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‘The progressive abolition of the death penalty worldwide’

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It is pleasure and an honour to speak at this very important meeting. I would like to congratulate ASEAN and everyone who has made this possible for their initiative and thank them for their hard work. I also wish to congratulate ASEAN on the Thematic Study that it has decided to undertake on the death penalty during 2015 and to assure them that my office, and I personally, stand ready to provide whatever assistance you think may be of use in taking this exciting project forward.

1) Two trends: A reduction of violence worldwide, and a move away from the death penalty

Working in the human rights field sometimes leaves one sceptical about impact, let alone overall progress. While we may be pushing, for example, for the better protection of the right to life, the news about continued killings, not only in so many conflicts around the world – need I mention for example Syria and

¹ I want to thank Thomas Probert for his research assistance.

Sudan? - but also the regular reports about executions by states for trivial offences, sometimes using brutal means such as beheading, or resumptions or expansions of the death penalty, seems to outbalance all of this. Yet, from looking at the available facts in a systematic way, it seems that at least on the right to life issues, including the death penalty, we may in some respects be making more headway than we think.

The essence of my message is that worldwide, and also in the ten ASEAN countries represented here today, much progress has been made to protect the right to life generally, and also to reduce the abuse and indeed the use of the death penalty. We need to move faster, but we are on the right track, so to speak.

It may not yet be possible to trace the number of killings of all sorts that do not comply with international standards accurately, but it appears that the incidence of homicides as well as of other violent deaths per year has been for a long time now in decline worldwide.² Researchers have shown us that the human race, contrary to the impressions we may often get in the media, is becoming less violent. This holds true for killings during armed conflict as well as in peace. Often repeated maxims such as that ‘the 20th century was the most violent century of them all’ is simply not true. The violence that remains is of course unacceptable, but a smaller percentage of the world’s population meet violent deaths today than ever before in history.

The available figures also indicate that there is a slow but steady decline in the number of states that still legally recognise the death penalty.³ More pertinently, the number of states which actually *practise* the death penalty continues to

² Figures concerning ‘violent death’ can be drawn from the WHO’s Global Health Estimates (morbidity statistics) which show a global decline in per capita incidence of deaths caused by both interpersonal and collective violence between 2000 and 2012. Due to inconsistent reporting it is difficult to offer statistics concerning homicide at a global level over time, however, for a (very) broad historical sweep see Steven Pinker *The Better Angels of Our Nature: The Decline of Violence in History and its Causes* (2011); Manuel Eisner ‘Long-Term Historical Trends in Violent Crime’ *Crime and Justice; A Review of Research* 30 (2003) pp.83-142

³ By the end of 2013, 98 countries had abolished the death penalty in law for all crimes.

shrink, with only 22 states executing in 2013.⁴ Of all those executions known to have been conducted, (a number which excludes China, where the figures are a state secret), almost 80% took place in just three countries Iran, Iraq and Saudi Arabia.⁵ And if we accept the unconfirmed reports that there has been a drastic reduction in the number of people executed in China in the last decade, it is clear that the overall number of people being executed per year is also going down.⁶

The United States is often cited as a prominent outlier in the trend discussed here, but an increasing number of states within the US have abolished the death penalty. I find it interesting to note that it appears that Texas (responsible for 41% of the 39 executions conducted in the US in 2013) will in 2014 have executed the smallest number of people for nearly 2 decades.⁷

These trends are important for two reasons: In the first place, the overall drop in violence in the world shows that, judged by global figures, there are even less grounds today than ever before to argue that the death penalty acts as a deterrent, at least to violent crime. Both the incidence of violence and the death penalty are dropping at the same time.

Secondly, the global trend to move away from the death penalty by states around the world strengthens the argument that state practice has turned against this form of punishment. It is becoming extinct – as happened to slavery two centuries ago. On all fronts states that retain the death penalty will find their position to be more and more isolated, and they will need to justify their approach.

⁴ Though a slight increase from 21 in 2012, this reflects a steady decline over the past two decades, from 25 countries in 2004 and 35 in 1994. See *Death Sentences and Executions in 2013* (2014) p.7.

⁵ Iran: 369+; Iraq: 169+; Saudi Arabia 79+ of a minimum total of 778 executions worldwide. The United States of America was the next most frequent executioner, with 39 in 2013, followed by Somalia (34+) and Sudan (21). See Amnesty International *Death Sentences and Executions in 2013* (2014) p.7.

