

# The obligation to refrain from assisting the use of the death penalty

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# THE OBLIGATION TO REFRAIN FROM ASSISTING THE USE OF THE DEATH PENALTY

BHARAT MALKANI\*

**Abstract** In this paper, I assert that the prohibition on the death penalty brings with it an obligation on abolitionist States to refrain from assisting the use of the death penalty in retentionist States. By considering the law on complicity and State responsibility, the obligation to protect under international human rights law, and the practice of States, I argue that although there are jurisdictional issues and although the death penalty is not prohibited under general international law, an obligation to refrain from being complicit in the death penalty is developing in international law.

**Keywords:** complicity, death penalty, diplomatic protection, extradition, mutual legal assistance, obligation to protect, State responsibility.

## I. INTRODUCTION

When a State abolishes the death penalty, its primary obligation is to refrain from subjecting any individual within its jurisdiction to such a penalty. This article argues that States that have ratified treaties prohibiting the death penalty in all circumstances, such as the European Convention on Human Rights (ECHR)<sup>1</sup> and the Second Optional Protocol to the International Covenant on Civil and Political Rights,<sup>2</sup> are also under a secondary obligation to refrain from facilitating the use of the death penalty elsewhere. Although many abolitionist States already take steps to ensure that they are not complicit in the use of the death penalty in retentionist States, recent developments suggest that the legal, political and moral obligation to refrain from aiding and assisting the use of the death penalty is wider than currently appreciated.

This paper begins by explaining what is meant by an obligation to refrain from assisting the use of the death penalty, as the broad issue of complicity in

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221. Although art 2 of the ECHR permits the death penalty, the European Court of Human Rights has held that this article has been amended by State practice so as to prohibit the death penalty in all circumstances. See *Al-Saadoon v United Kingdom* (App no 614898/08) (2010) 51 EHRR 9.

<sup>2</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 (at the time of writing, ratified by 75 States).

the international legal system is complex. It is asserted that Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles),<sup>3</sup> when read in conjunction with the 'obligation to protect' in international human rights law, points towards an obligation on abolitionist States to do more than merely refrain from imposing the death penalty.

Four ways in which a State might actually directly or indirectly assist the use of the death penalty are then identified and the extent to which abolitionist States are obliged to refrain from these actions and omissions is examined. The first concerns the obligations on abolitionist States to refrain from extraditing or deporting anyone to another State where there is a risk that they will face the death penalty, without obtaining adequate assurances that the death penalty will not be imposed beforehand. Although this obligation is well established, it is useful to outline the extent of this obligation, how this obligation has developed and its rationale, in order to understand whether abolitionist States might have similar obligations in different contexts.

With this in mind, the article then moves onto the second potential method of complicity by considering the scope of an abolitionist State's obligation to assist its nationals who are facing the death penalty abroad. Although the decision to provide diplomatic protection is essentially at the discretion of the executive, it is argued that this discretion is tempered in cases involving abuses of fundamental human rights, which the death penalty is increasingly being classified as. The third issue considered is how a State might provide mutual legal assistance or police-to-police assistance in investigations that lead to the imposition of the death penalty.<sup>4</sup> It is argued that, as in extradition cases, abolitionist States should refuse such assistance without assurances that the death penalty will not be imposed. Consideration is also given to the conduct of the United Nations in providing resources and intelligence in global anti-drug trafficking efforts to countries which impose the death penalty for drug offences, in violation of international law. The fourth issue concerns how a State might provide, or enable the provision of, materials that are used in executions. Given public pronouncements by States and private companies, and the rationale behind the obligation to not extradite offenders without assurances, it is argued that more stringent controls need to be put in place to ensure that exported materials are not used for the purposes of facilitating executions.

<sup>3</sup> The arts on State Responsibility are annexed to United Nations Resolution 56/83 adopted by the General Assembly on 12 December 2001. The UK courts have recognized these articles to be an authoritative statement of the principles of State responsibility (*R v Lyons* [2002] UKHL 44 [36]).

<sup>4</sup> Strictly speaking, extradition is a type or form of mutual legal assistance, and thus it might be wondered why I have chosen to consider the two separately. As will become clear, abolitionist States and international law have tended to treat the two differently in death penalty cases, and it is for this reason that extradition is considered separately to mutual legal assistance cases.

These last two methods of assisting the use of the death penalty are arguably not prohibited, owing to jurisdictional issues. Even if jurisdictional issues preclude an obligation in these situations, though, it can still be argued that there is a political or moral obligation to refrain from aiding the death penalty in these ways.

These obligations take on particular force when abolitionist States adopt explicit policies for promoting the abolition of the death penalty worldwide, as the United Kingdom did when the Foreign and Commonwealth Office (FCO) issued the 'UK Strategy for Global Abolition of the Death Penalty' in October 2010.<sup>5</sup> If a State publicly and actively promotes the abolition of the death penalty in other countries, then that State must be politically and morally obliged, if not legally obliged, to ensure that it is not complicit in the administration of the death penalty in those countries.

The article ends by suggesting that stronger legislative measures, or more explicit governmental policies, which comprehensively set out the duty to not aid executions abroad, are needed. In addition to domestic laws and policies, a treaty or regulation at the international level should be developed, which comprehensively sets out the duties on abolitionist States to refrain from assisting the use of the death penalty in retentionist States.

## II. COMPLICITY IN INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

States have long been criticized and held responsible for aiding and assisting violations of international law by third States.<sup>6</sup> In recent years, for example, the British Government has come under increasing scrutiny for its alleged complicity in the commission of torture by agents of the United States of America and of other States.<sup>7</sup> It is necessary therefore to identify the existing rules in relation to complicity in human rights violations, before applying these rules to the issue of complicity in the death penalty.

When considering the extent to which States can be held responsible for complicity in human rights violations, we are faced with a complex web of rules and principles of international law. First and foremost are the primary

<sup>5</sup> Available on the Foreign and Commonwealth Office's website: <<http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/death-penalty-strategy-oct-11-15>> accessed 8 October 2012. It is for this reason that reference is often made in this paper to the laws and practice of the UK for illustrative purposes. The UK is also referred to for illustrative purposes because, for the most part, it is an exemplar in ensuring that it is not complicit in executions.

<sup>6</sup> For examples, see HP Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 107–69.

<sup>7</sup> See, for example, Joint Committee on Human Rights, Twenty-Third Report of 2008–09, 'Allegations of UK Complicity in Torture' HL 152, HC 230, 21 July 2009. <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm>> accessed 8 October 2012. Also see Human Rights Watch: 'Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan' (November 2009) <[http://www.hrw.org/sites/default/files/reports/uk1109web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/uk1109web_0.pdf)> accessed 8 October 2012. It should be noted that the British Government has rejected the findings of the Human Rights Watch investigation.

rules of international human rights law that prohibit these conducts. The prohibition on complicity in torture,<sup>8</sup> for example, can be found either explicitly in Article 4 of the Convention Against Torture (CAT),<sup>9</sup> or implicitly in the general prohibitions on torture in international law, including Article 7 of the International Covenant on Civil and Political Rights (ICCPR),<sup>10</sup> and, at the regional level, Article 3 of the European Convention on Human Rights (ECHR).<sup>11</sup> Second, and seemingly quite separate to these primary rules of international law, we might turn to Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which reads:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

Article 16 operates as a secondary rule of international law, only coming into play when there has been a violation of a primary, substantive rule of international law.<sup>12</sup>

These options, whether relating to torture or another issue, are not mutually exclusive. The interplay between State responsibility under human rights law and State responsibility under the ILC Articles is not straightforward, and has caused much consternation for lawyers and commentators alike.<sup>13</sup> The following discussion considers how these rules and principles of international law operate in more detail, with a view to constructing a framework for determining the conditions under which a State might be held responsible for assisting the use of the death penalty.

### *A. Article 16 of the ILC Articles*

On first reading, it is tempting to use Article 16 as the basis of an obligation on abolitionist States to not assist executions. Aust writes that Article 16 sets up

<sup>8</sup> Torture is being used as an example because, as will be discussed, there is a wealth of materials on complicity and torture.

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 1.

<sup>10</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

<sup>11</sup> *Saadi v Italy* (App no 37201/06) (2009) 49 EHRR 30.

<sup>12</sup> It is not necessary to dwell on the distinction between primary and secondary rules of international law here. Suffice to say that primary rules relate to substantive wrongs, such as the use of torture, and secondary rules relate to procedural issues such as reparations for breaches of primary rules, and so on.

<sup>13</sup> For example, see the contributions of M Craven, B Conforti, MD Evans, and D McGoldrick in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (OUP 2004). Each of these writers considers the issue of State responsibility under human rights law, and how this relates to the ILC articles.

three questions that need to be considered: what sort of conduct will trigger responsibility for complicity, what exactly does the aiding State need to know, and what is meant by the criterion in Article 16(b) that the ‘act would be internationally wrongful if committed by [the aiding] State’?<sup>14</sup> Although these three questions are addressed throughout this paper, it is also noted that Article 16 is rather narrow in scope, potentially presenting problems for the arguments presented here.

In the Commentary to the ILC Articles, it is stated that ‘Article 16 limits the scope of responsibility for aid and assistance in three ways.’<sup>15</sup> First, the assisting State must be aware of the circumstances that make the actions of the third State internationally wrongful.<sup>16</sup> As will be seen, though, abolitionist States are often unaware that their actions might lead to the use of the death penalty. Second, the assisting State must give aid or assistance with the intention of facilitating the commission of the internationally wrongful act.<sup>17</sup> It is hardly ever the case, though, that abolitionist States directly intend to bring about the death penalty through their conduct. Third, the act committed by the principal State must also be internationally wrongful if committed by the assisting State.<sup>18</sup> For present purposes, this is easy to satisfy: States that have ratified a treaty that prohibits the death penalty would fulfil this criterion if they were to impose the death penalty. However, related to this is a problematic fourth criterion: under Article 16, responsibility only arises if the State committing the allegedly ‘wrongful’ act is prohibited from doing so.<sup>19</sup> It follows that an abolitionist State cannot be held responsible for assisting executions in, for example, the United States of America, because there is no rule of general international law that prohibits the death penalty,<sup>20</sup> and it is only those States party to treaties that prohibit the death penalty that commit an internationally wrongful act by imposing the death penalty.<sup>21</sup>

<sup>14</sup> HP Aust (n 6) 7.

<sup>15</sup> Commentary to art 16, United Nations International Law Commission, Report on the Work of its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10/2001/283, para 3. Also see Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 149.

<sup>16</sup> Commentary to art 16, para 3.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> J Cerone, ‘Re-examining International Responsibility: “Complicity” in the Context of Human Rights Violations’ (2008) 14 *ILSA Journal of International and Comparative Law* 525, 531.

