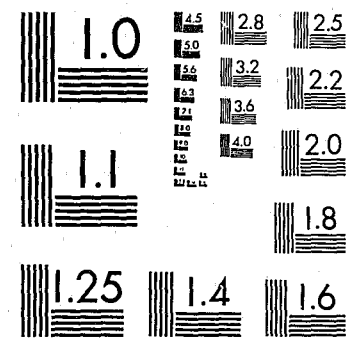


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UNITED NATIONS NORMS AND GUIDELINES IN CRIMINAL JUSTICE:  
FROM STANDARD-SETTING TO IMPLEMENTATION, AND CAPITAL  
PUNISHMENT

CAPITAL PUNISHMENT

Working paper prepared by the Secretariat

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## INTRODUCTION

1. By resolution 32/61 of 8 December 1977, the General Assembly called upon the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to discuss the various aspects of the use of capital punishment, and the possible restriction thereof, including a more generous application of the rules relating to pardon, commutation or reprieve, and to report thereon, with recommendations, to the General Assembly at its thirty-fifth session. The General Assembly also requested the Committee on Crime Prevention and Control to give consideration to the appropriate place on the agenda of the Sixth Congress for this discussion and to prepare the requisite documentation therefor.

2. Subsequently, the Committee on Crime Prevention and Control decided at its fifth session, to include the topic of capital punishment under item 7 of the provisional agenda of the Congress, entitled "United Nations norms and guide-lines in criminal justice - from standard setting to implementation". The Committee also decided (E/CN.5/558, para. 66) that a separate working paper on capital punishment should be provided by the Secretariat, including a discussion guide prepared in accordance with the terms of General Assembly resolutions 2857 (XXVI) and 32/61, to the effect that the main objective to be pursued in the field of capital punishment should be that of progressively restricting the number of capital offences with a view to the desirability of abolishing capital punishment, and focusing on the following issues:

(a) Legal provisions and practices that had contributed in the previous five years to the reduction or total abolition of capital punishment;

(b) The experience of countries that had succeeded in abolishing capital punishment;

(c) Current governmental, intergovernmental, non-governmental and popular initiatives and plans to reduce the use of capital punishment;

(d) Details of targets set for the eventual abolition of the death penalty.

3. The present working paper has been prepared in accordance with the above-mentioned mandate, as well as those given by General Assembly resolution 32/61 and Economic and Social Council resolution 1979/22 of 9 May 1979, taking into account that the Congress will also have before it, for consideration, the quinquennial report of the Secretary-General on capital punishment (E/1980/9 and Corr.1 and Add.1 and Add.1/Corr.1 and Add.2), in accordance with Council decision 1980/142.

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## I. UNITED NATIONS ACTION IN THE FIELD OF CAPITAL PUNISHMENT

### ACQUISITIONS

4. The United Nations involvement regarding the question of capital punishment dates back to the time of the establishment of the Organization. In the Charter of the United Nations, signed in 1945, the founding States emphasized the value of an individual's life, stating their will to "achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". Though the San Francisco Conference did not address the issue of the death penalty specifically, the provisions of the Charter paved the way for further action by United Nations bodies in the field of human rights, by establishing a Commission on Human Rights, and, in effect, charged that body with formulating an International Bill of Human Rights.

5. Following preliminary discussions on the nature of the proposed Bill of Rights in the beginning of 1947, the Commission on Human Rights established a Drafting Committee on an International Bill of Rights, entrusted with the preparation of a preliminary draft of such a Bill. 1/ Initially, both the proposals of the Secretary-General and of some Member States were aimed at granting everyone the right to life, except for cases of conviction for a crime for which the law had provided the death penalty. Some of the Member States, however, wanted to limit the denial of the right to life to only "the gravest" crimes, while still others suggested the inclusion in the Bill of legal safeguards to protect any person charged with a capital offence during trial. Two other proposals were submitted, one of which did not deal with the question of capital punishment at all, so as not to discourage the fragile abolitionist movement in existence in some Member States. The second, *per contra*, expressly suggested that the United Nations should not create the impression that it approved of the death penalty. Under the latter position it was first proposed to insert a provision on the abolition of capital punishment for political offenders and, later, for its abolition in time of peace. The post-war years were not conducive to allowing Member States to come to an unequivocal position on this issue. Some countries with a long abolitionist tradition argued for barring the death penalty during times of war, while other Members proposed an exception for offenders guilty of crimes against mankind. Furthermore, still other countries expressed the opinion that the question of the death penalty should be left to the penal law of each individual State. It was this complex situation which finally led the Commission on Human Rights to adopt a neutral stance on this issue and which subsequently brought about the provisions of the Universal Declaration of Human Rights adopted by the General Assembly in its resolution 217 A (III) of 10 December 1948. The Declaration stated in its articles 3 and 5:

"Everyone has the right to life, liberty and security of person" ...

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". 2/

1/ L. Lander, 1971, "Capital punishment as a human rights issue before the United Nations", *Human Rights Journal*, vol. IV, pp. 2 and 3.

2/ The provision on cruel, inhuman or degrading punishment was first related to the death penalty in General Assembly resolution 2393 (XXIII) of 26 November 1968.

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6. The United Nations position on the question of the death penalty was expected to be stated more specifically in the International Covenant on Civil and Political Rights, the drafting of which had been under way since the first session of the Commission on Human Rights in 1947. From that time, also, two main approaches to the issue of capital punishment became evident: one stressed the need for barring the death penalty, and the second placed emphasis on restricting its application to certain cases. The proponents of the first position suggested either the total abolition of the death penalty, or its abolition in time of peace, or for political offences. This approach came to be regarded as unfeasible, since many countries, including abolitionist ones, felt that a provision for an outright ban on the death penalty would prevent some States from ratifying the Covenant and that, basically, the abolition or retention of the death penalty as such should be left to the penal legislation of individual countries. At the same time, many countries insisted that the Covenant should not create the impression of supporting or perpetuating this penalty, and that hence a provision to this effect should be included.

7. During the 11-year period of drafting the relevant provision of the Covenant, the second approach, stressing everyone's right to life and emphasizing the need for the restriction of the application of capital punishment, won greater support than the first one. Many of the proposals put forth during the debates on the draft of the Universal Declaration of Human Rights reappeared during the discussion on the Covenant, and several new ones, advancing international standards for restricting the use of the death penalty, were submitted. The issue of legal safeguards for the protection of capital offenders, received much attention and resulted in extensive coverage in the Covenant. Finally, in 1957, the work on this provision was completed and approved for inclusion in the International Covenant on Civil and Political Rights, which was adopted by the General Assembly in its resolution 2200 (XXI) of 16 December 1966. Article 6 of the Covenant reads as follows:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

"2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

"3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

/...

"4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

"5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

"6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant."

