

THE ENIGMA OF *DE FACTO* ABOLITION OF CAPITAL PUNISHMENT

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I. Prelude

I first met Professor Luis Arroyo Zapatero in the Spring of 2009 at the World Congress Against the Death Penalty held in Geneva, and was immediately impressed by his enthusiasm, forceful energy, and utter commitment to do what he could to move forward the human rights agenda to end the death penalty throughout the world. He had been inspired by the Spanish initiative, announced in 2008, at the United Nations General Assembly, by the President of Spain –Jose Zapatero, Luis' cousin– to create the conditions and a structure to achieve a «universal moratorium» on the use of the death penalty by 2015, as a first step towards its «definite abolition»¹. This initiative was inspired by the UN's declaration of Millennium Objectives and «Development Goals» aimed to eliminate poverty, to promote peace, and to end violence and conflicts so as to achieve justice for all' which Luis Arroyo considered particularly relevant to the «renouncement of capital punishment because we repudiate killing in cold blood»².

The vehicle was to be the establishment in 2009 by the Spanish government, as part of its National Plan on Human Rights, of an International Commission Against the Death Penalty. Two of its main objectives would be: «to promote the establishment of an immediate moratorium on the use of the death penalty in all regions of the world,

* Roger had written a full draft of this essay when he fell ill and asked his colleagues for comments. Carolyn Hoyle and Saul Lehrfreund returned to it after his death and completed it for this collection.

¹ RODRÍGUEZ ZAPATERO, J. L., «For the Universal Abolition of the Death Penalty», in Luis Arroyo, Paloma Biglino Campos And William A. Schabas (eds.), *Towards Universal Abolition of the Death Penalty*, Valencia: Tirant lo Blanch, 2010 17-26 at 25.

² ARROYO ZAPATERO, L., «Towards a Universal Moratorium on the Death Penalty», *ibid.* 40-50 at 49.

aiming to achieve the effective implementation of a universal moratorium... prior to its complete abolition [and] to promote abolition in the legislature of those countries, *carefully considered* (my emphasis) that apply *de facto* moratoria on the use of the death penalty»³.

To support the Spanish government's initiative, the Commission, and governments and NGOs elsewhere dedicated to the abolitionist cause, Luis Arroyo founded in 2009 a new collaborative organisation called «Academics for Abolition» (known as the International Academic Network for the Abolition of Capital Punishment, or REPECAP). He recognised that although the great progress made towards universal abolition was undoubtedly significant and encouraging for abolitionists, it did not, as he put it, «represent the *end of the history* of abolition»⁴. Undoubtedly, he had in mind the considerable number of countries that continued to impose death sentences, though the number which regularly executed them had fallen substantially.

II. The Issue

The purpose of this short essay is to assess what progress has been made in the decade since the Spanish inspired project began in 2008. In particular, it focuses on the goal of persuading countries considered to be «abolitionist *de facto*» to take the decisive step to complete abolition. These are countries that retain the death penalty *de jure* but have not carried out an execution for at least 10 years, or if so, have within that period announced an official moratorium, or ratified the Second Optional Protocol to the ICCPR «aiming at the abolition of the death penalty»⁵. It sheds light on this issue by drawing on research recently carried out in the Caribbean on why some countries that have long ceased to execute offenders convicted of capital crimes, and therefore could be classed as abolitionist *de facto* (ADF) on the 10-year rule, appear to have set their face against abolition *de jure*. The message

³ See VALLE GARAGORRI, R., «The constitution of the International Commission; A group of likeminded States», *ibid.* 443-445 at 444; and ARROYO ZAPATERO, L., «Towards a Universal Moratorium on the Death Penalty». *ibid.* 40-50 at 49.

⁴ ARROYO ZAPATERO, L., «Towards a Universal Moratorium on the Death Penalty», *op. cit.* at 45.

⁵ This is the definition of *de facto* abolition now used by the United Nations. It should be noted that the UN does not count Taiwan (Province of China) as an independent jurisdiction, but Amnesty International does, while the UN number includes the tiny Pacific island Niue, but Amnesty International does not.

that I hope to convey, is that the goal of the abolitionist movement should be to remove the threat of the judicially imposed death penalty, whether enforced by executions or not, from the laws of all countries. By doing so, the moral message that it cannot prevail in any form, even symbolically without executions, can prevail universally.

