

protecting people whose lives are endangered by unacceptable discrimination

v i v e r e

CAMPAIGN TO ABOLISH THE DEATH PENALTY AND LIFE IMPRISONMENT WHEN APPLIED TO CHILDREN ¹

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¹ This file will be using the word "child" throughout for all under-18s, since it promotes full implementation of the *Convention on the rights of the child* (1989 - ratified by all countries, except USA) - according to Article No 1: « *a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.* » "Child" must be applied to all under-18s globally: rights are inalienable with no exceptions, even the 17-year-old violent re-offender.... The terms "juvenile" and "minor" are legal terms specific to minimum age of criminal responsibility in country-specific national legislations. In this document, when the quotes are mentioning "minor" or "juvenile", it means exactly the same definition as for "child".

In this survey, the issue is specifically dealing with detainees sentenced to death and being adults in the death row for crimes committed when they were children.

1 - Introduction

This document is set out by the Swiss association *Vivere*² in its' campaign to achieve - by 2025³ - the abolition of the death penalty and life imprisonment for crimes committed under the age of 18. This action forms an integral part of the universal campaign to abolish the death penalty⁴. No sector of the population at risk of the death penalty should be given precedence over another, at the expense of others ; the fight to abolish the death penalty is an inalienable principle which makes no distinction between human beings. However, the specific arguments for abolishing the death penalty when applied to children supplement the universally applicable arguments, and thus serve as a stepping stone towards the abolition of the death penalty and life imprisonment in general. This campaign is based primarily on Articles 6 and 37 of the **Convention on the rights of the child** (1989), here called « **Convention** »⁵ :

« **Article 6** :

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child. »

« **Article 37** : *States Parties shall ensure that :*

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age ; » (...)

In this document, the term “child” refers to Article 1 of the **Convention** (CRC - See Note No. 1).

To our knowledge, no Court in any country takes the decision to *execute* a human being under the age of 18, when their age has been proven. The question arises when an individual has committed a crime before the age of 18, has been sentenced to death, but has then become an adult in prison (for appeal, for presidential clemency, etc).

The **United Nations Committee on the rights of the child**⁶ stipulates, in its ‘*General Observations No 10*’ on justice for minors, that :

“ *Article 37 (a) of CRC reaffirms the internationally accepted standard (see for example article 6 (5) of ICCPR) that the death penalty cannot be imposed for a crime committed by a person who at that time was under 18 years of age. Although the text is clear, there are States parties that assume that the rule only prohibits the execution of persons below the age of 18 years. However, under this rule the explicit and decisive criteria is the age at the time of the commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.*”

² « **VIVERE** » website and presentation of the campaign : http://vivere.ch/crbst_19_en.html

³ The deadline of 2025 matches the strategy of the **Swiss Federal Department of Foreign Affairs** in its campaign against the death penalty in the world :

<https://www.eda.admin.ch/eda/en/home/foreign-policy/human-rights/human-rights-policy/die-schweiz-setzt-sich-fuer-eine-welt-ohne-todesstrafe-ein.html>

⁴ «**VIVERE** » is a member of the **World Coalition against death penalty**: <http://www.worldcoalition.org/index>

⁵ **CONVENTION ON THE RIGHTS OF THE CHILD** (1989) :

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁶ **COMMITTEE ON THE RIGHTS OF THE CHILD** (OHCHR) - « *General comment No 10* » :

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en

Most NGOs and institutions working to promote children's rights often deal with the subject of the death penalty and life imprisonment, but as a side issue. There are, however, cases of juvenile offenders, which are often covered up or where the facts have been manipulated, and whose the judicial procedure even contravene the specific legal agreements on children rights that these same States have ratified.

Although the actual number of children (when committing offence) being executed when they are adults is each year relatively small compared to the number of executions carried out worldwide, the extent to which these are illegal and complete disregard for humanity they show, are reason enough to justify a specific approach. However, in all countries, there are pro bono lawyers and activists from non-governmental organizations, working for the defence of detainees, whose commitment and determination must be highlighted.

This document aims to provide activists and those working for children's rights, as well as lawyers defending children implicated in a criminal case, to supplement their legal expertise and knowledge of their political contexts with arguments issued from international instruments to be addressed to the authorities and decision makers, who adopted, signed and ratified them and who have the mandate and the means to ensure that children's rights are respected and enforced.

2 - The facts

The death penalty is still used as a punishment and is enforced upon adults for crimes committed, whilst under the age of eighteen, in at least **13 countries** ⁷. Some of these countries do not carry out the death penalty, but others do, despite having ratified international legal instruments. They often legitimise this by citing the predominance of cultural, traditional or religious practices over civil law, by the - sometimes deliberate - uncertainty as to the age of the suspect, by the seriousness of the crimes, or by various pressures (public opinion, political interest, community leaders etc). Some countries maintain that the age of legal responsibility is fixed, either at the '*age of puberty*' or at 16. In fact, these countries implicitly authorise, or carry out the death penalty on adults, but who were 14, or between 16 and 18 when the offence was committed.

Life imprisonment is sanctioned, explicitly or otherwise, for children in **67 countries** ⁸. This is therefore something that cannot be considered as rare or exceptional. Life imprisonment can mean that there is no chance of being freed, but it can also mean that there is no set length to the period of detention. Whatever the case, it means that children can be locked up for life.

Below are some recent examples that we have been made aware of from extremely reliable sources :

Pakistan (juillet 2017) : « *M.I. was a juvenile at the commission of an offence. For the time being his execution has been stayed until the final disposal of the mercy petition. His trial was concluded in 1999 and his appeal to Lahore High Court was dismissed in 2002. A first Mercy petition has been rejected by the President of Pakistan : a second Mercy Petition, on humanitarian grounds has been issued in August 2017. He has been languishing in jail for 18 years. (...) Pakistan had already executed two juveniles in 2014 and 2015.* » (by correspondence from his lawyer)

Iran : « *Alireza Tajiki was executed on August 10 th, 2017 for offences he allegedly committed when he was 15. Alireza, was sentenced to death in 2013 following a conviction for murder. (...) Alireza is the fourth person to be executed this year in Iran for an offence allegedly committed as a child, while*

⁷ Saudi Arabia, Brunei Darussalam, United Arab Emirates, Iran, D.R of Laos, Malaysia, Maldives, Nigeria, Pakistan, Qatar, Somalia, Tonga, Yémen. This list might be updated at any time, according to information received and checked.

⁸ CHILD RIGHTS INTERNATIONAL NETWORK (CRIN):

<https://www.crin.org/en/library/publications/inhuman-sentencing-life-imprisonment-children-around-world>

88 child offenders remain on death row”⁹. Between January 1st, and March 15th, 2018, three inmates have been executed, whose one woman, for crimes committed before the age of 18. »

Saudi Arabia : *Fears that the Kingdom could be hours away from carrying out another round of unlawful executions were prompted on 14 July 2017, when all 14 men and boys were transferred from their detention in Al-Mabahith prison in Dammam to Riyadh in preparation for their execution after their death sentences were confirmed on 25 May 2017. Among the 14 are juveniles Mujtaba Sweikat and Salman Qureish, who were just 17 years old in 2012 when they were alleged to have participated in protests, in connection to which they were sentenced to death.*” (...) ¹⁰

3. The specific definition of a child

A child is a human being under the age of 18 and is worthy of the same respect as any other human being. However, a child is in a transitional phase of life and thus only has the capacity to make judgements, and express or defend him/herself in relative terms. A child has the inalienable right to grow up in a healthy environment on both a natural and human level, in a community which provides education, health and affection. This lies at the root of a child’s ability to flourish and progress in life.

A child may be vulnerable due to a variety of factors : lack of experience, inadequate upbringing and education, a developing personality and/or an inability to ward off bad influences. A child is less able than an adult to understand the consequences of his/her actions. A child is more likely to react emotionally or to be susceptible to - and act under - pressure from others.

The logic which, under civil law, exempts a minor of age from being treated the same as an adult should run in parallel to the logic used in criminal law. In state civil law, children are treated differently from adults : if a child under the age of 18 does not have the right to vote, or to see certain films, or to consume alcohol, etc ... because he/she has not reached the full maturity of an adult, what legal justification is there for subjecting a child to the same punishment as an adult, especially in the case of the death penalty or life imprisonment ?

Moreover, there are serious shortcomings in many of the legal cases which culminate in the death penalty, such as: an absence of documents or use of false identities, the substitution of identity, incomplete, fabricated or lost files, the absence or inadequacy of a social report, confessions obtained under duress or violence, preventive detention when awaiting trial of sometimes several months or years, external pressure exerted on the court, reference to customary or religious law, non-recognition of physical or mental handicap, a sentence exclusively based on the notion of "deserving of death"(which is a subjective and undemonstrable verdict), etc. In every case where proper procedure has broken down, the vulnerability and lack of ability of a minor to defend him/herself, is aggravating and clearly demonstrates the failure of the system in question. Condemned to death for being deemed to be “beyond redemption ? ”

Capital punishment when carried out on minors is not only indefensible (it contravenes the right to life), but also absurd, as it states with absolute certainty that a human being will never be able to reform. If, in civil law, a child cannot give his/her valid consent before the age of 18, because he/she is still developing, how is it possible for the same child to be judged as having given his/her consent for an act and to be fully aware of the consequences of this same act, when a crime of the utmost seriousness has been committed ?

