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International Secretariat
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London WC1X 8DJ
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@WORLD-WIDE MOVES TOWARDS

ABOLITION OF THE DEATH PENALTY

Seminar on 3 September 1990 by

Amnesty International

on the occasion of the

Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in Havana, Cuba from 27 August to 7 September 1990. The UN Crime Congresses on the Prevention of Crime and Treatment of Offenders are held every five years in a different host country. They are convened by and report to the UN General Assembly. The First Crime Congress took place in Geneva in 1955 at which the UN Standard Minimum Rules for the Treatment of Prisoners were adopted. Amnesty International has taken an interest in this area of the UN's work for the past 20 years and has attended the quinquennial Crime Congresses since 1970.

During the Eighth Crime Congress non-governmental organizations convened a program of parallel meetings open to all those attending the Congress. As part of this program, Amnesty International held a seminar on 3 September 1990 entitled "World-Wide Moves Towards Abolition of the Death Penalty" chaired by Ms Sofia Macher, a member of the International Executive Committee of Amnesty International.

The four speakers at the seminar were Justice P. N. Bhagwati, former Chief Justice, Supreme Court of India; Professor Sofia Kelina, Institute of State and Law, Soviet Academy of Sciences; Dr Abdul Carimo Issa, Legal Adviser to the Minister of Justice of Mozambique; and Nigel Rodley, Reader in Law, Essex University and former Head of the Legal and Intergovernmental Organizations Office of Amnesty International.

This document contains the text of the speeches given during the seminar which represent an interesting range of perspectives from different regions of the world on the subject of the abolition of the death penalty.

KEYWORDS: DEATH PENALTY1 / INDIA / USSR / MOZAMBIQUE / HUMAN RIGHTS INSTRUMENTS / LEGISLATION / UNITED NATIONS /

W O R L D - W I D E M O V E S T O W A R D S

A B O L I T I O N O F T H E D E A T H P E N A L T Y

A seminar held by Amnesty International on the occasion of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

Havana, Cuba - 3 September 1990

SPEECH BY MR JUSTICE P N BHAGWATI,

former Chief Justice of the Supreme Court of India

I feel deeply privileged to have been invited to speak at this seminar on "World-wide moves towards abolition of the death penalty". Let me make it clear at the outset that I am an abolitionist. I am against the death penalty, morally and ethically. I oppose the death penalty as a violation of all constitutional values and as an affront to the dignity of man and worth of the human person. I passionately believe in the true spiritual nature and dimension of man and with Mahatma Gandhi, the Father of my nation, I hold that destruction of an individual by society can never be a virtuous act. That is why in my dissenting opinion in Bachan Singh's case decided in 1980[1], I said that "[the] death penalty does not serve any social purpose or advance any constitutional values and is totally arbitrary and unreasonable so as to be a violation of Articles 14, 19 and 21 of the Constitution".

I pointed out that the death penalty is barbaric and inhuman in its effect, mentally and physically, upon the condemned prisoner and is positively cruel. The condemned prisoner suffers excruciating mental anguish and severe psychological strain during the long wait from the imposition of the sentence until the actual infliction of death. It involves lingering death. The physical pain and suffering which the actual execution of the sentence of death involves is also no less cruel and inhuman. The death penalty is cruel and inhuman, disproportionate and excessive.

Moreover, the discretion conferred on the judiciary to award the death penalty is not guided by any policy or principle laid down by the legislature or even by the courts and is wholly arbitrary. The Supreme Court of India has laid down that the death penalty may be imposed in the rarest of rare cases but it has not indicated and indeed, it is not possible to indicate, what is the test to be applied for determining whether a case falls within the category of "rarest of rare". The judicial discretion in this matter is bound to be influenced, consciously or sub-consciously, by the social philosophy and scale of values of the judge. Life or death would therefore depend on the discretion

[1] (1980) 2 Supreme Court Cases 684

of the judge, which discretion may vary from judge to judge. The possibility of judicial error also cannot be excluded leading to conviction and sentence of an innocent man. The death penalty is therefore in my opinion nothing short of murder by the State through the instrumentality of the judicial process and it is unconstitutional.