<sup>20</sup> It should be noted, though, that there is a trend in international law towards the prohibition of the death penalty. See W Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge 2003). It is also well documented that States across the world are predominantly moving towards abolition of the death penalty, with very few States introducing or expanding the use of the death penalty. For a thorough analysis of the global trend towards abolition, see R Hood, *The Death Penalty: A Worldwide Perspective* (4th edn, Oxford 2008) Also, it should be noted that there are some general rules of international law that govern the use of the death penalty. For example, international law prohibits the death penalty for offenders under the age of 18, and thus the United States of America would be committing an internationally wrongful act if it imposed the death penalty on such offenders, and the assisting State could therefore incur responsibility.

<sup>21</sup> It is for this reason, therefore, that when I refer to ‘abolitionist States’ in this paper, I am referring to those States that would be in violation of their obligations under international law if

This approach to Article 16 implies that only in extreme cases would abolitionist States incur responsibility for assisting the use of the death penalty. However, Article 16 is not determinative of the issue, since it can be displaced by the *lex specialis* on complicity in a particular area of law.<sup>22</sup> It is argued here that Article 16 can be complemented by the concept of the ‘obligation to protect’ under international human rights law to develop the *lex specialis* on complicity and the death penalty.<sup>23</sup> It is necessary, therefore, to consider how the obligation to protect is understood in terms of international human rights law, in order to see how the two might work in tandem.

### *B. The Obligation to Protect in International Human Rights Law*

The ‘obligation to protect’ in human rights law requires States to take steps to prevent human rights abuses from occurring, either domestically or in third States.<sup>24</sup> For example, the right to life under Article 6 of the ICCPR does not merely require States to refrain from arbitrarily taking life, it also requires States to protect lives by preventing third parties from killing.<sup>25</sup> The European Court of Human Rights has also interpreted the right to life under the ECHR to include a positive duty to prevent lives from being taken.<sup>26</sup> The principle of non-refoulement derives from the idea that States should not put individuals in situations where there is a risk that their rights will be abused, and it can therefore be said that the duty to protect requires States to ensure that they do not enable or assist a third party to engage in conduct that results in a violation of a right. It is in this sense that we can say that the concept of complicity under the ILC Articles and the concept of the obligation to protect are linked.

In some ways, though, the obligation to protect is analytically distinct from the concept of State responsibility for complicity.<sup>27</sup> As Aust writes,

... an infringement upon the prohibition of refoulement triggers the responsibility of the extraditing State regardless of whether the [human rights abuse] eventually materialises ... [whereas] [i]n situations covered by the concept of complicity [under the ILC Articles], no responsibility would intervene if the wrongful act of

they imposed the death penalty, rather than those States that have abolished the death penalty as a matter of domestic law, but have not ratified any international treaty to that effect.

<sup>22</sup> Art 55 of the ILC arts states that ‘special rules of international law’ take precedence over the arts, including art 16. This is so notwithstanding the alleged customary nature of art 16. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 [420] (the ICJ referring to art 16 as ‘reflecting a customary rule’).

<sup>23</sup> On the obligation to protect, see H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd edn, Princeton 1996) 52.

<sup>24</sup> M Hakimi, ‘State Bystander Responsibility’ (2010) 21 EJIL 341, 376 (Hakimi notes that this issue has not been considered in detail).

<sup>25</sup> Human Rights Committee, CCPR General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, para 8.

<sup>26</sup> *Osman v UK* (2000) 29 EHRR 245.

<sup>27</sup> Hakimi (n 24) 353–4.



the main actor was never committed as there is no such concept as an attempted internationally wrongful act.<sup>28</sup>

Aust contends that this distinction is artificial, though, since both concepts are concerned with ensuring that States do not act in such a way that brings about a wrongful act. Conforti also notes that the Draft Articles on State Responsibility contained a specific reference to the responsibility incurred by States for failing to prevent a wrongful act from occurring.<sup>29</sup> The decision to delete this provision from the final Articles could be understood as a rejection of this concept, but Conforti notes that the Commission rejected the obligation to protect because it believed that such an obligation is better understood as a primary rule of international law, whereas the rules of State responsibility are secondary rules of international law.<sup>30</sup> Conforti, like Aust, argues that the Commission was wrong to draw a sharp distinction between the two, and it is argued here that the concepts of complicity and the obligation to protect can work in tandem when assessing the scope of the obligations on abolitionist States to refrain from assisting the use of the death penalty.

Hakimi has similarly addressed the interplay between the obligation to protect in international human rights law, and the prohibition on complicity under the ILC Articles: 'A state that gives the abuser support not directed at any particular misconduct is not responsible for assisting in the misconduct. But that state may have an obligation to protect.'<sup>31</sup> Put another way, even if an assisting State's conduct does not meet the stringent requirements for complicity under Article 16 as discussed above, that State may nonetheless be 'responsible because it failed to satisfy an affirmative obligation to protect'.<sup>32</sup>

McGoldrick notes that the concept of State responsibility appears in human rights legal discourse,<sup>33</sup> and demonstrates that the ICCPR regime reflects principles of State responsibility.<sup>34</sup> However, in a study of the concept of State responsibility before the European Court of Human Rights, Evans writes: 'in the human rights arena in general—including the jurisprudence of the European Court of Human Rights—the language of State responsibility has been . . . employed quite deliberately to broaden the scope of substantive legal obligations.'<sup>35</sup> Aust too notes that there are 'special rules on complicity in human rights law' that are 'more far-reaching' than the concept of complicity

<sup>28</sup> HP Aust (n 6) 396.

<sup>29</sup> Art 23 of the Draft arts was concerned with the responsibility of States to prevent wrongful acts. See B Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004).

<sup>30</sup> B Conforti (n 29) 136.

<sup>31</sup> M Hakimi (n 24) 365.

<sup>32</sup> *ibid* 354.

<sup>33</sup> But note that, according to McGoldrick, '[t]here is little academic literature on State responsibility in the human rights context, outside of the discussion of the ILC draft Articles.' D McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights' in Fitzmaurice and Sarooshi (n 29) 167.

<sup>34</sup> *ibid* 199.

<sup>35</sup> MD Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Fitzmaurice and Sarooshi (n 29) 140.

in Article 16.<sup>36</sup> It is in this sense that it is argued here that the substantive obligation to refrain from imposing the death penalty can be broadened by the concepts of complicity and the obligation to protect to include a prohibition on assisting the use of the death penalty.

From the discussion above regarding the law on complicity and the obligation to protect, it follows that we must be clear about (a) which States are prohibited from assisting the use of the death penalty, and (b) the conditions under which such States might incur responsibility. With regard to the first question, States party to the ECHR and the Second Optional Protocol to the ICCPR are prohibited from assisting the death penalty, since these two treaties completely prohibit the death penalty. Although Article 2 of the ECHR expressly permits the use of the death penalty in limited circumstances, the European Court of Human Rights has held that the text of this article has been de facto amended by State practice so as to prohibit the death penalty in all circumstances in all Member States.<sup>37</sup> The Second Optional Protocol is solely concerned with the prohibition of the death penalty, and has been ratified by 75 States.<sup>38</sup> Even though neither of these treaties explicitly prohibits complicity in the death penalty, the lack of such a textual provision is not necessarily a limitation on the arguments advanced here. As noted above, the ECHR does not expressly prohibit complicity in torture, but the European Court of Human Rights has read such a prohibition into Article 3. With regard to the second question, it is again helpful to draw on the law of complicity in the context of torture, for guidance on what sort of conduct might constitute complicity.

### *C. Complicity in Other Areas of Human Rights Law*

The law prohibiting complicity in torture is well established in international law and in some domestic legal systems, and certain principles from such law can be used to guide and develop the law on complicity in the death penalty. The prohibition on complicity in torture can be found in Article 4(1) of the Convention against Torture which, alongside the ILC Articles, were considered authoritative statements of the law by the Joint Committee on Human Rights (JCHR) in 2009, when it reported on allegations that the United Kingdom had been complicit in torture by third States.<sup>39</sup> For the purposes of State responsibility, the JCHR surveyed relevant authorities and stated that complicity in torture ‘means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place’.<sup>40</sup>

<sup>36</sup> Aust (n 6) 390.

<sup>37</sup> *Al-Saadoon v United Kingdom* (n 1) [120].

<sup>38</sup> It should be noted though that many of these 75 are also party to the ECHR.

<sup>39</sup> JCHR (n 7) Also see Human Rights Watch (n 7).

<sup>40</sup> JCHR (n 7) para 35.

There are three aspects to the law on complicity in torture that can be used to develop the law on complicity and the death penalty. First, one can look to the law on torture for guidance on what sort of conduct constitutes complicity. The JCHR listed several situations that would amount to unlawful complicity in torture, including things such as the ‘provision of information to . . . a foreign intelligence service enabling them to apprehend a . . . suspect [who is then tortured]’.<sup>41</sup> This can be applied to death penalty situations, in that the provision of intelligence that leads to the imposition of the death penalty can amount to complicity in the death penalty. Second, the JCHR read the ILC Articles in conjunction with other rules and principles of international law, supporting the argument that Article 16 is not determinative of the obligation to not assist the use of the death penalty. Third, the JCHR did not refer to the requirement of ‘intention’, finding ‘constructive knowledge’ to suffice. The word ‘intention’ does not appear in Article 16 either, and therefore it is asserted that abolitionist States can incur responsibility for aiding the use of the death penalty even if such States do not directly intend their conduct to do so. It is enough that such States ought to know that their conduct will facilitate the use of the death penalty and, as will be explained, such States are becoming increasingly aware of how their conduct might assist the use of the death penalty elsewhere.

Therefore, even though there is no textual provision in international law prohibiting abolitionist States from assisting the use of the death penalty, and even though the death penalty is permitted under general international law, State practice, read alongside actual and theoretical approaches to complicity and the obligation to protect, points toward an emerging obligation. The remainder of this article seeks to provide clarification of the extent of this secondary obligation by considering four ways in which a State might be complicit in the use of the death penalty elsewhere: (1) by extraditing an offender, (2) by failing to provide diplomatic protection to a national facing the death penalty, (3) by providing mutual legal assistance, police-police assistance, and other types of assistance and (4) by supplying, or allowing the supply, of goods that can be used in executions.

### III. THE OBLIGATION TO REFUSE EXTRADITION AND DEPORTATION

The extradition or deportation of an individual to a State where they are likely to face the death penalty is an example of a State facilitating the use of the death penalty elsewhere, since the death penalty can only be imposed with the assistance of the extraditing State. It has been established by the UN Human Rights Committee in *Judge v Canada*,<sup>42</sup> and by the European Court of Human Rights in *Al-Saadoon v UK*, that abolitionist States must seek assurances that

<sup>41</sup> JCHR (n 7) para 43.