Article 6 of the Convention states : “2. *Parties shall ensure to the maximum extent possible the survival and development of the child*”. The personality of a child is not stable, nor is it deemed to be « beyond redemption » : a child does not premeditate, rationally or deliberately, the pros and cons of his act in stark comparison with adults ; a certain immaturity, a physical, emotional or psychological impulsiveness and naïvety should not mean that he/she is judged as an adult would be. If the principle

⁹ AMNESTY INTERNATIONAL :

<https://www.amnesty.org/en/latest/news/2017/08/iran-shameful-execution-of-man-arrested-at-15/>

¹⁰ REPRIEVE (UK Ngo) :

https://www.reprive.org.uk/wp-content/uploads/2017/07/2017_07_15_PUB-KSA-Letter-to-Prime-Minister-re-imminent-executions-in-Saudi-Arabia.pdf

whereby human beings are able to rehabilitate is so widely accepted for all perpetrators of adult crimes, then why would this not be the case for children, potentially more capable of change than adults ? Every human being under the age of 18 at the time of the offence must be given a second chance, with appropriate follow-up and support. Rights enshrined in a Convention are inalienable : they can't be taken away just because we don't like what a particular child had done.

"A child is not a miniature adult, a child is a developing person in the making. The idea of bringing the justice of minors closer to that of adults is the very negation of what it means to be a child." (Robert Badinter) ¹¹

"Young people are more likely to evolve and therefore have a greater capacity for reintegration than adults." (Mary Robinson, former High Commissioner for Human Rights) ¹²

The definition of "the best interest of the child" is inevitably vague, in so far as true juvenile justice is defined by the protection of the child *and* by the punishment or measure that he/she is given. However, this punishment cannot be carried out without a view to healing the offender : the interests of the victims and that of the community must also be taken into account, whilst also working towards reintegrating the child into the community.

4. Age assessment

In several countries, the process whereby births are registered is basically defective, or may even be locally non-existent : the absence of a proven date of birth, or even the circulation of false identity papers, create a serious risk that a child may fall prey to arbitrary procedures the consequences of which are not understood - that is if the language is understood in the first place (the child may be a foreigner).

In addition, data (from **CRIN**) reveal the following age related statistics for criminal responsibility : 12 countries do not have a legal age of criminal responsibility, in 46 countries the age is between 7 and 10 years, 78 countries between 10 and 13 years, and 63 between 14 and 16 years. Many countries are lowering or contemplating lowering the age of criminal responsibility, in order, supposedly to reassure public opinion of their authority and their willingness to "effectively" combat juvenile delinquency. ¹³

It is completely unacceptable that a human being should be condemned to death on the basis of the argument *"his facial hair is sufficient proof of his maturity"*... To determine chronological age, it is essential to understand that there may be a difference in maturity that can range from 3 to 5 years depending on the early or late physical development of a child.

In certain countries, when a doubt exists over the suspect being a minor, he/she may find him/herself wrongly judged based on the severity of the crime, ignoring the question of age. Whilst different morphological tests do exist, the calibration how they are measured may vary from one continent to another. International norms dictate that the accused should always benefit from the existence of any doubt, instead of being condemned to death, even if there is doubt. In the countries that consider that medical tests (which may include tests showing growth problems) and radiograms (if reliable) indicate a range of possible ages, it is the lowest age which should be the determinant. Other countries consider that an age difference of more than 3 years between bone age and the claimed age is potentially suspicious. In fact, 11 of the available age assessment techniques have significant margins of error. However in any case, where there is less than 3 years difference in age, the guidelines set by the **High Commission for Refugees** recommends : *« If an assessment of the child's age is necessary, the following considerations should be noted:*

¹¹ Robert BADINTER :

<http://www.telerama.fr/idees/robert-badinter-on-passe-d-une-justice-de-liberte-a-une-justice-de-surete-c-est-inquietant,38335.php>

¹² Mary ROBINSON (former UN High Commissioner for human Rights) quoted by Amnesty International :

<https://www.amnesty.org/download/Documents/88000/act500012004fr.pdf>

¹³ CRIN : <https://www.crin.org/en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility>

a) Such an assessment should take into account not only the physical appearance of the child but also his/her psychological maturity.

b) When scientific procedures are used in order to determine the age of the child, margins of error should be allowed. Such methods must be safe and respect human dignity.

c) The child should be given the benefit of the doubt if the exact age is uncertain.

Where possible, the legal consequences or significance of the age criteria should be reduced or downplayed. It is not desirable that too many legal advantages and disadvantages are known to flow from the criteria because this may be an incentive for misrepresentation. The guiding principle is whether an individual demonstrates an “immaturity” and vulnerability that may require more sensitive treatment. » ¹⁴

The **Committee of the rights of the child** ¹⁵ considers what should be adhered to in all circumstances : “ Age assessment (...) should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child ; giving due respect to human dignity ; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such ;”(...)

According to UNICEF ¹⁶, “Age assessments are conducted in cases when a child’s age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual. It is important that such assessments are conducted in a safe, child-and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child. As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child’s age. »

5 - The abolition of the death penalty is an international obligation

The abolition of the death penalty is henceforth being promoted as a fundamental principle and inalienable human right. The right to life and the right not to be subjected to inhuman, cruel or degrading treatment are, of themselves, absolute justification, on an international level for the abolition of the death penalty.

The **International Covenant on Civil and Political Rights**, which is one of the main treaties relating to human rights, stipulates in Article 6 that: « 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women ». The PIDCP was ratified by 169 countries in the middle of August 2004. ¹⁷

The **Convention on the Rights of a Child** (Article 37) prohibits the death penalty and life imprisonment for all persons under the age of 18. This Convention has been ratified by 193 States- i.e, every country apart from the United States of America. (See note 5).

The **African Charter on the Rights and Welfare of Children** stipulates in article 5-3 : « Death sentence shall not be pronounced for crimes committed by children. » Article 2 of this Charter, ratified

¹⁴ UNITED NATIONS HIGH COMMISSION FOR REFUGEES : “Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum » - No 5.11 : <http://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html>

¹⁵ COMMITTEE ON THE RIGHTS OF THE CHILD (OHCHR) - « General comment No 6 » (parag. 31-1): http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRC_Observation_Generale_6_2005_fr.pdf

¹⁶ UNICEF 2011 - Smith&Brownlees: “Age assessment practices: a literature review & annotated bibliography» : https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf

¹⁷ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS - 1976 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

by 33 African States, also stipulates that the term ‘child’ designates all human beings aged less than eighteen years.¹⁸

The **American Convention on human rights** envisages in article 4: « 5. *Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age;*(...) »¹⁹

In 1984, the **Economic and Social Council (ECOSOC)** adopted the « *Safeguards guaranteeing protection of the rights of those facing the death penalty* » (Guarantee n° 3) : « *Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death* » (...) ²⁰

According to **Amnesty International**, « *Child executions violate international law. The international consensus against putting child offenders to death for their crimes reflects the widespread recognition of the capacity of young people for growth and change. The life of a child offender should never be written off, whatever he or she has done. The guiding principle must be to maximize the child offender’s potential for eventual successful reintegration into society. Execution is the ultimate denial of this principle.* » ²¹

Officially, there is still debate over whether or not the definition of the death penalty should be classified as a form of torture: in his report of August 2012, M. Juan Mendez, **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment** ²², asserts : « *A new approach is needed as there is evidence of an evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This evolving standard, along with the resulting illegality of the death penalty under such prohibition, is developing into a norm of customary law, if it has not already done so. (...) Even if the emergence of a customary norm that considers the death penalty as per se running foul of the prohibition of torture and cruel, inhuman or degrading treatment is still under way, most conditions under which capital punishment is actually applied renders the punishment tantamount to torture.* »

Vivere’s campaign primarily targets countries where the death penalty or life imprisonment of children is authorised, or not explicitly forbidden. This also extends to situations where there is internal or international armed conflict in countries, since children are exposed - at least - to the same risks. An armed conflict in no way absolves adults/states from their legal obligations with regards to children, who even more than in peacetime, are subjected to pressure, manipulation and constraints, but are still judged for having committed (or having been complicit in) a crime. For most children, the experience of having been recruited has of itself been traumatic, whatever his/her participation as a party to the fighting, or only as a witness, etc... Not to forget that children are victims of extra-judicial executions, no more and no less than adults soldiers...

