HUMAN RIGHTS V. THE DEATH PENALTY

Abolition and Restriction in Law and Practice

(Article for a book on the death penalty to be published by the Council of Europe, tentatively entitled *Europe: A Death-penalty-free Zone*)

By Eric Prokosch, Theme Research Coordinator
Amnesty International

Fifty years after the adoption of the Universal Declaration of Human Rights, the trend towards worldwide abolition of the death penalty is unmistakable. When the Declaration was adopted in 1948, eight countries had abolished the death penalty for all crimes; today, as of November 1998, the number stands at 63. More than half the countries in the world have abolished the death penalty in law or practice, and the numbers continue to grow.

In Europe the trend is especially remarkable: the Parliamentary Assembly of the Council of Europe now requires a commitment to abolition as a condition of entry into the organization, and the European Union has adopted a far-reaching policy governing the promotion of abolition in non-member states. Within the United Nations (UN), the Commission on Human Rights has called on states that still maintain the punishment "to establish a moratorium on executions, with a view to completely abolishing the death penalty" (resolution 1998/8 of 3 April 1998). Yet there are still calls for the use or expansion of the death penalty, often in response to public concern about crime.

What do these matters have to do with human rights?

1. UNDERSTANDING THE DEATH PENALTY AS A HUMAN RIGHTS VIOLATION

Amnesty International opposes the death penalty as a violation of fundamental human rights - the right to life and the right not to be subjected to cruel, inhuman or degrading punishment. Both of these rights are recognized in the Universal Declaration of Human Rights, other international and regional human rights instruments and national constitutions and laws.

Defence of life and defence of the state may be held to justify, in some cases, the taking of life by state officials; for example, when law-enforcement officials must act immediately to save their own lives or those of others or when a country is engaged in armed conflict. Even in such situations the use of lethal force is surrounded by internationally accepted standards of human rights and humanitarian law to inhibit abuse.

The death penalty, however, is not an act of defence against an immediate threat to life. It is the premeditated killing of a prisoner for the purpose of punishment - a purpose which can be met by other means.

The cruelty of torture is evident. Like torture, an execution is an extreme physical and mental assault on a person already rendered helpless by government authorities.

The cruelty of the death penalty is manifest not only in the execution but in the time spent under sentence of death, during which the prisoner is constantly contemplating his or her own death at the hands of the state. This cruelty cannot be justified, no matter how cruel the crime of which the prisoner has been convicted.

If it is impermissible to cause grievous physical and mental harm to a prisoner by subjecting him or her to electric shocks and mock executions, how can it be permissible for public officials to attack not only the body or the mind, but the prisoner's very life?

Threatening to kill a prisoner can be one of the most fearsome forms of torture. As torture, it is prohibited. How can it be permissible to subject a prisoner to the same threat in the form of a death sentence, passed by a court of law and due to be carried out by the prison authorities?

The cruelty of the death penalty extends beyond the prisoner to the prisoner's family, to the prison guards and to the officials who have to carry out an execution. Information from various parts of the world shows that the role of an executioner can be deeply disturbing, even traumatic. Judges, prosecutors and other officials may also experience difficult moral dilemmas if the roles they are required to play in administering the death penalty conflict with their own ethical views.

The right to life and the right not to be subjected to cruel, inhuman or degrading punishment are the two human rights most often cited in debates about the death penalty. But the death penalty also attacks other rights.

As indicated by the annual reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and by Amnesty International's own information, in many cases prisoners are sentenced to death in trials which do not conform to international norms for a fair trial. Prisoners facing a possible death sentence are often represented by inexperienced lawyers, and sometimes by no lawyer at all. The defendants may not understand the charges or the evidence against them, especially if they are not conversant with the language used in court. Facilities for interpretation and translation of court documents are often inadequate. In some cases prisoners are unable to exercise their right to appeal to a court of higher jurisdiction and the right to petition for clemency or commutation of the death sentence. In some jurisdictions, capital cases are heard before special or military courts using summary procedures. Such practices undermine

the right to a fair trial and are in violation of standards recognized in international human rights instruments.

The death penalty is often used disproportionately against members of disadvantaged social groups, and thus in a discriminatory fashion, contrary to Articles 2 and 7 of the Universal Declaration of Human Rights. It is the ultimate denial of the dignity and worth of the human person, affirmed in the preamble to the Universal Declaration of Human Rights.

There is no criminological justification for the death penalty which would outweigh the human rights grounds for abolishing it. The argument that the death penalty is needed to deter crime has become discredited by the consistent lack of scientific evidence that it does so more effectively than other punishments. The death penalty negates the internationally accepted penological goal of rehabilitating the offender.