Corresponding to article 5 of the Universal Declaration of Human Rights, the Covenant reaffirmed in article 7 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

8. The discussion on the provisions concerning the issue of capital punishment in both international acts undoubtedly served as a stimulus for further action by other United Nations bodies. Parallel to the work of the United Nations on the question of the death penalty from the standpoint of the protection and promotion of human rights, the issue of capital punishment received much attention within the framework of the social development programme. This work originated in the summer of 1949 when the International Penal and Penitentiary Commission (IPPC), whose functions were soon to be transferred to the United Nations, decided to undertake a co-ordinated effort to "study the question of the death penalty" (E/CN.5/AC.6/L.3, para. 13). The Social Commission 3/ of the Economic and Social Council, which, in effect, inherited the functions of IPPC and was responsible for the implementation of the United Nations programme of research and study in the field of crime prevention and the treatment of offenders, decided, however, at its seventh session in 1951, to deal with the question of "capital and corporal punishment" at a later time. 4/ That time came when the General Assembly in its resolution 1396 (XIV) of 20 November 1959 on the death penalty, invited the Economic and Social Council to initiate a study of the question of capital punishment, of the laws and practices relating thereto, and of the effects of capital punishment, and the abolition thereof, on the rate of criminality.

9. Subsequently, two substantive reports were prepared by the Secretariat: Capital Punishment 5/ and Capital Punishment Developments, 1961 to 1965, 6/ in pursuance of Economic and Social Council resolutions 747 (XXIX) of 6 April 1960 and 934 (XXXV) of 9 April 1963.

3/ Known today as the Commission for Social Development.

4/ See "United Nations programme of research and study in the field of the prevention of crime and the treatment of offenders", International Review of Criminal Policy, 1952.

5/ United Nations publication, Sales No. 62.IV.2.

6/ United Nations publication, Sales No. 67.IV.15.

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10. In resolution 934 (XXXV), the Council had also urged Governments to review the types of crime to which capital punishment was in fact applied and to remove this punishment from the criminal law concerning any crime to which it was in fact not applied nor intended to be applied. Furthermore, Governments were urged to examine the facilities available for the medical and social investigation of the case of every offender liable to capital punishment and to ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases.

11. In resolution 2393 (XXIII) of 26 November 1968, the General Assembly specified some of these desirable legal safeguards. It invited Governments of countries where the death penalty still existed to provide that:

- "(i) A person condemned to death shall not be deprived of the right to appeal to a higher judicial authority or, as the case may be, to petition for pardon or reprieve;
- "(ii) A death sentence shall not be carried out until the procedures of appeal or, as the case may be, of petition for pardon or reprieve have been terminated;
- "(iii) Special attention be given in the case of indigent persons by the provision of adequate legal assistance at all stages of the proceedings".

Governments were also invited to consider whether these safeguards might not be further strengthened by the fixing of a time-limit or time-limits before the expiry of which no death sentence should be carried out.

12. The General Assembly, in its resolution 2857 (XXVI) of 20 December 1971, affirmed that:

"In order to guarantee fully 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".

The Economic and Social Council had made a similar affirmation the same year in its resolution 1574 (L).

13. In 1973, the Secretary-General submitted to the Economic and Social Council at its fifty-fourth session his third report on capital punishment (E/5242), requested by the Council in its resolution 1656 (LII). At this session, the Council adopted resolution 1745 (LIV), in which, *inter alia*, it invited the Secretary-General to submit to it periodic updated reports on capital punishment at five-year intervals, starting from 1975. Accordingly, a fourth report on capital punishment (E/5616 and Corrs.1 and 2 and Add.1) was prepared in 1975, and another one was submitted in 1980 (E/1980/9 and Corr.1 and Add.1 and Add.1/Corr.1 and Add.2) containing also information on statutory rules and practices which govern the right of a person sentenced to death to petition for

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pardon, commutation or reprieve, in accordance with General Assembly resolution 2857 (XXVI).

14. Besides the General Assembly and the Economic and Social Council, the Commission on Human Rights and the Committee on Crime Prevention and Control have also repeatedly discussed the issue of capital punishment. Furthermore, the Secretary-General has on several occasions appealed personally to the Governments of Member States to grant pardons to persons sentenced to death.

15. The above review makes it clear that in the past the United Nations has considered most of the problems involved in capital punishment. With the issuance of the 1962 and 1967 reports on this subject, the United Nations has gradually shifted from the position of a neutral observer concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty (Council resolution 1574 (L) and General Assembly resolution 2393 (XXIII)). From the moral standpoint, the United Nations has followed the guidance of the Universal Declaration of Human Rights. From the practical or utilitarian point of view, it has acted on the evidence made available, and therefore called only for the "eventual abolition of capital punishment (General Assembly resolution 2857 (XXVI)).

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## II. CAPITAL PUNISHMENT IN LAW AND IN FACT

16. As is well known, more than a century ago Venezuela initiated a successful abolitionist regulation on the death penalty (For a list of abolitionist States, see the annex to the present document). From that time on, the abolitionist movement has gone through various stages of development, some of which were marked by new legislation which no longer accepted the death penalty and some of which, on the contrary, saw its restoration. This pendulum effect was experienced in the past by a number of countries, and is likely to occur in the future. To mention only a few States that underwent such changing legal attitudes, one may refer to formerly abolitionist countries such as Argentina, the Union of Soviet Socialist Republics or Sri Lanka (E/5242). 7/ Other countries underwent an even fuller cycle of criminal policy changes. For example, Brazil, in 1890, abolished the death penalty, then restored it in 1969 and then, once again, abolished it in 1979 (E/5242 and E/1980/9 and Add.1). Similarly, Spain first abolished this punishment in 1932 and then restored it for certain crimes in 1934 before its restoration was confirmed in 1938, but decided to abolish it in 1978 (E/1980/9). 8/

17. In the period from 1945-1979, 12 countries abolished the death penalty altogether and 10 more abolished it for ordinary crimes. Two countries (Belgium and Suriname), though formally retentionist, have abolished capital punishment not having executed those sentenced to death in the past 40 years.

18. In the last five years (1975-1979) of the above-mentioned period, seven countries abolished capital punishment totally and another six abolished it for ordinary crimes. This makes a total of 37 countries, so far, out of the 152 Member States which are abolitionist, either totally (21) or for ordinary crimes (15), or at least by custom (2), and two Member States, that is, the United States of America and Australia which are divided on this issue. Furthermore, there appears to be emerging de facto abolitionist positions in some other countries: in the past 10 years at least seven retentionist States have not executed those sentenced to death (Cyprus, Guyana, Ireland, Ivory Coast, Madagascar, Maldives and Upper Volta), and among Member States of the Council of Europe, not a single execution has taken place since 1977. The situation, thus, could be assessed positively. The number of countries which abolished the death penalty completely or for ordinary crimes has increased and the number of reported sentences and, especially, of executions appears to be on the decline. While, during the period 1956-1960, 69 responding countries informed the United Nations of a total of 3,108 capital offences and 1,647 executions, during the period 1961-1965, 58 States reported 2,066 death sentences and 1,033 executions, and for the years 1975-1979, 73 countries reported 2,740 capital sentences and 786 executions. 9/ However, neither the former nor the latter assessment seems to be

7/ See also K. P. Gorshenin, Istoritscheskij akt. Ukaz Presidiuma Verhovnovo Sovieta SSR Ob otmene smertnoi kazni, (Historical Act. Act of the Supreme Court of the USSR on the Abolition of Capital Punishment) (Moscow, Izdatelstvo Pravda, 1947).