The **Convention on the protection of civilian persons in time of war** of the 12 th August 1949 (Fourth Geneva Convention) states in article 68 : « *in any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.* » ²³

¹⁸ **AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF CHILDREN** - 1999
https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf

¹⁹ **AMERICAN CONVENTION ON HUMAN RIGHTS** -1969
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.html

²⁰ **ECONOMIC AND SOCIAL COUNCIL (ECOSOC)** : « *Safeguards guaranteeing protection of the rights of those facing the death penalty* » - 1984 - Guarantee No 3
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>

²¹ **AMNESTY INTERNATIONAL** - *Stop Child Executions !*
<https://www.amnesty.org/download/Documents/88000/act500152004en.pdf>

²² **UNITED NATIONS** - Doc No A/67/279
<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/458/12/PDF/N1245812.pdf?OpenElement>

²³ **CONVENTION (IV) relative to the PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1949)** :
<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/TRA/380?OpenDocument&>

The **Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I)**, states in article 77: « 5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed. » ²⁴

The **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)** stipulates in article 6-4 : 4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. ²⁵

The context of armed conflict and related references in the **Geneva Conventions (and Protocols)** with regard to the protection of civilian populations, are therefore not specifically treated in this document. It should, however, be remembered that :

- The **Rome Statute on International Criminal Court** states :« For the purpose of this Statute, "war crimes" means: (xxvi)Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. » ²⁶

- the then **Secretary General of the United Nations**, Mr. Kofi Anan, adds : “is of the opinion that Courts should be able to judge child soldiers between the ages of 15 to 18 according to the ‘seriousness of the crimes for which they were accused’. (...) However, only a handful of child soldiers will be brought to justice. Mr Annan asserts that no child will be condemned to prison and recommends that their trial be subject to special measures.”- ‘Libération’ (France - 06.10.2000)

6 - International recognition of common practice (« *jus cogens* »)

In addition to the aforementioned legal instruments is the fundamental principle of international law and the notion of ‘*jus cogens*’ the definition of which is given in the **Vienna Convention on the law of treaties** (1969):

Article 53. *Treaties conflicting with a peremptory norm of general international law (« JUS COGENS »)* : « For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. » ²⁷

Amnesty International, for its part, adds: « The fact that the provision of restricting the death penalty to offenders above 18 years of age is so widespread, the fact that leading international instruments set a minimum of 18 years for the imposition of the death penalty and the fact that the death penalty is so rarely used against offenders under 18, even in countries where the law sets a minimum age lower than 18 or none at all, indicate that there is an emerging consensus that execution of juveniles for crimes committed under the age of 18 is contrary to international law. » ²⁸

²⁴ **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**, 8 June 1977.

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/TRA/470?OpenDocument&>

²⁵ **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)**, 8 June 1977.

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/TRA/475?OpenDocument&>

²⁶ **ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT - Article 8**, alinéa xxvi :

<https://childrenandarmedconflict.un.org/keydocuments/english/romestatuteofthe7.html>

²⁷ **VIENNA CONVENTION ON THE LAW OF TREATIES(1969) :**

<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

²⁸ **AMNESTY INTERNATIONAL :** <https://www.amnesty.org/en/documents/asa33/007/1995/en/>

7 - The pretext of 'Reservations' to guarantee impunity ?

The **Convention on the rights of the child** was adopted by the General Assembly of the United Nations on November 20th, 1989 and ratified by every single country in the world apart from the United States of America. Any State can, however put up 'Reservations' during the two successive stages of signature and ratification of an International Convention.

The **Convention on the law of treaties** (1969) states (see note 26) :

Article 2. 1 : (...) (d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State ; (...)

Art. 19 - « Formulation of reservations - A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless : (...) (c) in cases (...) the reservation is incompatible with the object and purpose of the treaty. »

Many countries who carry out the death penalty to offenders under eighteen years old at the time of the offence, have made general 'Reservations' : *“(This) is the case for certain Islamic States who wish to protect the close ties that exist between their legal systems and the religious order and who state, for example, that : “The provisions of the Convention shall be interpreted in the light of principles derived from Islamic laws and values.” It should be noted that such reservations have not been made by all States for whom Islam is the official religion ; some have chosen to refine their reservations, or have declined to make any. (...) These reservations affect all of the rights guaranteed by the Convention as well as its internal status.(...) The internationally recognised rights of children are not rejected per se ; but it is an open question whether or not the ratification of the Convention is rendered meaningless since its totality is reduced to the level of a simple international declaration.”*²⁹

Moreover, the unquestionably legal status of “Reservations” would indicate that any State making a *General reservation on the entire text* has actually decided to withdraw from any constraint and to contradict the Article 51 (2) of the Convention which it has ratified. *« - 2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted. »*

The **Vienna Convention on the law of Treaties** (1969) adds :

« Article 27. Internal law and observance of treaties - A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. » (see note 27)

The **Committee on the rights of the child** (paragr. No 20) adds :

*(...) « Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention. In case of any conflict in legislation, predominance should always be given to the Convention, in the light of article 27 of the Vienna Convention on the Law of Treaties.”*³⁰

The fact that *Reservations* are completely legal does not make them any less illegitimate. They render it impossible for any evolution to take place with regards to a State's internal legislation regulating child protection and even sanctions all kind of regressive measures that can be carried out with total impunity. How can it be that a *Reservation*, made out of religious conviction for instance, can be used to justify the legalisation of state-sponsored homicide, which itself represents the utmost violation possible of a human being ? and also in direct contradiction to the universally accepted consensus as to the relative ability of a child to make a judgement, to express him/herself or to defend him/herself ? What is a State's

²⁹ Marie-Françoise LUCKER-BABEL - French original version :« Les réserves à la Convention des Nations Unies relative aux droits de l'enfant et la sauvegarde de l'objet et du but du traité international » : <http://www.ejil.org/pdfs/8/4/790.pdf>

³⁰ COMMITTEE ON THE RIGHTS OF THE CHILD - General Comment No 5 : http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en

ratification worth if it can be unilaterally and publically revoked by simply declaring a *General Reservation* to a whole Convention and for there to be no consequences ?

Moreover, even if a '*Reservation*' has legal international status, no State is '*bound by its own Reservation*' : the Convention is a treaty which relates to human rights and does not have any bearing on the relationship between States. A State is thus completely within its rights to retract its Reservation, or to decide not to apply it, and would not suffer any consequence. Egypt in July 2001, Indonesia in February 2005, Morocco in October 2006, etc, are examples of States that withdrew their Reservations they had made at the time of signing and ratifying the Convention.

In 2006, the **Committee on the rights of the child** (responsible for controlling the application of the Convention, according to its Chapter 5) addressed one country as follows : « *The Committee (...) reiterates its concern that the general nature of the reservation allows courts, governmental and other officials to negate many of the Convention's provisions and this raises serious concerns as to its compatibility with the object and purpose of the Convention.* »³¹

Furthermore, the President of the Committee followed this up by stating that : « *It is very clear that a reservation based on religious grounds is contrary to the aims and objectives of the Convention on the Rights of the Child, and that this can in no way be used to justify the death penalty, since this runs contrary to one of its core principles and objectives- the respect of life : to ensure the survival and development of the child. (Article 6).* » (Pr Jean Zermatten, former President of the Committee on the Rights of the Child)

The United Nations does not provide for a procedure whereby a country which has ratified a Convention, but whose laws or national practice violate the said Convention, is excluded or has sanctions raised against it. However, this does not negate or discredit the existence of established international norms ; on the contrary, the international conventions relating to human rights are the only legitimate tools that actors in civil, national and international society can use if they are to form their own analysis to confront States who violate these norms through their laws or practices.

This is the background from which *Vivere* advocates the mobilisation of International NGOs who specialise in juvenile justice, with a view to creating the framework for an **Opinion Tribunal**³² similar to those created in the past. This would enable us to establish the facts and demonstrate proof of these violations, with witnesses, prosecution and defence lawyers, public prosecutors and independent judges, drawn from civil society, and whose integrity and competence is above question on an international level. The resulting conclusions and judgements should be made widely available on a global level in the media and on social networks. This would have a very real impact on certain elements of public opinion and thus on the international image of the country concerned.

8 - The question of cultural diversity

The pretext of cultural differences is misplaced : cultural rights must not be invoked or interpreted as to justify any act which leads to denying or violating any human right or fundamental freedom. Human rights are not in conflict with cultural diversity, and children from countries which apply the death penalty to minors of age, be, are not "worse" than the children of abolitionist countries.

In all countries, the law is an expression of a system of values, which have evolved through history and which continue to evolve. All cultures, even those which are religiously inspired, establish norms of « good and evil », « true and false », « violent and nonviolent », « freedom and slavery », etc.

The law is based on universally shared values which are the subject of the **Universal Declaration of Human Rights**³³ and many other legal instruments which have been *negotiated, adopted, signed* and *ratified* by countries of all different cultures.

In reality, all countries are subject to both progressive and regressive change, between the interpretation of social and cultural values and the legislative framework. They are sometimes called so-

³¹ COMMITTEE ON THE RIGHTS OF THE CHILD - Document CRC/C/SAU/CO/2 - par.7 :

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FSAU%2FCO%2F2&Lang=en

³² OPINION TRIBUNAL organized by DCI-Interntional against detentin of migrant children in Belgium - Cf. pages 17 à 30 du lien suivant (website only in french) : http://www.sdj.be/admin/docmena/Dossier_Final_FR.pdf

³³ "Universal Declaration of Human Rights" : <http://www.un.org/en/universal-declaration-human-rights/>

called “Swing States”, which “go back and forth” in their accentuation or alleviation of the repressive nature of the regime. It is not so much a matter of the interpretation of religious texts, but rather that of the relationship within a country between the political forces ; a conflict of power between conservatives and reformists, liberals or fundamentalists, etc. In all countries, irrespective of religious culture, the state seeks to reply to the legitimate demands of the community to provide a sense of identity and security, by incorporating “our values” : sometimes the religion, presented as the « source of law » plays an essential role in this process to consolidate the legitimacy of new laws and regulations.

