

Launch of the Parliamentary Fact Sheet on the Death Penalty and Terrorism-related Offences

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Statement,
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Special Rapporteur on extrajudicial, summary or arbitrary executions

Honourable Chair,
Distinguished Delegates,
Ladies and Gentlemen,

I wish to thank the Permanent Missions of Norway, Australia and Palau and the organisers for giving me the opportunity to address this side event, my first address as Special Rapporteur on extrajudicial, summary or arbitrary executions.

1. Faced with terrorist attacks or terrorist threats in their countries, some governments have recently turned to the death penalty in an attempt to curb terrorist action, by either expanding the scope of offenses punishable by death or resuming executions for terrorist-related offences after years of moratoriums in executions.
2. The world trend towards abolition remains strong: some 141 countries have abolished the Death Penalty in law or in practice. In 2015 and 2016, 6 more countries abolished the death penalty for all crimes.¹
3. It is thus disturbing to see a small minority of States disregarding the international standards for the imposition of the death penalty and the protection of the right to life in their quest to thwart a real or perceived threat posed by terrorism.
4. Governments resort to the death penalty in their anti-terrorism campaigns in almost all regions in the world: 65 countries retain the death penalty in law for terrorism related

¹ <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/>

offenses, of which 15 have carried out such executions in the last 10 years. In 2015, the death penalty was imposed for these offences in at least seven countries. ²

5. Let me first be very clear: the risks to public safety and to lives posed by “terrorism” must be addressed, and they must be addressed effectively. This sentence however raises two central and difficult issues: the meaning of the words “terrorism” and “effectiveness.” I will return later to these. But the opening principle is that the risks to public safety and to lives posed by “terrorism” must be addressed.
6. A minority of governments has determined that to do so, the death penalty must be applied or re-introduced.
7. Before highlighting how they have done so, let me highlight a fundamental characteristic of international standards related to the death penalty: International law imposes severe restrictions on its use and demands strict safeguards for it to be lawfully applied. It also outlaws it in some specific circumstances or with regard to specific groups of vulnerable persons, such as children or people with mental disability. Non-compliance with these standards leads to arbitrary and thus unlawful deprivation of life.

Chairperson, Delegates,

8. Some governments have resumed executions for terrorist-related offences after years of moratoriums in executions.
9. Reintroducing the death penalty in countries that were de jure or de facto abolitionist runs contrary to the repeated resolutions by the UN General Assembly calling on States that maintain the death penalty to progressively reduce its use, establish a moratorium, and for those that have abolished the death penalty, not to re-introduce it. Indeed, as the previous UN Special Rapporteur on extrajudicial, summary or arbitrary executions points out in his final report to the UN GA³, such a re-introduction runs contrary to international trend towards the progressive abolition of the death penalty. The Human Rights Committee noted in its general Comment No. 6 (1982) that all measures of

² http://www.worldcoalition.org/media/resourcecenter/EN_WD2016_Factsheet.pdf

³ A/71/372, 2 September 2016

abolition should be considered as progress in the enjoyment of the right to life. By implication, conversely, any resumption or expanded use of the death penalty, leads to lesser protection of this right.⁴

10. The African Commission has recently adopted a General Comment on the Right to Life which states that “States that have abolished the death penalty shall not reintroduce it, nor facilitate executions in retentionist states through refoulement, extradition, deportation or other means. It goes on to call on States with moratoria on the Death Penalty to take steps to formalize abolition in law⁵”.
11. This position is all the more important now that it is widely held that the death penalty can no longer be regarded as compatible with the prohibition of cruel, inhuman or degrading treatment. The use of the death penalty raises concerns regarding torture and ill-treatment at many levels: extraction of confessions, prison conditions, death row holding conditions, poor access to medicine (particularly for people with mental disease, who should not be on death row in the first place), execution methods and execution circumstances⁶.
12. So when states re-introduce the death penalty for terrorism-related crimes or any other crimes, they are not only breaking with international trends or commitment regarding the progressive abolition of DP; they are also potentially violating international standards related to cruel inhuman, or degrading treatment.

Chairperson,

13. A second development in response to the real threat posed by “terrorism” has been for some States to expand the scope of the death penalty to terrorism-related offences
14. Under international law, the Death Penalty may only be imposed for the “most serious crimes.” My predecessors have devoted much time examining the *travaux* of the International Covenant on Civil and Political Rights, the jurisprudence of the Human

⁴ A/71/372, para. 45

⁵ African Commission on People and Human Life, General Comment No.3 on the African Charter on Human and People’s Right: The Right to Life, 2015

⁶ A/67/279, 9 August 2012

Rights Committee, comments by the Secretary-General, principles declared by the Economic and Social Council and the Commission on Human Rights, practices by member states, and other sources⁷. On that basis, they have concluded that, if it is to comply with the most serious crimes restriction, the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life. My own review of the evidence, jurisprudence and more recent development leads me to conclude likewise.