III. Questions of Definition and Counting

It may help briefly to explain how the concept of *de facto* abolitionist status developed and the significance of how its definition has been changed and the category differentially applied in the past thirty years. Was it meant to indicate the countries that were clearly «on the road», to abolition; or indeed that it was the main, natural, or even essential, road to take? Or was it more broadly meant to signify that the practice of judicial execution had ceased for a sufficient period to be able to assume that it would not be revived?

Marc Ancel's report to the United Nations entitled *Capital Punishment*, and his report to the Council of Europe on *The Death Penalty in European Countries*, both published in 1962, applied the term *abolition de facto* to those countries:

«whose positive law (penal code or special statutes) make provision for the death penalty and where sentences of death are passed but in which such sentences are never carried out by virtue of an *established custom*» (my emphasis)⁶.

It is notable that, at that time, he applied it restrictively to only four states (only one of which could be described as a populous country): Belgium, Liechtenstein, Luxembourg and the Vatican City State, even though he recognised that there were other states and territories which had ceased executions, some of which had done so for over 10 years.⁷ These he characterised instead as retentionist jurisdictions «in

⁶ Both reports are discussed in the Amnesty International Report, *The Death Penalty*, 1979. London, 24-25.

⁷ It should also be noted that the first reports commissioned by the UN from Professors Ancel (1962) and Morris (1967) included as separate jurisdictions the states of federal systems: Australia, the United States and Mexico in their calculation of the number of abolitionist and retentionist countries. Thus, «In Australia only Queensland had abolished the death penalty; in Mexico five of the 29 states retained the death penalty; in the USA the federal system, the Dis-

which an experiment in abolition appears to be in progress»⁸. Indeed he noted that «The process of abolition has usually taken a long time and followed a distinctive pattern ... leading to de facto abolition, and eventual abolition de jure»⁹.

On receiving the report, the UN Economic and Social Council (ECOSOC), «urged UN member governments... to remove the punishment from the criminal law concerning any crime to which it is, in fact, not applied or to which there is no intention to apply it (*de facto* abolitionist countries)». Norval Morris, in his follow-up report to the UN published in 1967, covering the period 1961-65, listed the countries and territories «whose laws provide the death penalty at all, whether it is used in practice or not». He observed that «Actual utilization of capital punishment as an instrument of public policy... must be addressed quite apart from the existence or non-existence of legal provisions for the death penalty», but made no attempt to provide a criterion for defining a list of *de facto* countries.¹⁰

When Amnesty International produced its first, country by country, report in 1979 on *The Death Penalty*, covering the years 1973 to 1976, it began in an Editorial Note with the following statement: «The contents list shows [marked by an asterisk] those countries which have totally abolished the death penalty for all crimes, whether committed in peacetime or in time of war. *It is only such countries which can properly be classified as abolitionist*» (my emphasis). Following this principle, there was no attempt to separate a *de facto* category. And when the UN began to conduct quinquennial surveys in 1975 the writers of the reports used the restrictive term favoured by Ancel: namely «abolition by custom», which William Schabas has revealed «referred to a State which had not sentenced a person to death or carried out an execution for at least 40 years»¹¹. This obviously indicated a very high standard of proof that a return to executions was unlikely. Yet, by the

tract of Columbia and 41 of the 50 states retained it». The Western Pacific Islands were grouped as one entity.

⁸ United Nations, *Capital Punishment* (Ancel Report). New York, 1962, paras 8 and 9 and fn. 4, page X: «To these countries which are *certainly* abolitionist *de facto* could be added, to some extent at least, those [few] in which an experiment in abolition appears to be in progress... The exact scope of these experiments is, however, debatable».

⁹ MARC ANCEL, *The death penalty in European Counties*. Strasbourg: Council of Europe 1962, 12-13

¹⁰ United Nations, *Capital Punishment. Developments 1961 to 1965* (Morris Report), New York 1967, p. 7.