The real challenge for cultural diversity would be for all countries concerned to initiate an exploratory project which would draw on their own - sometimes secular - customs and traditions of mediation, reparation, compensation etc. It may include procedures for settling conflicts and the breakdown of social relationships that young people may have infringed (as in any human society...). An official process of updating some of them in today's context would ensure compliance with international standards of juvenile justice, on the strict condition that it does not, *under any circumstances*, permit the reinstatement of physical punishments, humiliations or exclusion of the child.

The history of the gradual abolition of the death penalty in the world reveals that resistance to it is more of a political rather than philosophical or religious nature, and that ultimately, it is always fundamental values, such as the respect for life, which prevail ; this can be seen in the slow but real regression of capital executions throughout the world.

In the countries where the possibility of the legal death sentence for a child (at the time of the offence) is an issue, asking for the abolition of the death penalty should not constitute a “favour”, nor should it be viewed as a humanitarian measure, or an exception for a special case (which would nevertheless be justified), but would rather be a legislative step towards the general and definitive abolition of the death penalty. This would be in line with the course of history.

9 - Is the death penalty for minors a deterrent ?

There is no link between the existence of the death penalty and the level of violence in society. On this issue, the neuroscientific angle seems quite compelling. The so-called ‘deterrent effect’ that the death penalty has on potential criminals, notably amongst the young people, is purely and simply a question of opinion (of the type “*I don’t know anything about it, but I do know what I think*” or “*She/he deserves to die*”) and has no basis in academic research or reputable evidence. There has been no direct correlation between the adoption, or re-institution of the death penalty and the homicide rate over a significant number of years and it is thus impossible to draw any conclusions. The statistics between Hong Kong, which has abolished the death penalty, and Singapore, which hasn’t, remain stable.

« Deterrence theory is based upon the classical economic theory of rational choice, which assumes that people weigh up the costs and benefits of a particular course of action whenever they make a decision. Deterrence theory relies on the assumption that offenders have knowledge of the threat of a criminal sanction and then make a rational choice whether or not to offend based upon consideration of that knowledge. Deterrence theory relies on the assumption that offenders have knowledge of the threat of a criminal sanction and then make a rational choice whether or not to offend based upon consideration of that knowledge. Rational choice theory, however, does not adequately account for a large number of offenders who may be considered ‘irrational’. ³⁴

There is absolutely no proof that the prospect of the death penalty plays a determining role in the lead-up to a crime, even more so amongst children whose ability to make rational judgements is still immature. A child, by definition, is not capable of appreciating the likely consequences, or possible risks, of his/her actions. The risk of being caught and punished is only partially taken into consideration ; the gains are weighed up against the risks. The criminal behavior of a child is more determined by external circumstances ; a child has neither the experience, judgement or rational perspective of an adult

³⁴ “ Sentencing Advisory Council ” (Govt.Australia)

<https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>

but acts much more on impulse. To varying extents, a minor who has committed an offence could even be seen as being a victim of a poor upbringing in which not enough protection from outside influences was given (be it poverty, discrimination, violence etc).

In other words, the evaluation in a legal trial of the degree of responsibility of a child and assessment of his/her abilities and faculties, must not depend on age alone (proven or otherwise), but should be examined on a case by case basis and should take into consideration the child's life experience, level of poverty, schooling and family support as well as the other influences at play. Conversely, if, throughout the different stages of the legal process, the child shows the same ability to reason as an adult and behaves in the same way, there are grounds to question the reasons behind such precocious behaviour : and the law and rights remain the same.

Some studies ³⁵ have shown that the idea of life imprisonment is actually perceived as a more effective deterrent than the death penalty (*playing with fire*) even if this alternative punishment is neither relevant.

The most serious crimes cannot be effectively prevented by the death penalty : *“Those who believe that the death penalty is a deterrent have not grasped the essentials of human nature. Criminal passion is no more hindered by the fear of death than are the other, more noble passions. (...) That the fear of death acts as a constraint to a man in the throws of his most extreme passion, is something we have invented to justify the death penalty.”* (Robert Badinter) ³⁶

“ The possibility of being able to use the death penalty on juvenile delinquents is to negate the idea that adult society as a whole is at the very least partially responsible for the crime committed by a child. The profiles of child offenders show that they are often adolescents who are mentally handicapped or emotionally disturbed and have had a childhood marked by violence, destitution or extreme neglect. The history of child offenders executed in the United States since 1990 leaves us to think that Society had failed to fulfil its obligations to them, well before the moment when they decided to deprive them of their life.” The deterrent effect is much more evident in the *“increased guaranteed number of arrests and convictions, rather than an increased number of the most serious punishments”*(.....) and even if the death penalty eliminates the offender, it doesn't stop crime » - **Amnesty International.** ³⁷

The knee-jerk tendency of a certain sector of society to call for vengeance (*‘an eye for an eye, a tooth for a tooth’*) is actually rooted in the belief that the criminal justice system doesn't work, or doesn't work adequately. But as Mahatma Gandhi said *“ An eye for an eye ends up making the whole world blind. »* ³⁸

Moreover, the death penalty neither negates nor compensates for a crime. In fact the involvement of the State brings another dimension to the debate. Since execution is, by definition irreversible, and since, depending on the legal system, there are often mistakes made, there is a very good argument for abolishing the death penalty. It is the responsibility of the State to weigh up the likelihood of a legal error occurring and the deterrent effect that may have. Legal error is not an option when a life is at stake.

The State's mandate and responsibility are to treat, in a durable way, the deep-rooted causes of violence of children, which essentially, results of social discrimination in all of its forms, and to fight against impunity by guaranteeing the proper functioning and existence of the legal system. Any failures or breach of law (more frequent with young offenders) that occur in the judicial process and under the responsibility of the judiciary should be called out as real abuses of authority, and as such be severely sanctioned.

The incidence of re-offending is sometimes used to justify capital punishment. However, how can the State, which has already judged a child, once or several times, and handed down a sentence of rehabilitation, then resort to capital punishment ? Would this not, in essence, amount to a recognition

³⁵ Suzanne D. STRATER *«The Juvenile Death Penalty: In the Best Interests of the Child ?* page 160 : <https://pdfs.semanticscholar.org/2a86/590bd783a31f925ce090bac17b728b72e840.pdf>

³⁶ Robert BADINTER, ex-ministre de la justice français - Discours à l'Assemblée Nationale française : <http://www.assemblee-nationale.fr/histoire/peinedemort/deputes.asp>

³⁷ AMNESTY INTERNATIONAL : *« Halte à l'exécution de mineurs délinquants »* <https://www.amnesty.org/download/Documents/88000/act500152004fr.pdf>

³⁸ MAHATMA GANDHI : *« An eye for an eye ends up making the whole world blind »* <http://www.bbc.co.uk/religion/hinduism/hinduethics/>

that the earlier judgements were wrong and that penal system has failed ? In some countries, the first deprivation of liberty (sometimes with adult detainees) is the « Preparatory class », the second one is « Bachelor », and the third one is « Master » in criminality...

Furthermore, to what degree does the state-sanctioned homicide of a criminal who has killed a person send a message to society that murder should be condemned ? *“Capital executions degrade all those who participate in them, and instead of reinforcing the protection of society, only serve to increase the level of cruelty in society.”* (Amnesty International).

There is also a case here to protest against the public nature of executions, including those where young adults are executed for crimes committed before the age of eighteen. : *“The death penalty harms society by the example it gives to man”* (...) César Beccaria.³⁹

Conversely, any executions carried out in near concealment to avoid any kind of national and/or international pressure, should also be protested against. Moreover, witnesses testify to the fact that some executions have been carried out without notice or more quickly than scheduled in order to stop any international outcry.

10 - Questions on criminalisation

Most death sentences purport to deal with the most serious crimes : murder, sexual violence, drug trafficking etc. However, certain countries have expanded their definition as to what constitutes a serious crime : to condemn a child to capital punishment for *blasphemy* is absolutely absurd. Blasphemy is an *“outrage against divinity or God”*- but surely a child is taught his/her religion through his/her upbringing, thus making that ‘crime’ primarily a failure of this upbringing. The verbal or written transgression of a belief is surely rooted in the child’s relative capacity to make a judgement ; so, how could a child ‘deserve’ an adult punishment ?

Sentencing a child to capital punishment for *drug trafficking* is also absurd. No religion mentions the drug trafficking as a motive for applying the death penalty. Then, juveniles involved in drug trafficking are, in one way or another, themselves victim of the traffickers who flaunt the immediate and substantial gains to be earned : they think that a child is less likely to be sentenced with the death penalty, or, even worse, would prefer that children involved to be hang in their place, irrespective of whether or not they were coerced or willing participants to the offence. Moreover there is no evidence to suggest that the death penalty reduces the death rate of drug addicts... If any drug trafficker is sentenced to death, he will immediately be replaced by another...

Finding a child guilty of *terrorist offence* is also absurd. Whilst it is impossible to give a global legal definition of the term terrorism, the respective anti-terrorism law are generally too broad and allow a wide range of notions and facts. All over the world, the law has been amended many times to adapt to the changing nature of the terrorist threat : violent or deadly actions ? with or without ideological motivation ? by a group of armed forces or by a single individual ? If the judicial principle called *« nulla crimen sine lege »* (no crime without law), an imprecise definition of crime by the law may create a risk of abusive interpretation of the facts. How can a child possibly act independently in such a situation ?