It is obvious from the various resolutions passed by the Economic and Social Council and the General Assembly that the United Nations favours the eventual abolition of the death penalty and that is the normative standard set by the world body which every nation must ultimately strive to attain. Directed towards this goal, three major international treaties now incorporate Protocols aimed at the abolition of the death penalty. There is a world-wide movement for abolition of the death penalty and I believe 39 countries have totally abolished it while 17 have abolished it for ordinary crimes and 30 have abolished it de facto. India still retains the death penalty and in fact, in recent times, the scope of application of death penalty has been extended rather than restricted. The death penalty has been provided for in two anti-terrorist laws enacted in 1984 and 1987 for certain acts defined as 'terrorist'. But in practice, no death sentence has so far been awarded by the Special Courts under either of these two laws. Even under the ordinary criminal law, the number of persons condemned to death is a minuscule fraction of the total number of persons convicted for such offences.

The UN Economic and Social Council has in its Resolution dated 25 May 1984 laid down certain international norms and safeguards for the protection of those facing the death penalty and, by another Resolution dated 24 May 1989, endorsed by the General Assembly on 15 December 1989, recommended to the member states to take steps to implement these safeguards. So far as the first safeguard is concerned, it may be pointed out that there is a provision in Section 304 of the Indian Code of Criminal Procedure that in a prosecution for an offence which is punishable by death, free legal assistance shall be provided to the accused and, on an interpretation of article 21 of the Constitution, the Supreme Court has ruled that in a criminal trial, legal aid must be provided to an accused, if he is unable to afford legal representation on account of his poverty. The Supreme Court has also directed that when an accused is first produced before the magistrate, he must be told that he is entitled to free legal assistance and if he wants it, he must be provided with a lawyer at state cost and if this is not done, the trial would be vitiated. But despite this ruling, there are instances when the accused in a capital sentence case has gone without free legal representation. Even where free legal aid is given, the quality of defence is poor. Legal aid fees are very low and, with notable exceptions, few experienced lawyers are prepared to take up such cases. Usually inexperienced raw juniors are assigned such cases and, quite often, at short notice so that there is very little time left to them to prepare the defence.

So far as mandatory appeal or review is concerned, there is in India compliance with this international norm. The original trial in a capital offence case is always before the Sessions Judge and if the Sessions Judge convicts the accused and sentences him to death, the case must go before the High Court for confirmation of the death sentence. The High Court reviews the entire evidence and decides whether the accused has been rightly convicted and sentenced. Then the accused can apply to the Supreme Court for special leave to appeal and he can do so by addressing a letter from the jail or even a relative or friend can file such a petition. Though it is discretionary with the Supreme Court whether to grant special leave or not, special leave

is always as a matter of course granted in death sentence cases as a result of the observations made by the majority of the judges in the Bachan Singh case and the Supreme Court, after grant of special leave, invariably reviews the entire case on merits.

The power of clemency or pardon vests in the Government under the relevant provision of the Code of Criminal Procedure, but apart from statute, it is in express terms conferred upon the President of India and the Governor of a State by the Constitution of India and it is given constitutional status and sanctity. But the problem is that in quite a few cases, the petition for commutation or pardon remains pending for long periods and in the meantime, the condemned prisoner continues to suffer tremendous mental anguish and almost living death. The reason is that the President or the Governor acts on the aid and advice of the executive and the case papers often remain unattended in the Home Ministry for months and months. This is a deplorable state of affairs. I am firmly of the opinion that in the matter of granting commutation or reprieve, the President as the head of the nation and the Governor as the head of the state must act on their own and not on the basis of aid and advice received from the executive.