¹¹ WILLIAM SCHABAS «International Trends towards limitation and abolition in the world», in Arroyo *et al.* (ed.), *op. cit.*, 27-37 at 29.

third quinquennial report in 1985 (which was only published internally) it was decided that retentionist states which had not executed a person for an «ordinary crime» for at least 10 years should be separately classified as «abolitionist *de facto*»¹².

This was the convention I followed when invited to update the Morris Report to cover the developments during the period 1965 to 1988. By 1988, 52 countries had abolished the death penalty completely or for ordinary crimes committed in peacetime and 26 were now classified as ADF. However, 13 countries which had become ADF had resumed executions during this 23-year period.¹³ The conclusion was clear: at this time cessation of executions, even for as long as 10 years, could not be taken automatically as a signal that a country was firmly allied to the abolitionist cause.

Nor did it turn out, as the abolitionist movement proceeded rapidly to gather adherents in the years following the fall of the Berlin Wall¹⁴, that becoming ADF was a necessary or even typical precedent to finally abolishing the death penalty completely. Over the period from 1989 to 2014 only 25 of the 58 countries that abolished the death penalty preceded this with a 10-year period of ADF¹⁵.

In the 5th edition of *The Death Penalty*, published in 2015, Carolyn Hoyle and I concluded: For all these reasons ... «abolitionists cannot be satisfied with non-enforcement of capital punishment, even when it has lasted 10 years or so». As a result, our ADF category was unambiguously defined as a sub-category of retentionist countries: «Retentionist but abolitionist *de facto*». This was because we believed its «dormant existence in law can readily be translated into a practical reality in response to a heightened fear of crime or political instability, such that the practice of executing offenders can be revived after decades without use»¹⁶.

¹² It is interesting to note, however, that none of the 18 countries which at that time retained the death penalty for «exceptional crimes» but had not carried out an execution for at least 10 years, were classified as abolitionist *de facto*.

¹³ Bahrain, Barbados, Bermuda, Chile, Gabon, Gambia, Grenada, Guyana, Indonesia, Libya, Mauritius and St Kitts. See Roger Hood, *The Death Penalty: A Worldwide Perspective*, Oxford: Oxford University Press, 1st edition, 1988, at 8. Of these, countries 32 years later in 2018 [UN 2020], only Gabon and Mauritius have fully abolished the death penalty, although Gambia was classified as abolitionist in 2018 by the UN (but ADF by Amnesty International). Bahrain, Indonesia and Libya remain retentionist states, Chile abolitionist but for ordinary crimes only, and Barbados, Bermuda, Grenada, Guyana and St Kitts remain retentionist but abolitionist *de facto*.

¹⁴ By 2001 the number of completely abolitionist nations had jumped from 35 in 1988 to 75. Hood 3rd edition 2002, 14.

¹⁵ ROGER HOOD/CAROLYN HOYLE, *The Death Penalty: A Worldwide Perspective*, 5th edition, 2015, at 16 and 18.

¹⁶ ROGER HOOD/CAROLYN HOYLE 5th edition, *op. cit.*, at. 174.

There remain disputes about which countries should be defined as abolitionist and retentionist, which affect the number categorised as ADF according to the UN and those defined as «abolitionist in practice» by Amnesty International, who in addition to the criterion of non-execution for at least 10 years add an additional criterion, namely that they «are believed to have a policy or established practice of not carrying out executions».

As a result, the 10th UN Quinquennial Survey categorised 50 states as ADF at the end of 2018, whereas Amnesty International only placed 28 countries in its «abolitionist in practice» category' at the end of the same year¹⁷. The UN reported 47 States as «retentionist» in 2008, but only 30 in 2018, a fall of 36 per cent. Because of its stricter definition, Amnesty's total of 56 retentionist States for 2018 was only two fewer than the 58 recorded a decade earlier¹⁸.

The number of abolitionist states (114) reported by Amnesty International in 2018 was virtually identical to the UN's total (115)¹⁹. The difference therefore lies in the «definitional dispute» surrounding the *de facto* category. Indeed, of the 56 countries listed as retentionist by Amnesty International in 2018, 21 were classified as abolitionist *de facto* by the UN report²⁰. Thus the UN recorded 168 States as «abolitionist or abolitionist de facto» comprising 86% of UN member states, while Amnesty International considered only 142 as «abolitionist in law or practice», amounting to 72% of nations.