It is an established fact that several countries, whether or not they are engaged in armed conflict or turmoil, have changed their law to make ‘terrorism’ punishable by the death penalty. They justify this by citing the prevention of terrorism as a pretext for arresting and following adolescents who are involved in social movements or the defence of minorities, etc. Whether the age - supposed or real - of the adolescent is in doubt, or the age of legal responsibility has been set at 16, there is a very real risk of the death penalty being sentenced and executed when they reach the adult age, after years in prison.⁴⁰

Generally speaking, no child committing an offence which would be criminal if committed by an adult, should be treated and sentenced as an adult.

In an armed conflict, irrespective of the side they have been forced to fight for, children who have participated in terrorist acts must first and foremost be considered as children. If the local context is one

³⁹ Cesare BECCARIA (1738-1794) - « *On crimes and punishments* » :

<https://www.biography.com/people/cesare-beccaria-39630>

⁴⁰ OHCHR - World day against death penalty - *Death penalty and terrorism*.

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20659&LangID=E>

where organised, armed combatants are fighting in an internal conflict, those who have been arrested, must be subject to the benefits as stipulated by the Geneva Convention. In no armed conflict is it permissible for a child's right to physical and psychological protection to be suspended ; a child should, above all else, be treated as such, and protected against all forms of violence and revenge, but must also be protected from being stigmatised, as much by the authorities as by public opinion.

Besides, how likely is it that a child would, on his own, decide to commit, or be voluntarily complicit in an act of terrorism ?

The term "radicalisation" as applied to juveniles can be linked to the notion of manipulation to recruit young people, whatever the motive, by an exploitative family break-up, promises for the future, 'heroism', the myth of perfection, idealisation of violence, religious glorification of martyrs to recruit other young people, etc. A child might be also pressured into participating under the threat of death to him/herself or to his/her family. Different studies have shown the degree to which 'child soldiers' who have committed crimes having been forced to do so, or whilst under the influence of drugs, have become indifferent to their own life, and therefore to their own death... In such a situation, how effective is the death penalty as a deterrent ? In any case, these children were themselves victims before becoming the perpetrators of crimes.

In February 2007, **UNICEF** instigated the *Paris Principles and Guidelines on Protection of children associated with armed forces or armed groups* :

6.25 *Children are more likely to join or be re-recruited into armed forces or armed groups if they are harassed or attacked or their rights are violated in any other way. Advocacy should therefore also include demands for respect of the humanitarian and human rights principles during and after armed conflict.(...)*

7.6 *Children who leave armed forces or armed groups by any means, including those who escape, are abandoned or are captured by an opposing armed force or armed group or by multinational forces retain their human rights as children, and relevant international law and standards must be applied, inter alia:*

7.6.0 *No child may be subjected to torture or other cruel, inhuman or degrading treatment or punishment;*

7.6.1. *No capital punishment nor life imprisonment without possibility of release should be imposed for offences committed by persons below eighteen years of age;(...)*⁴¹

11 - Alternatives to capital punishment for children ?

The role of the justice system is to ensure that the State fully assumes its role of protecting and rehabilitating children at the same time as protecting society as a whole.

The only possible solution to this, even for "*the most serious crimes*" is that of restorative justice, as stated by **UNDOC** : « *Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders.(...)* »

A "restorative process" is defined as "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator." ⁴²

As far as children are concerned, the **Lima Declaration (Terre des hommes « Congress on restorative juvenile justice »** (2009) states : » *Restorative juvenile justice is a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence. This aim requires a process in which the child offender, the victim and, where appropriate other individuals and members of the community participate actively together in the resolution of matters arising from the offence. There is not one single model for practicing this*

⁴¹ **UNICEF** - « *PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS* » - February 2007 : https://www.unicef.org/french/protection/files/Paris_Commitments_FR.pdf
« *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* » : <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>

⁴² **UNODC** - « *Handbook on restorative justice programmes* » - page 6 onwards
https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf

*restorative justice approach. »(...)« The outcome of this process includes responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.»*⁴³

The **Economic and Social Council (ECOSOC-UN)** mentions :

« 7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

*9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.»*⁴⁴

However, even if the conditions for restorative justice are not met, the general principles of juvenile justice are still valid. Justice as applicable to juveniles is based on some immovable principles, even if the accused does not admit responsibility, and /or the victim doesn't want to discuss reparations, and/or the community is not receptive to the reintegration of the accused.

All possible options in terms of punishment and/or measures, including alternatives to the deprivation of liberty, should be considered with the aim of education and reintegration. The deprivation of liberty should only be used as a last resort and for the shortest time possible. When it is used, it should never lead to all rights being denied (such as physical and psychological protection, health, education, access to family, etc). Statistical studies show that for primary juvenile offenders, the first deprivation of liberty is the school of crime, more than a deterrence of re-offending. (Australia)

In the ultimate interest of the child sentenced to punishments, a multidisciplinary follow-up should be coordinated to enable the revision of any previously made decision at any time, permanently under the authority of the appointed judge. Any penalty when applied to a juvenile who has been found guilty should take into account his/her individual circumstances, his/her age and maturity, especially if the crime was committed with - or organised by - adults.

Any deprivation of liberty should always be coupled with psychological, medical and social support with a view to reintegration back into society. This process should also - at any time - be subject to a continual process of re-evaluation, the length of which is indeterminate, and which should be reviewed by the judge, taking into consideration the reports from the different professionals involved. This is in no way overly lax or humanitarian, but is « imposed » in a spirit of realism. The fact that a child is constantly developing renders total exclusion from society, without individual support, and for an undetermined period of time, absolutely pointless : the child would almost certainly re-offend.

The *Committee on the rights of the child (General Comment No 10)* states : « (...) the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of (the Convention) » - (see Note n° 6)

12 - The abolition of life imprisonment for children is also a priority

The campaign to abolish life imprisonment when applied to children goes hand in hand with that to abolish the death penalty for two basic reasons :

⁴³ **TERRE DES HOMMES FOUNDATION** - « Lima Declaration » :

https://www.tdh.ch/sites/default/files/declaration-de-lima-sur-la-justice-juvenile-restauratrice_en.pdf

⁴⁴ **ECONOMIC AND SOCIAL COUNCIL (UN)** - Résolution 2002/12 :

<http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>

- both penalties are mentioned together in Article 37 of the Convention and in all texts related to it ;
- many debates put forward life imprisonment as a possible alternative to the death penalty.

Among the list (see footnote No 8) of around sixty countries having (or not excluding) life sentence for children, some of them are unexpected : United-Kingdom, China, Japan, Singapore, New Zealand, Ethiopia, Australia, India, Israël, Jamaïca, etc. In its report (2013) to the Committee of the rights of the child, China, for example, explains: (...), *"in an extremely small minority of cases, where juveniles have committed a crime which should be punishable by death, the possibility of life imprisonment does exist. However, life imprisonment in China is not the same as imprisonment for the rest of one's natural life. (...) when an offender is serving a life sentence, if there is clear an expression of repentance, or if there is evidence of meritorious performance, then the sentence may in general be commuted to a term above 18 years and below 20 years. In cases where there has been a major merit in performance, the sentence may be commuted to a term above 13 years and below 18 years."*

However, life imprisonment is no more valid when applicable to children than is the death penalty. It is sometimes handed down as a sentence, but carried out in extremely rare cases, although imprisonment can be for between 20 to 25 years. Many experts, and indeed common sense, hold that there should be a maximum sentence of 12 to 15 years for any juvenile at the time of any offence.

The **UN Committee on the rights of the child** (General Comment No 10 - parag. 77) stipulates :
 (...) « *The child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.* » (see note No 6)

After abolishing the death penalty as applicable to children in 2005 (see above), the United States completed its legislation by deciding, in 2012, that mandatory life imprisonment without parole is unconstitutional : *"The Supreme Court of the United States judged, on Monday 25 June, that life imprisonment of young offenders who have been found guilty of murder, is unconstitutional, and has signed a 'historic judgement' for child justice(...). In a ruling voted by five against four, the High Court decided that the eighth amendment of the Constitution, which forbids 'cruel and unusual punishments' was applicable in perpetuity, where offenders of less than 14 years were found guilty of murder."* ⁴⁵

In January 2016, the same Supreme Court of the United States decided that the ruling made in 2012 should be applied retroactively, which, in procedural terms, is extremely rare : *"The Supreme Court has ruled repeatedly over the last decade that it is morally and constitutionally wrong to equate offenses committed by emotionally undeveloped adolescents with crimes carried out by adults. (...) The court left open the question of whether that ruling should be retroactively applied to about 2,000 people who were sentenced automatically to life without parole before the 2012 decision. On Monday, in Montgomery v. Louisiana, the court offered the answer : The constitutional rule announced in the Miller decision applies retroactively to that group."* ⁴⁶

There are different degrees of life imprisonment, ranging from the most severe, where there is no possibility of release ('without parole') to a commuted sentence after a long period of detention. This can come about as a surprise, as a result of a legal decision, because of medical necessity, because of a presidential pardon (or amnesty), or because there are exceptional circumstances. However, it could also be the case that the decision to free a prisoner is as a result of good behaviour. Life imprisonment with

⁴⁵ « **Le Monde** » (25.06.2012) - in french :

http://www.lemonde.fr/ameriques/article/2012/06/25/etats-unis-la-perpetuite-pour-les-mineurs-jugee-anticonstitutionnelle_1724442_3222.html#PwiAqcZIfzXGZdom.99

⁴⁶ "New York Times":

<https://www.nytimes.com/2016/01/26/opinion/the-supreme-court-says-again-juveniles-are-different.html>

the possibility of release ('*with parole*' within a previously stated time period) is also a possibility, but is often subject to certain conditions and restrictions. There are also sentences where no length of time is stipulated and it is left to the discretion of the authorities, also for children : such sentences could theoretically last a whole lifetime, although it is rare for an offender, sentenced for a crime at the age of 22 for a crime committed when he/she was 16 or 17, to still be in prison at the age of 75...