8/ See also Capital Punishment, op. cit.

9/ Capital Punishment, op. cit.; Capital Punishment Developments, 1961-1965, op. cit.

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accurate. The impression of a steadily abolitionist evolution is due to the importance given to recent developments in a few countries which have accepted the abolitionist position only lately. Shifts within the abolitionist position, that is, from "abolitionism for ordinary crimes only" to "total abolitionism", as in the case of Denmark, Portugal or Sweden - which have applied the death penalty very rarely - give this impression of a major step forward. The same misleading impression comes after taking cognizance of the statistics of the number of capital sentences and executions. This is mainly so because of a partly different and far from complete list of countries which responded to each of the United Nations questionnaires concerning this issue. In fact, not every country in which prisoners were either sentenced and/or executed by capital punishment replied to every United Nations survey. Therefore, the particular numbers which contributed to the above totals cannot be considered as fully indicative of any trend in the frequency of applications of the death penalty and, especially, of a decrease in their occurrence. As regards the decreasing number of reported executions, this should not be considered per se as a reliable indicator of any progress made, since several countries do not disclose the number of executions and since such a number depends on the countries which respond at each particular time.

19. It is obvious that this analysis does not take into account the number of the so-called "extra-judicial executions" and of disappeared persons, which would substantially alter the real number of individuals whose life has been taken by or with the tacit consent of Governments. At the recent session of the Commission on Human Rights the view was expressed that "the phenomenon of massive disappearances of persons represented, in effect, an institutionalized practice of eliminating actual or potential opposition and constituted an aggression by the State against its own citizens". 10/

20. Following these observations regarding the use of the death penalty in law and in fact, it is appropriate to consider the current statutory scene on which capital punishment operates. Information (sometimes incomplete) on the classes of capital offences was available for 125 Member States. In 99 of these, homicide is subject to capital punishment, but offences against the State are punishable by death even more frequently - in 113 countries. Violent crimes other than homicide are capital offences in 41 States, while non-violent property offences can carry a death sentence in 30 countries. Finally, in 69 Member States, other categories of crime, such as narcotic offences, serious breaches of military discipline and hijacking, are also capital offences.

21. As mentioned above, offences against the Government occupy the first place among capital crimes. In particular, treason and espionage, attempts to overthrow the Government in power, attempts on the life of a leading political figure, and participation in armed rebellions are punishable by death. There is no doubt that in these cases the legislator perceives these acts as deserving the ultimate reaction; perhaps their seriousness is perceived as being even greater than that

10/ Official Records of the Economic and Social Council, 1980, Supplement No. 3 (E/1980/13), para. 210.

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of ordinary capital crimes. However, it is worth noting in this context that also far less serious and often vaguely defined acts such as sedition frequently result in a penalty of death. This also illustrates the fact that, in a number of countries, capital punishment is used primarily to protect the current form of Government rather than as an ordinary criminal sanction.

22. The second place is occupied by a large and heterogeneous group of ordinary "hard core" acts starting with those generally termed "homicide". These include: premeditated murder, killing of law enforcement personnel, killings by prisoners serving a life-sentence, killing in the course of the commission of another offence, particularly robbery, rape, arson, smuggling etc. Several of these offences, however, can also be capital offences in themselves, that is, without resulting in someone's death; for example, armed robbery (mostly if committed by a gang), rape, piracy, and arson. The reason for stipulating the death penalty for these acts lies, apparently, in the legislator's perception of the seriousness of these crimes assumed to be equally heinous as those resulting in the victim's death.

23. In some countries, certain non-violent property offences, such as currency counterfeiting, and economic offences, such as speculation or bribery and corruption, are capital offences. Trafficking in narcotic drugs is punishable by death in several countries. Torture is also a capital crime in a few countries.

24. The spread of the use of capital punishment for such various and differing types of crimes may lead to the conclusion that, for example, an offence of castration of a person which results in his or her death within 40 days after its perpetration, or an offence of cattle-rustling, if a person is seriously injured or killed as a result, or the occasion of the commission thereof, is equal in its mens rea and gravity to a premeditated murder or killing of a law enforcement officer and, therefore, should be subject to the same death penalty. In some countries women found guilty of adultery are subject to be stoned to death, often in public. Forcing a woman to marry against her will, and desecration of graves were until a few years ago capital offences in one industrialized country. <sup>11/</sup> Looting, possession of fire-arms, malfeasance in office, sabotage, aiding certain persons to commit suicide and many other of these "garden-variety" offences may warrant some form of punishment, but the question is whether they should necessarily remain as capital offences. <sup>12/</sup>

25. It is true that in a global context, there is a relativity of cherished values and appropriate norms to protect them. As it is frequently said: "there is, as yet, no universally accepted code of morality, even though each genuine moral system claims to enunciate universal principles". <sup>13/</sup> However, the extent to which the recourse to an extreme punishment such as the death penalty is indicated is to be found in article 6, paragraph 2, of the International Covenant on Civil and Political Rights, which states, inter alia, that "the sentence of death may be

<sup>11/</sup> C. H. Patrick, "The status of capital punishment: a world perspective", Journal of Criminal Law, Criminology and Police Science, No. 56, 1965, pp. 397-411.

<sup>12/</sup> D. C. Gibbons, The Criminological Enterprise. Theories and Perspectives (Englewood Cliffs, Prentice-Hall, Inc. 1979).

<sup>13/</sup> J. M. Domenach, "Our moral involvement in development", New York, United Nations Centre for Economic and Social Information, 1971, p. 3.

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imposed only for the most serious crimes". Moreover, there is no doubt that the category of crimes eventually subjected to the death penalty should be, as the General Assembly expressed it in its resolution 2857 (XXVI), progressively restricted and not broadened. Furthermore, even accepting the relativity of values and norms as far as serious crimes are concerned, there appears to exist a differentiation as to the degree of their societal condemnation. One of the tentative conclusions which may be drawn from several studies conducted in this field is that in the majority of the countries surveyed, it was not homicide which was regarded as the most heinous act deserving major condemnation, but collective rape. The next act after rape was, in one country, theft of private property, in another bribery and in still another one, robbery. In only one country was homicide ranked first, while in the rest it was located between second and seventh place on a 14-item scale. Of course, these studies, owing to the somewhat different methodologies employed and dealing only with representative samples of residents of large cities, cannot be considered as conclusive. <sup>14/</sup> But even if tentative, they should encourage the reconsideration of the extent to which legislation concerning the death penalty follows the perception of deviance of society.