<sup>42</sup> *Judge v Canada*, Comm No 829/1998, UN Doc CCPR/L/78/D/829/1998 (2003).

the death penalty will not be imposed before extraditing or deporting an individual to a State when there is a real risk that they will face the death penalty.

Although there is considerable literature on this issue already,<sup>43</sup> it is necessary to examine the development of international and European human rights law and the jurisprudence of some domestic courts on this point, in order to appreciate how this obligation has come about, and the rationale for this obligation.

#### *A. When There Was No Obligation to Refuse Extradition*

Many will be familiar with the case of *Soering v United Kingdom*, decided by the European Court of Human Rights in 1989,<sup>44</sup> and this section discusses how the law has developed since this decision. In *Soering*, the applicant argued that his proposed extradition from the UK to the USA violated his ECHR rights because he faced a real risk of being subjected to the death penalty. The Court held that the risk of being subjected to the death penalty did *not* violate Soering's right to life under Article 2 of the ECHR, because Article 2 explicitly permitted the death penalty. However, the Court considered the *manner* in which the death penalty was implemented, and held that there was a real risk of Soering suffering from the 'death row phenomenon' while awaiting execution, which would be contrary to Article 3 of the ECHR which prohibits cruel treatment and punishment.<sup>45</sup> The UK was therefore prohibited from extraditing Soering to the US without adequate assurances that the death penalty would not be sought.<sup>46</sup>

A similar approach was taken contemporaneously outside the European context. Two years after *Soering*, in *Kindler v Canada*, the Supreme Court of Canada also refused to rule that the risk of the imposition of the death penalty in and of itself placed an obligation on the abolitionist State to refuse extradition without assurances that the death penalty would not be sought.<sup>47</sup> When the UN Human Rights Committee heard the case in 1993, the Committee also decided that Canada had no duty to demand an assurance

<sup>43</sup> For example, see J Yorke, 'Europe's Judicial Inquiry in Extradition Cases: Closing the Door on the Death Penalty' (2004) 29 ELR 546; A Clapham, 'Symbiosis in International Human Rights Law: The *Öcalan* Case and the Evolving Law on the Death Sentence' (2003) 1 JICJ 475; A Sherlock, 'Extradition, Death Row and the Convention' (1990) 15 ELR 87; J Dugard and C Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187; CR Roecks, 'Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime' (1994) 25 CalWIntLJ 189.

<sup>44</sup> *Soering v United Kingdom* (App no 14038/88) (1989) 11 EHRR 439.

<sup>45</sup> The 'death row phenomenon' refers to the mental anguish that an individual might suffer when awaiting execution on death row. In this case, the individual's age of 19 years was a factor that was taken into account.

<sup>46</sup> Although some assurances had been given in this case, the Court agreed with the applicant that the assurances were very vague and did not rule out the possibility of the death penalty altogether.

<sup>47</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779.

that the death penalty would not be imposed.<sup>48</sup> It is clear, therefore, that in the early 1990s there was no international obligation on abolitionist States to refuse the extradition of an individual to States where they might face the death penalty.

*B. The Development of the Obligation to Refuse Extradition*

In 2001, in *United States v Burns*, the Canadian Supreme Court revisited its reasoning and decision in *Kindler*, and held that assurances must be sought in extradition cases involving the death penalty in all but the most exceptional of circumstances.<sup>49</sup> To do otherwise would be contrary to section 7 of the Canadian Charter of Rights and Freedoms, which protects the rights to life, liberty and security of the person. The Court based its reasoning on the international trend toward abolitionism: ‘The arguments against extradition without assurances have grown stronger since this Court decided *Kindler* . . . Canada is now abolitionist for all crimes, even those in the military field. The international trend against the death penalty has become clearer.’<sup>50</sup>

The UN Human Rights Committee picked up on this trend and in 2003 also reversed its decision in *Kindler*. In *Judge v Canada*, the HRC said that since *Kindler*, ‘there has been a broadening international consensus in favour of abolition of the death penalty’,<sup>51</sup> and that therefore, ‘[f]or countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.’<sup>52</sup> Furthermore, the HRC said that there would be a violation of the right to *life* under the International Covenant on Civil and Political Rights if an abolitionist State placed somebody at risk of the death penalty. This is a crucial development from the 1990s jurisprudence, which had only prevented extradition when the manner of the imposition of the death penalty constituted cruel or inhuman or degrading treatment or punishment.<sup>53</sup>

In the UN Secretary-General’s Eighth Quinquennial Report on the status of the death penalty worldwide between 2004 and 2008, it is noted that ‘[w]ith one exception, all fully abolitionist States responding to the questionnaire declared a policy of denying extradition to States where the death penalty might be imposed, unless assurances were given that the individual concerned could not be sentenced to death or, if sentenced to death, that the penalty would not be carried out.’<sup>54</sup> Only two abolitionist States are identified in the Report as having policies that do not unequivocally require assurances that the death

<sup>48</sup> *Kindler v Canada*, Comm No 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993) [14.6].

<sup>49</sup> *United States v Burns* [2001] 1 SCR 283 (Canada). <sup>50</sup> *ibid* [131].

<sup>51</sup> *Judge v Canada* (n 42) [10.3]. <sup>52</sup> *ibid* [10.4].

<sup>53</sup> For example, *Ng v Canada*, Comm No 469/1991, UN Doc CCPR/C/49/D/469/1991 (1994); *Soering v United Kingdom* (n 44).

<sup>54</sup> United Nations Economic and Social Council, *Report on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty* (18 December 2009) para 9. Available at <[http://www.unodc.org/documents/commissions/CCPCJ\\_session19/E2010\\_10eV0989256.pdf](http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf)> accessed 8 October 2012.

penalty will not be sought: Canada has a policy to obtain assurances ‘in all but exceptional circumstances’ and in Australia the ‘Attorney General has a residual power, “in ill-defined circumstances, to allow the extradition of a person to a State where he or she may face the death penalty”’.<sup>55</sup>

Returning to the European context, the European Union responded to the strengthening of the ‘abolition norm’<sup>56</sup> in international law and, more specifically, European human rights law by including a provision in the Charter of Fundamental Rights in 2000 that reads: ‘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 . . .’.<sup>57</sup> In 2005, in *Öcalan v Turkey*, the European Court of Human Rights was invited to find that Article 2(1) of the ECHR had been amended by State practice so as to prohibit the death penalty outright. The Court accepted that movements within the Council of Europe towards the absolute prohibition of the death penalty could signal ‘an agreement [of the Contracting States] to abrogate the exception provided for in the second sentence of Article 2(1)’.<sup>58</sup> However, although the Court did not exclude the possibility that Article 2(1) had been amended, it refrained from finding that Article 2 had been modified so as to no longer permit the death penalty.<sup>59</sup>

In *Al-Saadoon v United Kingdom* in 2010, though, the Court went beyond its decision in *Öcalan* and accepted that Article 2 could be said to have been amended by State practice. In this case, the applicants argued that their transfer from UK custody to Iraqi authorities to stand trial in Iraq for various offences violated their ECHR rights because they faced a real risk of being subjected to the death penalty. The Court held that the proposed transfer of the prisoners, without an assurance that the death penalty would not be sought, violated the applicants’ right to life under the Convention. The Court noted that all but two Member States have signed Protocol No. 13 to the ECHR, which prohibits the death penalty in all circumstances, and all but three of the Member States that had signed the Protocol had ratified the Protocol too. This led the Court to state: ‘These figures, together with consistent state practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances.’<sup>60</sup> It followed, for the Court, that ‘Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to

<sup>55</sup> *ibid* (quoting the Human Rights Committee, Concluding Observations on Australia (CCPR/C/AUS/CO/5), para 20).

<sup>56</sup> The ‘abolition norm’ refers to the emerging norm in international law that demands the prohibition of the death penalty. See B Malkani, ‘The Judicial Use of International and Foreign Law in Death Penalty Cases: A Poisoned Chalice?’ in A Sarat (ed), *Is the Death Penalty Dying?* (vol 42 Studies in Law, Politics and Society, Elsevier 2008).

<sup>57</sup> Charter of Fundamental Rights of the European Union, OJ EC 18 December 2000, 2000/C 364/1, art 19(2).

<sup>58</sup> *Öcalan v Turkey* (App no 46221/99) (2005) 41 EHRR 985 [162].

<sup>59</sup> *ibid* [162]–[165] Also see Clapham (n 43) 475.

<sup>60</sup> *Al-Saadoon* (n 1) [120].

another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.<sup>61</sup> The Court rejected the UK Government's argument that it was bound by international law to transfer the prisoners to Iraqi authorities notwithstanding the possibility of death sentences being imposed, because of the 'fundamental nature' of the right not to be subjected to the death penalty. The Court held:

... it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention. *This principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty and the grave and irreversible harm risked by the applicants.*<sup>62</sup>

### *C. Conclusions*

As international and European human rights law has moved towards the prohibition of the death penalty on the grounds that it is a violation of the right to life, there has been a correlative development of an obligation to refrain from extraditing or deporting an individual to a State where they might face the death penalty. The way in which this obligation has developed, and its scope, has ramifications for the argument that abolitionist States are obliged to refrain from assisting the use of the death penalty in other ways. It is significant that both the European Court and the HRC considered it irrelevant that the death penalty was lawful in the third State in the respective cases. This has implications for the way in which Article 16 of the ILC Articles on State Responsibility is used to develop a *lex specialis* on the topic of complicity and the death penalty. The issue is not whether the executing State would violate international law itself: it is the obligations of the abolitionist States that matter here.

As will be explained, though, the obligations to provide diplomatic protection; to refrain from providing mutual legal assistance or police-to-police assistance; and to refrain from providing materials that are used in executions, are not as historically well established as the obligation to refuse extradition without assurances that the death penalty will not be used. However, taking the principles established by the development of the prohibition on extradition, and taking recent developments in these fields into account, it is argued that the obligations on abolitionist States to refrain from other activities that facilitate the use of the death penalty is wider than currently appreciated by such States.

#### IV. ASSISTING NATIONALS ABROAD WHO ARE FACING THE DEATH PENALTY

In situations where a State's national is facing the death penalty abroad, the question arises regarding the obligation of the home State to protect their

<sup>61</sup> *ibid* [123].

<sup>62</sup> *ibid* [138] (emphasis added).

national from the death penalty by providing diplomatic or consular assistance. The traditional view is that the State has a discretionary power, but is not obliged, to offer protection. It is argued here, though, that the State's discretionary power is fettered in cases involving the death penalty.

