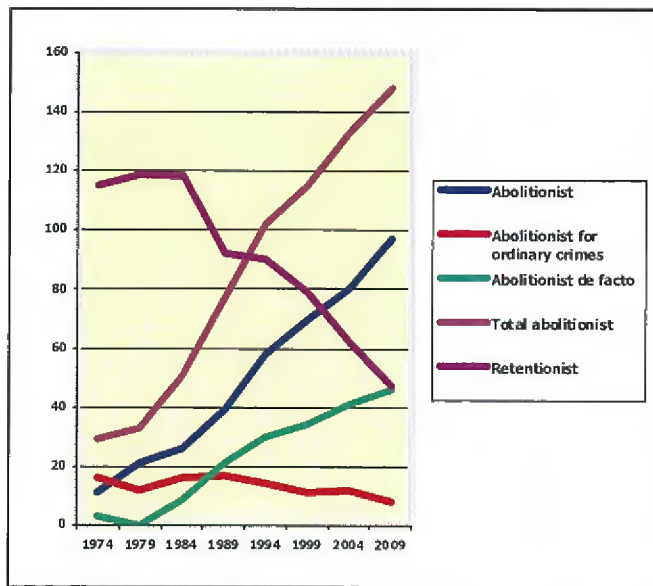


## THE COMMONWEALTH AND THE SECOND OPTIONAL PROTOCOL ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

### A Paper prepared for the Commonwealth Secretariat by Professor William Schabas OC MRIA\* on behalf of the Commonwealth Lawyers Association

1. According to the eighth quinquennial report of the United Nations Secretary-General on the status of capital punishment, issued in 2010, there has been a measurable international trend towards abolition of capital punishment for at least three decades. In fact, it appears to have accelerated in recent years. As of 31



December 2008, 97 countries had abolished the death penalty altogether, while a further 8 had abolished it for 'ordinary crimes', retaining the possibility of capital punishment in cases of treason and war-related offences. A further 46 States were abolitionist *de facto*, meaning that they had not carried out a death sentence for more than a

decade. Only 47 States of the total of 198 were described as retentionist.<sup>1</sup> The chart, which is taken from the recent United Nations survey, shows this trend towards abolition, based upon the statistics in the quinquennial reports since they first appeared, in 1975.

2. Although the general trend is also apparent in the policies and legislation of Commonwealth States, as a general observation the Commonwealth lags somewhat behind the world trend. Only 17 Commonwealth States have abolished the death penalty altogether, *i.e.*, about 31% of the total. By comparison, of the 198 States and entities assessed in the United Nations survey, approximately half or 97 were fully abolitionist. In addition, one Commonwealth State, Fiji Islands, is abolitionist for 'ordinary crimes'; eight States studied in the global survey belong to this category.
3. As for retentionist States, ten Commonwealth members belong to this category, or 18%; in the United Nations survey, 47 of 198 States, or 23%, are retentionist. The survey indicates an important decline in the use of the death penalty by

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<sup>1</sup> 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General', UN Doc. E/CN.15/2010/14, Table I.

retentionist States. The practice of Commonwealth States is consistent with this trend. In only one Commonwealth country, Pakistan, did use of the death penalty increase over the 2004-2008 quinquennium. When Pakistan is excluded from the total, there were only 9 executions in Commonwealth States in 2008, compared with 27 in 2004. In 2008, there were at least 36 executions in Pakistan, 5 in Bangladesh and 1 each in Botswana, Malaysia, Saint Kitts and Nevis and Singapore.