According to CRIN,⁴⁷ over the 112 countries concerned, 23 have fixed the maximum length of detention at between 3 and 9 years, 52 at between 10 and 15 years, 18 at 20 years, 5 at 30 years and 1 at 50 years. The remaining 67 States having still the possibility of life sentence for juveniles must therefore be required to :

- explicitly abolish the life imprisonment of children in law, without any reservations ;
- review with immediate effect any juvenile sentenced to an indefinite period in prison (or period at the authorities' discretion) by at least commuting the sentence to one with the possibility of release ;
- review the circumstances which led to the offender being sentenced to life imprisonment when he/she was a minor at the time of the offence ;
- publish all statistics relevant to the detention of this category of children
- review the legal procedures and respect the rights of all children in detention.

According to certain scientific studies, amongst inmates (both boys and girls) who have been in custody for a long period of time, up to 60% can suffer from a variety of several serious and chronic psychiatric disorders: personal neglect, problems in forming relationships, sexual abuse, increased rate of attempted suicide, depression, aggressive behaviour, substance abuse, etc....so many disorders that are rarely treated as they should be, or taken seriously (offenders are put in solitary confinement or in a secure unit which keeps them apart from their fellow inmates). For sure the deprivation of liberty, presented as without possibility of liberation *per se* inevitably leads to not having access to proper care or being able to benefit from education, etc

As is frequently the case after many years spent in prison, even though these individuals have been freed (because of a pardon, amnesty, etc) the immediate or long-term danger their psychological state poses to the general population can well be imagined. This is the background against which levels of reoffence are cited, pointing to the irredeemable character of the offender, according to an inquiry examining the psychiatric problems of children in prison in the USA : "*Nearly two thirds of males and nearly three quarters of females met diagnostic criteria for one or more psychiatric disorders. Excluding conduct disorder (common among detained youth), nearly 60% of males and over two thirds of females met diagnostic criteria and had diagnosis-specific impairment for one or more psychiatric disorders. One half of males and almost one half of females had a substance use disorder, and over 40% of males and females met criteria for disruptive behavior disorders. Affective disorders were also prevalent, especially among females ; 20% of females met criteria for a major depressive episode.*"⁴⁸

In its *Resolution on the rights of the child*, dated 19.04.2012 : "*The Human Rights Council (...) also demands that all States immediately commute this type of punishment and ensures that any child condemned to capital punishment or imprisonment for life without the possibility of release, be removed from any special detention wing, particularly if on death row, and transferred to an ordinary detention centre in keeping with his/her age and the crime committed.*"

It should also be remembered that, in accordance with the recommendation made by UNODC in "*Model law in juvenile justice*" Vivere demands that the imprisonment for life of children for crimes committed under the age of eighteen, **either with or without the possibility of release**, be forbidden:

"Article 56 - Prohibited sentences : (1) Under Article 37(a) CRC, the use of the death penalty and of

⁴⁷ CRIN : « *Inhuman sentencing on children* » :

<https://www.crin.org/en/library/publications/inhuman-sentencing-life-imprisonment-children-around-world>

⁴⁸ « *Psychiatric Disorders in Youth in Juvenile Detention* » - NCBI - NIH

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2861992/>

*life imprisonment for children without the possibility of release is regarded as falling within the definition of cruel, inhuman or degrading treatment or punishment.”*⁴⁹

13 - Children's rights during the legal process

The seriousness of a crime - and emotional reaction it engenders - should in no way lead to children's rights being suspended whilst they are under pre-trial detention as well as during their trial.

It is truly shocking that these juveniles, who come from families who do not have the means to pay for lawyers' fees, are faced with trumped up charges where the whole process is illegal or has been manipulated. They are too often 'defended' by a state-assigned lawyer who is scarcely available, poorly paid and unlikely to challenge any fault in the system or, to mount a defence based on national penal legislation : they let alone the norms and obligations stipulated in the international agreements that have been ratified by their own country.

The legal arguments for defending juveniles who are in danger of being sentenced to the death penalty are of-course important, but it is the socio-economic aspect whereby the accused overwhelmingly come from the most disadvantaged backgrounds is often under-estimated. Punitive sanctions have never solved any social problem...

Children's rights during a legal trial are the same as for any other human being. Moreover, there are additional rights for children involved in legal proceedings: parental involvement, spoeocofoc audtion procedures,etc. But given the limited ability of a juvenile to fully understand and defend himself, indifference and negligence prevail with regards to respecting these rights - which is scandalous, and which can influence the verdict. There is a risk that in countries where no specific procedure for juvenile justice exists, juveniles can be subject to the same procedure as adults. Since the time spent in pre-trial detention can (illegally) last many years, the offender, who was below the age of eighteen at time of the crime, becomes an adult before the trial and is judged as an adult - which often leads the public perception to express that *“Only an adult could possibly have committed such a crime, so this juvenile must be punished in the same way as an adult!”* If the age of criminal responsibility has been set very low, or if there is a real or fictitious doubt as to the age of the suspect when the crime was committed, there is very little chance of a fair trial and risk for sentence to death.

A child has a limited ability to cope with the stress of a police questioning or a trial. It is difficult to validate his/her claims in a systematic way. A child suspected of crime might have been forced or manipulated and may not answer everything, or hesitates, or contradicts him/herself. A child has a limited ability to adapt to a traumatic, unsafe or violent situation, and finds it easier to express him/herself through images or slightly vague impressions rather than a logical, detailed series of statements.

The intellectual development of a child, even after the age of 14 and adolescent, is not the same as an adult. The ability to weigh up the consequences of an action, linguistic development, judgement, analysis and memory, depends a lot on the community he/she is from, upbringing and life- experiences. Adolescence is a phase of life in which perceptions of identity and self-image can be problematic and easily be de-stabilised. Mixing with other prisoners of the same age, or even with adult prisoners (which is theoretically forbidden) over a period of weeks, months or years of detention, can have a dramatic and negative effect. Most times, detention is a school for crime.

A child deprived of liberty must enjoy the following basic rights :

- not to be in contacts with adults during the procedure (police custody, pre-trail detention) ;
- to have the right to a fair and rapid hearing by a competent and impartial authority ;
- to be judged by magistrates specialised in children rights, and separately from adults who are prosecuted in the same offences which they committed jointly ;
- to benefit from an effective legal assistance to prepare and to present its defence;

⁴⁹ UNODC : « *Model Law in juvenile justice* »

https://www.unodc.org/documents/justice-and-prison-reform/Justice_Matters_Involving-Web_version.pdf

- to be the subject of a social assessment by a social worker ;
- to be informed quickly and directly of the charges against him/her (with an interpreter if necessary) and of the possibilities of appeal ;
- to be accompanied by a member of his immediate family, or a support person, by a social worker and/or by a lawyer from the very beginning of the procedure and throughout the whole process ;
- to be presumed innocent until and unless recognized as guilty according to the law, which means not before the end of the trial and the judgement ;
- not to be compelled to testify against him/herself ;
- the right to have witnesses against him/her questioned ;
- to be respected in its integrity, dignity as well as in his/her private life, and to be protected from any kind of discrimination or humiliation.

In some trials, the ethnic origin of the victim appears to be more important than that of the accused. The death penalty is more likely to be given if the accused is from an ethnic minority and from a lower social class than the victim... This is also the case if the accused does not have a lawyer, or if the state-assigned lawyer was late in taking on the case or wasn't often available.

The length of time spent on pre-trial detention is one of the rights that is most often violated. The pre-trial should remain an item of procedure, justified by citing the risk of escape, of collusion or likelihood of re-offending. The law always puts limited duration of detention before trial. But in many cases, it can last months, even years : the professional negligence of judges and prosecutors to allow this to happen, under the pretext that the juvenile does not understand anything, or cannot protest, is an abuse of power and abdication of their responsibilities - and they should be punishable.

On another side, computerised data for each situation and DNA testing are now at affordable costs and should reduce the likelihood of legal errors, thus shortening the amount of time spent on pre-trial detention, or even taking away the need for it altogether.