Before setting out and critiquing the legal position, it is worth being clear about how a failure to provide diplomatic assistance can be construed as complicity in the death penalty. Put simply, foreign nationals who are arrested are often unable to understand the case that is being made against them, due to language barriers and unfamiliarity with the foreign legal system. Consular assistance can remedy this by ensuring that the individual is aware of such rights as the right to silence, and that the individual is able to present any relevant defences, or any relevant mitigating circumstances. Consular assistance thus reduces the risk of a wrongful conviction, and reduces the likelihood of the imposition of the death penalty.<sup>63</sup> Even if a State only becomes aware that its national is on death row after a sentence of death has been imposed, the home State can still assist with appeals and with making applications for clemency. If it can be shown that the chances of execution decrease when a home State intervenes on behalf of its national, then it can be inferred that a deliberate omission to provide assistance comes with it constructive knowledge on the part of the home State that it is making the imposition of the death penalty likelier.<sup>64</sup> If we accept this argument,<sup>65</sup> then we need to consider the extent to which abolitionist States are obliged to provide diplomatic assistance to nationals facing the death penalty abroad. It is concluded here that although States retain discretion whether to provide assistance or not, this discretion is tempered in death penalty cases. It is argued that there is a legitimate expectation that States will assist their nationals who are facing the death penalty abroad, and that domestic courts should take action if and when the relevant domestic authorities refuse to provide protection without giving sufficiently good reasons.

<sup>63</sup> C Buys, S Pollock and I Pellicer, 'Do Unto Others: The Importance of Better Compliance with Consular Notification Rights' (2011) *DukeJComp&IntlL* 461, 466–75. Also see the European Commission funded 'European Foreign Nationals Facing the Death Penalty' project run by the charity Reprieve. This Project aims to ensure that foreign nationals are provided with assistance from consular officials, with the founder of Reprieve asserting that governmental assistance makes a 'life and death' difference because, rather than seeking to execute 'some anonymous individual', the State is instead attempting to execute an individual who has the force of a government behind them. See <<http://www.reprieve.org.uk/investigations/ecproject/>> The interview with Clive Stafford Smith, in which he explains how consular assistance can help prevent executions, begins at 1:57 in the embedded video.

<sup>64</sup> On constructive knowledge being sufficient, see *JCHR* (n 7) para 35.

<sup>65</sup> It should be noted that there are many instances in which the home State has intervened but has not been able to prevent the execution of one of its nationals. For examples see *LaGrand Case (Germany v United States of America)* [2001] *ICJ Rep* 466; *Sanchez-Llamas v Oregon*, 548 US 331 (2006); B Simma and C Hoppe, 'From *LaGrand* and *Avena* to *Medellin*—A Rocky Road Toward Implementation' (2006) 14 *TulJIntl&CompL* 7; and the execution of British national Akmal Shaikh in China on 29 December 2009 (for information on this case, see <<http://www.reprieve.org.uk/cases/akmalshaikh/>> accessed 8 October 2012).



*A. The Position in International Law*

The position in international law is clear. Article 36(1)(b) of the Vienna Convention on Consular Relations provides a right for individuals to request consular assistance if they are arrested while abroad, and to be informed of this right.<sup>66</sup> However, there is no corresponding duty on the State of nationality to intervene and provide assistance. Despite the attempts of the Special Rapporteur, John Dugard, to establish a ‘duty to protect’, the ILC affirmed the traditional approach in its 2006 Draft Articles on Diplomatic Protection,<sup>67</sup> a position which is consistent with general international law and UK authority.<sup>68</sup> There are at least two reasons for adopting this position. The first relates to practical considerations, since it is arguably not feasible for a State to protect every national abroad. However, this is not so relevant in death penalty cases, since such cases are relatively rare. Another rationale for the rule lies in the requirement for States to take into account relations with foreign States. On occasion, it might be in the State’s overall interests not to interfere with the way in which a third State is treating its national, and it is certainly plausible that foreign relations concerns might weigh heavily on a State that is asked to protect a national abroad, regardless of whether they are facing the death penalty.

The ILC Articles on State Responsibility also do not provide a means for arguing that States are obliged to provide assistance, since the causal link between the omission to assist and the imposition of the death penalty is probably too remote for the purposes of responsibility. Although Article 16 is not determinative, when read in light of the restatement of the law on diplomatic protection in 2006, it is difficult to make the argument that international law obliges abolitionist States to provide diplomatic protection in all death penalty cases. However, recent developments in States such as the UK and South Africa suggest that there is a legitimate expectation that States will assist their nationals who are facing the death penalty abroad, and that domestic courts are able to take action if and when the relevant domestic authorities refuse to provide protection without sufficiently good reasons.

<sup>66</sup> But note the many cases in which individuals have not been informed of this right upon arrest, and have subsequently faced capital charges. In some cases, the individual’s home State has voluntarily intervened and attempted to prevent the execution. The efforts of Paraguay, Germany and Mexico to assist their nationals on death row in the United States of America, for example, has been well documented: see for example Simma and Hoppe (n 65); C Hoppe ‘Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights’ (2007) 18 EJIL 317.

<sup>67</sup> On the efforts of John Dugard to establish a duty to protect, and on the eventual rejection of Dugard’s proposals, see CF Amerasinghe, *Diplomatic Protection* (OUP 2008) 80–90.

<sup>68</sup> *China Navigation Co Ltd v Attorney General* [1932] 2 KB 197.

*B. Developments in National Law Creating an Obligation*

Although international law currently accepts that diplomatic protection is basically a discretionary matter for States, many States have created an obligation to provide assistance as a matter of domestic law. Laws to this extent can be found in the constitutional provisions of, inter alia, Hungary, Portugal, Poland, Ukraine, and Cambodia.<sup>69</sup> The German Federal Constitutional Court has taken the view that diplomatic protection must be exercised<sup>70</sup> as long as such assistance ‘does not run counter to truly overriding interests of the Federal Republic’.<sup>71</sup>

Even within the UK, which has traditionally adhered to the view that the power to exercise diplomatic protection is a matter of executive discretion, as part of the Royal Prerogative, the courts have been increasingly assertive, especially with respect to nationals who are facing human rights violations abroad. This issue has arisen in the context of British nationals being held by United States authorities in Guantánamo Bay. Although the English courts have reiterated the wide discretion afforded to the executive, they have restrained that discretion somewhat by stating that individuals have a legitimate expectation<sup>72</sup> that the State will at least *consider* helping them if they are subject to human rights violations. That is, there is a procedural obligation to consider providing diplomatic protection, even if there is no substantive obligation to actually provide assistance in any given case. This expectation takes on more force in cases involving serious violations of human rights, which the death penalty is increasingly being classified as.

In *R(Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, the Court of Appeal concluded that the British Government is under no duty to ensure that non-Contracting Parties (in this case, the US) observe the ECHR, and that it is not obliged to provide a remedy for violations of the ECHR committed by non-Contracting Parties when UK authorities are not complicit or causally connected to the violations.<sup>73</sup> Moreover, in Lord Phillips’ words: ‘It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State.’<sup>74</sup> However, the process by which the State reaches a decision in such cases can be open to judicial review.<sup>75</sup> In this particular case, though, it was clear that the Government had considered Mr Abbasi’s case, and its substantive decision not to assist Abbasi was not

<sup>69</sup> For a more comprehensive outline of which States have created a duty to provide diplomatic protection, see Amerasinghe (n 67) 82.

<sup>70</sup> *Hess-Entscheidung*, 7 July 1975, BVerfGE 55 (reproduced in 90 ILR (1992) 387) (cited by Amerasinghe (n 67) at 83).

<sup>71</sup> WK Geck ‘Diplomatic Protection’ (1992) 1 EPIL 1052 (cited by Amerasinghe (n 67) at 83).

<sup>72</sup> On this, see CRG Murray, ‘In the Shadow of Lord Haw Haw: Guantánamo Bay, Diplomatic Protection and Allegiance’ [2011] PL 115, especially at 122–4.

<sup>73</sup> *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.  
<sup>74</sup> *ibid* [69].  
<sup>75</sup> *ibid* [106(i)].

open to review. The courts followed this line of reasoning in the case of *Al Rawi*: despite evidence that the claimants had been ill-treated by US authorities, the English courts held that they could not compel the Government to act if there was no evidence that UK authorities had colluded in such treatment.<sup>76</sup>

On first reading, these two cases do not support the claim that abolitionist States are under a duty to assist nationals facing the death penalty abroad. However, there are at least two reasons for arguing that these cases actually do point towards such an obligation. First, the courts in *Abbasi* and *Al-Rawi* emphasized that the State will not be compelled to provide assistance when there is no evidence of collusion in the human rights abuse. On this point, it is arguable that death penalty cases are distinguishable from *Abbasi* and *Al-Rawi* because, as argued above, the State's inaction in death penalty cases facilitates or makes the imposition of the death penalty more likely. This is distinguishable from *Abbasi* and *Al-Rawi*, as in these cases the human rights abuses had already occurred, or were already occurring, prior to the State's inaction.

Second, the political effects of the *Abbasi* and *Al Rawi* judgments have had a considerable impact on the practice of diplomatic protection. Both cases had a 'ripple effect'<sup>77</sup> in that they stirred public opinion about the treatment of British citizens in Guantánamo Bay to such an extent that the Government felt compelled politically to seek their release from custody. Having done so, it is arguable that the UK Government has created a legitimate expectation for other individuals who are the subject of serious human rights violations while abroad. With the European Court of Human Rights stating that the imposition of the death penalty now constitutes a violation of 'fundamental' human rights under the ECHR in *Al-Saadoon*, it is plausible to argue that the UK Government is compelled to exercise diplomatic protection in cases involving British citizens facing the death penalty abroad.<sup>78</sup>

The Constitutional Court of South Africa has supported the contention that States are under a duty to exercise diplomatic protection in cases involving serious violations of fundamental human rights. In *Kaunda*, decided in 2004, 69 South Africans were arrested in Zimbabwe with a view to extraditing them

<sup>76</sup> *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279.

<sup>77</sup> CRG Murray, 'The Ripple Effect: Guantanamo Bay in the United Kingdom's Courts' (2010) 1 *Pace International Law Review Online Companion* 15.

<sup>78</sup> See, for example, the indication given by the British Government in 'Support for British Nationals Abroad: A Guide', issued by the Foreign and Commonwealth Office. On page 19 of the Guide, the following is written: 'If you are facing a charge that carries the death penalty, or if you have been sentenced to death, we will normally raise your case at whatever stage and level we judge to be appropriate.' <<http://www.fco.gov.uk/resources/en/pdf/2855621/english>> accessed 8 October 2012. Although the British Government does routinely assist nationals on death row abroad, the Government is not always able to prevent the execution. See, for example, the execution of Akmal Shaikh in China 29 December 2009 <<http://www.reprive.org.uk/cases/akmalshaikh/>> accessed 8 October 2012.

to Equatorial Guinea to face charges relating to an attempted coup in that country.<sup>79</sup> Fearing an unfair trial, ill-treatment and the death penalty, Kaunda et al petitioned the South African government to ensure that their rights under the South African Constitution were not violated. The Constitutional Court held that there was no obligation in either South African law or international law on States to provide diplomatic protection in such cases. However, the Court's reasoning and approach to the issue renders it possible to argue that there is now an obligation on the State to exercise diplomatic protection in cases involving the death penalty.