⁶ ‘China Executed 2,400 People in 2013, Dui Hua’ (20 October 2014) http://duihua.org/wp/?page_id=9270

⁷ ‘In Texas , the Death Penalty Is Slowly Dying Out’ *The Atlantic* (29 October 2014) <http://www.theatlantic.com/national/archive/2014/10/texas-death-penalty-executions/382057/>.

2) The ‘protect life’ principle

If one proceeds from what I believe is the right starting point—that each life is of incommensurable value, and each unwarranted loss of life is a tragedy—it is clear that there will be no room for complacency as long as there is deadly violence anywhere. Yet, there is encouragement to be taken from the general trend towards the realisation of what I like to call the ‘protect life’ principle.⁸

The “protect life” principle requires that, for one human being to take the life of another such an action must as a minimum be necessary *in order to save another life*. This is increasingly seen as the norm, and I think it is safe to say, in practice there is increasing compliance with this norm as well.

It is possible to discern the impact of the ‘protect life’ principle on the application of the death penalty. The situation, which existed not so long ago, when there were few constraints on using the death penalty to enforce state authority in general, or to punish a wide range of petty offences, has given way to an approach where it may be used, if at all, only as a punishment for the most serious crimes, and those are understood to be crimes involving murder.

This approach is closer to the ‘protect life’ principle than any alternative, insofar as the intentional taking of life—murder—is seen as the trigger. However, it still falls short of full compliance, because the taking of life comes as a punishment afterwards, and the deterrent value of the death penalty is at best contested and remote.

In general the death penalty does not seem to sit easily with the human rights project as a whole. It is increasingly seen as being contrary to the right to life. It is also widely seen as a violation of the right to be free from torture, cruel,

⁸ The ‘protect life’ principle is the standard posed in law enforcement and in personal self-defence (see A/HRC/26/36 ¶¶70-73); Some observers also argue that such an approach is starting to play a stronger role in armed conflict, see Sandesh Sivakumaran ‘International Humanitarian Law’ in D Moeckli, S Shah & S Sivakumaran (eds.) *International Human Rights Law* (OUP, 2010)

inhuman or degrading treatment of punishment,⁹ the right to equality and also the right to dignity.

I would like to address a number of aspects related to this move away from the death penalty, to show that it is a coherent and consistent—and necessary—practice.

3) The progressive abolition of the death penalty and GA Resolutions for moratoria

While international law in general, and my mandate in particular, has in the past been interpreted as not necessarily abolitionist,¹⁰ I have argued elsewhere that international law, in my view, requires the progressive abolition of the death penalty. This does not mean that it necessarily requires immediate compliance (as is often the case with civil and political rights such as the right to life), but it requires at least the gradual, progress toward realisation, as is often the case with socio-economic rights.¹¹

One of the ways in which this progressive realisation might be achieved is through moratoria.

⁹ See generally A/67/279.

¹⁰ See for example Philip Alston's report on the United States (2009) A/HRC/11/2/Add.5 ¶3.

¹¹ When drafting the International Covenant on Civil and Political Rights (ICCPR) of 1966 the compromise between abolitionist and retentionist states was to provide for the protection of the right to life and the prohibition of its arbitrary deprivation (in paragraph (1) of article 6), while still carving out some space for the death penalty (in paragraph (2)) by stating that 'in countries which have not abolished the death penalty' it may only be imposed for the 'most serious crimes', subject to certain further restrictions. This space, however, was expected to shrink. According to the Chairperson of the Working Group on the drafting of article 6, the wording of article 6 (2) was intended to 'show the direction' in which the Working Group hoped the situation would develop. As a result, a 'constant reappraisal' of the meaning of the term would be needed. The wording chosen reflected their expectation that the category of permissible capital offences would narrow over the years as the value attached to life and other human rights values increased. As a result, article 6 did not enumerate and thereby entrench the then-permissible capital offences but rather used the open-ended – and open to narrowing – phrase "most serious crimes". This understanding of article 6 (2) as a progressively narrowing exception is supported by the inclusion of article 6 (6), which provides that nothing in article 6 may be invoked to delay or prevent the abolition of capital punishment by any state party to the Covenant. See generally Roger Hood, "The enigma of the 'most serious' offences", Center for Human Rights and Global Justice Working Paper, No. 9 (New York, NYU School of Law, 2006) and William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge University Press, 2002).