The international norm in regard to the minimum age of 18, below which no offender should be sentenced to death or execution, is also not incorporated into the domestic jurisprudence of India. The Law Commission in its Report made in 1967[2] recommends that the death penalty should not be enforced on offenders below the age of 18 at the time of commission of the offence but this recommendation has not yet been implemented by suitable legislative amendment. The Supreme Court of India could have laid down a rule of law to this effect and that would have been binding as law throughout India but the Supreme Court has so far failed to do so. On the contrary, the Supreme Court has been equivocal on this point. In the absence of any legislative or judicially evolved rule of law guiding the discretion of the court, the exercise of discretion in the matter of imposition of the death penalty on youthful offenders has been arbitrary and renders the death penalty unconstitutional.

So far as pregnant women are concerned, they are exempted in law from the death penalty; either the execution is stayed until after the delivery of the child or the sentence is commuted to life imprisonment. In practice, however, no woman has been executed since 1944.

There is nothing in statute law with regard to the exemption of persons with limited mental competence or suffering from mental retardation from the death penalty nor is there any judicially prescribed rule to that effect. But in a recent case the Supreme Court ordered the prison authorities to satisfy themselves that a particular prisoner was in "a fit mental state" before executing him, indicating that no execution would be allowed by the Court if the offender is not in a fit mental state.

I have no doubt that shortly the High Courts and the Supreme Court will, in laying down the law, incorporate and internalise the international norms relating to safeguards for protection of the rights of those facing the death penalty.

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[2] The Law Commission of India: Thirty Fifth Report on Capital Punishment (1967), paragraphs 878 - 887

Speaking about the death penalty, it may be pointed out that although the majority of judges held in Bachan Singh's case that the death penalty is not unconstitutional, three years later the Supreme Court was called upon to consider whether a mandatory death penalty suffers from the vice of unconstitutionality. Section 303 of the Indian Penal Code provides that where a person suffering life imprisonment commits murder, he shall be punished with death. The Supreme Court held that a mandatory death penalty - which does not leave any discretion to the Court to adapt the punishment to the particular facts and circumstances - in all cases violates the equality clause of the Constitution and is therefore constitutionally invalid. This was indeed a step forward towards abolition of the death penalty.

But there was another case where the Supreme Court had an opportunity of taking one step further but the Supreme Court missed it. When Kehar Singh's case was before the Supreme Court after the President of India refused the application for commutation of the sentence of death, the Supreme Court could have held that an accused who is convicted on the basis of circumstantial evidence should never be sentenced to death as a matter of law. It was in fact so argued by the learned counsel for Kehar Singh. But the Supreme Court missed a brilliant opportunity of restricting the application of the death penalty by excluding from its scope and ambit cases of conviction based on circumstantial evidence. When Bhutto was convicted on circumstantial evidence and sentenced to death, jurists all over the world were unanimous in condemning the imposition of the death sentence and so also in the case of Kehar Singh, jurists were all shocked. I definitely hold the view that, in any event, when conviction is based only on circumstantial evidence, sentence of death should never be imposed on the accused.

I may also refer to one decision given by Rajasthan High Court in 1985 when it convicted a man and a woman of the offence of murder by burning to death a young bride who could not provide an adequate dowry. They were sentenced to death and were ordered them to be publicly executed. When this came to my notice on reading the newspaper report, I asked the Attorney General to bring a petition to the Court against the judgment and I stayed the public execution, saying that a barbaric crime does not have to be met with a barbaric penalty. The Supreme Court voted against public execution.