4. The Commonwealth sets itself apart from the overall international pattern in the size of the category of States that are abolitionist *de facto*. Approximately half of the Commonwealth membership belongs to this category, whereas it is less than one-quarter of the global total. Whether the *de facto* abolitionist category is a meaningful indicator of trends has often been questioned. Certainly many of those in the *de facto* abolitionist category would insist that their failure to carry out executions for a decade or more does not manifest any change in policy. For example, in its report to the Human Rights Council, Barbados insisted that no moratorium on capital punishment was in place despite the fact there had been no executions in recent years.<sup>2</sup> Twelve Commonwealth Member States in the *de facto* abolitionist category registered their opposition to General Assembly resolution 62/149, entitled 'Moratorium on the use of the death penalty', by including their names in a *note verbale* addressed to the Secretary-General of the United Nations.<sup>3</sup>
5. In some cases, however, States in the *de facto* abolitionist group have indicated that a moratorium is indeed in place, and that a policy decision is responsible for the lack of executions over a ten-year period. In its report to the Human Rights Council in the context of the universal periodic review process, Sri Lanka indicated this to be the case.<sup>4</sup> Cameroon said 'it may not be an over statement to say executions have been suspended *de facto* in Cameroon'.<sup>5</sup> Kenya's second periodic report to the Human Rights Committee said a *de facto* moratorium has been in place since 1996.<sup>6</sup> Zambia made a similar declaration in its third periodic report.<sup>7</sup>
6. The recent United Nations survey concludes that the *de facto* abolitionist classification is a very good indicator of trends towards abolition *de jure*. During the 2004-2008 quinquennium, no State in the *de facto* abolitionist category resumed executions. The United Nations study examined patterns over a forty-year period, and concluded: 'When the *de facto* abolitionist category is looked at over a longer time horizon, it appears to provide useful confirmation of the hypothesis that most States that have stopped using the death penalty for ten years will remain in that category or proceed to *de jure* abolition... In conclusion, *de facto* abolition appears to be a useful indicator of future behaviour, and a

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<sup>2</sup> 'Report, Barbados', UN Doc. A/HRC/10/73, paras. 13, 48.

<sup>3</sup> UN Doc. A/62/658: Antigua and Barbuda, Barbados, Brunei Darussalam, Dominica, Grenada, Jamaica, Maldives, Papua New Guinea, Saint Lucia, Saint Vincent and the Grenadines, Swaziland, Tonga.

<sup>4</sup> 'National Report, Sri Lanka', UN Doc. A/HRC/WG.6/2/LKA/1, para. 59.

<sup>5</sup> UN Doc. CCPR/C/CMR/4, para. 122.

<sup>6</sup> UN Doc. CCPR/C/KEN/2004/2, para. 53.

<sup>7</sup> UN Doc. CCPR/C/ZMB/3, para. 150.

valuable concept to assist in understanding trends with respect to capital punishment in both practice and law.<sup>8</sup>

7. The international trend towards abolition of the death penalty is also reflected in the willingness of States to accept international legal obligations that prohibit the use of capital punishment. More than eighty States are now party to a series of specialised treaties on the issue of the death penalty adopted by the United Nations, the Council of Europe and the Organization of American States. The most important of these, if only because of its universal application, is the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>9</sup>
8. The Second Optional Protocol to the International Covenant on Civil and Political Rights imposes two primary obligations upon States parties: not to execute anyone within their jurisdiction and to 'take all necessary measures to abolish the death penalty' within their jurisdiction. It is possible for a State to make a reservation at the time of ratification in order to exclude application of the Protocol with respect to 'application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime', although this option has rarely been invoked.
9. The Second Optional Protocol was adopted by the United Nations General Assembly in 1989. It entered into force in 1991, following the tenth ratification or accession. The Protocol can only be ratified by States that are already party to the International Covenant on Civil and Political Rights. Some 165 States, that is, about 86% of the membership of the United Nations, have ratified the International Covenant on Civil and Political Rights. By comparison, only 42 of the 54 members of the Commonwealth, or 78%, have ratified the Covenant. As for the Second Optional Protocol, it has been ratified by 72 of the 165 States that have ratified the Covenant itself, or about 44%. By comparison, only 11 of the 40 Commonwealth members that are Parties to the Covenant, or about 27%, have also ratified the Second Optional Protocol.
10. Three members of the Commonwealth, Mauritius, Samoa and Vanuatu, have ratified the International Covenant on Civil and Political Rights and have abolished the death penalty, but have not ratified or acceded to the Second Optional Protocol. There is no legal impediment to ratification or accession. According to recent interpretation of article 6(2) of the International Covenant on Civil and Political Rights, according to which the possibility of imposing capital punishment may only be invoked by a State that has not yet become abolitionist, they may well be prevented from restoring the death penalty;<sup>10</sup> to that extent, their legal position would not be substantially altered by accession to or ratification of the Second Optional Protocol.
11. Three other Commonwealth States, Kiribati, Solomon Islands and Tuvalu, abolished the death penalty back in the 1970s, but have not ratified the Second Optional Protocol. However, they cannot take this step until they ratify the International Covenant on Civil and Political Rights. A non-member of the United