15. Societies around the world have confronted violent and massive attacks against civilians and civilian targets, by groups classified as “terrorist”, and resulting in large loss of life. One could thus easily conclude that all terrorism-related offences involve killing, or even intentional killing. This, however, is not the case. There are many, the majority of, offences related to “terrorism” that do not involve the actual act of killing, let alone “intentional killing.” For instance, being affiliated with, a member of, or simply supportive of the causes of a group defined as “terrorist” under domestic law cannot be equated to having committed a heinous crime, let alone an intentional murder.
16. Unfortunately, when adopting anti-terrorism laws some countries have defined terrorists offenses very broadly and included amongst those punishable by death nonviolent acts, or acts that do not constitute the “most serious crimes” (intentional killing); for example, speaking out or engaging in nonviolent actions can be characterized as terrorist acts punishable by death in some States. Similarly, the establishment, organization or management of a “terrorist” group may be punishable by death in some States, even in circumstances where no intentional killings have been perpetrated or ordered⁸.

⁷ See in particular, A/HRC/420, 2007 Accessible at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/105/00/PDF/G0710500.pdf?OpenElement>

⁸ For instance, Egypt, Chapter 1, article 2 of the 2016 Anti-Terrorism Law stipulates that “A terrorist act shall refer to any use of force, violence, threat, or intimidation domestically or abroad for the purpose of disturbing public order, or endangering the safety, interests, or security of the community; harming individuals and terrorizing them; jeopardizing their lives, freedoms, public or private rights, or security, or other freedoms and rights guaranteed by the Constitution and the law”. Chapter 2, article 12 also stipulates that “Whoever establishes, founds, organizes, or manages a terrorist group or assumes command or leadership there of shall be punished by the death sentence or life imprisonment”. Iraq’s 2005 anti-terrorism law defines as “terrorist” acts involving “targeting infrastructure, the population or state security,” as well as crimes “related to insurgency, including nonviolent support for or facilities groups or individuals accused of ‘terrorist’ acts.”

17. This is where the absence of international consensus over the definition of “terrorism” raises many challenges. It is well-recognised that “terrorism” is a politically-charged term, with a range of opposing views held, including on the status of “freedom fighters” and on whether States can engage in “terrorism.” Nevertheless, in the absence of a definition, the international community has reached some level of agreements around the constitutive elements and threshold for “terrorism”. In 2016, the United Nations Global Counter-Terrorism Strategy Review, reaffirmed that *“the acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, at threatening territorial integrity and the security of States and at destabilizing legitimately constituted Governments⁹.”* The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has determined, based on an extensive review of international agreements, that terrorist offences should be confined to instances where the following three conditions cumulatively meet:

(a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Similarly, any criminalization of conduct in support of terrorist offences should be restricted to conduct in support of offences having all the above characteristics. In the prohibition of terrorist conduct, it is important for States to ensure that prescriptions to that effect are accessible, formulated with precision, applicable to counter-terrorism alone, non-discriminatory, and non-retroactive¹⁰.

18. In reality though, what is “terrorism”, a “terrorist group” or a “terrorist” has become a rather elastic concept, too often expanded to include any groups or acts which some members of societies or Governments do not tolerate.

19. Listening to some public officials right now around the world, you could easily conclude that all people of a certain faith are “terrorists” or at the very least “potential” terrorists.

⁹ A/70/L.55

¹⁰ E/CN.4/2006/98, para.50 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>

Or that people crossing borders with their belongings on their back, in fear of their life and in search of a better life – these are also de jure or de facto “terrorists.” There are individuals or groups calling for equal rights, the end of discrimination for instance for religious minorities. These too may be defined, indeed legally so, as “terrorists” by some governments or people in societies.

20. I am not suggesting that all these people so-described will be charged, tried and sentenced to death. But actually some are, and have been. We are living in an environment where the use of this word “terrorism” has become too often abused, to spread fears, plant the seeds of, and justify intolerance, and indeed violence.

Chairperson,

21. With national security and public order becoming the mantra of our era, there is a greater need than ever to ensure that the best checks and balances are in place, to ensure that these all-too-powerful calls, grounds, messages are not abused to curtail human rights, including the most fundamental of all rights – the right to life.

22. Unfortunately, when applied to the use of Death Penalty, these checks and balances are often not in place, irrespective of the global context and the globalised messages to justify using the death penalty.

23. Time and time again, experts have provided evidence demonstrating that death penalty is unfairly applied, including because of discrimination; and that it is preceded by trials, which too often have not complied with international standards related to fair trial. Executions carried out without adherence to the strictest guarantees of fair trial and due processes are unlawful and tantamount to an arbitrary execution. Governments are repeatedly asked to halt such executions and to retrial the defendants in compliance with international standards; however in all too many instances this is sadly not the case. I will elaborate on this through two examples, which were the objects of communication between my Office and Governments.