But on the question of delay in execution, the Supreme Court has not been very clear. In one case in February 1983, two judges of the Court held that a convict could ask for commutation of death sentence on the grounds that he suffered agony and mental torture because the sentence had not been carried out for an unreasonably long period of time and that delay in execution of two years or more should entitle the convict to commutation. But in a subsequent case, which came just two months later, the Supreme Court disapproved of any hard and fast rule of two years because the appellate process itself might take more than two years. The question was then considered in a wider decision which held that no fixed period of delay could make the sentence of death inexecutable and that any delay to be taken into account must be only delay after the final judgment in appeal, such as a delay in disposal of a clemency petition etc. The Supreme Court thus narrowed down the scope of the power of commutation and again left it to the discretion of the judge as to what may be an unreasonably long period.

Even so, it is in extremely rare cases that the death penalty is imposed in India and rarer still are the cases where the death sentence is executed.

Enlightened public opinion in India is against the death penalty because is it now recognized by many that in the land of Gandhi and Buddha, the death penalty has no place: it has no greater deterrent effect than a life sentence; it is disproportionate and excessive according to the prevailing standards of human decency; it is arbitrary and unreasonable in its application; it violates the equality clause of the Constitution; it is cruel, inhuman and degrading and violative of basic human dignity; and it is destructive to the right to life which is the most precious right of all. It is necessary to create national and international public opinion against the death penalty by encouraging full and informed public debate which would expose the myth of the efficacy of the death penalty and emphasize how incompatible it is under the evolving standards of human decency and how barbaric and retrogressive it is when humanity is marching towards a new millennium.

WORLD-WIDE MOVES TOWARDS

ABOLITION OF THE DEATH PENALTY

A seminar held by Amnesty International on the occasion of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

Havana, Cuba - 3 September 1990

SPEECH BY PROFESSOR SOFIA KELINA,

Institute of State and Law, Soviet Academy of Sciences

THE QUESTION OF THE DEATH PENALTY IN THE USSR

In the history of the Soviet state there have been three periods when the death penalty was abolished by legislative act. These were 1917, 1920 and 1947, but on each occasion it was reinstated quite quickly. So, after it was abolished in 1920, 360 people were executed in January 1921, on the instructions of military tribunals in the RSFSR and the Ukraine alone. And in the course of 1921 a total of 4,337 people were executed on the instructions of these tribunals.

The criminal legislation which is currently in force proclaims the death penalty as a "temporary" and "exceptional" measure of punishment. In peacetime it is envisaged for 18 crimes, including crimes against the state, such as treason, espionage, sabotage and also for premeditated murder with aggravated circumstances, banditry, counterfeiting, theft on an especially large scale, bribe-taking with especially aggravated circumstances and others. In practice the death penalty is mostly used (ie in 96% of cases) for premeditated murder with aggravated circumstances.[3]

Active discussion of the death penalty issue among scholars, workers in the field and members of the public has begun only comparatively recently, in preparation for a reform of the legal system, and work on new legislative drafts in the period of perestroyka. But it is now one of the most pressing questions facing us today. Of all the letters which followed the publication of the draft Fundamentals of Criminal Legislation of the USSR and Union Republics in December 1988, 45.3% were about the death penalty. Of these 31.7% came from professionals in the legal field and 52.1% from non-specialist members of the public.

After some additional work, the draft Fundamentals of Criminal Legislation were passed to the USSR Supreme Soviet. The people who drafted them share the opinion of that part of the world community which favours total abolition of the death penalty. They recognize that a human life represents the highest value, which no one has the right to dispose of, not even the state; that the death penalty is not a deterrent[4] ; and that evil and cruelty on the part of the state can only provoke cruelty in return. As experience shows, there is no-one more cruel and ruthless than the person who has already committed a capital crime - they have nothing to lose. The people who worked on the draft also recognize that carrying out a death sentence permanently excludes the possibility of correcting a judicial error.

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[3] According to statistics, 770 people were executed in 1985, 344 in 1987, 276 in 1989 and 195 in 1990

[4] According to available information, the fear of punishment deters no more that 14-18% of people from committing a crime.