Earlier this year, in July, stating that the death penalty ‘has no place in the 21st century’, the UN Secretary General called on states to support the biennial General Assembly resolution calling for a global moratorium on its application.¹² The resolution, which will come to a vote in the general Assembly in December, will be the fifth since 2007. The language of the resolution is designed to be broad and inclusive: it does not impose the abolition of the death penalty, but rather a moratorium on executions themselves, either in law or otherwise, with a view to abolishing the practice in the future.

From the perspective of my mandate, and of the right to life, a moratorium is a very helpful “half-way house” or step forward in the process of the progressive abolition of the death penalty. It allows the sometimes-lengthy processes of legal and constitutional reform to take place without further loss of life.

Each iteration of the General Assembly resolution has been passed by a wider margin, reflecting the progressive global movement away from this punishment. In 2012, 111 states voted in favour of the resolution.

In my report to the General Assembly in October of this year I offered a word of caution about moratoria, and the possible arbitrariness of resuming executions after an extended period. The UN currently regards 10 years as a suitable threshold for a state to pass without conducting executions before it might be considered “de-facto abolitionist”. One could perhaps debate which country is more “de facto abolitionist” – one which has not executed for five years since a change of administration and in that time has voted for three GA resolutions; or one which has not executed for ten years, but has consistently opposed GA resolutions calling for a moratorium? In either case, the subsequent resumption would be regarded as a step backwards (and—depending on the circumstances,

¹² http://www.un.org/apps/news/story.asp?NewsID=48192#.U_WzhsWSySp

especially regarding notice—possibly an arbitrary execution), but the question remains in which case would it be the greater surprise?

I strongly urge the states represented here today to vote in favour of the moratorium, a process which starts next week in the third committee.

4) The importance of regional initiatives

In my October 2014 report to the General Assembly I also highlighted the role that regional mechanisms such as ASEAN can play generally in the protection of the right to life. Regional systems are in many cases closer to the people concerned than the global system and, as such, have a unique ability to facilitate greater participation in the international system and to foster its legitimacy.¹³ This can also apply to the death penalty.

The Council of Europe has become the first regional mechanism to become “execution-free”.¹⁴ Of the 57 participating states of the OSCE, only 10 have not abolished the death penalty and of those, 8 have a moratorium.

In the inter-American system, while legal provision for the death penalty remain in several places, the area has—with the notable exception of the United States, which as we saw is also moving away from the death penalty—been execution free for several years.

In Africa there is at the moment an initiative to adopt a protocol to the African Charter on Human and Peoples’ Rights on the death penalty.¹⁵ They are also developing a General Comment on the right to life.

¹³ A/69/265

¹⁴ Russia has not abolished the death penalty in law, but it has not been applied since 1999 following a moratorium decision of its Constitutional Court

¹⁵ Cotonou Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa [<http://www.achpr.org/news/2014/07/d150>]

The situation of the death penalty in the ASEAN region is mixed. This is one reason that this initiative by AICHR — to develop a Thematic Study on the right to life, with a particular focus on the question of the death penalty — is so important.

- Of 10 member states, 2 have abolished in law, 3 have abolished in practice, but half retain the death penalty.
- Between 2007-2013 there were 91 executions reported among the ASEAN member states, 65 of which (>70%) in Vietnam.
- 2012 was an execution free year in ASEAN.
- There is a worryingly upward trend in the number of death sentences being passed (294 in 2013, up from 101 in 2008).
- Singapore caused some concern a few months ago by resuming the death penalty (after 3 years). Indonesia had done the same in 2013 (after 4 years).
- While Brunei Darussalam is classified as ‘de facto abolitionist’ a new Penal Code was enacted in October 2013 retaining the death penalty including for acts that do not meet the threshold of the ‘most serious crimes’ and, in some cases, acts that should not be considered crimes at all, including adultery and consensual sex between people of the same gender. Furthermore, the end of childhood is defined by the age of puberty, allowing for the imposition of the death penalty for crimes committed by defendants below 18 years of age.
- There are nearly a thousand people on death row in Malaysia.
- In January 2013 authorities in Myanmar announced the commutation of remaining death sentences.
- Before the abolition of the death penalty on 2006, the then president of the Philippines commuted 1230 death sentences to life imprisonment.

- In 2013, the High Court of Singapore began reviewing the cases of 32 prisoners who had been mandatorily sentenced to death for drug-related offences and murder. Several death sentences were commuted to life imprisonment and other lesser punishment
- Recent political instability in Thailand has undermined progress toward abolition (statement in support of candidature to HRC pledged to “study the possibility” of abolishing capital punishment).¹⁶ There have been several recent legislative efforts to impose the death penalty for non-most serious crimes.
- I wish to note that in the recent years, a new phenomenon of sentencing large groups of individuals in mass trials emerged in several countries around the world, including in Vietnam. This has led to serious concerns that such mass trials violate international human rights standards for fair trial guarantees and other safeguards.