24. In January 2016, the **Kingdom of Saudi Arabia** held a mass execution of 47 men convicted of terrorism charges. These included 4 Shiites, including Sheikh Nimr al-Nimr

sentenced for demanding political reforms and participating in demonstrations that had resulting in the death of police officers. The executions triggered international indignation and condemnation because of the personality of Sheikh Nimr al-Nimr, a Shia political leader and the likely non-violent face of protests. In the year preceding his death, several Special Rapporteurs issued repeated urgent appeals to the authorities, on his behalf, highlighting the alleged use of torture and the unfair trial procedures¹¹.

25. We also sent several urgent appeals¹² and issued a press release in September 2015 on the case of Ali Mohammed al-Nimr, a high school student, arrested in 2012 by the Saudi authorities when he was 17, for his participation in Arab Spring protests in Qatif, Eastern Province. Mohammed al-Nimr remains on death row to this day, even though any judgment imposing the death penalty upon persons who were children at the time of the offence, and their execution, are incompatible with Saudi Arabia's international obligations¹³.

26. Over the last few years, Egypt Military Courts have delivered death sentences to hundreds of defendants convicted of "terrorism" without establishing the individual responsibility of each presumed terrorist. The use of military courts raises many concerns identified by my Mandate, along with the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, as well as the UN Counter-Terrorism Implementation Task Force. Of particular concerns are the lack of independence and impartiality of military tribunals, and the absence of fair trial guarantees as prescribed by international human rights law. Mass trials resulting in death penalty without due consideration of fair trials are illegal. In 2014 and 2015, several Special Rapporteurs sent joint Urgent Appeals¹⁴ and issued a press release¹⁵ related to the imposition of mass death sentences, including against 183 people in February 2015.

Chairperson,

¹¹ Cases SAU 9/2014 of 28/08/2014; SAU 12/2014 of 17/11/2014; and SAU 5/2016 of 01/09/2016.

¹² Cases SAU 6/2015 of 21/09/2015; SAU 2/2016 of 22/03/2016 and SAU 5/2016 of 01/09/2016

¹³ <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16487&LangID=E>

¹⁴ Cases EGY 9/2014 of 26/6/2014; EGY 7/2015 of 29/05/2015

¹⁵ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15556&LangID=E>

27. Let me then return to the issue of effectiveness. What is the meaning of “effectiveness” in such a context and faced with such offences? Of course, holding those responsible to account; and demonstrating to victims and society at large that justice has been delivered, are central to the quest for an effective response to “terrorism,” along with prevention and ensuring that such crimes are not repeated.
28. There is a lack of persuasive evidence that the death penalty could contribute more than any other punishment to eradicating terrorism. Moreover, the political motivation and dedication to a cause that are often behind a terrorist act can counteract the legal threat implied by this punishment. In addition, some terrorists assume the risk of death as a potential outcome of their engagement in terrorist acts, therefore significantly neutralizing the deterrent effect of the death penalty.¹⁶ Delegates at the HRC 2015 High Level panel discussion on the question of death penalty have also warned that the death penalty is also an ineffective deterrent because terrorists who are executed may just gain in prestige, as may their cause.
29. A more effective entry point remains undoubtedly those actions included in the **Global Counter-Terrorism Strategy** adopted on 8 September 2006, including its fourth pillar on **Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism**. In adopting this plan Governments reaffirmed that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognized that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism.

Chairperson, Honorable delegates, ladies and gentlemen,

30. In conclusion, allow me to stress that the world trend towards abolition of the death penalty remains strong. New countries each year eradicate this form of punishment and

¹⁶ See http://www.worldcoalition.org/media/resourcecenter/EN_2016WorldDayLeaflet.pdf

add their names to the two-thirds of the world, which have abolished the death penalty in law or in practice. Recent developments regarding the re-introduction of the death penalty or the expansion of death penalty offences run contrary to this global trend.

31. International law allows only very limited space for the death penalty, which must be limited to the most serious crime and must meet the strongest guarantees related to fair trial. International law prohibits mandatory death sentences or the imposition of the death penalty on children.
32. Ensuring that the legal system complies with all the relevant safeguards should not be incremental: that is an immediate obligation. Addressing immediate lack of fair trial guarantees, including discrimination patterns, is also an immediate obligation.
33. Further, in keeping with international trends, at least incremental steps to reduce the scope of the application of the death penalty are required. This would include: For States that have re-introduced the death penalty to revert to their moratorium; that State executes fewer people every year; a reduction in the number of “most serious” crimes for which the death penalty may be imposed.
34. We should also reflect on the role that the international community can play. Agencies and states offering financial or technical cooperation to counter terrorism ought to insist that programmes to which they contribute do not ultimately result in the imposition of the death penalty. In addition, States that have abolished the death penalty must not be complicit in the use of the death penalty anywhere, in any circumstances.
35. In conclusion, I wish to reiterate my thanks to the organisers for giving me the opportunity to contribute to this immensely important discussion on death penalty and its use in the context of the fight against terrorism, and to clarify the international standards and steps required to ensure respect and protection for the right to life.