At the same time, in handling the death penalty issue in new Soviet criminal legislation, the people working on the draft have been obliged to take the Soviet crime rate into account and public opinion on the subject. On the crime rate, statistical evidence shows a continual rise over the last 20 years, which has accelerated since 1988. In 1989 a total of 2,467,692 crimes were recorded, which meant an increase of 31.8% of 1988. Of these the largest increase was for serious crimes of violence committed for mercenary motives - ie for crimes which carry the death penalty. During the period from 1988 to 1989 the number of premeditated murders rose from 16,702 to 21,467; serious bodily injuries from 37,191 to 51,485 and rapes from 17,658 to 21,873.

This rise in crime has inevitably had an impact upon public opinion, which is heavily influenced by the mass media. Even before, the public always called for much stiffer penalties for criminals and now abolition of the death penalty finds support among no more than 23% of the population[5]. The rest not only want it kept, but would like to see its scope widened, because they believe it is a deterrent.

Against this background the people who prepared the new drafts of criminal legislation came to the conclusion that total abolition of the death penalty would be supported neither by parliament nor by the public. Nevertheless, Article 41 sets a substantial limit on the use of the death penalty, regarding both the number of crimes and the types of people to which it can be applied.

The published draft abolishes the death penalty for all economic crimes. It does, however, provide the death penalty as a punishment for high treason, espionage, terrorist acts, sabotage, premeditated murder with aggravated circumstances, rape of juveniles, and also war crimes and genocide. After discussion in the commissions which are responsible for preparing the Fundamentals, it was decided to narrow the range of capital crimes further. The latest draft prescribes the death penalty for high treason, terrorist acts, premeditated murder with aggravated circumstances, and also for war crimes and genocide, although as one alternative, it considers abolishing the death penalty as a punishment for high treason.

The draft Fundamentals also provide the possibility of pardon for someone who has been sentenced to death. In these cases they may be given a 15-year sentence of imprisonment (longer sentences are not provided under Soviet law).

The draft Fundamentals also envisage a substantial reduction in the categories of people eligible for the death penalty. They propose exemptions not only for juveniles and pregnant women - as now - but also for men who have reached the age of 60 at the time of sentencing and for all women.

In the current reform of the Soviet legal system, legislators have been scrupulously observing the principle that the norms of international law take precedence over domestic legislation and the norms, and sometimes the recommendations of the international community have also been taken into account. Particular consideration was given to these norms and recommendations in the drafting of new criminal-implementation legislation. The draft Fundamentals of Criminal-Implementation Legislation of the USSR and Union Republics, currently before the USSR Council of Ministers, took international standards into account, including the recommendations made in Resolution 15 on "Regulations Guaranteeing the Rights of People Condemned to Death", adopted by the Seventh UN Congress on Crime and the Treatment of Offenders (Milan 1985). The draft contains special norms regulating the legal rights of prisoners sentenced to death.

The draft Fundamentals of Criminal-Implementation Legislation establishes the rights of condemned prisoners to petition for pardon, to have visits with their lawyer and with their relatives, to have correspondence, to have possessions, to perform religious observances, to get married, etc. The draft also regulates the manner of execution, which may not be carried out in public, and provides a number of conditions for halting an execution, in the event of the mental illness of the prisoner.

In these ways the legislative drafts I have outlined clearly pursue the aim of humanizing Soviet legislation. At the same time the people responsible for the drafts realize that in the complex economic, political and social conditions of perestroyka, discussion of the new laws will be long and difficult.

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[5] This corresponds to the results of opinion polls in other countries. As we know, annual public opinion polls in the USA show that about 80% of the population are in favour of the death penalty.

WORLD-WIDE MOVES TOWARDS

ABOLITION OF THE DEATH PENALTY

A seminar held by Amnesty International on the occasion of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

Havana, Cuba - 3 September 1990

SPEECH BY DR ABDUL CARIMO ISSA,

Legal Adviser to the Minister of Justice (Mozambique)

Madam Chairman, delegates;

The history of human rights is bound up with humanity's struggle to fulfil its yearning for democracy.