2. RESTRICTION THROUGH INTERNATIONAL STANDARDS

International human rights standards have developed in a way that favours ever tighter restrictions on the scope of the death penalty. This progressive narrowing of the death penalty is mirrored by actual practice in most states which still use the punishment.

Progressive restriction as a goal

In a resolution on capital punishment, the UN General Assembly in 1971 affirmed that "in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, 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 in all countries" (resolution 2857 (XXVI) of 20 December 1971). The goal of progressive restriction of capital offences was reiterated by the General Assembly in 1977 (resolution 32/61 of 8 December 1977), by the UN Commission on Human Rights in resolutions 1997/12 of 3 April 1997 and resolution 1998/8 of 3 April 1998, and by the European Union in the Guidelines to EU Policy towards Third Countries on the Death Penalty ("EU Guidelines"), adopted in 1998.

Restriction to the most serious offences

The International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, states in Article 6(2): "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes".

In a general comment on Article 6 of the ICCPR, the Human Rights Committee established under that treaty stated that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure" (general comment 6, adopted by the Committee at its 16th session on 27 July 1982).

In the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted in 1984 ("ECOSOC Safeguards"), the UN Economic and Social Council (ECOSOC) reiterated that the death penalty should be imposed only for the most serious crimes and stated that the scope of these crimes "should not go beyond intentional crimes with lethal or other extremely grave consequences".

There have been various specific standards and statements about the crimes for which the death penalty should not be used. Article 4(4) of the American Convention on Human Rights (ACHR) states that the death penalty shall not be inflicted "for political offences or related common crimes." The Human Rights Committee has stated that "the imposition ... of the death penalty for offences which cannot be characterized as the most serious, including apostasy, committing a third homosexual act, illicit sex, embezzlement by officials, and theft by force, is incompatible with article 6 of the Covenant" (UN document No. CCPR/C/79/Add.85, 19 November 1997, paragraph 8). The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the death penalty "should be eliminated for crimes such as economic crimes and drug-related offences" (UN document No. E/CN.4/1997/60, 24 December 1996, paragraph 91).

The international standard of restricting the death penalty to the most serious crimes, in particular to those with lethal consequences, is broadly reflected in practice. Most states which continue to carry out executions today do so only for murder, although they may retain the death penalty in law for other crimes. Moreover, the rate of executions in most such countries has declined to a point where it representes only a tiny fraction of the number of reported murders. (The most outstanding exception is China, which carries out more executions than all other countries combined, and continues to execute prisoners for non-violent offences including theft and embezzlement.)

A further development in the restriction of capital offences is the adoption by an international conference in Rome in July 1998 of the Statute of the International Criminal Court, in which the death penalty is not provided for what are arguably the most heinous crimes of all - genocide, other crimes against humanity and war crimes. Similarly, the UN Security Council excluded the death penalty for these grave crimes in 1993 and 1994 when it established the International Criminal Tribunals for the former Yugoslavia and for Rwanda. If these decisions are read together with the well-established standard that the death penalty should be used only for the most serious crimes in countries which have not abolished it, the implication is that the death penalty should not be used at all. If the use of the death penalty is excluded for the most serious international crimes, it can hardly be countenanced for lesser crimes.

Restriction of applicable offenders

International standards have also developed in such a way as to exclude more and more categories of people from those against whom the death penalty might be used in countries which have not abolished it.

- The exclusion of *juvenile offenders* - those under 18 years old at the time of the offence - is so widely accepted in law and practice that it is approaching the status of a norm of customary international law. The prohibition of sentencing juvenile offenders to death has been set forth in the ICCPR (Article 6(5)), the ACHR (Article 4(5)), the ECOSOC Safeguards, the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War and the two Additional Protocols of 1977 to the Geneva Conventions of 1949 and - more recently - in the Convention on the Rights of the Child (Article 37(a)), which has been ratified by all but two UN member states. The prohibition is widely observed in practice. Between January 1990 and October 1998 Amnesty International documented only 18 executions of juvenile offenders worldwide, carried out in six countries. Half of the executions were carried out in just one country, the United States of America.

- The exclusion of *pregnant women*, *new mothers*, and *people over 70 years old*, set forth variously in the ICCPR, the ACHR and the ECOSOC Safeguards, are also widely observed in practice.

- The ECOSOC Safeguards also state that executions shall not be carried out on "persons who have become *insane*" (emphasis added), and in resolution 1989/64, adopted on 24 May 1989, ECOSOC recommended that UN member states eliminate the death penalty "for persons suffering from *mental retardation* or extremely limited mental competence, whether at the stage of sentence or execution" (emphasis added). These exclusions are less widely observed. Amnesty International has documented many cases of prisoners sentenced to death and - sometimes - executed, particularly in the USA, who were of extremely limited mental ability.