This difference is troubling for those seeking to decide the most suitable strategy to increase the number of countries committed through their laws or constitutions to fully embrace and cement their abolitionist status. It is troubling because it undermines the argument employed to convince the retentionist nations of the size of the

¹⁷ Amnesty International, *Death Sentences and executions in 2018*, ACT 50/9870/2019, Annex II, 48-49.

¹⁸ Of the 56 countries counted as retentionist in 2018 by AI, 35 had executed in the last 10 years, just five more than the UN retentionist total. The five states not counted as retentionist by the UN but counted as such by AI were: Taiwan (not recognised by UN); Palestine, Gambia, Oman, and Equatorial Guinea.

¹⁹ This does not mean that they were exactly the same countries. For example: The Russian Federation and Liberia were counted as Abolitionist by the UN but ADF by Amnesty; Nauru was ADF according to the UN but Abolitionist by Amnesty. Oman and Qatar were ADF according to the UN but regarded as retentionist by Amnesty.

²⁰ They were: Caribbean Commonwealth countries (11): Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica Guyana, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Trinidad and Tobago. Africa (7): Comoros Chad (became fully abolitionist in 2020), Democratic Republic of Congo. Ethiopia, Lesotho, Uganda and Zimbabwe. Other (3): Cuba, Lebanon, and Qatar.

international consensus on abolition. Some commentators are confident that states that do not carry out any executions for more than ten years are highly unlikely to do so. As Professor William Schabas argues, «... the phenomenon of halting executions for ten years and then resuming them seems to have declined significantly. It is almost as reliable a predictor of future conduct as *de jure* abolition»²¹. I share his optimism but have also warned of the danger of campaigning organisations assuming that it is acceptable to ignore ADF countries who clearly are not committed to removing the death penalty from their laws, political discourse, and their culture, forever²².

One must bear in mind that 10 years is also an arbitrarily devised criterion. The evidence that no *de facto* abolitionist countries resumed executions between 2004 and 2018 cannot be a cast-iron guarantee that in uncertain political circumstances executions might be resumed in some ADF countries that have so far declined to commit themselves to abolition²³. Indeed, the latest UN survey notes that several countries that had appeared to be heading towards abolition resumed executions²⁴. There is clear evidence that public outrage has also interrupted the long-movement to abolish the death penalty. For example, in India a man was executed for the rape-murder of a child in 2004, the first since 1995. This was followed by a 16-year gap in executions for «ordinary» crimes until the next executions in 2020 –of four men for a notorious rape-murder of a young woman, though there were a few executions for terrorist offences during this time. In the United States, seven federal executions took place under the Presidency of Donald Trump, a strong supporter of the death penalty, in 2020, the first for 17 years.

Furthermore, movement away from ADF status has been slow. Of the 47 ADF states and territories which the UN 8th quinquennial report listed in 2008, 37 were again listed in 2018: 18 of these countries had last carried out an execution between 20 and 29 years previously

²¹ William SCHABAS, «International Law and the Abolition of the Death Penalty», in C. S. Steiker and J. M. Steiker, *Comparative Capital Punishment*. Edward Elgar Publishing 2019, 217-231 at 227.

²² See Roger HOOD, «Staying Optimistic», in Lill Scherdin, *Capital Punishment: A Hazard to a Sustainable Criminal Justice System?* Ashgate Publishing 2014, 293-314 at 305-6.

²³ William Schabas has suggested that one way of overcoming inertia would be to promote a significant increase in the number of abolitionist *de facto* nations by convincing them to ratify the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty ... as «an indirect way of prohibiting the death penalty by law when enactment of national legislation is difficult for political reason» (SCHABAS, 2019 at note 22).