Battles for the rights of citizens, slave revolts, conflicts between patricians and plebeians, and the introduction of political constitutions are all examples of man's constant and often bloody struggle for dignified treatment from arrogant absolutist authorities.

Britain's Magna Carta in the 13th century (1215), and the introduction of habeas corpus and the Bill of Rights (1689) in the 17th century, were to be closely mirrored by the United States of America's 1776 Declaration of Independence, and the Declaration of the Rights of Man and Citizen, proclaimed by the French Revolution in 1789 and amended in 1793. These latter documents expressly recognized that "all are equal before the law" and "everyone has the right to life, liberty", and offered the assurance that "all human beings are born free and equal in ... rights" and that the aim of society is the common good.

On different occasions in the 20th century set-backs occurred in the struggle against intolerance and tyranny which caused the defence of human rights to be raised to the sphere of universal responsibility.

On 10 December 1948, the United Nations Organization proclaimed the Universal Declaration of Human Rights. Although its 30 articles are not legally binding, they represent, in the words of the preamble, "a common standard of achievement for all peoples and all nations".

The Universal Declaration of Human Rights recognizes the right of every individual to life and categorically states that "no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

The death penalty, from this point of view, undoubtedly represents a violation of such rights, and the movement for its abolition can in no way be dissociated from the human rights movement.

The Mozambican people, like other peoples, loves life.

It is precisely because it loves life and wishes to live in peace and progress, that it cannot tolerate crimes which threaten its security and that of the state, crimes which constitute an attack on a freedom for which it paid, and is still paying, so dearly.

Although there was no tradition of capital punishment in Mozambique, its people had no alternative but to employ it as a means of defence.

At the time of, and in the years following, National Independence the death penalty was not included in the range of sentences applicable to crimes of all legal categories.

It was introduced in March 1979 under Law No. 2.79, the Law on Crimes against the Security of the People and of the People's State, with the aim of punishing and discouraging hateful and barbarous crimes being committed at that time against the people, state security and national sovereignty.

It was indeed on 25 June 1975, that Mozambique, following a 10-year armed struggle against Portuguese colonial rule, and guided always by humanitarian principles, finally achieved National Independence.

Meanwhile, in 1976, even before the first anniversary of independence, we applied total sanctions against the regime of Ian Smith, as decided by the international community. Our economy, which was geared to serving what was then Southern Rhodesia, mainly by providing a market for its produce and transportation of raw materials essential for its population and for production, was seriously affected by this step. Furthermore, we did this at the very time in which some of the richest countries in the world were breaking the sanctions.

Therefore, we introduced the death penalty in response to Rhodesian aggression against our country, devastating massacres in Rhodesian refugee camps in Mozambique, and the heavy bombing of our vital infrastructure. Its aim was to punish and discourage possible crimes against security and stability in our country. When peace returned, following the independence of Zimbabwe, the Law on Crimes against the Security of the People and of the People's State fell practically fell into abeyance.

However, when Renamo moved to South Africa and there was a rise in orchestrated violence against Mozambique, it became necessary once again to employ the above law.

This was the main reason why the Mozambican State employed capital punishment.

Under this law, prisoners accused of crimes of this nature were to be tried, in principle, by ordinary courts and have the right of appeal to the Supreme People's Court, which would always confirm death sentences before they were carried out.

However, since the Supreme People's Court had yet to be set up, the Revolutionary Military Tribunal was created under Law No. 3/79 of 29 March.

The Revolutionary Military Tribunal was never designed to crush potential political opposition, but rather to deal with special situations, what are known in every country in the world as crimes.

This tribunal would never have existed were it not for the aggression firstly by Rhodesia and secondly by the forces of Apartheid, and the resulting massacre of innocent people and destruction of our economy.