26. Another dimension - a legal and normative one - of the same issue emerges from reviewing the relevant provisions of the national criminal statutes in question. In the light of article 6, paragraph 2, of the International Covenant on Civil and Political Rights and of General Assembly resolution 2857 (XXVI), it seems surprising to observe the persisting disparity in the number of offences liable to the death penalty. For example, in one country, about 40 offences are subject to capital punishment, and in another one, more than 20; yet still other States have only one category of crime subject to such punishment.

27. On the basis of the available data, it seems impossible to determine whether a process of restricting the number of capital offences has really taken place. Rather, an opposite trend seems to emerge. In several countries, crimes against the State, the national economy, and against public property have been made capital offences, and several forms of armed robbery, narcotics offences, hijacking and kidnapping are also punishable by death. The experience of countries which have introduced new crimes subject to the death penalty, and of others which consider broadening the scope of their capital punishment legislation, may serve as an example of this reversion to the "progressive restriction" trend. It is clear that the latter is neither close to success as yet, nor automatic in its progress. <sup>15/</sup>

<sup>14/</sup> J. Kwaśniewski and A. Kojder, "Postawy Mieszkańców Warszawy Wobec Zjawisk i Zachowań Dewiantycznych", (Attitudes of the residents of Warsaw to the deviant phenomena and behaviour), Studia Socjologiczne No. 1, 1979, pp. 157-179; R. M. Stănoiu "Analiza Socjologică a Reacției Sociale Față de Comportamentele Deviante" (Socio-juridical analysis of social reaction towards deviant behaviour), Studii de Certari Juridice, 1976, pp. 371-385. The countries surveyed are: Canada, Italy, Poland, Romania, Venezuela, Yugoslavia. The Canadian, Polish and Romanian surveys were based on the same methodology.

<sup>15/</sup> D. Chandler, Capital Punishment in Canada. A Sociological Study of Repressive Law (Toronto, Carleton Library Original, McClelland and Stewart Limited, 1976).

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III. LEGAL PROVISIONS CONCERNING THE REDUCTION OR ABOLITION  
OF CAPITAL PUNISHMENT

28. Between 1975 and 1979, several countries were reported to have abolished capital punishment, either completely or at least for ordinary crimes, or to have restricted its use.

29. In Brazil, Constitutional Amendment No. 11 of 1979 revoked Constitutional Amendment No. 1 of 1969, which had allowed the death penalty in cases of psychological warfare or revolutionary or subversive activities, under the conditions established by law, that is, the National Security Law. Following Constitutional Amendment No. 11, the death penalty can now be imposed only under penal legislation applicable in the case of war.

30. In Canada and in Fiji, the abolition of capital punishment was preceded by a trial period or moratorium of several years, during which capital punishment was temporarily suspended. A similar procedure had been followed in the United Kingdom 10 years earlier. Such a moratorium has been regarded as an effective way for determining whether the death penalty is really needed to prevent a dramatic increase in the frequency of capital offences. The experience of countries which did go through such a trial period indicates that, in fact, capital punishment is by no means necessary for the preservation of law and order.

31. In Luxembourg and in Norway, as well as in several other countries which abolished capital punishment before 1975, death penalty statutes were repealed after a long time during which there had been no death sentence or executions.

32. In Portugal, capital punishment was abolished completely when the Code of Military Justice was amended in 1977, in accordance with the new constitution of 1976, which declared that "Human life shall be inviolable". In Spain, the new constitution of 1978 abolished the death penalty except for certain military offences committed in time of war.

33. The abolition of capital punishment in Nicaragua, finally, was part of the new revolutionary government's general policy. The Government introduced a Bill of Rights which abolished the death penalty for all crimes, out of a concern for human rights.

34. In the countries which retain capital punishment, several restrictions precluding sentencing or executions are employed.

35. Sixty-one of the Member States on which the necessary information is available indicate that they obey the norms of the International Covenant on Civil and Political Rights and exempt offenders under 18 years of age from capital punishment. In six countries "minors" or "young people" of an unspecified age are not sentenced to death. However, there are at least 14 countries in which this age-limit is lower than 18, and in some countries the law seems to provide no such age-limit at all. Pregnant women are protected against execution in accordance

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with the Covenant in at least 66 States, and 28 nations have exemptions from executions for mental or physical illness or other circumstances. In Guatemala, for example, women over 70 years of age and political offenders cannot be executed. Similarly, in Mongolia, men over 60 years of age and women cannot be sentenced to death, the latter because they are "above all mothers and require(d) particularly humane treatment, and ... because it was considered that the exemption of women from the death penalty was a significant step towards its complete abolition". <sup>16/</sup> In Nepal, certain religious reasons lead to the commutation of death sentences, and, in Romania, minors and women with children under 3 years of age have their death sentences commuted to 25 years of imprisonment.

36. Once a person is sentenced to death, he or she faces not only the eventual execution but also the agony of waiting for the outcome of appeals, petitions for pardon, and, finally, for the date of the execution. This waiting often lasts for months or even years, while the prisoner is usually under constant surveillance, frequently in a maximum security institution. As Albert Camus has said in his book entitled Reflections on the Guillotine:

"The devastating, degrading fear imposed on the condemned man for months or even years is a punishment more terrible than the death penalty itself, and one that has not been imposed on his victim. A murdered man is generally rushed to his death, even at the height of his terror of the mortal violence being done to him, without knowing what is happening ... For the man condemned to death, on the other hand, the horror of his situation is served up to him at every moment for months on end. Torture by hope alternates only with the pangs of animal despair". <sup>17/</sup>

37. Besides this and several other similarly forceful, but subjective accounts of the plight of prisoners awaiting their execution, very little research has been conducted on this subject. Certainly, it must be one of the least common and most stressful of all human experiences to anticipate one's own death at a specific moment in time, in a known manner and under precisely planned circumstances.

38. In recent studies which have examined persons awaiting execution, the authors found that the prisoners often seem to adapt to their extreme situation and to their anxiety by maintaining hope for an eventual retrial or commutation, by thinking of their situation after a successful appeal, and by attributing their plight to the attitudes of the prison staff and the persons involved in their trial. Some prisoners, keenly attuned to the irony of their predicament, characterize their existence as living death and themselves as the living dead. Emotional death appears to lie at the core of the experience of living death: men feel abandoned by the living. Others cope with this specific "ontological insecurity" by strengthening their psychological defences against internal and external tensions, by seeking medical attention - which may be given reluctantly -

<sup>16/</sup> Discussion on the Covenant of Civil and Political Rights (CCPR) ((C)1/Add.38), part III, art. 6, p. 2 and at the Human Rights Committee, 21 March 1980.