²⁴ 10th quinquennial Report, E/2020/53, para 19. Referring to: Bahrain in 2017 (2010); Pakistan 2014 (2008); Thailand 2018 (2009); Botswana 2016 (2013), Nigeria 2016 (2013). See para 224 pp 11-12.

and 19 had been *de facto* abolitionist for thirty years or longer.²⁵ In other words, countries can remain in ADF status for decades and may sentence to death many hundreds of people over that time. As the 10th UN quinquennial report put it:

«It is not uncommon for States in the *de facto* category to continue to pronounce sentences of death, even if there is no intention of having them carried out. ... This is not without negative consequences, however, because in some States where it seems highly unlikely that there will be any executions, “death row” continues to exist, with all of its attendant conditions. The spectre of execution, however remote it may be, continues to haunt prisoners and their families»²⁶.

In fact, 36 of 50 countries identified as ADF by the UN in 2018 had imposed at least one death sentence since 2008 and 32 of them had done so in the five years 2014-2019, according to Amnesty International.

Yet another indicator of attitudes of ADF countries to the question of abolition is the way they have voted, seven times since 2007, at the UN General Assembly on the resolution to establish a universal moratorium on the use of the death penalty.²⁷ In 2007, only 13 of the UN *de facto* countries listed in 2008 had voted in favour, 14 against, and 17 abstained (one was not present). Eleven years later, in 2018, two countries that had voted in favour of the moratorium had changed their votes: one voting against, the other abstaining. One that had voted against voted in favour (Dominica) and four others that had voted against abstained. Meanwhile, five countries that had abstained gave their support for the moratorium in 2018.²⁸ So, only six countries changed their initial vote from 2007 to vote in favour of the moratorium in 2018. No one could claim that this was a massive shift in opinion of the kind that would signal a rapid movement in favour of a

²⁵ Benin, Burkina Faso, Burundi, Gabon, Suriname, Tajikistan, and Togo became fully abolitionist; Guatemala became abolitionist for ordinary crimes. Russia and Gambia were deemed abolitionist by the UN but not by AI. 25 of the 49 ADF states had not conducted an execution for 25 years or more on 31 Dec 2018 (UN para 13 p. 8).

²⁶ E/2010/10, para 23 p. 14. For an account of conditions under sentence of death on death row and the consequences for those so confined, see Roger Hood and Carolyn Hoyle, 5th edition, *op.cit.* pp 202-222.

²⁷ Bearing in mind that not everyone voted as might be expected over that period; see Daniel Pascoe and Sangmin Bae «Idiosyncratic Voting in the UNGA Death Penalty Moratorium Resolutions», *International Journal of Human Rights*, 2020, vol 20, online.

²⁸ Central African Republic, Eritrea, Malawi, Niger, and Sierra Leone.

world-wide moratorium. Perhaps a more optimistic measure was the fall in the number who have endorsed the *Note Verbale* protesting against the issue being introduced at all as a proper matter to be voted on by the UN General Assembly. The Note asserts that it is not the business of the UN to vote on this matter as it is not an issue of human rights but one of national sovereignty. In 2007, 25 UN ADF countries signed the *Note* sent to the secretary-general, whereas following the vote in 2018 only nine did so.

The *de facto* category therefore appears to merge two different conceptions: one sees ADF status as a steppingstone towards, or indication of intention to embrace full abolition in principle; the other employs it as a compromise between retaining the death penalty as a symbol of ultimate state power but not enforcing it. Non-enforcement can be for a variety of political reasons, including the diplomatic disadvantage of retentionist countries allying themselves with several of the few states which are renowned for their determination to continue executions on the grounds that they have sovereign decision-making powers over all aspects of their criminal justice policy.

It is not acceptable to portray the ADF sub-category as being almost indistinguishable from the countries that have expunged the death penalty from all their laws or even their constitution. Indeed, to do so endangers the prospect of all countries accepting, as a matter of principle, that this punishment is utterly unacceptable. After all, as Professor Schabas notes, as party to the ICCPR, these countries are reminded by the Human Rights Committee that Article 6(6), which demands that nothing in the treaty shall be invoked to «delay or to prevent the abolition of capital punishment», that they should all be «on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future»²⁹. Certainly, over 25 years as ADF is far too long to justify, to use Marc Ancel's words, «an experiment in abolition».