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<sup>8</sup> 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General', UN Doc. E/CN.15/2010/14, para. 22.

<sup>9</sup> UN Doc. A/RES/44/128, annex.

<sup>10</sup> *Judge v. Canada*, UN Doc. CCPR/C/78/D/829/1998, para. 10.6.

Nations may accede to or ratify the Covenant if so invited by the United Nations General Assembly;<sup>11</sup> such a general invitation has already been made.<sup>12</sup> In 2009, Tuvalu reported to the United Nations Human Rights Council that it had 'no objection to the substance of the International Covenant on Civil and Political Rights [but that] the Government did not have the resources required to report on or implement these and many other international conventions. If provided with resources, the ratification would be a matter of course.'<sup>13</sup> Subsequently, Switzerland offered to provide such technical assistance.<sup>14</sup>

12. At the political level, the Commonwealth also stands out from the more general pattern observed internationally. In 2007, 2008 and 2010, the United Nations General Assembly has adopted resolutions calling for a moratorium on the use of the death penalty. Previous attempts at adoption of such a resolution in the General Assembly, in 1994 and 1999, had not been successful. The 2010 resolution was adopted by a majority of 109 to 41, with 35 abstentions. Among Commonwealth States, only 19 voted in favour while 22 voted against, with 12 abstentions. In other words, while 59% of United Nations Member States that voted were in favour of the resolution, only 36% of Commonwealth States that voted were in favour. More than half of the United Nations Member States that voted against the resolution were members of the Commonwealth. Over the three resolutions, there has been a slight increase in the majority and in the abstentions, and a slight decline in the number of states voting against. This tendency is also reflected in the behaviour of Commonwealth States.

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<sup>11</sup> International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 48(1).

<sup>12</sup> GA Res. 3270 (XXIX).

<sup>13</sup> UN Doc. A/HRC/10/84, para. 14; also paras. 55, 67(1), (2).

<sup>14</sup> *Ibid.*, para. 22.