<sup>17/</sup> B. H. Wolfe, File-up on Death Row (Garden City, Doubleday, 1973), appendix A.

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and by seeking support in a cohesive peer-group among other death-row prisoners. The research findings suggest that the human cost of capital punishment is inordinately high and many of the stresses felt by death row prisoners seem beyond our capacity to handle. 18/

39. The plight of the persons awaiting execution ends when it comes to the last stage of this "successful degradation ceremony", that is, their physical execution.

40. The methods of execution practiced most frequently in Member States are hanging and shooting. The least frequent methods are lapidation, which may be used in Saudi Arabia and the United Arab Emirates, and asphyxiation in the gas chamber. Somewhere in between on this continuum are located beheading and electrocution, the latter practiced in at least two countries (Philippines and in some States of the United States of America). To meet the faire mourir sans faire souffrir principle, also, lethal injections were introduced as a means of a judicial execution. 19/ In the light of the provision of the Covenant on Civil and Political Rights against cruel and degrading punishment, these "softly killing" methods appear to be "more humane" than those involving suffering; however, given the goal of the total abolition of the death penalty, they do not contribute to its achievement.

18/ J. L. Gallemore and J. H. Panton, "Inmate response to lengthy death row confinement", H. A. Bedau and C. M. Pierce, eds., Capital Punishment in the United States (New York, AMS Press, 1976); R. Johnson, "Death row, Alabama style", paper presented at the Interdisciplinary Conference on Capital Punishment, April 1980 at Georgia State University, United States of America.

19/ G. Tarde, Philosophie pénale (Lyon, 1890). See also G. Tarde, Penal Philosophy, 1912, transl. by R. Howell (Boston, Little, Brown and Company, 1912). No mention is made here on the methods of "extra-judicial" executions which, in some countries, involved burning and burying alive, Timamanya mwene Mushanga (Crime and Deviance: An Introduction to Criminology) (Nairobi, Kampala, Dar Es Salaam, East African Literature Bureau, 1976).

#### IV. RULES RELATING TO THE PARDONING OF CAPITAL OFFENDERS

41. As important as the extraneous reasons precluding sentencing or the execution of capital offenders are the rules relating to their pardoning. The laws of nearly all Member States of the United Nations have provisions allowing a person sentenced to death to petition for pardon, and in some cases it is even the duty of the sentencing court or the prosecutor to forward the dossier to the pardoning authorities once a death sentence has become final. In most countries, a death sentence cannot be carried out unless it is confirmed by the authority vested with the prerogative or power of pardon.

42. The basic provisions for the pardoning power are often contained in the constitution and are usually vested in the head of State, which may be an individual or, as in several socialist countries, a collective body such as the praesidium of the legislature or the State council. Only, in a few countries, is the legislature the body which decides on pardons, even though the president may also have certain limited powers in this regard. In other countries, a high court may have the power to grant gracia, except for military offenders, for whom the president would be the relevant authority.

43. The vesting of clemency powers in the head of State is consistent with the popular view of the pardon as a discretionary power entrusted to the most elevated personage in the land. However, only very rarely do heads of State or other pardoning authorities act on their own, without the formal advice or sanction of some political organ such as the minister of justice, and the previous screening of the case by an authority such as the trial judge or a parole board which makes its recommendation on the basis of the knowledge of the history of the offender, his or her behaviour after being sentenced, and the nature of the offence. While in some instances the ultimate decision belongs to the pardoning authority as such, most often the latter is required to act on the initiative or recommendation of the Government, the minister of justice, or some other executive, judicial, quasi-judicial, or legislative power. 20/

20/ L. Sebba, "The pardoning power - A world survey", Journal of Criminal Law and Criminology, No. 68, 1977, pp. 83-121.

V. THE EXPERIENCE OF COUNTRIES WHICH HAVE ABOLISHED CAPITAL PUNISHMENT

44. As early as 1836, a report of the Commissioners on the Criminal Law in the United Kingdom stated that:

"It has not, in fact, been found that the repeal of capital punishment with regard to any particular class of offences, has been attended with an increase of the offenders. On the contrary, the evidence and statements to be found in our appendix, go far to demonstrate, that as the proportion of those actually executed for, to those actually convicted of, any particular class of crimes, has become less, the absolute number of the offenders has diminished." 21/

45. This historic statement has been confirmed by the subsequent experience of several countries which have abolished capital punishment. For example, Denmark abolished the death penalty for ordinary crimes in 1930. The available data on homicides known to the police in Denmark clearly show that there was no increase in homicides after abolition - in fact, in four of the six years after abolition, there were fewer homicides than there had been before. 22/

46. Sweden abolished the death penalty in time of peace in 1921, and totally abolished capital punishment in 1973. Sweden's average homicide rate from 1754 to 1942 shows nothing to suggest that its level of homicide has in any way been influenced by the abolition of the death penalty in the twentieth century.

47. In the Netherlands, capital punishment was abolished in 1870 for ordinary crimes. There was an upward trend in the conviction rate for murder and attempted murder in the second 10-year period following abolition, but even then the rate never attained the 1860-1870 level, during which the death penalty was still available. The rate reached its lowest level in the 1920s when the death penalty was not in effect, and the second lowest level was observed immediately after abolition. 23/

48. Similar trends were observed elsewhere, for example in Austria, Italy, New Zealand, Norway, and Queensland (Australia): in no case was there any increase in the number of capital offences which could be attributed to the abolition of capital punishment, and some countries even experienced a subsequent reduction in the frequency of these offences. 24/

21/ Second Report of His Majesty's Commissioners on the Criminal Law (London, Parliamentary Papers, vol. 36, 1836), p. 343.

22/ E. A. Fattah, "The Canadian experiment with abolition of the death penalty", W. J. Bowers (ed.), Executions in America (Lexington; D.C. Heath and Co., 1974).

23/ Ibid.

24/ Ibid.; see also G. Kaiser, Wozu die Todesstrafe: die Todesstrafe aus Kriminologischer Sicht (Freiburg i.Br., Max-Planck-Institut für ausländisches und internationales Strafrecht, 1976).

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49. According to fragmentary data for Central America (Costa Rica, Panama) and South America (Colombia), their respective homicide rates in the years 1947-1967 varied significantly, with a tendency to stabilize or to decline slightly in the second decade of this period. 25/ Since in these countries the death penalty was abolished a long time ago, it would be impossible to attribute these changes to its existence. No information is available on other countries which have abolished or suspended the use of capital punishment either decades ago (Dominican Republic, Ecuador, Portugal, Uruguay and Venezuela) or, more recently (Fiji, Seychelles and Solomon Islands).