IV. An Empirical Contribution

The question therefore arises: Why do some countries resist so strongly the appeal to finally abolish the death penalty? In the various editions of *The death penalty: A worldwide perspective*, Carolyn Hoyle

²⁹ Human Rights Committee in its general comment No 36. E/2020/53.

and I have suggested that the answer can probably be found in a combination of assumptions about hostile public opinion, continuing belief in the uniquely deterrent effect of the death penalty, the view that it must still be available for exceptionally grave crimes, and the political fear that abolition may be perceived as «a sign of weakness», particularly among political leaders who do not enjoy strong support³⁰.

Believing that it was time to try to investigate this empirically, the Executive Directors of the Death Penalty Project –Saul Lehrfreund and Parvais Jabbar– and I decided to undertake an empirical survey, in collaboration with West Indian colleagues, in seven small independent Caribbean island States: Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Barbados³¹. All are classified by the 2020 UN quinquennial report as abolitionist *de facto*, but Amnesty International classifies six of them as «retentionist» (Grenada is the exception), accounting for a third of the 18 «UN *de facto* countries» that Amnesty believes should still be regarded as retentionist³². Yet, with the exception of St Kitts and Nevis, nobody has been judicially executed in any of the other countries for more than 20 years; and in three of them (Dominica, Grenada, and Barbados) for more than 30 years³³. Furthermore, death sentences have been imposed within the past 10 years only in St Lucia and Barbados; and in four of these seven nations there were no persons still under sentence of death on «death row» in 2018 when the study was carried out³⁴.

One hundred citizens of these island States, judged to be knowledgeable «opinion formers», drawn from politics, criminal justice, the clergy, civil society and the media, were interviewed about their own views on the question of retention or abolition of the death penalty in their country. Among other questions, they were asked what they be-

³⁰ ROGER HOOD/CAROLYN HOYLE, 5th edition, *op. cit.*, page 174.

³¹ ROGER HOOD and FLORENCE SEEMUNGAL (2020), *Sentenced to death without execution: Why capital punishment has not yet been abolished in the Eastern Caribbean and Barbados, The Views of opinion formers*, London: The Death Penalty Project. A similar survey, based on a similar questionnaire to that used in the Eastern Caribbean, was carried out a little later by my colleague, Carolyn Hoyle (2020), in Zimbabwe.; *Time to Abolish the Death Penalty: Exploring the Views of its Opinion Leaders*, London: The Death Penalty Project.

³² All these countries had (with the exception of Dominica in 2017) signed the *Note Verba-le* to the UN General Assembly protesting against and dissociating themselves from the bringing forward and adoption of the moratorium resolution.

³³ The last execution in St Kitts and Nevis took place in 2008 (after a gap of 10 years) The last execution in the other nations was: Antigua & Barbuda (1991), Dominica (1986) Grenada (1978) St Lucia (1995), St Vincent and the Grenadines (1995), and Barbados (1984).

³⁴ There was one death row prisoner in 2018 in Grenada and, one in St Vincent and the Grenadines, and 11 in Barbados: all 11 are due to be resentenced now that Barbados has renounced the mandatory death penalty for murder.

lieved would be the consequences if the death penalty were to be abolished; and what attitudes and factors they thought still constrained their governments from finally abolishing capital punishment. The informants were almost equally divided between those who favoured retention (52) and those who supported abolition (48).

There is not space here to report on all the findings which are available in the published report, but key conclusions will be highlighted. Most (84%) of those who favoured retention did so for a retributive reason and only 10% because they believed it was a deterrent; and none because they thought public opinion was opposed. On the other hand, the majority of retentionist and abolitionists thought that the government had not embraced abolition either «because [their government] believed that the majority of citizens are still in favour of it, [so] there is no pressure to do so»; and /or because «politicians think support for abolition would make them unpopular and/or stir up opposition in the media»; and/or because their government «like other OECS countries and Barbados, believe it is [an] especially necessary deterrent to control the incidence of murder». Clearly, there was a large gap between what the informed respondents had stated was *their* justification for retaining capital punishment and the reasons they attributed to *their governments* for not abolishing the death penalty. In particular, 90% of the «opinion formers» who personally favoured retention had not chosen «public opinion is opposed» as a reason, whereas the majority thought that the government believed that the majority of citizens were in favour of retention and not ready to embrace abolition.