Chief Justice Chaskalson said that South African nationals may request 'the protection of South Africa in a foreign country in case of need'<sup>80</sup> and may 'have the request considered and responded to appropriately'.<sup>81</sup> The exact response to such a request, though, is at the discretion of the executive branch of government. Interestingly, though, the Court stated that there is still room for judicial oversight, and if the response is made in bad faith or is irrational, then the Court could order the executive to 'deal with the matter properly'.<sup>82</sup> Moreover, in their concurring opinions, Justice Ngcobo said that the State is 'obliged to take some steps when an egregious violation is being committed',<sup>83</sup> and Justice O'Regan said that there is a duty not 'to ignore' the request for diplomatic protection by 'a citizen who is threatened with or has experienced an egregious violation of human rights norms'.<sup>84</sup> Justice Sachs was of the opinion that the government is obliged 'to do whatever is reasonably within its power to prevent South Africans abroad . . . from being subjected to torture, grossly unfair trials and capital punishment'.<sup>85</sup> These statements reflect Chief Justice Chaskalson's view:

There may . . . be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.<sup>86</sup>

The Court ultimately held that there was no obligation on the State to protect nationals from the death penalty because international law does not forbid capital punishment. In other words, the imposition of the death penalty was not considered to be an 'egregious' violation or 'gross abuse' of human rights. Specifically, the Court said: 'Although the abolitionist movement is growing stronger at an international level, capital punishment is not prohibited by the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights, and is still not impermissible under

<sup>79</sup> *Kaunda and others v President of the Republic of South Africa* (2005) 4 SA 235.

<sup>80</sup> *ibid* [62].

<sup>81</sup> *ibid* [63].

<sup>82</sup> *ibid* [80].

<sup>83</sup> *ibid* [164].

<sup>84</sup> *ibid* [238].

<sup>85</sup> *ibid* [275].

<sup>86</sup> *ibid* [69].

international law.<sup>87</sup> This decision, though, was issued in 2004. We have already seen above that international law, especially European human rights law, has since moved towards abolition. Given the decision in *Al-Saadoon* in 2010, it is arguable that if the facts of *Kaunda* came before the European Court of Human Rights today, and the Court was to follow the South African Constitutional Court's approach, the European Court would say: 'the abolitionist movement *has grown* stronger at an international level, and capital punishment *is* prohibited by the European Convention on Human Rights'. If the death penalty is classified as an 'egregious' human rights violation, it arguably follows that there is a duty, at least on States party to the ECHR, to provide diplomatic protection when its individuals are facing the death penalty abroad.

### *C. Conclusions*

While States will always have a degree of discretion in the field of diplomatic protection, it is arguable from *Kaunda* and *Al-Saadoon* that courts—both domestic and international— should not unquestionably defer to the judgment of the executive when the State decides not to assist a national facing the death penalty abroad. Indeed, it is difficult to think of a 'good' reason for not offering protection. It is arguably easier to think of 'good' reasons for extraditing an offender notwithstanding the risk of the death penalty. For example, if the individual concerned in an extradition case is considered to be a significant threat to the public, an abolitionist State might have good reasons for wishing to ensure that that person is extradited. However, the law is quite clear in extradition cases that such reasons will not be accepted, and it follows that the law should be reluctant to accept reasons for not providing diplomatic assistance in death penalty cases. Having said this, the obligation to consider exercising protection cannot yet extend to a mandatory obligation to provide protection in all cases involving the death penalty.

#### V. THE OBLIGATION TO WITHHOLD ASSISTANCE IN CASES THAT MIGHT LEAD TO THE IMPOSITION OF THE DEATH PENALTY

Mutual legal assistance and police-to-police assistance are the processes through which one State provides assistance to another State with evidence, resources and/or intelligence in the investigation and prosecution of criminal offences in that other State.<sup>88</sup> In addition to case-specific assistance, ongoing inter-State assistance is also a feature of initiatives to combat transnational

<sup>87</sup> *ibid* [98].

<sup>88</sup> Mutual legal assistance is the phrase applicable when a judicial or prosecuting authority in another State makes a request to another State for assistance, whereas police-to-police assistance is the phrase applicable when the police force of one country makes a request to the police force of another country for assistance.

crimes, such as drug smuggling and human trafficking. In some cases, such assistance can lead to the arrest, trial and execution of an individual.<sup>89</sup> Some anecdotal examples are provided in order to illustrate exactly how the provision of assistance can comprise complicity in the use of the death penalty. This is followed by the argument that abolitionist States are obliged to withhold assistance from retentionist States without assurances that the death penalty will not be imposed in any conviction that results from such assistance, at least when it may be reasonably anticipated that the death penalty will be sought in any resulting criminal case.

#### *A. Examples of Assistance Facilitating the Use of the Death Penalty*

In 2011, the Attorney General of Antigua revealed that UK authorities had provided assistance in a homicide investigation without assurances that the death penalty would not be sought. With the UK's assistance, Antiguan authorities arrested two individuals and sought to sentence them to death, notwithstanding the UK's belated request for the death penalty not to be imposed. According to the Attorney General: 'having given us the assistance, [the British government] basically indicated that they hoped we would take their views into consideration in terms of this matter.'<sup>90</sup> Although the death penalty was ultimately not imposed on the offenders in question, this was because of the presiding judge's opinion that the facts of the case did not warrant the death penalty, and not because of the British government's post-assistance request.<sup>91</sup> In February 2012, two senior police officers from Dyfed-Powys Police were sent to Thailand to assist the Thai authorities with the investigation of the murder of a UK national in 2000. No discussions, however, have taken place regarding sentencing in this case, leaving it possible that UK police could be complicit in the imposition of the death penalty if such a penalty is sought as the result of any arrest arising from the investigation.<sup>92</sup>

Assistance on an ongoing basis in order to combat transnational crimes has also been provided by abolitionist States without due regard to the possibility of death sentences being imposed. For example, the UK government, alongside

<sup>89</sup> On the tension between respecting human rights generally and the need to provide and receive mutual legal assistance, see R Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 *CrimLF* 143.

<sup>90</sup> R Turner 'Death penalty not ruled out as killers of Welsh honeymooners face sentencing' *Wales on Sunday* (25 September 2011) <<http://www.walesonline.co.uk/news/wales-news/2011/09/25/death-penalty-not-ruled-out-as-killers-of-welsh-honeymooners-face-sentencing-91466-29482484/>> accessed 8 October 2012.

<sup>91</sup> 'Mullany Murders: Honeymooners' Killers Jailed for Life' *BBC News* (16 December 2011) <<http://www.bbc.co.uk/news/uk-wales-south-west-wales-16214772>> accessed 8 October 2012.

<sup>92</sup> Request for information under the Freedom of Information Act 2000 and response on file with the author; B Wright, 'British police assist Thai murder enquiry' *The Independent* (London, 16 February 2012) <<http://www.independent.co.uk/news/world/asia/british-police-assist-thai-murder-inquiry-6988692.html>> accessed 8 October 2012.

other governments and international organizations such as the United Nations Office on Drugs and Crime (UNODC) and the European Commission, provide various types of assistance in counter-narcotics efforts in Iran, yet Iran regularly imposes the death penalty for drug-related offences.<sup>93</sup> As stated by the International Harm Reduction Agency (IHRA): 'In countries that have legislation allowing for the death penalty for drug offences, such funding, training and capacity-building activities—if successful—result in increased convictions of persons on drug charges and therefore potentially increase death sentences and executions.'<sup>94</sup> The IHRA has claimed that as a direct result of a project funded by, inter alia, the United Kingdom, the United Nations, and the European Commission, a drug trafficker named Han Yongwan was arrested, tried, and executed in China on 26 June 2008.<sup>95</sup>

More recent reports by Harm Reduction International (formerly IHRA) and Human Rights Watch, in June and August 2012 respectively, detail how a steep rise in the number of executions for drug-related offences in Iran, Afghanistan and Pakistan has coincided with the provision of money and equipment supplied by the UNODC for anti-drug trafficking initiatives. Abolitionist States such as the UK, France and Canada are named as donor States to the UNODC.<sup>96</sup> Japan is also listed as a donor State and, while Japan has not abolished the death penalty outright, it has abolished the death penalty for drug offences in line with international standards on the death penalty. Since the death penalty for drug offences is an 'internationally wrongful act', retentionist States could also incur responsibility for complicity in the imposition of the death penalty for drug related offences.<sup>97</sup>

Recently, abolitionist States and other organizations have indicated an awareness that the provision of case-specific and ongoing assistance can

<sup>93</sup> 'Death Penalty for Drug Offences: Global Overview 2010' International Harm Reduction Association (3 June 2010) <[http://www.ihra.net/files/2010/06/16/IHRA\\_DeathPenalty\\_Report\\_Web.pdf](http://www.ihra.net/files/2010/06/16/IHRA_DeathPenalty_Report_Web.pdf)> accessed 8 October 2012.

<sup>94</sup> 'Complicity or Abolition? The Death Penalty and International Support for Drug Enforcement' (2010) International Harm Reduction Agency (21 June 2010) 6 <[http://www.ihra.net/files/2010/06/20/IHRA\\_ComplicityorAbolition.pdf](http://www.ihra.net/files/2010/06/20/IHRA_ComplicityorAbolition.pdf)> accessed 8 October 2012.

<sup>95</sup> *ibid* 20.

<sup>96</sup> See the press release issued by Human Rights Watch: <<http://www.hrw.org/news/2012/08/21/iran-donors-should-reassess-anti-drug-funding>> accessed 8 October 2012; Harm Reduction International, 'Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights' (2012). <[http://www.ihra.net/files/2012/06/20/Partners\\_in\\_Crime\\_web1.pdf](http://www.ihra.net/files/2012/06/20/Partners_in_Crime_web1.pdf)> accessed 8 October 2012. Also see J Doward, 'Has Britain's war on drugs led to more executions in Iran?' *The Guardian* 15 September 2012 <<http://www.guardian.co.uk/world/2012/sep/15/britain-drugs-war-executions-iran?INTCMP=SRCH>> accessed 8 October 2012.

