

Towards World-wide Abolition of the Death Penalty

A statement delivered to the International Commission against the Death Penalty Madrid 7th October 2010

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I am honoured to have been invited to make a short statement to the very distinguished President and Members of the International Commission established on the initiative of the Spanish Government to bring more weight to bear on those countries that have yet to accept that the death penalty inevitably, and however administered, violates universally accepted human rights: namely, the right to life and the right not to be subjected to a cruel, inhuman or degrading treatment or punishment.

I begin with two issues that need, in my opinion, to be resolved head-on if you are to achieve your goal of a universal moratorium on the use of the death penalty as a prelude to complete abolition of the death penalty world-wide. The first barrier to be overcome is that many of these countries continue to insist that capital punishment is a criminal justice issue, not a human rights issue: that they have the sovereign right to determine the nature of their penal system and thus to retain the death penalty on the grounds that it is required as a necessary repressive tool to control the most serious crimes or is justified by the legitimate cultural expectations of their citizens. This argument needs to be boldly confronted. The tenet that each nation has the sovereign right to determine its system of criminal justice is not the issue; it is an evasion. The issue is that internationally accepted human rights standards should determine the limits of state power over persons accused and convicted of crimes, however serious. In other words, although the choice of punishments is a matter for national sovereignty they should not be punishments that breach the human rights of defendants.

The second barrier concerns those countries that argue that the death penalty is not forbidden under international law. They point to the fact that although Article 6 (1) of the

International Covenant on Civil and Political Rights (ICCPR) of 1966 proclaimed the right to life it did not ban capital punishment. Furthermore they claim that Article 6(2) legitimates the use of capital punishment as long as it is restricted to ‘the most serious crimes’. This argument must also be vigorously confronted. You will no doubt remind them that this Article was formulated in 1957 when abolitionist countries were a small minority; that now the definition of most serious crimes should be interpreted as narrowly as possible, following the judgments of the UN Human Rights Committee and the opinion of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. In particular it should not be enforced for any drug-related or economic offences. This will involve making further efforts at the United Nations to rewrite safeguard 1 to the ECOSOC Safeguards Guaranteeing the Protection of the Rights of those facing the Death Penalty, which vaguely defines the most serious crimes as those ‘intentional crimes with lethal or extremely grave consequences.’ As a stage to abolition safeguard 1 should limit the death penalty to intentional murder, but only of the gravest kind, and ensure that it is never mandatorily enforced. Also, retentionist countries will need to be constantly reminded that Article 6(2) must be read in the context of Article 6(6) which declares that: ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ...Covenant’. And it is now almost 40 years since, in 1971, a resolution of the UN General Assembly proclaimed ‘the desirability of abolishing this punishment in all countries’. Furthermore, they will need to be presented with the evidence that shows that capital punishment inevitably in practice violates Article 7 of the Covenant which proscribes any ‘cruel, inhuman or degrading treatment or punishment’.

Progress towards the UN objective was steady but slow until the end of 1988 when the abolitionist movement, still encompassed only 52 (29%) of the then 180 member states of the United Nations, only 35 of whom –less than one fifth of all nations – had eliminated it altogether from their penal and military codes – the remaining 17 reserving it for crimes against the state and under military law in time of war. But since then there has been a remarkable transformation: the number of abolitionist nations has doubled to 103 of the 196 UN member states. The vast majority, 95 of them, have abolished it for all crimes in

all circumstances. In the USA, New Jersey, New York and New Mexico recently *abolished* capital punishment, bringing the number of abolitionist states to 15, plus the District of Columbia. Among the 93 countries that retain the death penalty in law only 45 have executed anyone within the past 10 years – less than a quarter of all nations and Amnesty International regards 35 as truly ‘abolitionist in practice’. Thus 70 per cent (138/196) of states no longer inflict or intend to inflict the ultimate penalty. At the UN General Assembly in December 2008, 106 countries voted in favour of a resolution calling for a world-wide moratorium on death sentences and executions, 34 abstained and only 46 countries voted against: as many as 14 of those that abstained were, according to Amnesty International, ‘abolitionists in practice’. It will be interesting to see how many of them abstain when confronted with this resolution again in two month’s time.ⁱ The Commission would, I think, find it rewarding to target the abstaining countries so as to overcome their resistance to support for a worldwide moratorium leading to abolition.