In fact, the findings revealed weak support for the use of the death penalty even among those who favoured its retention. Only 18 of the 100 favoured any expansion in the use of the death penalty or in the number of executions. Furthermore, when asked to rank nine social and criminal justice policies, a list that included more executions, in terms of their likely effectiveness as a way of controlling violent crime leading to death, 90 per cent did not chose «more executions», but preferred improved educational and social policies or more effective policing. In response to a question about what might happen if the government abolished the death penalty, only 19 (seven of the 52 abolitionists and 12 of the 48 retentionists) endorsed the view that «there would be demonstrations of strong public dissatisfaction, in the media and elsewhere, against the decision and repeated calls for its reinstatement». Most thought there «might be some demonstrations or expressions of dissatisfaction leading up to abolition, but the majority of the

public would come to accept it once the law was passed». When asked for their personal views, only 12 of the 100 informants, all of them retentionists, said they would strongly oppose any legislation to abolish the death penalty by definitely voting against legislation.

It is clear that supporting retention of capital punishment did not imply that most of our informants believed abolition would be unacceptable to the majority of the population of their country once it had passed into legislation. However, the majority were ignorant of the negative response of their own government to the international efforts of abolitionist countries to persuade all UN member states to support a universal moratorium. Only 20 per cent knew that their governments, with the sole exception of Dominica in 2017,³⁵ had signed the *Note Verbale*.

Perhaps it is not so surprising that almost all the informants who favoured retention shared their government's view that the question of abolition should not be influenced by, or follow, the policy adopted by the majority of nations. When asked:

Does the fact that, in recent years, since 1989, the number of counties worldwide that have completely abolished [the death penalty] has now risen from 35 to 106 – AND that eight states of the USA have abolished capital punishment [New York, Illinois, New Mexico, Connecticut, Maryland, New Jersey, Delaware and Washington] – alter your view on whether your country should follow the international trend ?

Forty-four of the 48 (92%) answered no: «it makes no difference; I would still support the death penalty»; four said they were «not sure» or expressed no opinion; but none said yes. This was very strong evidence that they gave no weight to the international or regional movement to embrace abolition.

The findings of this survey suggest that «opinion formers» who supported the retention of the death penalty, and their government's resistance to the international moratorium, were strongly influenced by the view that the issue of capital punishment is a matter of national sovereignty and justified by cultural exceptionalism. However, they did not personally accept that assumptions about the strength of public opposition to abolition, or assumptions about the death penalty's dete-

³⁵ Even so, none of the 15 participants from Dominica were aware that their government had, for the first time, not signed the *Note Verbale*.

rrerent effect, should determine the issue. When questioned more closely, most of these knowledgeable and influential citizens did not believe that a policy of executing those convicted of murder was likely to be effective in reducing violent crime leading to death, nor did they predict that there would be a serious reaction from the public if the death penalty were to be abolished completely and –with only a few exceptions– they would not oppose or reject total abolition of capital punishment if their government were to take the lead.

These findings could provide ammunition to those who work to eliminate the shadow of the death penalty in the Eastern Caribbean, to challenge the assumption that leaving it on the statute book without enforcing it is sufficient. Only when the death penalty has been abolished through legislation or a change to the constitution and excised from political debate can a culture that rejects it completely as a violation of universal human rights take hold. The seven Caribbean countries included in this survey are illustrative of a wider phenomenon witnessed in the 50 ADF states accounted for by the United Nations. Executions cease and become a matter of historical record in virtually all these states, yet the longer they remain ADF, the possibility that states take the final bold steps to abolish the death penalty altogether diminishes over time.

For a state to remain ADF for decades without taking the steps to remove the death penalty from all their laws represents a failure to shed the vestiges of the inhumanity of the past. While a state remains in ADF status, the idea that it is legitimate for the state to kill its citizens remains embedded in the culture, whereas abolition *de jure* clearly signals that it is unthinkable for even the most authoritarian government to employ the death penalty.