<sup>97</sup> HRC Concluding Observations: Iran, UN Doc CCPR/C/79/Add.25 (1993) para 8: 'considers the imposition of [the death] penalty . . . for crimes that do not result in loss of life, as being contrary to the Covenant'. Indeed, it is remarkable that the United Nations plays such a major role in the provision of assistance and resources when it is the United Nations that has been one of the major proponents for the abolition of the death penalty, especially for drug offences.

facilitate the use of the death penalty elsewhere. In December 2010, the European Parliament called for guidelines to govern

international funding for country-level and regional drug enforcement activities to ensure such programmes do not result in human rights violations, including the application of the death penalty; [and has stressed] that the abolition of the death penalty for drug-related offences should be made a precondition for financial assistance, technical assistance, capacity-building and other support for drug enforcement.<sup>98</sup>

In the UK, in 2011, the Foreign and Commonwealth Office issued a document titled ‘Overseas Security and Justice Assistance: Human Rights Guidance’ to all staff involved in the provision of assistance overseas, making it clear that officials should seek assurances that the death penalty will not be imposed prior to providing assistance in both case-specific situations, and on an ongoing basis.<sup>99</sup> In 2012, the UNODC issued a ‘position paper’<sup>100</sup> setting out the organization’s human rights obligations, recognizing the ‘obligation to protect’ under human rights law.<sup>101</sup> According to the position paper, ‘[i]f . . . a country actively continues to apply the death penalty for drug offences, UNODC places itself in a very vulnerable position *vis-à-vis* its responsibility to respect human rights if it maintains support to law enforcement units, prosecutors or courts within the criminal justice system.’ The document goes on to explicitly address the issue of State responsibility:

Whether support technically amounts to *aid or assistance* to the human rights violation will depend upon the nature of technical assistance provided and the exact role of the counterpart in arrest, prosecutions and convictions that result in application of the death penalty. 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.<sup>102</sup>

This resonates with the Commentaries to the ILC Articles: ‘There is no requirement that the aid or assistance should have been essential to the

<sup>98</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter [65] <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0489&language=EN>> accessed 8 October 2012.

<sup>99</sup> ‘Overseas Security and Justice Assistance: Human Rights Guidance’ (OSJA Guidance) <<http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/osja-guidance-151211.pdf>> accessed 8 October 2012. Also, In July 2012, an Early Day Motion was tabled before Parliament calling on the Government to promote anti-drug trafficking initiatives that ‘respect, protect and fulfil human rights.’ The Early Day Motion can be read at <<http://www.parliament.uk/edm/2012-13/by-topic/724/drugs-crimes>> (EDM No 384) accessed 8 October 2012.

<sup>100</sup> UNODC, ‘UNODC and the promotion and protection of human rights’ <[http://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_HR\\_position\\_paper.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UNODC_HR_position_paper.pdf)> accessed 8 October 2012.

<sup>101</sup> *ibid* 4.

<sup>102</sup> *ibid* 10 (emphasis in original).



performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.<sup>103</sup>

The approaches taken by the European Parliament, the FCO and the UNODC are comparable to the approach taken by abolitionist States in diplomatic protection cases: attempts should be made by the abolitionist State to ensure that the death penalty is not imposed before providing assistance, but States are under no legal duty to withhold assistance without assurances that the death penalty will not be imposed. Such an approach, though, is not appropriate. Mutual legal assistance and police-to-police assistance cases are more comparable to extradition cases than to diplomatic protection cases, and the approach taken should therefore mirror the approach taken in extradition cases. In *United States v Burns*, for example, the Supreme Court of Canada characterized extraditions as a form of mutual legal assistance,<sup>104</sup> and it follows that the principles that apply to extradition cases should also apply to assistance cases. The following sets out why the current approaches are not adequate, and explains why, as in extradition cases, there should be an obligation to seek assurances that the death penalty will not be imposed, and an obligation to withhold assistance in the absence of such assurances.

*B. Current Approaches: Restraining, But Not Prohibiting, the Provision of Assistance*

The European Union, the United Kingdom and Australia have all taken the view that although assistance should generally not be provided, in some circumstances assistance can be provided without seeking assurances, or can be provided even if sought assurances are not forthcoming.

Article 11 of the Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters, for example, permits, but certainly does not demand, EU States to refuse assistance unless an assurance is provided by Japan not to seek the death penalty.<sup>105</sup> Before the British government opted into this Agreement, the matter was debated by the European Scrutiny Committee in Parliament, with the Parliamentary Under-Secretary of State for the Home Department stating that

Agreed Government policy, in mutual legal assistance cases in which there is a risk of the death penalty being imposed for the crime under investigation, is that we would seek assurances that anyone found guilty would not face the death penalty before providing assistance.<sup>106</sup>

<sup>103</sup> Commentary to art 16 (n 15) para 5.

<sup>104</sup> *United States v Burns* (n 49) [73].

<sup>105</sup> Agreement between the European Union and Japan on mutual legal assistance in criminal matters [2010] OJ L39/20, art 11(1)(b) read in conjunction with art 11(4).

<sup>106</sup> European Scrutiny Committee, *Mutual Legal Assistance in Criminal Matters between the EU and Japan* (HC 2009–10, 4). <<http://www.publications.parliament.uk/pa/cm200910/cmgeneral/euro/100202/100202s01.htm>> accessed 8 October 2012.

It is notable, though, that the UK has entered into several bilateral treaties that do *not* explicitly state that assistance can be or must be refused without assurances that the death penalty will not be sought or imposed.<sup>107</sup> The treaties do have clauses that allow the refusal of assistance if ‘the execution of the request would prejudice the sovereignty, security, *ordre public* or other essential interests of the Requested Party’,<sup>108</sup> and it is possible for the imposition of the death penalty to be construed as prejudicial to the ‘*ordre public*’ or ‘essential interests’ of the United Kingdom, but it is by no means clear that the UK *must* seek assurances and *must not* provide assistance without such assurances.<sup>109</sup>

Indeed, there is no reference at all to the death penalty in the eighth or ninth editions of the Mutual Legal Assistance Guidelines that is provided to other countries that seek the UK’s assistance.<sup>110</sup> This is in contrast to the seventh edition, which specifically referred to the possibility of refusing requests that were considered ‘inappropriate on public policy grounds (for example, requests involving double jeopardy will not be executed; there are also issues surrounding requests where the death penalty is an issue . . .)’.<sup>111</sup> The removal of this reference hardly emphasizes a policy or obligation on the part of the UK to refuse assistance without assurances. Indeed, the removal of this reference suggests that there is no duty to even *consider seeking* such assurances.<sup>112</sup>

The UK has recently moved towards creating an obligation to consider withholding assistance without assurances that the death penalty will not be sought. The 2011 ‘Overseas Security and Justice Assistance: Human Rights Guidance’ makes it clear that risks to human rights

<sup>107</sup> For a list of such treaties, see the website of the Foreign and Commonwealth Office: <<http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/treaty-command-papers-by-subject/crime>> accessed 8 October 2012.

<sup>108</sup> Treaty between the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters (Cmd 7879) (2009), art 4. <[http://www.fco.gov.uk/resources/en/pdf/3706546/3892733/21824849/Tr\\_VietnamMLA\\_July2010](http://www.fco.gov.uk/resources/en/pdf/3706546/3892733/21824849/Tr_VietnamMLA_July2010)> accessed 8 October 2012.

<sup>109</sup> Having said this, the following response from the UK Central Authority to a request under the Freedom of Information Act should be noted: ‘UKCA may refuse an MLA request if, for instance, the execution of the request would prejudice the sovereignty, security, *ordre public*, or other essential interests of the UK. This would include requests where the requesting State did not give assurances that it would not seek the death penalty. I can therefore disclose that MLA has not been provided in any cases where the requesting State refused to issue assurances that it would not seek the death penalty.’ (Received on 10 May 2012. Request and response on file with the author).

<sup>110</sup> Mutual Legal Assistance Guidelines for the United Kingdom (9th edn) 8 April 2011 <<http://www.homeoffice.gov.uk/publications/police/operational-policing/mla-guidelines-9th-ed?view=Binary>> accessed 8 October 2012.

<sup>111</sup> Mutual Legal Assistance Guidelines for the United Kingdom (7th edn) 25 June 2009, chapter 3, at 13. <http://www.homeoffice.gov.uk/publications/police/operational-policing/MLA-Guidelines-7th-edition?view=Binary>> accessed 8 October 2012.

<sup>112</sup> A request for an explanation under the Freedom of Information Act 2000 was refused on 1 May 2012 under section 35(1)(a) on the grounds that the formulation or development of Government policy is exempt (request and response on file with the author).

should be considered before the provision of assistance is made, and paragraph 13 places the death penalty at the top of the list of such human rights risks.<sup>113</sup> However, in Annex B of the Guidance, the following is written:

Where there is a significant risk of the death penalty being imposed for the crime under investigation, the policy is:

- a) Written assurances *should* be sought before agreeing to the provision of assistance that anyone found guilty would not face the death penalty.
- b) Where no assurances are forthcoming *or where there are strong reasons not to seek assurances*, Departmental Ministers (including FCO) should be consulted to determine whether, given the specific circumstances of the case, *we should nevertheless provide assistance*.
- c) In exceptional circumstances, where it is imperative that we act quickly to safeguard the integrity of evidence or protect British lives, UK personnel should be allowed to deploy immediately without seeking assurances about the death penalty. Departmental Ministers (including FCO) should be consulted and consideration given to seeking assurances in slower time.<sup>114</sup>

Although the presumption is that assurances should be sought, there are some unspecified circumstances in which the authorities can refrain from seeking assurances, or can provide assistance even if sought assurances are not forthcoming. Although there have to be ‘strong reasons’ for not seeking assurances, no guidance is given as to what sorts of reasons will be ‘strong’ enough.

This issue has also received considerable attention in Australia. Until 2009, the position was that unless a person had already been charged with an offence that carries the death penalty, Australian authorities could provide assistance irrespective of whether or not the investigation might later lead to the imposition of the death penalty. This much is made clear in the ‘Australian Federal Police (AFP) Practical Guide on International Police-to-Police Assistance in Death Penalty Charge Situations’.<sup>115</sup> However, this Guide was reviewed following the Bali Nine case in 2005–06. In this case, the AFP assisted Indonesian authorities with the arrest of nine Australians on drug-trafficking charges, three of whom were sentenced to death. Although a legal challenge against the AFP failed in 2006,<sup>116</sup> the public outcry that resulted from the prospect of Australians being executed with the assistance of

<sup>113</sup> Although this list is not ranked in order of importance, it is nonetheless striking that the death penalty is at the top of the list.

<sup>114</sup> ‘Overseas Security and Justice Assistance: Human Rights Guidance’ (n 99) 16 (emphasis added).

<sup>115</sup> The AFP Practical Guide is available through the website of the New South Wales Council for Civil Liberties website: <<http://www.nswccl.org.au/docs/pdf/afp%20dp%20guidelines.pdf>> accessed 8 October 2012.

<sup>116</sup> *Rush v Commissioner of Police* [2006] FCA 12 (Federal Court of Australia).