### Ratification of Treaties by Commonwealth Member States and Status with Regard to Capital Punishment

	<i>Party to the International Covenant on Civil and Political Rights</i>	<i>Party to the Second Optional Protocol to the International Covenant</i>	<i>Abolitionist de jure</i>	<i>Abolitionist de facto</i>	<i>Retentionist</i>
<b>Antigua and Barbuda</b>				X (1989)	
<b>Australia</b>	X	X	X		
<b>Bangladesh</b>	X				X (2008)
<b>Barbados</b>	X			X (1984)	
<b>Belize</b>	X			X (1986)	
<b>Botswana</b>	X				X (2008)
<b>Brunei Darussalem</b>				X (1857)	
<b>Cameroon</b>	X			X (1997)	
<b>Canada</b>	X	X	X		
<b>Cyprus</b>	X	X	X		
<b>Dominica</b>	X			X (1986)	
<b>Fiji Islands</b>			X <sup>a</sup>		
<b>Ghana</b>	X			X (1993)	
<b>Grenada</b>	X			X (1978)	
<b>Guyana</b>	X			X (1997)	
<b>India</b>	X				X (2004)
<b>Jamaica</b>	X			X (1988)	
<b>Kenya</b>	X			X (1987)	
<b>Kiribati</b>			X		
<b>Lesotho</b>	X			X (1995)	
<b>Malawi</b>	X			X (1992)	
<b>Malaysia</b>					X (2008)
<b>Maldives</b>	X			X (1952)	
<b>Malta</b>	X	X	X		
<b>Mauritius</b>	X		X		
<b>Mozambique</b>	X	X	X		
<b>Namibia</b>	X	X	X		
<b>Nauru</b>	Signatory			X (1968)	
<b>New Zealand</b>	X	X	X		
<b>Nigeria</b>	X				X (2002)
<b>Pakistan</b>	X				X (2008)
<b>Papua New Guinea</b>	X			X (1950)	
<b>Rwanda</b>	X	X	X		
<b>Samoa</b>	X		X		
<b>Seychelles</b>	X	X	X		
<b>Sierra Leone</b>	X			X (1998)	
<b>Singapore</b>					X (2008)
<b>Solomon Islands</b>			X		
<b>South Africa</b>	X	X	X		
<b>Saint Kitts and Nevis</b>					X (2008)
<b>Saint Lucia</b>				X (1995)	
<b>Saint Vincent and the Grenadines</b>	X			X (1995)	
<b>Sri Lanka</b>	X			X (1976)	
<b>Swaziland</b>	X			X (1989)	
<b>The Bahamas</b>	X			X (2000)	
<b>The Gambia</b>	X			X (1981)	
<b>Tonga</b>				X (1982)	
<b>Trinidad and Tobago</b>	X			X (1999)	
<b>Tuvalu</b>			X		
<b>Uganda</b>	X				X (2006)
<b>United Kingdom</b>	X	X	X		
<b>United Republic of Tanzania</b>	X			X (1994)	
<b>Vanuatu</b>	X		X		
<b>Zambia</b>	X			X (1997)	
<b>Total</b>	<b>42</b>	<b>11</b>	<b>18</b>	<b>27</b>	<b>10</b>

<sup>a</sup> For ordinary crimes only.

**Vote on General Assembly Resolution 65/206, Moratorium on the Use of the Death Penalty (21 December 2010)**

	<i>In favour</i>	<i>Against</i>	<i>Abstain</i>	<i>Change in position vis à vis previous years</i>
Antigua and Barbuda		X		
Australia	X			
Bangladesh		X		
Barbados		X		
Belize		X		
Botswana		X		
Brunei Darussalem		X		
Cameroon			X	
Canada	X			
Cyprus	X			
Dominica			X	Voted against in 2007 and 2008.
Fiji Islands			X <sup>a</sup>	
Ghana			X	
Grenada		X		
Guyana		X		
India		X		
Jamaica		X		
Kenya			X	
Kiribati	X			
Lesotho			X	
Malawi			X	
Malaysia		X		
Maldives	X			
Malta	X			
Mauritius				
Mozambique	X			
Namibia	X			
Nauru	X			
New Zealand	X			
Nigeria			X	Voted against in 2007 and 2008.
Pakistan		X		
Papua New Guinea		X		
Rwanda	X			
Samoa	X			
Seychelles				
Sierra Leone			X	
Singapore		X		
Solomon Islands			X	
South Africa	X			
Saint Kitts and Nevis		X		
Saint Lucia		X		
Saint Vincent and the Grenadines	X	X		
Sri Lanka	X			
Swaziland		X		Abstained in 2007, voted against in 2008.
The Bahamas		X		
The Gambia	X			Abstained in 2007 and 2008.
Tonga		X		
Trinidad and Tobago		X		
Tuvalu	X			
Uganda		X		
United Kingdom	X			
United Republic of Tanzania			X	
Vanuatu	X			
Zambia			X	
<b>Total</b>	<b>19</b>	<b>22</b>	<b>12</b>	

<sup>a</sup> For ordinary crimes only.