Finally, the detention centers have to be controlled on the level of the human rights of prisoners, who have become adult whilst on death row, and who sometimes have been there for many years. The various processes of appeal, presidential pardon, etc, inevitably take months or years. There are many situations in which adults, sentenced to death for a crime committed when under the age of eighteen, are being denied their fundamental human rights on a daily basis, from the first day, with the only perspective to be executed after ten, fifteen, or even twenty years later...⁵⁰

14 - Religion and the death sentence

Considering the countless number of tragedies, wars, massacres, suffered by humanity during centuries, the 'international community' has at last produced in the XXth century a globally accepted, binding legal document, entitled "**The Universal Declaration of Human Rights**" (1949).

It cannot be denied that the whole *Declaration* aims at bringing together the fundamental values which are incarnated in the Torah, the Gospel, the Koran, and Confucianism, etc, with regards to the respect for human life.

Every religion has for centuries pursued idealistic goals, but within certain historical and socio-economic contexts. History progressively shows that, at some time or another, each religion is confronted with movements who demand a reinterpretation of the « *Sacred Scriptures* ».

Nowadays, the death penalty should not be linked to religion as such. The rights of all human beings have, for about a century, been subject to a number of international texts, which set out norms and standards, and which have been *negotiated, adopted, signed, and ratified at the heart of the United Nations by a large number of countries* - thus making the use of the death penalty ever more anachronistic.

Christianity⁵¹, for example, is based on the Bible, whose several passages, if read literally in the

⁵⁰ HUMAN RIGHTS WATCH : https://www.hrw.org/sites/default/files/supporting_resources/children_behind_bars.pdf

⁵¹ All quotes about Christianity are coming from the website of FIACAT - *International Federation of Action by Christians for the Abolition of Torture, FIACAT*, (in French): <http://www.fiacat.org/introduction-des-chretiens-et-la-peine-de-mort>

Old Testament, advocate the death penalty: “*The *redeemer of blood must kill the *murderer. The *redeemer of blood must kill the *murderer as soon as he finds him.*” (Numbers 35/19)

- “*If those guilty of ‘lèse-majesté’ are condemned to death, (...) even more reason to condemn those who offend against Christ (...) for it is much more serious to offend the eternal majesty than it is a temporal majesty.*” (The Pope in...1199)

However, in March 1990, the **Ecumenical Council of Churches** (COE), which was created in 1948 and groups together Protestant and Orthodox churches, adopted a declaration stating its unconditional opposition to the death penalty:

“*Recognising that all human beings are created in the image of God,*” it asserts that :

- “*By taking a human life, the State “usurps the will of God”*”
- it “*declares its unconditional opposition to the death penalty and demands that States abolish it*” ;

(...). It :

- (a) *advocates the abolition of the death sentence in States where it is still legal;*
- (b) *opposes all efforts to reinstate the death penalty in States where it has been abolished*
- (c) *supports all international efforts to obtain the universal abolition of the death penalty;*
- (d) *advocates developing theological and biblical arguments to help its own members, and others, in their efforts to abolish this punishment and to refute all theological and biblical arguments put forward by those in favour of the death penalty.*” (...)

In the **Catholic church’s Encyclical Letter**, Pope Jean-Paul II states (*Evangelium Vitae* 1995): (...)*“In the same perspective there is evidence of a growing public opposition to the death penalty, even when such a penalty is seen as a kind of “legitimate defence” on the part of society. Modern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform.*” (Parag 27).

“*The new evangelization calls for followers of Christ who are unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitively denying criminals the chance to reform.*” (Visit of Pope John-Paul II to the United States)

In the United States, where many executions take place (except, since 2005, for cases where the offender was a child at the time of the crime), the **Conference of American Bishops** regularly takes the following position:

“*Catholic teaching offers a unique perspective on crime and punishment. It begins with the recognition that the dignity of the human person applies to both victims and offenders. It affirms our commitment to comfort and support victims and their families. It also acknowledges the God-given dignity of every human life, even those who do great harm.*» (...) «*Our fundamental respect for every human life and for God, who created each person in his image, requires that we choose not to end a human life in response to violent crimes if non-lethal options are available. Moreover, at a time when respect for the sanctity of human life is undermined in many ways, the Church’s opposition to the use of the death penalty is an important witness in support of a culture of life.*”

As far as **Islam** is concerned, the Sacred Scriptures mention and do not exclude the death penalty, but nor do they exclude its abolition. In the different muslim juristic schools, there are various interpretations of the Sharia law principles, in relation with the conditions and the context of their application.

Many countries with a large majority of muslims, even some of them under the rule of an “*Islamic Republic*”, have abolished the death sentence, showing that Sharia does not oblige muslim States to apply the death penalty. Moreover, many basic human rights principles can as well be found in Sharia law principles.

There are different approaches amongst the specialists of academic islamic doctrine, who advocate adopting a more open interpretation of the sacred texts, and putting them in their historical context, thus seeking to prioritise the fundamental issues from the side issues, whilst taking circumstances into consideration.

Several Quranic Surahs go beyond the death penalty, and express that God prescribe forgiveness over punishment :

«And the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah. Indeed, He does not like wrongdoers. (Surah 42:40) ⁵²

(...) «The repayment of a bad action is one equivalent to it. But if someone pardons and puts things right, his reward is with Allah. Certainly He does not love wrongdoers. (Surah Ash-Shura, 40) ⁵³

All following quotes are coming from the PRI document (see footnote No 52) : “We ordained therein for them : “Life for life eye for eye nose for nose ear for ear tooth for tooth and wounds equal for equal.” But if anyone remits the retaliation by way of charity it is an act of atonement for himself.” (Quran, 5:45)

‘It is better for the next of kin to forgive [the perpetrator] in qisas cases, and to seek compensation [diyya], or other forms of compensation’.(...)- Shi’a jurist Shaykh Al-Hurr al-Amili.

“There is legal consensus [i.e. among Muslim jurists] that it is permissible to pardon [the guilty party] in qisas cases and that this option is better [than the application of qisas]. This is supported by the Quranic verse 2:178: “And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord.” - Sunni jurist Shaykh Mansur Ibn Yunus al-Bahuti. He mentions also a famous hadith narrated by a companion (Sahaba) of the Prophet Muhammad and recorded in major Sunni collections of hadith : “Whenever a qisas case was brought to the Prophet Muhammad, he would always order that the guilty party be pardoned.”

The Yemeni jurist, Muhammad al-Shawkani (1759–1834 CE), included a chapter on ‘the merits of pardoning’ in qisas-related cases : “It is narrated on the authority of Abu al-Darda [a companion of the Prophet Muhammad] that he said: I heard the Prophet of God [Muhammad] saying ‘[w]hoever suffers some physical injury and pardons the offender, God will elevate him or her a degree higher and erase some of his or her sins.’”(All these above quotes are excerpts from PRI - “Sharia Law and death penalty” - see footnote No 49).

However diverse the interpretations of these texts are amongst the muslim juristic schools, religious texts should not serve as an excuse for “State-endorsed violence” and the subsequent application of the death penalty, and should in no way be used as a means of absolving a State from the responsibilities it signed up to when ratifying international human rights instruments, which are themselves based on the ‘Universal Declaration of Human Rights’.

The Human Rights Council has, on countless occasions, addressed several States as follows : “The Committee notes with concern that reference is made in the State party system to certain religious tenets as primary norms. The State party should ensure (...) that the provisions of its internal norms are not invoked as justification for its failure to fulfil its obligation under the Covenant. » (see Note No 16)

(...) “The State party should immediately end the execution of minors, and further amend the draft juvenile crimes investigation act and the Bill of Islamic Criminal Code with the aim of abolishing the death penalty for crimes committed under the age of 18. The State party should also commute all existing death sentences for offenders on death row who had committed a crime while under the age of 18.” ⁵⁴

15 - Is public opinion an insurmountable obstacle ?

The history of the abolition of the death penalty throughout the world, slow as it has been, has shown that in the huge majority of cases, abolition has come about because there has been a will from within the State powers, or because leaders or pressure groups have ‘overcome’ public opinion and opinion polls which support keeping or re-introducing the death penalty.

⁵² Holy Qur’an, Surah Ashura. 42:40 : <https://quran.com/42/40>

⁵³ Holy Qur’an Surah 40 : <http://harunyahya.com/en/Articles/17230/verses-of-the-quran-about>

⁵⁴ HUMAN RIGHTS COUNCIL : 103^e session - CCPR/C/IRN/CO/3 - 29.11.2011

https://www.google.ch/search?q=HUMAN+RIGHTS+COUNCIL+%3A+103e+session++CCPR%2FC%2FIRN%2FCO%2F3+-++29.11.2011&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&dc=0&ei=vO0OWtG9HoGZX4iGg8AE - Paragraphs 5 and 13.

However, one experience in Japan is interesting.⁵⁵ The government has carried out opinion polls, every five years since 1956, to see if public opinion is still in favour of keeping the death penalty. The last poll, (carried out in 2014), shows a large majority in favour of the death penalty (about 80%), citing its 'inevitability' as the main reason, but only 34% say their opinion is fixed.

A parallel, academic '*deliberative*' poll based on scientific methods found that :

- 27% of participants confirm that they will not change their mind in favour of the death penalty
- to the question " *Who should decide if the death penalty be kept or abolished*", 40% thought that the decision should be made by the general public (for example, by referendum). However, 71% said that they would accept abolition if the government had taken the decision.
- the majority of abolitionists do not base their opinions on the question of human rights, but on the proviso of life imprisonment as an alternative. The same majority add that the risk of judicial error is the primary reason why they are in favour of abolition.