Australian authorities<sup>117</sup> led to the adoption in 2009 of the ‘AFP Practical Guide on International Police-to-Police Assistance in Potential Death Penalty Situations’.<sup>118</sup>

The 2009 Guide sets out ten factors that must be taken into account before assistance is provided in a situation involving or potentially involving the death penalty. The factors include things such as ‘the person’s age and personal circumstances’, ‘the potential risks to the person, and other persons, in not providing the information’, and ‘Australia’s interest in promoting and securing cooperation from overseas agencies in combating crime.’

The AFP is only obliged to consider these factors, and is not obliged to withhold assistance even if it is considered likely that the death penalty will be imposed. The rationale for limiting the obligation to merely *considering* withholding assistance is that Australia, like all other States, has a public policy interest in tackling crime, especially transnational crimes such as drug trafficking that directly affect the State. It follows that States should therefore have the discretion to provide assistance notwithstanding the potential imposition of the death penalty. This mirrors the approach taken in Australian legislation. Section 8 of the Mutual Assistance in Criminal Matters Act 1987, as amended in 1996, specifically states that:

A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, *unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.*<sup>119</sup>

Finlay has argued that this approach is compatible with Australia’s obligations under international and domestic law relating to the prohibition of the death penalty,<sup>120</sup> writing that ‘Australia’s current approach strikes an appropriate and practical balance between competing public policy interests, namely Australia’s opposition to the death penalty and broader law enforcement objectives.’<sup>121</sup> As the Law Council of Australia has pointed out, though, treating the abolition of the death penalty as a public policy consideration is not consistent with Australia’s stated opposition to the death penalty in all

<sup>117</sup> See references to media reports discussed in L Finlay, ‘Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia’ (2011) 33 *Sydney Law Review* 95.

<sup>118</sup> For the AFP Guide, see <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205401745\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401745_text)> and <<http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/OG00014%20-%20International%20police%20to%20police%20assistance%20in%20death%20penalty.ashx>> accessed 8 October 2012.

<sup>119</sup> Emphasis added. In *Rush v Commissioner of Police* (n 116), it was held that the Bali Nine case did not fall under this Act because the Indonesian authorities had not made a formal request for assistance. The AFP volunteered the information to the Indonesian authorities.

<sup>120</sup> Finlay (n 117).

<sup>121</sup> *ibid* 96.

circumstances.<sup>122</sup> The abolition and opposition of the death penalty is not a public policy objective that can be set aside when expedient to do so, and therefore assistance should be withheld when assurances are not forthcoming, regardless of the State interest in combating crime.<sup>123</sup>

The Law Council's criticisms do not appear to have been taken on board by the Ministry of Justice, since the revised Guidelines published in February 2012 retains the list of ten factors. The new 'AFP National Guideline on international police-to-police assistance in death penalty situations'<sup>124</sup> draws a distinction between those cases where no person has been arrested or charged, and those cases where an individual has been arrested or charged. In cases involving the former, any request for assistance that potentially has death penalty implications must go through a formal approval process 'when there is a *reasonable likelihood* that the assistance to be provided will result in a person being arrested, detained, charged or convicted for a death penalty offence'.<sup>125</sup> This goes further than the 2009 Practical Guide as it puts the onus on the AFP to inquire whether there is potential for the death penalty to be an issue. However, the AFP is still able to provide assistance in potential death penalty situations, provided the ten factors have been taken into account. In cases involving persons already arrested or charged with offences that attract the death penalty, assistance can only be given with the approval of the Attorney General or the Minister for Home Affairs and Justice. There is little guidance, though, on how the Attorney General or Minister will come to their decisions, and of course there is still explicitly scope for assistance to be provided notwithstanding the risk of the death penalty.

*C. An Obligation to Seek Assurances, And to Withhold Assistance without Assurances*

As the European Court of Human Rights and Human Rights Committee have said in extradition cases, the prohibition of the death penalty brings with it the obligation to ensure that no individuals are put at risk of the death penalty in any country. Given that extradition is a type of mutual legal assistance,<sup>126</sup> it follows that abolitionist States should refuse the provision of assistance without similar assurances. Indeed, in *Al-Saadoon*, the European Court

<sup>122</sup> Letter from Glenn Ferguson, President of the Law Council of Australia, to The Hon Brendan O'Connor MP, Minister for Home Affairs, 29 January 2010. <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=D02680F0-1E4F-17FA-D22C-26C61CEDF5C2&siteName=1ca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=D02680F0-1E4F-17FA-D22C-26C61CEDF5C2&siteName=1ca)> accessed 8 October 2012.

<sup>123</sup> For example, it is unclear why a person's age is relevant to such determinations, when Australia prohibits the death penalty in all cases, regardless of age.

<sup>124</sup> Available at <<http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/NAT12011%20International%20Police-to-police%20Assistance%20in%20Death%20Penalty%20Situations%2014MAY2012.ashx>> accessed 8 October 2012.

<sup>125</sup> Emphasis added.

<sup>126</sup> *United States v Burns* (n 49) [73].

rejected the UK's argument that it was obliged to hand the applicants to the Iraqi authorities because of its obligations under international law, stating that Contracting States are not permitted to enter into agreements with another State which conflicts with its obligations under the ECHR.<sup>127</sup> In the context of MLA and police-to-police assistance, and in the context of ongoing assistance, this can be reworded to read: 'it is not open to a Contracting State to enter into an agreement *to provide legal or police or other assistance to another State if such assistance conflicts with its obligations under the Convention.*' While States must be able to assist each other in the fight against crime, the prohibition and opposition of the death penalty is not something that can be set aside for the sake of convenience. Abolitionist States do not set aside opposition to the death penalty when crimes that shock the public occur in a domestic setting, despite calls to do so, and it follows that such States must not be complicit in the administration of the death penalty elsewhere for expedient's sake, even if the actual or threatened crime has an impact in the abolitionist State. Abolitionist States should therefore ensure that assistance is only provided when assurances have been received that the death penalty will not be imposed as the result of any such aid or assistance.

The approach put forward above takes its lead from the law that applies to extradition cases. A possible counterargument to the above is that, in extradition cases, States are only under a duty to seek assurances because the individual at risk of facing the death penalty is within the jurisdiction of the abolitionist State. In contrast, in other types of assistance cases, there is no identifiable individual within the jurisdiction of the abolitionist State, thus placing a jurisdictional limit on the scope of the abolitionist States' obligations. The issue of jurisdictional limits is also applicable to the next method of complicity—the supply of materials that can be used in executions—and is therefore considered in detail after an outline of this fourth method of complicity. It will be argued that States should not hide behind the veil of jurisdictional limits.

VI. THE OBLIGATION TO REFRAIN FROM PROVIDING, OR ENABLING THE PROVISION  
OF, MATERIALS THAT ARE USED IN EXECUTIONS

Abolitionist States might knowingly or inadvertently facilitate the use of the death penalty elsewhere by providing materials that are used in executions. In recent years, steps have been taken to restrict trade in such goods, and it is arguable that a legal obligation to refrain from providing, or enabling the provision of, materials that can be used in executions is developing.

A useful starting point for this discussion is 2005, when the European Union adopted a regulation that introduced export controls on goods that are used in

<sup>127</sup> *Al-Saadoon v United Kingdom* (n 1) [138].

capital punishment.<sup>128</sup> The restrictions imposed by this regulation—commonly called the Torture Regulation because it also imposes controls on goods that are used in torture—is limited to goods that are solely designed for use in executions, such as electric chairs, gallows, and automatic drug injection systems. In more recent years, there have been concerns with the exporting of drugs that are used in lethal injections. In the United States, lethal injections have historically consisted of a cocktail of three drugs, which are imported from companies overseas.<sup>129</sup>

In *R (Zagorski and Bale) v Secretary of State for Business, Innovation and Skills*,<sup>130</sup> the claimants—US citizens facing the death penalty in the United States—sought controls on the export of sodium thiopental from a company based in the UK. The claimants, though, failed in their challenge under the Torture Regulations, with the High Court pointing out that the regulations only imposed controls on the export of goods that had no other use than for the death penalty, and did not prohibit ‘the export of goods which “could be used” for the purpose of capital punishment’.<sup>131</sup> The Court noted that the drug in question could also be used for legitimate medical purposes, and therefore held that no export controls should be imposed.

Although Zagorski and Bale did not succeed in their legal challenge, several private companies and abolitionist States have subsequently taken steps to ensure that they do not knowingly or inadvertently supply prisons with the drugs required for lethal injections. In November 2010, the British Government enacted controls after it became clear that the US was importing the drug from UK companies for the sole and specific purpose of lethal injections. The UK has also enacted controls on the export of pancuronium bromide, potassium chloride, sodium pentobarbital and propofol, a drug that prison authorities have turned to in the wake of the restrictions on the supply of sodium thiopental.<sup>132</sup> The pharmaceutical firm Hospira, based in Italy, has ceased exporting sodium thiopental for the same reason (but still exports pancuronium bromide), and in Germany the Trade Minister Philipp Rösler in 2011 refused a request from the US Commerce Secretary to export sodium

<sup>128</sup> Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L200/1, Annex II.

<sup>129</sup> Companies in the US generally do not produce these drugs since there is little profit to be made from them.

<sup>130</sup> *R (Zagorski and Bale) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin).<sup>131</sup> *ibid* [46].

<sup>132</sup> See ‘The consolidated list of strategic military and dual-use items that require export authorisation (Annex III)’, Department for Business Innovation and Skills (August 2012). The short title of the List is ‘The UK Strategic Export Controls List’ and it can be viewed at <<http://www.bis.gov.uk/assets/biscore/eco/docs/control-lists/12-1014-uk-strategic-export-control-list-consolidated.pdf>> accessed 10 December 2012. Also see the associated press release from the Department for Business Innovation and Skills: <<http://news.bis.gov.uk/Press-Releases/Government-bans-export-of-lethal-injection-drugs-to-the-US-6657f.aspx>> accessed 10 December 2012.

thiopental for use in lethal injections.<sup>133</sup> The Danish company Lundbeck has also ceased trading in drugs that are used in lethal injections. It is not just companies in European countries that have taken steps to cease trade in chemicals that can be used in lethal injections—in November 2011, the Indian pharmaceutical firm Naari recalled its supply of sodium thiopental from the state of Nebraska after finding out that the drugs were to be used in executions.<sup>134</sup> US authorities have attempted to amend the three-drug cocktail in light of these developments, with the state of Missouri, for example, implementing a one-drug method of lethal injection. The single drug to be used—propofol—was to be imported from the German firm Fresenius Kabi, but this firm has also resisted trading in materials that are used in lethal injections.<sup>135</sup>

In addition to these private companies taking steps to restrict the trade of materials that can be used in executions, the European Union amended the 2005 Torture Regulation on 20 December 2011 to include chemicals used in lethal injections, illustrating the move towards prohibiting all trade in materials that might be used to administer capital punishment.<sup>136</sup> All these actions represent recognition on the part of States, companies, and the European Union that, at least on moral and political grounds, abolitionist States should not facilitate the administration of the death penalty elsewhere by providing the materials that are required to carry out executions.