50. In a few countries, the effect of the abolition of capital punishment on the crime rate has been studied very thoroughly.

51. In December 1967, Canada declared a five-year moratorium on capital punishment for the murder of policemen and prison guards and, at the same time, abolished the death penalty for all other ordinary offences. This moratorium was later extended and, in 1976, capital punishment was abolished for all ordinary crimes.

52. During the initial moratorium, a study was conducted on the possible effect of the suspension of the death penalty on crime. 26/ In particular, the study was to answer the following questions:

(a) How much has violent crime actually increased in Canada since 1962?

(b) What violent crimes have increased most rapidly?

(c) Has there been an increase in criminal homicide?

(d) If so, can such an increase be attributed to the suspension of the death penalty?

53. The study covered the nine-year period from 1962 to 1970 and examined the development of statistics on criminal homicide (murder and non-negligent manslaughter), attempted murder, wounding and assault, rape and robbery.

54. The results of this study indicate that the rate of recorded violent crimes, as well as the one of non-violent offences, increased substantially over the period under study, but this increase may be due, to some extent, to the introduction of new recording practices and several other demographic, social and economic factors. The five categories of violent crimes examined remained remarkably constant as a percentage of all violent crimes. The criminal homicide rate showed the widest variations from year to year, and its over-all increase was the lowest among all offences studied.

25/ U. K. Jadhav, Is Capital Punishment Necessary? (Bombay, Anand Publications, 1973).

26/ E. A. Fattah, A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation (Ottawa, Information Canada, 1972).

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55. Fattah 27/ concluded that nothing emerges from the study that would support the proposition that the suspension of capital punishment has caused an increase in the homicide rate. Thus, in his view, the retention of capital punishment cannot be justified by the argument that it is a more effective deterrent to potential killers than the alternative of long-term imprisonment. It seems that criminal homicide is not an isolated phenomenon but an integral part of violent criminality, affected by the same social factors or conditions that lead to other crimes of violence.

56. In the United Kingdom, a Royal Commission on Capital Punishment (1949-1953) concluded, after hearing evidence on the experience in Belgium, Denmark, the Netherlands, Norway, Sweden and the United States of America, that "there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its re-introduction has led to a fall". 28/ Subsequently, capital punishment for ordinary crimes was suspended in 1965 and abolished in 1969.

57. It is sometimes argued that since that time, the United Kingdom experienced an "abnormal increase in the rate of murder" in England and Wales. 29/ An above-mentioned study by Morris and Blom-Cooper revealed, however, that the frequency of murder in England and Wales had developed with a certain regularity over the last two decades, irrespective of the penalties imposed. Accordingly, the authors concluded that there are compelling reasons for doubting the social protection assumed to be provided by capital punishment. It is this line of reasoning which apparently led the Home Office Advisory Council on the Penal System to put the death penalty issue aside and to recommend the use of long-term imprisonment. 30/

58. In the United States of America, no executions were actually carried out between 1967 and 1977, even though a considerable number of persons were still sentenced to death during these years. A study of the effect of this "judicial moratorium on capital punishment" found that even though there had been an increase in homicide rates in those States which had previously imposed the death penalty, this increase could not be explained by the de facto suspension of executions. 31/ This finding is remarkably similar to the one reported on the Canadian experience with a legislative moratorium on capital punishment.

59. In both the countries which have abolished and those which retain the death penalty, the issue of the deterrent value of capital punishment is widely discussed.

27/ Ibid.

28/ T. Morris and L. Blom-Cooper, "Murder in England and Wales since 1957", The Observer, 1979.

29/ Jadhav, op. cit., p. 26.

30/ Sentences of Imprisonment. A Review of Maximum Penalties (London, HM Stationery Office, 1978).

31/ Bowers, op. cit.

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This subject has received much attention from both the proponents and the opponents of capital punishment who expect to acquire the ultimate evidence supporting their respective positions.

60. Investigations into the deterrent value of the death penalty have a very long historical tradition; however, only in this century did they take the form of empirical studies. The first well-known findings, published by Sutherland, 32/ initiated a flow of research efforts, mostly in the United States of America, which focused on the relationship between the death penalty and capital offences. More precisely, these studies tried to examine the additional or marginal deterrence efficacy which prevented the general population from committing capital offences through the threat of the death penalty, over and above the deterrence achieved through the threat of the next most severe punishment, that is, long-term imprisonment.

61. When considering the results of these studies, it should be remembered that the only way of obtaining a conclusive answer to the question of whether or not capital punishment has any substantial deterrent effect of its own would be a comparison of large numbers of randomly selected jurisdictions. In such an experiment, one would have to compare the rate of some act in a jurisdiction where the act is a capital offence and the rate for the same type of act in a jurisdiction where it is not criminal. 33/

62. Such a procedure is, of course, not feasible because it is difficult to identify any act that is a capital offence in some jurisdictions but not a crime in another. The only available alternative is the examination of non-experimental data, that is, the experience of individual jurisdictions before and after the abolition of capital punishment, or the comparison of more or less similar abolitionist and retentionist jurisdictions.

63. The overwhelming majority of empirical studies focuses on the taken-for-granted relationship between homicide rates and capital punishment derived from a common sense observation that "since murder is the most serious offence one man perpetrates against another, it calls out in us the strongest emotional response and we react in kind by inflicting the death penalty upon the offender". 34/

32/ E. H. Sutherland, "Murder and the death penalty", The Journal of Criminal Law and Criminology, No. XV, 1925, pp. 522-529. There exists an extensive literature covering this subject. A bibliographical source containing about 1,000 titles on this and several other subjects was released in International Bibliography on Capital Punishment (Rome, United Nations Social Defence Research Institute, 1978).

33/ J. P. Gibbs and L. M. Erickson, "Capital punishment and the deterrence doctrine", H. A. Bedau and Ch. M. Pierce, eds., Capital Punishment in the United States (New York, AMS Press, 1976).

34/ H. Mattick, The unexamined death (John Howard Association, 1966); D. Glaser, "Capital punishment - deterrent or stimulus to murder? Our unexamined deaths and penalties", The University of Toledo Law Review, No. 10, 1979, p. 317.

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64. Several studies, highlighted, *inter alia*, by the works of Sutherland and Sellin <sup>35/</sup> led first to the conclusion that abolitionist States of the United States of America have slightly lower homicide rates than their neighbours who retain the death penalty, or that it is impossible to differentiate States employing capital punishment from abolitionist States solely by examining offence rates. These early studies were found by many researchers to be unsatisfactory owing both to the general failure to allow to control adequately for the variety of demographic, cultural and socio-economic factors other than the death penalty, and their inability to differentiate the legal status of capital punishment from its practical application. Subsequently, a call for more sophisticated research was expressed, answered by recent econometric studies involving a vast array of better controlled variables analysed with complex methodologies.