Procedural safeguards

Procedural safeguards to be followed in all death penalty cases have been set forth in Article 6 of the ICCPR and Article 4 of the ACHR and reiterated and elaborated upon in the ECOSOC Safeguards and other UN resolutions. They include all international norms for a fair trial, including the right to appeal to a higher court, and the right to petition for clemency. In General Assembly resolution 2393 (XXIII) of 26 November 1968 and successive resolutions, the UN has repeatedly stated its wish to ensure the most careful legal procedures and the greatest possible safeguards for those accused in capital cases in countries where the death penalty has not been

abolished. The need to respect minimum standards in death penalty cases is also reflected in the EU Guidelines.

Although the safeguards exist in principle in many countries which retain the death penalty, they are often not fully observed in practice, and even where an effort is made to observe them, the use of the death penalty often remains arbitrary. Factors such as inadequate legal aid and prosecutorial discretion result in some defendants being sentenced to death and executed while others convicted of similar crimes are not. The safeguards have failed to prevent the arbitrary use of the death penalty or to preclude its use against people innocent of the crimes of which they were convicted.

3. THE EMERGENCE OF ABOLITION AS A HUMAN RIGHTS NORM

International bodies have increasingly made statements and adopted policies favouring abolition on human rights grounds. These statements and policies are beginning to be backed up by national court decisions ruling out the death penalty as a violation of human rights.

Statements and policies

In resolution 2857 (XXVI) of 20 December 1971, cited above, the UN General Assembly affirmed the desirability of abolishing the death penalty in all countries. The desirability of abolishing the death penalty was reiterated in General Assembly resolution 32/61 of 8 December 1977 and - most recently - by the UN Commission on Human Rights in resolution 1998/8 of 3 April 1998.

In its general comment on Article 6 of the ICCPR, cited above, the Human Rights Committee stated that Article 6 "refers generally to abolition [of the death penalty] in terms which strongly suggest ... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life... "

In resolution 1997/12 of 3 April 1997, the UN Commission on Human Rights expressed its conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights". This statement was reiterated by the Commission on Human Rights in resolution 1998/8 of 3 April 1998.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that he "strongly supports the conclusions of the Human Rights Committee and emphasizes that the abolition of capital punishment is most desirable in order fully to respect the right to life" (UN document No. E/CN.4/1997/60, paragraph 79). He has urged governments of countries where

the death penalty is still enforced "to deploy every effort that could lead to its abolition" (UN document No. A/51/457, paragraph 145).

In resolution 727 of 22 April 1980, the Parliamentary Assembly of the Council of Europe stated that "capital punishment is inhuman" and appealed to the parliaments of member states which retained the death penalty for peacetime offences to abolish it. It widened the appeal in resolution 1044 (1994) of 4 October 1994, calling "upon all the parliaments in the world which have not yet abolished the death penalty, to do so promptly following the example of the majority of Council of Europe member states". It stated that it "considers that the death penalty has no legitimate place in the penal systems of modern civilized societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights" (recommendation 1246 (1994)).

The EU Guidelines, cited above, state that "abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights". The Guidelines establish as an EU objective "to work towards universal abolition of the death penalty as a strongly held policy view agreed by all EU member states".

National court decisions

On 24 October 1990 the Hungarian Constitutional Court declared that the death penalty violates the "inherent right to life and human dignity" as provided under Article 54 of the country's constitution. The judgment had the effect of abolishing the death penalty for all crimes in Hungary.

On 6 June 1995 the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim constitution (*Makwanyane and Mcbunu v. The State*, paragraphs 95, 146). Eight of the 11 judges also found that the death penalty violates the right to life. The judgment had the effect of abolishing the death penalty for murder.

International abolitionist treaties

The community of nations has adopted three international treaties providing for the abolition of the death penalty. One is of worldwide scope; the other two are regional. In order of adoption, they are Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights") concerning the abolition of the death penalty, adopted by the Council of Europe in 1982; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989; and the Protocol to the American

Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990. Protocol No. 6 to the European Convention on Human Rights provides for the abolition of the death penalty in peacetime; the other two treaties provide for the total abolition of the death penalty but allow states parties to retain the death penalty in time of war if they make a declaration to that effect at the time of ratification or accession.

Protocol No. 6 is the most widely ratified of the three in comparison to the number of states parties to the parent treaty; as of October 1998 it had been ratified by 28 states and signed by another five. The Second Optional Protocol to the ICCPR had been ratified by 33 states as of the same date and signed by another three, while the Protocol to the American Convention on Human Rights to Abolish the Death Penalty had been ratified by six states and signed by one other. The numbers of signatories and states parties continue to grow. In 1998 alone Estonia ratified and Latvia signed Protocol No. 6, Nepal ratified the Second Optional Protocol to the ICCPR and Costa Rica and Ecuador ratified the American protocol.