Despite these developments, the extent to which abolitionist States are under a legal duty under international law to ensure that private companies under their jurisdiction do not trade in such materials has not been as well articulated as the other obligations discussed in this paper. This is arguably because of jurisdictional limitations. Zagorski and Bale's legal challenge also faltered on jurisdictional grounds because they were not at any material time under the jurisdiction of the United Kingdom, and thus could not rely on the protections of the ECHR or the EU Charter on Fundamental Rights. This question of jurisdiction is also relevant to the provision of assistance discussed above, and it is a question that requires particular attention.

#### VII. JURISDICTIONAL LIMITS ON THE OBLIGATION TO REFRAIN FROM AIDING AND ASSISTING THE USE OF THE DEATH PENALTY

The last two methods of complicity discussed above—the provision of assistance and the supply of materials used in executions—raise difficult

<sup>133</sup> 'German Minister Denies US Request for Execution Drugs' *Der Spiegel*, 6 September 2011 <<http://www.spiegel.de/international/world/european-opposition-to-death-penalty-german-minister-denies-us-request-for-execution-drugs-a-767613.html>> accessed 8 October 2012.

<sup>134</sup> Information about the recent controls on the exportation of drugs to the United States of America can be found at Reprive's Stop the Lethal Injection Project website: <<http://www.reprive.org.uk/investigations/executiondrugs/>> accessed 8 October 2012.

<sup>135</sup> On this development, see <[http://reprive.org.uk/publiceducation/2012\\_03\\_26\\_slip\\_further\\_detail/](http://reprive.org.uk/publiceducation/2012_03_26_slip_further_detail/)> accessed 8 October 2012.

<sup>136</sup> Commission Implementing Regulation (EU) No 1352/2011 [2011] OJ L 338.



questions relating to jurisdiction. In her article on the AFP Practical Guide, Lorraine Finlay explains why, in her view, the Second Optional Protocol to the ICCPR does not prohibit Australia from providing mutual legal and police-to-police assistance in actual or potential death penalty cases. Article 1 of the Second Protocol refers to the prohibition of the death penalty ‘within the *jurisdiction*’ of a State party, and Finlay argues:

The wording of this article places a clear and unambiguous jurisdictional limitation on the nature of the obligation. The article does *not* impose an obligation on States not to expose a person to the real risk of the application of the death penalty. Rather, the language expressly limits the obligation to the abolition of the death penalty within the State’s own jurisdiction.<sup>137</sup>

In extradition and diplomatic protection cases, the individual at risk of the death penalty is clearly within the jurisdiction of the abolitionist State. In extradition cases, the abolitionist State has territorial jurisdiction over the individual, and in diplomatic protection cases, ‘... although the State in which the wrong was perpetrated has territorial jurisdiction over the alien, the State of nationality retains its personal jurisdiction over its national, even while he or she is residing in another State.’<sup>138</sup> However, if for example the UK provides intelligence to Iran which is then used to arrest, try and execute an Iranian national in Iran, the UK cannot be responsible under the ECHR for the violation of that individual’s rights. As already noted, Zagorski and Bale’s legal challenge against the export of drugs that are used in lethal injections faltered on jurisdictional grounds.

To say that States owe no duty to protect the rights of individuals outside its territorial or personal jurisdiction, though, depends on rather narrow conceptions of jurisdiction and obligations under human rights treaties. There is extensive case law and literature that demonstrates the ever-increasing extraterritorial scope of obligations under human rights treaties,<sup>139</sup> and it is plausible to argue that the requirement of jurisdiction is satisfied when the act that leads to the wrong occurs within the territory or effective control of the

<sup>137</sup> Finlay (n 117) 109 (emphasis in original).

<sup>138</sup> Amerasinghe (n 67) 23. Also see G Leigh, ‘Nationality and Diplomatic Protection’ (1971) 20 ICLQ 453.

<sup>139</sup> For a fuller account of jurisdiction under the ECHR following *Al-Skeini*, see A Cowen, ‘A New Watershed? Reevaluating *Banković* in light of *Al-Skeini*’ (2012) 1 Cambridge Journal of International and Comparative Law 213. For accounts of the extraterritorial application of human rights treaties generally, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011); M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010); F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), especially the chapter by D McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’. The issue of jurisdiction under human rights treaties has more recently been examined in APV Rogers and D McGoldrick, ‘Assassination and Targeted Killing—The Killing of Osama Bin Laden’ (2011) 60 ICLQ 778, 784–7.

abolitionist State. An examination of some of the authorities will explain why this is a plausible approach to the question of jurisdiction.

The European Court of Human Rights has noted that ‘the term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.’<sup>140</sup> This was given a narrow interpretation by the Court in *Banković v Belgium*,<sup>141</sup> which was accepted by the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*.<sup>142</sup> In these cases, it was stated that the rights guaranteed by the ECHR could only be relied upon by those within the territory of a Member State, ‘other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case . . .’.<sup>143</sup> In 2011, though, in *Al-Skeini v United Kingdom*,<sup>144</sup> the European Court widened the concept of jurisdiction for the purposes of the ECHR, holding that a State has jurisdiction for acts committed extraterritorially when it exercises ‘public powers’ on the territory of another State. This illustrates a growing concern among the judiciary about the extraterritorial abuse of Convention rights.

Article 2(1) of the ICCPR stipulates that a State party must respect and protect the rights of ‘all individuals within its territory and subject to its jurisdiction’. The Human Rights Committee has stated that this ‘means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.<sup>145</sup> This approach to jurisdiction was adopted by the International Court of Justice in its Advisory Opinion on Israel’s construction of a security wall in the West Bank, in relation to the applicability of the International Covenant on Economic, Social and Cultural Rights.<sup>146</sup>

It is clear, then, that obligations under human rights treaties extend beyond territorial borders, but it remains to be seen whether the provision of assistance or materials that are used in executions can be construed as the exercise of ‘public powers’ as per the ECHR, or whether the person at risk of the death penalty in these types of cases can be deemed to be ‘within the power or effective control’ of the abolitionist State as per the ICCPR. It would be difficult to make the case that abolitionist States have power or effective control over individuals in these cases, and it is also difficult to argue that an abolitionist State is exercising ‘public powers’ abroad when it supplies or

<sup>140</sup> *Drozd and Janousek v France and Spain* (App no 12747/87) (1992) 14 EHRR 745.

<sup>141</sup> *Banković v Belgium and Others* (App no 52207/99) (2007) 44 EHRR 1.

<sup>142</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

<sup>143</sup> *Banković* (n 141) [61].

<sup>144</sup> *Al-Skeini v United Kingdom* (App no 55721/07) (2011) 53 EHRR 18.

<sup>145</sup> Human Rights Committee, CCPR General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, para 10.

<sup>146</sup> ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 131.

allows the supply of materials that are used in executions. However, it is certainly arguable that the presence of, for example, UK police abroad to help with investigations constitutes the exercise of 'public powers' in the territory of another State. Although of course the police themselves would not impose the death penalty as such, when considered alongside the extradition cases of *Soering* and *Al-Saadoon*, it is clear that abolitionist States need to be more careful about providing assistance without assurances that the death penalty will not be imposed. Moreover, the developing law on the scope of extraterritorial obligations under human rights treaties suggests that the issue of jurisdictional limits need not be determinative of the scope of abolitionist States' secondary obligations to refrain from facilitating the use of the death penalty elsewhere. In an article on the relationship between mutual legal assistance and human rights, Robert Currie discusses the provision of evidence to another State for use in an unfair trial, noting that: 'To provide evidence for use in a foreign criminal procedure that amounts to a "flagrant denial" of fair trial rights, simply on the basis that "our human rights obligations don't cover the accused," may render the requested State complicit in conduct which it has agreed to prohibit, necessarily leaving a bad taste from a legal and moral standpoint.'<sup>147</sup> The same can be said about the provision of assistance that leads to the imposition of the death penalty: knowingly facilitating the death penalty to occur abroad, but not taking steps to prevent this merely because 'our human rights obligations don't cover the accused', leaves a questionable aftertaste, and it is for this reason that the UK government, the UNODC, the Australian Federal Police and the European Union have all taken some steps to address the relationship between the provision of assistance and materials and other resources, and the use of the death penalty. These authorities have not attempted to hide behind the issue of jurisdictional limits, and this issue should therefore not be used as a means of limiting the obligation to refrain from aiding and assisting the use of the death penalty elsewhere.

#### VIII. CONCLUSIONS

It would seem that whenever abolitionist States have facilitated the use of the death penalty elsewhere, they have done so inadvertently, rather than intentionally. This is arguably because of the lack of any comprehensive outline of the secondary obligations imposed on abolitionist States to refrain from aiding and assisting the use of the death penalty elsewhere. At present, these legal, political and moral obligations are somewhat disjointed, as court judgments such as *Al-Saadoon*, and political and moral efforts such as the UK's Strategy for Global Abolition of the Death Penalty, and the Australian Federal Police's guidelines, have emerged in the absence of any clearly articulated list of obligations. Although these abolitionist States have

<sup>147</sup> Currie (n 89) 153.

themselves weaved a web of obligations to ensure that their actions do not directly or indirectly facilitate the administration of the death penalty, such States have not been consistent in their approaches, either between themselves or within themselves. This has been particularly true in cases involving the provision of resources and aid for anti-drug trafficking initiatives in countries that still impose the death penalty for drug offences.

The enactment of official policies on extradition, diplomatic protection, mutual legal assistance and police-to-police assistance, and controls on the exportation of goods that can be used in executions, go some way to limiting, if not eradicating, State complicity in the use of the death penalty. To ensure that abolitionist States adopt a consistent and more effective approach to avoiding complicity in the use of the death penalty, though, it would perhaps help if a comprehensive list of positive and negative duties was drawn up, comparable to EU Torture Regulations. This article has gone some way to developing such a list.

It is important for State practice to continue in the direction that it has been going, so that such practice can influence the interpretation of restrictions on activities that advertently or inadvertently assist the administration of the death penalty elsewhere. State practice was instrumental in the European Court of Human Rights' decision in *Al-Saadoon*, and abolitionist States should therefore be encouraged to continue issuing policies and official pronouncements to the effect that they will not engage in activities that facilitate the use of the death penalty, regardless of jurisdictional limits and so on. Moreover, particularly in instances of case-specific and ongoing assistance in criminal investigations, these policies should make it clear that, as in cases involving extradition and the death penalty, opposition to the death penalty will not be set aside on policy and national interest grounds. This would certainly more closely align with States' principled opposition to the death penalty both at home and abroad.