In October 1988, in accordance with Law Number 3/79, and given the fulfilment of conditions required for responsibilities to be transferred from the Revolutionary Military Tribunal to the ordinary courts; the inauguration of the Supreme People's Court; the institutionalization of the Republic's Public Prosecutor's Office, and also the fact that it was designed as a temporary, emergency measure, the Revolutionary Military Tribunal was disbanded.

Between 1979 and 1983, in an attempt as we said, to discourage and punish certain types of crime, some 50 death sentences were passed and carried out. Between March 1983 and February 1986 no further death sentences were passed.

But in two trials at the beginning of 1986 over 10 people were sentenced to death for crimes they had committed whilst carrying out actions for Renamo. Since then no death sentences have been handed down at any trial.

In fact, since 1986, the People's Republic of Mozambique has favoured the abolition of the death penalty, a stance finally confirmed in article 38 of the Constitution of the People's Republic of Mozambique, which is soon to be adopted.

Seeking to efficiently protect by international legal means men and women's inalienable rights and guarantees, Mozambique adopted the Universal Declaration of the Human Rights.

Recognizing the need to abolish the death penalty in order to protect and defend human rights;

Considering that there is no firm evidence that the death penalty either prevents political crimes or terrorist acts;

Confirming the proof that there is no direct relation either between murder rates and use of the death penalty or murder rates and the political will of governments;

Conscious of the fact that not even perpetrators of serious crimes can be punished with a sentence of such enormity;

Finally, mindful of the fact that the death penalty empirically cannot be shown to be a more effective deterrent than long-term prison sentences,
Mozambique, through its shortly to be adopted Constitution, and as a reflection of its people's opinion and customs, hereby embraces abolition, conscious that life is immeasurably good and should be preserved in the name of all of civilisation and of society's supreme values, and that alternative measures will succeed, where capital punishment failed, in achieving Peace, Harmony, Respect for Human Life and Stability.

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SPEECH BY NIGEL RODLEY,

Reader in Law, Human Rights Centre, University of Essex (former Head of Amnesty International's Legal and Intergovernmental Organizations Office)

INTERNATIONAL DEVELOPMENTS TOWARDS ABOLITION OF THE DEATH PENALTY

The death penalty was a major topic for discussion at the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1980. That discussion was inconclusive. Since then, however, a good number of states and territories have chosen to leave the ranks of those that mobilize the majestic machinery of the state solemnly and in cold blood to achieve the deliberate extinction of human life.

Thus, of the 41 countries that are abolitionist for all crimes, 13 of them became so in the last decade (including Czechoslovakia, Ireland and Namibia this very year). Of the further 18 countries that are abolitionist for ordinary crimes, four became so in the past 10 years (including Nepal this year). During the same period, six countries entered the ranks of countries that are abolitionist de facto (though one or two previously in this category resumed executions). So, some 23 countries have become abolitionist in one form or another between the Sixth and Eighth Congresses, and more are to come. Chile, Mozambique and Poland appear to be set on abolition.

This talk does not present a full analysis of the scope, forms and rationale of the death penalty. Those interested are invited to consult the Amnesty International publication When the State Kills (1989) and the report prepared by Roger Hood for the 1988 session of the UN Committee on Crime Prevention and Control.

Nor are we dealing with what the UN calls summary or arbitrary executions, that is, executions carried out after trials or procedures failing to conform to internationally-recognized standards. It is still worth recalling that in 1984 the Economic and Social Council (ECOSOC) adopted and the General Assembly endorsed a compilation of those standards drafted by the Committee on Crime

Prevention and Control: the "Safeguards guaranteeing protection of the rights of those facing the death penalty". It is also chastening to recall that countries with the highest absolute numbers of executions, eg, China, Iran and Iraq, frequently execute people without regard to such niceties as a fair and public trial with full defence rights, or an appeal or a process of pardon or reprieve.