4. THE PATH TO ABOLITION

The pace of abolition has accelerated in the second half of the 20th century, and especially in the past 20 years. At the beginning of the century, only three states had permanently abolished the death penalty for all crimes - Costa Rica, San Marino and Venezuela. In 1948, the number stood at eight. By the end of 1978 it had risen to 19. During the past 20 years the number has more than tripled.

Sixty-three countries today have abolished the death penalty for all crimes. Another 16 have abolished the death penalty for all but exceptional crimes such as wartime crimes.

Alongside the countries which have abolished the death penalty for all crimes or for ordinary crimes only, there are 24 which can be considered abolitionist *de facto*, in that they retain the death penalty in law but have not carried out any executions for the past 10 years, or have made an international commitment not to do so. As Roger Hood has stated, the death penalty in these countries "has a far greater symbolic than practical significance" (*The Death Penalty: A World-wide Perspective*, revised and updated edition, Oxford, Clarendon Press, 1996, page 79, paragraph 124).

These figures make for a total of 103 countries which have abolished the death penalty in law or practice. Ninety-two other countries could be said to retain the death penalty, but the number of countries which actually execute prisoners in any one year is much smaller. In 1997, for example, Amnesty International recorded 2,607 executions in 40 countries worldwide. The vast

majority of reported executions, 85 per cent, were carried out in just four countries - China, Iran, Saudi Arabia and the USA.

As indicated above, these developments in law and practice nationally have been mirrored by the development of international standards restricting the application of the death penalty and affirming the desirability of abolition on human rights grounds. As William A. Schabas has observed, "Given the enormous and rapid progress in the development of international norms respecting the death penalty since the end of the Second World War, the general acceptance of abolition and its elevation to a customary norm of international law, perhaps even a norm of *jus cogens*, may be envisaged in the not too distant future" (William A. Schabas, *The Abolition of the Death Penalty in International Law,* second edition, Cambridge, Cambridge University Press, 1997, p. 20).

The trend to abolition seems inexorable, yet the battle has to be fought over and over again. Each country has to go through a process which is often long and painful, examining for itself the arguments for and against, before finally - we hope - rejecting the death penalty.

Even after abolition, there may be calls to bring the death penalty back. If the calls are serious enough, the arguments have to be gone through again.

The decision to abolish the death penalty has to be taken by the government and the legislators. This decision can be taken even though the majority of the public favour the death penalty. Historically, this has probably almost always been the case. Yet when the death penalty is abolished, usually there is no great public outcry; and once abolished, it almost always stays abolished.

This must mean that although a majority of the public favours the death penalty in a given country, it is also the case that a majority of the public is willing to accept abolition. This is a feature of public opinion which is not usually revealed by polls asking respondents to state their position on the death penalty. If the questions were more sophisticated, the polls would probably give a better sense of the complexities of public opinion and the extent to which it is based on an accurate understanding of the actual situation of criminality in the country, its causes and the means available for combating it.

The assertion that the death penalty deters crime more effectively than other punishments is now largely discredited by the lack of scientific evidence despite the many studies that have been made. Yet many members of the public believe that it does. Their belief flies in the face of the scientific evidence. In other words, the public does not have a scientific understanding of the deterrent effect of the death penalty.

As the UN Secretariat suggested as long ago as 1980, governments should take on the task of educating the public on the uncertainty of the deterrent effect of capital punishment (UN document No. A/CONF87/9, paragraph 68). A better public understanding of crime prevention and criminal justice would produce more support for anti-crime measures which are genuine and not merely palliative. At the very least, politicians should not make demagogic calls for the death penalty, misleading the public and obscuring the need for genuine anti-crime measures.

For Amnesty International, the human rights argument is paramount. But in practice, it is only one of several powerful arguments against the death penalty which need to be part of the national debate.

While Amnesty International is making the human rights argument, others need to make the other arguments. Statements from religious leaders, other respected public figures, influential organizations and the news media can create a moral climate in which the legislators will be more willing to vote in a way which they know will be unpopular with many of their constituents.

Often the national debate on the death penalty is conducted in purely national terms. The international dimension needs to be brought in. Countries can learn from other countries' experience.

Over the centuries, laws and public attitudes relating to torture have evolved. It is no longer permissible to use thumbscrews or the rack as legally sanctioned means of interrogation and punishment. Attitudes toward the death penalty are also changing, and as more and more countries abolish capital punishment, the guillotine, the garrotte and the noose are being relegated to the museums, alongside the medieval instruments of torture.

Bringing about abolition requires courageous political leadership, leadership which will be exercised in the defence of human rights. The requirement of respect for human rights has to include the abolition of the death penalty. It is not possible for a government to respect human rights and retain the death penalty at the same time.