Clearly a new dynamic had been at work. It has been influenced greatly by the process of democratisation in Europe, including the former Soviet empire, and freedom from colonialism and post-colonial repression in Africa and other parts of the world. Key to these changes has been the development of international human rights law and international covenants and treaties to put them into effect (notably Protocol No. 2 to the ICCPR (1989) and Protocols Nos. 6 (1983) and 13 (2002) to the ECHR), as well as new democratically inspired Constitutions in many countries that specifically ban the death penalty under their right to life provisions. Altogether, 82 countries have ratified or signed one or other of the international treaties or conventions which bars the imposition and reintroduction of capital punishment. This still falls short of the total number of abolitionist nations. Identification of those who have yet to ratify Protocol No 2, would provide a good target for the Commission.

As Commissioners you will, no doubt, need to confront and reject the most persistent justifications for capital punishment: retribution and the need to denounce and expiate through execution those whose crimes shock society by their brutality; that it is demanded by public opinion; and the utilitarian argument that nothing less severe can act

as a sufficient deterrent to those who contemplate committing capital crimes. The exclusion of capital punishment as a sanction by the UN Security Council when it established the International Criminal Tribunals to deal with atrocities in the former Yugoslavia and Rwanda, and from the Statute of the International Criminal Court established in 1998 for genocide, other grave crimes against humanity and war crimes, has raised the inevitable question: If it is not available for these atrocious crimes why should it be the punishment for lesser crimes? Although public opinion cannot be entirely ignored, the task is to inform and lead the general public to appreciate and then to accept the case for abolition. Experience has shown that as a new generation grows up with no expectation that criminals will be punished by death, the majority come to reject it as a 'barbarity of the past'. It is important also to go further than the repetition of the mantra that 'capital punishment is not a deterrent' by confronting skeptics with the fact that even if it were shown that it could have a marginal deterrent effect, this could only be achieved by high rates of execution, mandatorily and speedily enforced. This would increase the probability of innocent or wrongfully convicted persons being executed and also lead to the execution of people who, because of the mitigating circumstances in which their crimes were committed, do not deserve to die. The message has to be: utilitarianism must be subject to respect for human rights.

It has needed political leadership and judicial support, backed up by NGOs, especially but not only Amnesty International, to bring about the great increase in the pace of abolition. Political will has been the key. I am confident that this new prestigious Commission will add considerably to the momentum provided by the Council of Europe and the European Union through a diplomatic offensive to convince 'third countries' that "the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights".

The effect of the new human rights dynamic has been remarkable. Abolition has been embraced across the globe by many different political systems, peoples and cultures. In Europe only Belarus retains and uses the death penalty but in 2009 no executions were recorded. The Commissioners might like to start there. In South and Central America only three small countries (Belize, Guyana and Suriname) hang on to it, although none

have carried out an execution for at least 10 years. There have been no executions in Cuba since 2003: another possible target for the Commission. The Commonwealth Caribbean island States grimly maintain it in law, although successful challenges by dedicated human rights lawyers have made executions a rarity within the last 10 years. At the end of 1988 in the African region only Seychelles and Cape Verde had abolished capital punishment, whereas 15 countries are now completely abolitionist (the most recent being Burundi and Togo) and another 22 have not carried out an execution for at least 10 years. Judicial executions were carried out in 2009 South of the Sahara only in Botswana and Sudan. Helping to influence the Commonwealth Secretariat to make abolition one of its goals might be another target for the Commission as well as missions to Commonwealth African nations such as Ghana, Kenya and Tanzania.

Although all countries in the Middle East and North Africa where Islam is the dominant religion retain the death penalty, three of them – Tunisia, Algeria and Morocco – have not carried out any judicial executions for over 10 years. Abolition is being considered in Jordan, Morocco and Lebanon and executions have sharply declined in Egypt. It is notable that several secular states with large Muslim majorities have already joined the abolitionist movement: such as Albania, Azerbaijan, Bosnia-Herzegovina, Kyrgyzstan, Turkey, Turkmenistan and Senegal. They may soon be joined by the Maldives. In fact, only four retentionist Muslim countries now make regular and large scale use of capital punishment as a crime control measure: Iran, Saudi Arabia, Iraq and Yemen. Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may imagine. No doubt those countries with Muslim majorities that appear not to be hostile to abolition would be a worthy focus for the Commission's work.

