*were a necessary and foreseeable consequence of his departure from the Embassy"* (§14.4) and so "*the Committee cannot find the State party exercised jurisdiction over the author in a way that exposed him to a real risk of becoming a victim of any violations under the [ICCPR]"* (§14.6). Romania had sought to avoid jurisdiction by relying on jurisprudence relating to the more restricted approach to jurisdiction under the European Convention on Human Rights (§§4.10, 4.13, and §9.4). The Committee did not follow this approach.

f. *Saldías de López v Uruguay*[39] was a case about the abduction in Argentina of the author's husband by para-military groups in co-operation with the Uruguayan security and intelligence forces. Although these acts were perpetuated "*on foreign soil"* there was an exercise of jurisdiction by Uruguay (§12.1). The reference in article 1 of the First Optional Protocol to the ICCPR to "*individuals subject to its jurisdiction"*[40] was not to be interpreted as a reference "*to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the [ICCPR], wherever they occurred"*: §12.2. There was an exercise of jurisdiction because "*it would be unconscionable to so interpret the responsibility under article 2 of the [ICCPR] to permit a State party to perpetrate violations of the [ICCPR] on the*

[39] Communication No 12/52, 29th July 1981, [A/36/40 (Supp) at 176].
[40] The same phrase is used in article 1(2) of the Second Optional Protocol.

territory of another State, which violations it could not perpetrate on its own territory": §12.3.[41]

J. A customary norm

37. Finally, the view is highlighted that there is an emerging norm of customary international law that the death penalty as such is a violation of the absolute right against torture and cruel, inhuman and degrading treatment of punishment, and that a norm against the facilitation of the death penalty follows from that.

38. The International Law Commission has clarified that customary international law also includes rules of "*particular customary international law, whether regional, local, or other"*. These are rules of "*customary international law that appl[y] only among a limited number of States"*. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law among themselves.[42]

39. The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, concluded in 2012: "*there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment ... The Special Rapporteur is convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation*".[43] If there is such a norm, the foothold for the death penalty under article 6(2) of the Covenant cannot save it, in view of the provisions of article 6(6), according to which nothing in article 6 can be used to prevent the abolition of the death penalty.

40. More directly relevant for current purposes, it is further submitted that, irrespective of whether the view is accepted that customary international law prohibits the death

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[41] The same wording is used to describe jurisdiction in *Celiberti de Casariego v Urugay:* Communication No R.13/56, 29th July 1981, [A/36/40 (Supp) at 185], §§10.1-10.3.

[42] International Law Commission, "*Draft conclusions on identification of customary international law with commentaries"* (2018) (A/73/10), conclusion 16.

[43] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 9th August 2012, (A/67/279), §72.

penalty as a form of torture or ill-treatment, the prohibition specifically for abolitionist states of refoulment to a real risk of the death penalty may have evolved to a binding rule under customary international law.[44] Such a general principle is recognised as a rule of regional customary law in Europe.[45] It also follows from the following:

a. The Charter of Fundamental Rights of the European Union, states at article 19(2): "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*";

b. Article 21(3) of the Council of Europe Convention on the Prevention of Terrorism allows the refusal of extradition "*if the person who is the subject of the extradition request risks being exposed to the death penalty*";

c. Article 9 of the Inter-American Convention on Extradition declares that states "*shall not*" grant extradition when the offence in question is punishable by the death penalty and sufficient assurances have not been provided.

41. These obligations are also reflected by State practice. On 13th April 2015, the United Nations Secretary General published a "*quinquennial report"* containing statistical data on the death penalty. All fully abolitionist states responding to the Secretary General's survey declared a policy of denying extradition to states where the death penalty might be imposed, unless respective assurances were given.[46]

42. On the same basis as was argued above concerning article 6 of the Covenant[47] – that the prohibition of extradition is but the most visible manifestation of a broader rule against facilitation of the death penalty by other states – it may thus be deduced that there is a fundamental principle, and possibly a binding customary norm, that states that

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[44] Yuval Ginbar, Jan Erik Wetzel, Livio Zilli, "*Non-refoulement Obligations Under International Law in the Context of the Death Penalty"*, in Peter Hodgkinson, "*Capital Punishment: New Perspectives"* (Routledge, 2016), p.100.

[45] Sir Michael Wood, "*Customary International Law and Human Rights"*, Academy of European Law (AEL 2016/03), at p.10, footnote 36.

[46] "*Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty"* (E/2015/49).

[47] The norms of article 6 have, themselves, been said to have been elevated to the status of customary international law: William Schabas: "*The Abolition of the Death Penalty in International Law"* (Cambridge University Press, Third Edition), p.§73.

have abolished capital punishment may generally not directly assist, and serve as the crucial link, in bringing about the death penalty in other countries.

G. Conclusion

43. While there are good reasons for states to assist each other as far as ensuring accountability for criminal activity is concerned, abolitionist states are bound under international law not to directly facilitate the imposition of the death penalty by other states. This applies under the ICCPR, at least as far as article 6 is concerned, and arguably also as far as article 7 is concerned, though the latter point is not dealt with here. There is also an emerging norm under customary international law against the death penalty, at least as far as torture and cruel, inhuman and degrading treatment or punishment is concerned, and at least among abolitionist states there may be a similar norm as far as direct facilitation of the death penalty is concerned.

44. The problems that the obligation not to facilitate the death penalty may pose for abolitionists states in ensuring accountability can be overcome through seeking and receiving diplomatic assurances. To hold that they need not do this will seriously compromise the implications of the legal concept of abolition.

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