Before taking stock of important standard-setting developments during the 1980s, we should remember the basic international legal context of the death penalty. While the death penalty cannot be described as per se unlawful under international law, the attitude of the UN is one that tends to encourage abolition. So, according to General Assembly Resolutions 2857 (XXVI) (1971) and 32/61 (1977) "the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment". Similarly the UN Secretary-General, referring to the death penalty in his statement to the Sixth Congress, affirmed that "the taking of life of human beings violates respect for the dignity of every person and the right to life, as declared in the basic postulates of the United Nations". At the same Congress a UN Secretariat working paper had already opined that "the death penalty constitutes 'cruel, inhuman or degrading punishment' which even in the light of the behaviour at which it is directed, should not be acceptable". The Human Rights Committee established under the International Covenant on Civil and Political Rights was to conclude in 1982 that "all measures of abolition should be considered as progress in the enjoyment of the right to life".

Perhaps the most important legal development to have occurred since the Sixth Congress has been the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. This Protocol, which prohibits resort to the death penalty by States Parties to the Covenant and Protocol (reservations are permitted for wartime use of the penalty), resulted from an initiative of the Federal Republic of Germany in the wake of the Sixth Congress inaction on the capital punishment problem.

Instead of seeking further normative proscription of the death penalty, the idea after the Sixth Congress became that of securing agreement on a treaty instrument, parties to which could commit themselves to abolition. The FRG brought the idea to the 1980 session of the General Assembly. The Assembly referred it to the Commission on Human Rights which, in turn, referred it to its Sub-Commission on Prevention of Discrimination and Protection of Minorities. Eventually, the Sub-Commission agreed on a draft text, prepared by its Special Rapporteur, Marc Bossuyt, and transmitted it to the Commission which then forwarded it on through ECOSOC to the General Assembly. The Assembly adopted it in 1989. The vote was 59 in favour, 26 against and 48 abstentions. As of August 1990, the Protocol has received 16 signatures and three ratifications (German Democratic Republic, New Zealand and Sweden).

Meanwhile, there have been two analogous regional developments. In 1984, the Council of Europe adopted the Sixth Protocol to the European Convention on Human Rights. This was the result of an initiative launched by the late Austrian Minister of Justice, Dr Christian Broda, as a result (according to him) of his participation in a 1977 Amnesty International conference on the Abolition of the Death Penalty. The Protocol, which by August 1990 had been ratified by some 15 states members of the Council of Europe, requires abolition of the death penalty, subject to the possibility of retaining an exception for the penalty "in time of war or imminent threat of war".

Similarly, just three months ago, the General Assembly of the Organization of American States adopted a Protocol to the American Convention on Human Rights to Abolish the Death Penalty, reservations being permitted for the application of the penalty "in wartime in accordance with international law, for extremely serious crimes of a military nature". The legal significance of the Protocol is limited as States Parties to the American Convention are already bound by Article 4 neither to reintroduce the death penalty after it has been abolished, nor to extend it to crimes to which it did not already apply. It has considerable symbolic value, however, reinforcing the progress of the abolitionist cause.

Two last regional aspects deserve note. The Vienna Concluding Document of the Conference on Security and Cooperation in Europe adopted in 1989 has taken up the death penalty as an issue to be kept under review. This is despite the fact that the participants included the two superpowers, both of which have this penalty on the books and apply it in practice. Furthermore, the European Parliament has repeatedly declared the death penalty to violate human rights, including the prohibition of cruel, inhuman or degrading treatment or punishment and has invoked the "common civilization" of EC member states in appealing for abolition. It may not be too much to say that abolition of the death penalty has become an implicit condition of membership of the European Community.

Progress towards the agreed goal of abolition and towards a formal international legal requirement of universal abolition is slow, but real. The political momentum, nationally and internationally, is firmly in the direction of abolition. And the death penalty is solidly on the agenda as a human rights issue, not just an issue of criminal policy. It is to be hoped that this Congress will endorse this trend.