The degree of reflection necessitated by the questions this survey poses, and the resulting dialogue and level of uncertainty and hesitation amongst the participants, lead to the conclusion that there is a window for abolition. The question centering on the age of the offender at the time of the crime was not asked in this opinion poll (Japan is not in the list of retentionists countries for juveniles) : could it reasonably be concluded that had this been the case, the results would have been even more so in favour of abolition ?

The growth of social media and its increasing power to reach a large public audience via the content and language it uses, should enable to define arguments and strategy to maximum effect. However the most ardent opponents of abolition, who cynically exploit legitimate popular emotions for their own ends, are also experts on social media...

But it is clear that a badly-informed public will always clamour for blind repression. But, as soon as a public opinion poll refines the questions, it asks on:

- alternative punishments for juveniles
- the risks of justice being perverted or the risks of judicial error
- the disproportionate amount of cases and ineffectiveness of the death sentence
- the work that can be done to compensate or give reparations to victims
- how offenders can be reintegrated using the legal system, and competent psychological and social services, etc ...it is hard to imagine, in most concerned countries, a majority being in favour of the death penalty for juveniles at the time of their offences.

However, on this scene, there is also a crucial ethical issue that needs to be considered : should we wait for public opinion to be sufficiently '*enlightened*' on the essential ethical questions (death penalty, as well as for genetic manipulation, etc) before changing the law ? The fact that a State has ratified an International Convention, should be enough justification for immediately initiating the process leading to abolition, since all sectors of civil society will be allowed to express their opinion throughout the process. The State would therefore be fulfilling its role of shaping public opinion towards a greater respect for human rights and protection of life.

16 - Abolition or Moratorium ?

Abolition or moratorium ? These two terms are not contradictory. The final objective is to obtain a change in the national penal code, since abolition with regards to children should only be viewed as a step on the way to the general abolition of the death penalty, which then should be written into the *Constitution* of the country concerned.

A moratorium is "*a legal authorisation with regards to a category of persons, which suspends the requirements of religious beliefs, or legal processes.*" (Robert French Dictionary-1986, p.571)

In practice, a moratorium does not postpone the date of an execution, but suspends or grants a stay of execution, through a decree issued by a government with immediate effect, with a view to

⁵⁵ THE DEATH PENALTY PROJECT : «*The public opinion myth – Death penalty project*» Mai Sato & Paul Bacon
<http://www.deathpenaltyproject.org/wp-content/uploads/2015/08/The-Public-Opinion-Myth.pdf>.
 See the interview on vidéo (18 mn) : https://www.youtube.com/watch?v=q5v_POd5pHo

simultaneously initiating the legal steps necessary for the general abolition of the death penalty. Many offenders sentenced to death and being in prison for years can be saved. In addition to not having to go through the procedure of executions, a moratorium also has the advantage of not making abolitionist judges feel obligated to apply the law (especially since they were under considerable pressure from the public or their superiors to pass a sentence of death). Conversely, judges who are in favour of the death penalty would be obliged to apply the moratorium....

Calls for an evolutionary process, and even for a moratorium come from various sources : the President of the Minaret of Freedom Institute (USA) wrote in an article that : « (...) *All Muslims accept the permissibility of the death penalty because it is addressed in the Qur'an. However, our views range from those who would apply it for a moderately short list of crimes (short compared to the enormous list of capital crimes in the old testament) to those who would apply it to a somewhat shorter list still, and finally, to those who would call for a moratorium on the death penalty in America altogether.* » ⁵⁶

In the “ *General Comment No 10* », the **UN Committee on the rights of the child** ” stipulates the following norm : « 76. *The Committee recommends the few States parties that have not done so yet to abolish the death penalty for all offences committed by persons below the age of 18 years and to suspend the execution of all death sentences for those persons till the necessary legislative measures abolishing the death penalty for children have been fully enacted. The imposed death penalty should be changed to a sanction that is in full conformity with CRC.* » (See Note No 6)

The **UN General Assembly** « *voted overwhelmingly for a 6th resolution calling for a universal moratorium on executions : on 19 December 2016, with 117 States voting in favour of the resolution, the UN member states reasserted their support for a universal moratorium on the use of the death penalty. (...) The 2016 resolution has also introduced new elements to make the text stronger in encouraging all States to take further steps towards respecting international law and reducing the application of the death penalty. Paragraph 6(f) thus calls upon States to “ensure that those facing the death penalty can exercise their right to apply for pardon or commutation of their death sentence” along fair and transparent procedures. To increase the transparency, the UNGA also called upon the States to disaggregate the information on the use of the death penalty by sex, age and race (Paragraph 6(c). Resolution excerpt :« 7. Calls upon all States: (...) - (g) To establish a moratorium on executions with a view to abolishing the death penalty;* » ⁵⁷

17 - A fundamentally political question

Several countries have abolished the death penalty ‘*de facto*’. In some cases there have been no executions for several years because a presidential pardon has been invoked. However, the death penalty is still enshrined in law, but commuted to life imprisonment. This leaves the way clear for the death penalty to be reinstated in exceptional cases. Our objective is therefore to obtain the explicit abolition of the death penalty (and life imprisonment), or the legal equivalent of this, thus eliminating the risk of any shift in public opinion, regime change, or change in circumstances being able to be reinterpreted in the courts.

Some countries amongst those who still carry out the death penalty, have decided to limit its use to ‘*the most serious offences*’. In these cases, it is generally either treason, or a security threat to the State, or drug trafficking. The problem is that the definition of a ‘*crime against the State*’, may depend on the geographical location, the culture, or politics of the country concerned. A juvenile cannot commit one of these ‘*most serious crimes*’ completely in absence of any kind of manipulation or constraint, whilst still between the ages of 16 and 18. The explicit abolition of the death penalty as applied to juveniles, whatever the gravity of the offence, is non-negotiable : a juvenile, by definition, has a limited ability of expression, a limited ability to understand the consequences of his/her actions, and a limited ability to defend him/herself.

⁵⁶ **Dr. Imad ad-Dean Ahmad (USA)**, american muslim astrophysician, founder of *Minaret of Freedom Institute* (USA): <https://deathpenalty.procon.org/view.answers.php?questionID=001180>

See video : <https://www.youtube.com/watch?v=0Juq5STB2do> (29 mn - from mn 1’25)

⁵⁷ **UNITED NATIONS RESOLUTION - A/RES/71/187 du 19.12. 2016 :**
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/187

The example of the USA is relevant: after decades of invoking the independence of the judiciary for individual States of the Union, and their right to uphold the death penalty for juveniles, this right has now been abolished by the Supreme Court : all States of the Union no longer have the right to sentence juveniles to the death penalty : « *The highest court of the United States, is of the opinion that there is, today, a 'consensus' in american society that considers juveniles to be 'less guilty' since they are less responsible for their acts. Capital punishment is therefore 'disproportionate' and is in violation of the eighth amendment of the Constitution, which forbids cruel or harsh punishments.* » ⁵⁸

The above quote clearly demonstrates the need for a State's laws to recognise the essential incompatibility that exists between the role of child protector and that of state executioner. It is impossible and fundamentally contradictory for a State to be responsible for the '*best interests of the child*' whilst simultaneously playing the role of executioner of an offender who committed the crime whilst still a child.

Sometimes there is no correlation between what a State's doctrine is, what its beliefs are, and what happens in practice : but it is not acceptable that the judiciary may exercise discretionary powers and invoke doubt as to the real age of the offender, the seriousness of the crime, the opinion of the victim's family, and then proceed to judge a juvenile as if he/she were an adult. Moreover, social and political circumstances, or public opinion, can also influence the verdict, which can happen in cases of '*terrorism*'.

The example of the United States also shows that supporters of the death penalty cannot use the pretext of Federalism as an obstacle to its abolition; a federal decision, made by the Supreme Court (or its equivalent) has precedence over decisions made by the individual States of the Union.

France Parliament abolished the death penalty in October 1981, five months after the presidential election, in full knowledge of the negative majority in the opinion polls. When there is a genuine political will, progress in the field of respect for human rights is possible, even if it goes against public opinion.

However, this political will often comes about when public opinion is mobilised, uses well-structured arguments, involves as many actors from civil society as possible who work in conjunction with partners on a national level who are, or who could be, fully supportive, and adopts a strategy that has been adapted to the particular country. Any person or organisation likely to be able to influence any change in the law or procedure must be targeted: Ministry for Justice, Parliamentary Commissions, National Commission for Human Rights, NGOs specialised in children's rights, academics, religious leaders, etc.

In conclusion, Vivere demands that all the countries concerned impose a moratorium on all executions, with a view to explicitly abolishing the death sentence and life imprisonment, first for offenders who were children at the time of the offence, and thence enshrine in the law the abolition of the death penalty in general.

"In truth, the question of the death penalty can be analysed quite simply. It should not be framed in terms of dissuasion, nor repression, but more in terms of a political or moral choice." (R. Badinter)

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Lausanne, March 2018

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⁵⁸ « **Le Monde** » : http://www.lemonde.fr/ameriques/article/2005/03/02/la-cour-supreme-des-etats-unis-abolit-la-peine-de-mort-pour-les-mineurs_400029_3222.html