65. Despite much more advanced research efforts mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy. In a heated debate initiated by a pro-capital punishment econometric study of I. Ehrlich, <sup>36/</sup> some researchers have argued that the carrying-out of a capital sentence for murder may even have the opposite criminogenic effect to increase the number of these acts. <sup>37/</sup> However, the most authoritative evaluation of the present state of the scientific evidence for and against the deterrent effect of death penalty was collectively expressed by the Panel on Research on Deterrent and Incapacitive Effects in the report commissioned by the National Academy of Sciences of the United States:

"In summary, the flaws in the null-effect results and the sensitivity of the Ehrlich results to minor variations in model specification and their serious temporal instability lead the Panel to conclude that the results of the analyses on capital punishment provide no useful evidence on the deterrent effect of capital punishment ... Our conclusion should not be interpreted as meaning that capital punishment does not have a deterrent effect, but rather that there is currently no evidence for determining whether it does have a deterrent effect.

<sup>35/</sup> E. H. Sutherland, "Murder and the death penalty", *The Journal of Criminal Law and Criminology*, vol. XV, 1925, pp. 522-529; Th. Sellin, "Homicides in retentionist and abolitionist States", *Capital Punishment* (New York, Evanston and London, Harper and Row, 1967); Th. Sellin, *The Penalty of Death* (Beverly Hills and London, Sage Library of Social Research, vol. 102, 1980).

<sup>36/</sup> I. Ehrlich, "The deterrent effect of capital punishment: a question of life and death", *American Economic Review*, No. 65, 1975, pp. 397-417; I. Ehrlich, "Capital punishment and deterrence: some further thoughts and additional evidence", *Journal of Political Economy*, No. 85, 1977, pp. 741-788; K. Shin, *Death Penalty and Crime: Empirical Studies* (Fairfax, Va., George Mason University, Center for Economic Analysis, 1978).

<sup>37/</sup> G. R. Hann, *Deterrence and the Death Penalty, A Critical Review of the Econometric Literature* (Solicitor General, Canada, 1976).

"The deterrent effect of capital punishment and its magnitude reflect only one aspect of the many considerations involved in the choice of the use of the death penalty. Those considerations include issues related to the value of human life, the moral justification of killing by Government, and the appropriate form of public outrage at heinous crimes - all of which are likely to dominate policy decisions in comparison to inevitably crude estimates of the deterrent effects ... The strong value content associated with decisions regarding capital punishment and the high risk associated with errors of commission make it likely that any policy use of scientific evidence on capital punishment ... almost certainly will be unable to meet those (extremely severe Panel) standards of proof. Thus the Panel considers that research on this topic is not likely to produce findings that will or should have much influence on policy makers". <sup>38/</sup>

66. Despite the evident inconclusiveness of the deterrent effect of capital punishment, there is a wide-spread belief in its deterrent value and considerable public support for the death penalty, particularly in countries that still retain it. Several psychological studies have linked support for the death penalty to such traits as dogmatism, authoritarianism, punitiveness and a desire for retribution.

67. The most important factor in this context, however, seems to be the belief in the deterrent effect of capital punishment. Some investigators have found that perceptions of increasing crime rates appear to stimulate heightened fears of victimization, and that this fear is linked directly to both an increased belief in the effectiveness of punishment and a willingness to employ punishment as a response to crime. <sup>39/</sup> A recent Japanese study <sup>40/</sup> basically confirms this hypothesis, but may also allow the conclusion, in view of the comparatively low crime rate of that country, that it is not so much the level of criminality *per se* as the very idea of "crime" threatening the citizenry, which wants to react to it with "punishment". The belief in the effectiveness of punishment is, in turn, directly linked to both the greater willingness to punish and to the increased level of support for the death penalty. Some of the support for capital punishment is, thus, an expression of the public's fear that it will become a target of criminal activity, and is based on the belief that the death penalty will reduce the level of crime. In this context it is worth while to recall Samuel Romilly's

<sup>38/</sup> A. Blumstein et al., "Report of the Panel on Research on Deterrent and Incapacitive Effects", A. Blumstein, J. Cohen, and D. Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, (Washington, D.C., National Academy of Science, 1978), p. 62.

<sup>39/</sup> C. W. Thomas and S. C. Foster, "A sociological perspective on public support for capital punishment", *American Journal of Orthopsychiatry*, No. 45, 1975, pp. 641-657.

<sup>40/</sup> T. Nishikawa, "Capital punishment in Japan", a paper presented at the Interdisciplinary Conference on Capital Punishment, April 1980, Georgia State University, USA.



opinion that "Penal legislation hitherto has resembled what the science of physics must have been when physicians did not know the properties and effects of the medicines they administered". 41/

68. It therefore seems to be an important task of Governments, the academic community, the mass media, and other publicly minded organizations not only to prevent crime and reduce the general fear of victimization, but also to educate the public as to the uncertainty of the deterrent effect of capital punishment. 42/

69. Apart from the presumed general deterrent effect of capital punishment, there is also the special deterrent effect of capital punishment to be considered: the executed offender can obviously never recidivate. This rather cynical point is raised quite frequently, but it is often overlooked that this special deterrence applies only to a person who would have recidivated in the first place. It is therefore important to examine whether the probability that a capital offender will commit a second capital offence is so large that it could justify the taking of his life.

70. The literature relating to this issue was recently reviewed by Jayewardene. 43/ For example, in Finland, one study calculated the risk involved in releasing persons convicted of criminal homicide. It found that the probability that these persons would kill for a second time in any given year was 0.0023, which is quite high when compared to the general population's probability of committing a first homicide, but still too low to justify execution on these grounds. The number of lives possibly saved by such executions would be substantially lower than the number of lives lost through them. Similar findings of very low recidivism rates for murderers are also reported from Canada, Sri Lanka, the United Kingdom and the United States of America. 44/

71. It would be unreasonable to argue that, given the inconclusiveness of the evidence on the deterrent effect of capital punishment, this penalty should be abolished. The decision to apply capital punishment may neglect the results of scientific investigations in the name of other policy determining factors considered to be more important. In such cases, capital punishment may become an instrument of suppressing social or political dissent and may be used in a discriminatory manner. There is a substantial body of evidence that this happens in South Africa where the racist Government sentences to death and executes persons for their opposition to apartheid. The General Assembly condemned these practices by its resolution 2394 (XXIII) of 26 November 1968 and also called for the Government of South Africa to cease such executions. Nevertheless, the present

41/ S. Romilly, commenting on Bentham's *theorie: des peines et des récompenses*, 1811, quoted after the report of the Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (London, HM Stationery Office, p. 17).

42/ Bowers, *op. cit.*

43/ C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, Mass., Lexington Books, 1978).