While only four Asian states (Nepal, Bhutan, Cambodia and Philippines) have so far completely abolished the death penalty, six others are now abolitionist *de facto*, including most recently South Korea. There are other countries that may be ready to move in this direction. In January 2010 President Elbegdorj of Mongolia called on the Mongolian Parliament to follow the path of the majority of the world's countries and abolish the death penalty. In India – with the second largest population in the world – the death penalty is in principle to be imposed in only the 'rarest of rare' cases. Death sentences are still

imposed but the last execution took place in 2004, the first since 1997. Japan, for long a rejecter of the human rights argument, but now perhaps becoming more susceptible to it, would also be worthy of special attention. Three years ago the representative of the People's Republic of China at the UN Human Rights Council stated that 'The death penalty's scope of application was to be reviewed shortly ... with the final aim of abolishment'. That process has tentatively begun with the recent announcement that it will be abolished for 13 non-violent economic offences. The return of the review of all death penalty verdicts from the provincial High Courts to the Supreme People's Court at the beginning of 2007 has been of particular significance. According to former Chief Justice Xiao Yang, the aim is to impose the death penalty 'strictly, cautiously and fairly ... on a tiny number of serious criminal offenders.' It is regrettable that China still refuses to publish any statistics on the number of its citizens who are executed annually. Nevertheless, a vigorous debate on the 'reform' of the scope of the death penalty is now underway. As one prominent senior scholar put it recently at an international meeting, abolition is now 'an inevitable international tide and trend.' Furthermore, a recent major public opinion survey in China suggests that citizens are not likely to be so hostile to further restriction and abolition of the death penalty as officials had previously maintained. Thus, while the situation in China as regards the use of the death penalty remains grave, there is now some reason to be optimistic that the abolitionist movement is having an influence on government. It would be marvelous if the Commission could help to increase the pace of reform in China.

The Commission might also now be able to persuade countries to move more resolutely and quickly towards complete abolition. There is already a trend in this direction. In the past it was common for abolition in law to be preceded by a lengthy period – often of 10 years or more – when the death penalty was imposed but executions were not carried out. Yet, since 1988, only a minority (21) of the 54 countries that first abolished the death penalty since then had been through a 10-year abolitionist de facto stage. The majority moved much faster: for example Turkmenistan abolished capital punishment in 1999, just two years after the last execution. In addition, the number of countries actually carrying out judicial executions each year has shrunk: only 18 in 2009 compared with 38 in 1998.

Also, with a few exceptions, such as Iran, the number of executions annually recorded appears to be falling almost everywhere. Singapore which in the 1990s had the world's highest execution rate per head of population, executed only one person in 2009 and Pakistan which had executed 34 people in 2008 executed none in 2009. In the United States 40 of the 51 US state jurisdictions had no execution in 2009 and of the 52 executions almost half (24) occurred in Texas alone. Yet the number of death sentences imposed in the US has fallen from over 300 in the mid 1990s to only 106 in 2009 and to only 9 in that year in Texas compared with 28 in 2003. Since 1976, 16 of the states with the death penalty have executed no more than six people – an average of less than one every five years. Last year, the influential American Law Institute decided that it would withdraw its support for the death penalty 'in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.' Indeed, the growing disenchantment with the death penalty combined with the very high cost of administering it and the incontrovertible evidence that innocent people have been sentenced to death, may well persuade yet more states to abolish the death penalty. We can hope that it will not be many years before the US Supreme Court will be able to find that the majority of states do not support the death penalty, and therefore rule that 'emerging standards of decency' will no longer tolerate the use of capital punishment in the USA. Given the importance of the USA, the Commissioners might wish to target those retentionist States, Colorado for instance, which might be susceptible to following New Jersey, New York and New Mexico.

Certainly the battle is not over: many examples of the cruelty involved in the use of the death penalty regularly come to light and very occasionally some countries, such as Taiwan recently, that appeared to be on the road to abolition, resume executions. But the fact is that there are now very few nations that regularly execute their citizens. Those that do are being forced to reconsider by the very weight of international opinion whether their system of criminal law should allow the elimination of convicted captive citizens. Abolition of capital punishment is clearly becoming across the globe the litmus test for the respect for human rights. It is against this optimistic assessment that I wish the Commission every success in its endeavours.

ⁱ In November 2010, when the resolution was again put before the Third Committee of the General Assembly, 107 countries voted in favour with 36 abstaining and only 38 against .