5) Future pressure points

I think there are a number of factors that will play an important role in reducing the space for the death penalty in future:

- There will be increased pressure and possibility for transparency.¹⁷ In a connected world there will be less room for states to hide their practices, and in that way to insulate themselves from scrutiny and pressure. The global visibility of botched executions and the resulting embarrassment is another driver away from continuing with this practice. (The great elephant in the room with respect to transparency is China. However the

¹⁶ <http://www.fidh.org/en/asia/thailand/16190-thailand-action-not-words-needed-to-abolish-the-death-penalty>

¹⁷ GA Resolution 67/176 called on States to make available relevant information with regard to their use of the death penalty.

fact that they are the only country in the world to hold this view may perhaps be exerting a pressure of its own.

- It is very difficult to execute someone in a humane way. Hanging, shooting by firing squad, lethal injection, all of these methods have in one way or another become discredited or at least seriously questioned. But there are not really many other alternatives to get the job done.
- There is increased pressure on and by states and corporations who collaborate with states that execute not to do so.
- There is an increased availability of DNA testing that has the potential of showing that the death penalty was wrongfully imposed, even in states with well-functioning legal systems, which undermines its credibility.
- There seems to be a growing disbelief in the myth of deterrence. The fact that in spite of all the pressure against the death penalty, and the increased availability of scientific methods, the deterrent value of the punishment has not yet been proven by proponents of the death penalty, may suggest that it never will be shown because it cannot be shown. And the onus is on those who want to limit rights to prove that such a limitation is justified.
- There is a growing view that the death penalty constitutes a violation of the prohibition of torture and cruel, inhuman and degrading treatment or punishment, in addition to the right to life.

Perhaps the most important point in this regard is the fact that the norm has shifted. While the traditional position was that the death penalty was the norm, abolition is now the norm. The onus and burden of proof is on states that want to retain the death penalty to justify their position. It is not simply someone like myself as a lone Rapporteur, or NGOs, who have to make the point that the death penalty is on its way out – the figures are there for everyone to see, and those states that retain extreme positions will increasingly find themselves being

isolated and under pressure to change. The change in the tide is global, and irresistible.

6) Conclusion

It seems likely that over the coming ten to twenty years the death penalty, as an exception rather than a rule, will become confined to an ever-diminishing number of states. To expand a statistic I have used above: Over the past seven years there have been known executions in 36 countries, but 86% of them have occurred in just six countries (Iran, Saudi Arabia, Iraq, USA, Pakistan, Yemen).¹⁸

The very public calls for a moratorium from high-profile figures—ranging from the Secretary General of the United Nations to the High Commissioner for Human Rights—speak not only to uneasy relationship of the death penalty with human rights more generally, but also to an emerging consensus that at least the *practice* of executions is a chapter of the world's history that is being closed. At the same time I think it is important to note that international law makes very clear the desirability of abolition; but leaves states to determine the best way to do this. In the fifty years since the pronouncement of the International Covenant some 160 countries have acknowledged this directionality and abolished the death penalty either in law or practice. While waiting for the remaining states it is important that organisations such as AICHR continue to insist that it be implemented within the very narrow exception allowed by the law.

¹⁸ These six countries account for 4,148 of 4,807 known executions (excluding China).

It is also important, as the High Commissioner for Human Rights has recently emphasised, that political leadership will be exercised in this context.¹⁹

Let me conclude by going back to where I have started this address. I made the point then that both the use of the death penalty and the percentage of the world population who dies violent deaths is decreasing. It is important from my point of view that we see the debate on the death penalty in this broader context.

As the death penalty slowly exits the scene, we need to increase our focus on the other aspects of the protection of the right to life. As I mentioned, on my continent, Africa, for example, the African Commission on Human and Peoples' Rights is developing a general comment on the right to life in general. The rules on the use of force, how to deal with custodial deaths and also with private killings that exhibit a pattern will be dealt with.

May I gently urge ASEAN to give consideration to expanding its upcoming Thematic Study on the death penalty to also include the other components of the protection of the right to life. The current moment in time seems to be an excellent opportunity for regional systems to make a much needed contribution towards world jurisprudence on this fundamental right.

I wish you all the best for your important work.

¹⁹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15101&LangID=E>