44/ *Ibid.* See also H. A. Bedau, "Parole of capital offenders, recidivism and life imprisonment, *The Death Penalty in America* (Chicago, Aldine Publishing Co, 1964).

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situation is still very alarming. In 1979, according to information made available to the Parliament by the Minister of Justice, a total of 133 executions were carried out at Pretoria Central Prison, all but 2 of them involving individuals officially classified as blacks or "coloureds". This total for 1979 exceeded by one the total for the previous year, placing South Africa in the ranks of the States with the highest rates of judicial executions in the world. The figures of the death penalty compared to those of the earlier mid-1970s. Indeed, the total of 133 hangings in 1979 constitutes an increase of more than 300 per cent over the comparable figure for 1974, when 40 executions were carried out. 45/

72. The capricious fashion of applying capital punishment is an issue of concern to both developed and developing countries. The criminological literature affords proof of the unequal use of the death penalty against members of racial and religious minorities, against the poor, and also the evidence of the arbitrary administration of justice influenced by other factors. In India, for example, "there is insufficient evidence ... that the death penalty, as actually administered, both in terms of judicial imposition and clemency procedures is violative of article 6 of the International Covenant on Civil and Political Rights ... It is clear that divergent attitudes and social philosophies of individual justices make the award of capital sentence arbitrary. Statistics cogently demonstrate that some justices ... are regularly inclined to affirm the death sentence, others are similarly disinclined, and the remainder are eclectic". 46/ The racial bias in capital punishment has been explored in the United States of America. A sophisticated research study conducted there has revealed that members of the black minority are disproportionately and more frequently sentenced and executed than whites for rape. 47/ Other studies confirm this pattern for other capital offences. 48/ Moreover, when such findings are presented to the court, they are usually disregarded. 49/

45/ *The Death Penalty in South Africa*, Amnesty International (NS/CO/AD), 1980.

46/ U. Baxi, "Human rights in the administration of criminal justice", paper presented at the Teachers' Seminar, International Law Association, Indian Branch, 1979.

47/ M. E. Wolfgang and M. Riedel, "Rape, racial discrimination and the death penalty", H. A. Bedau, and Ch. M. Pierce, eds. *Capital Punishment in the United States*, (New York, AMS Press, 1976), pp. 99-121.

48/ L. Foley, "The effect of race on the imposition of the death penalty", paper presented at the Symposium on Extra-Legal Attributes Affecting Death Penalty Sentencing, American Psychological Association, New York; Wolfgang and Riedel, *op. cit.*, pp. 120-121, foot-note 35; M. López-Rey, *Crime and Human Rights*, *Federal Probation Quarterly*, No. 1, 1978. According to the data of the Legal Defense and Educational Fund, the numbers of black minority, which constitutes about 12 per cent of a whole population, makes up about 40 out of 646 death row inmates currently awaiting execution in the United States. (*The Death Row* (New York, NAACP, April 1980)).

49/ M. F. Wolfgang, "The death penalty: social philosophy and social science research", *Criminal Law Bulletin*, No. 14, 1978, pp. 18-33.

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VI. CURRENT GOVERNMENTAL, INTERGOVERNMENTAL, NON-GOVERNMENTAL  
AND POPULAR INITIATIVES TO ABOLISH CAPITAL PUNISHMENT

73. The campaign to abolish capital punishment obtained its most important impetus in 1764 with the publication of Cesare Beccaria's book On Crime and Punishments. 50/ Austria and Tuscany based the reforms of their penal codes on his work and, at least temporarily, abolished capital punishment.

74. Attitudes to death - and to the taking of human life - have their roots in religion, culture and social tradition and consequently vary considerably both within and between Member States. This diversity in religious and cultural backgrounds is one reason why in some countries there is a strong movement towards the death penalty, while in others there seems to be little or no concern over the issue. Another reason is, of course, that in several countries capital punishment has already been abolished, so that there is no reason for such a movement, while in some retentionist countries the political climate does not favour the expression of opposition to the death penalty, sometimes on the public's assumption that those in power must have adequate reasons for retention of capital punishment.

75. In several countries dedicated individuals have made their abolitionist views public, for example, through scientific publications addressed to the question of abolition. In the Soviet Union, one researcher stresses the temporary character of the death penalty in socialist societies. 51/ A Romanian study on the death penalty underscores its exceptional character with a view to the complete renunciation of capital punishment in the future. 52/ In Poland, an eminent scholar, Cieślak, has strongly voiced his opposition to the death penalty and in another study of Grzeškowiak, recently released, the author argues that the death penalty is not in line with the general aims of socialist criminal law and should therefore be abolished, at least for peace-time offences. 53/

76. The sanctity of human life, with the command "thou shalt not execute", gathers support in the Jewish religion. 54/ Both the Christian denomination and Buddhism are in a position to urge high respect for life in all forms and therefore to express their opposition to the death penalty. Restriction of the use of capital

50/ C. Beccaria, transl. by H. Paolucci (New York, Bobbs-Merrill Co., 1963).

51/ G. Z. Anashkin, "Umanisimul dreptului penal sovietic" (Humanism of the Soviet Penal Law), Analele-romano-sovietice, 1963, p. 6.

52/ I. Poenaru, Contributi la Studiul Pedepesii Capitale (Contribution to an Investigation of Capital Punishment) (Bucharest, Editura Academiei Republicii Socialiste Romania, 1974).

53/ M. Cieślak, "Problem Kary Śmierci" (The problem of capital punishment), Państwo i Prawo, No. 2, 1966, pp. 833-853; A. Grzeškowiak, Kara Śmierci w Polskim Prawie Karnym (Capital Punishment in Polish Criminal Law) (Toruń Uniwersytet Mikołaja Kopernika 1978); J. Jasinski, "Kara Śmierci w Aspekcie Prawnym i Moralnym" (Capital punishment in legal and moral aspect), Wież, No. 10, 1979, pp. 28-44.

54/ E. Erez, Thou shalt not execute: the attitude of Hebrew law toward capital punishment, paper presented at the Interdisciplinary Conference on Capital Punishment, April 1980, Georgia State University, USA.

/...

punishment is embodied in the basic principles of the Islamic religion. Information from Governments are compiled in a document entitled "Capital punishment" (ST/SOA/118). 55/ Moreover, several institutionalized clerical actions were undertaken for banishment of the death penalty. The Central Committee of the World Council of Churches has urged the Member Churches to promote efforts towards the abolition of capital punishment as a significant expression of its belief in the sanctity of life, as did many other religious organizations. 56/

77. From time to time international forums of scientists and individuals, or organizations concerned with the issue of the death penalty express their position on it. In 1967, the International Colloquium to Commemorate the Centennial of the Abolition of the Death Penalty in Portugal was held at Coimbra. The Coimbra Colloquium, taking into account that no deterrent effect of the death penalty had been demonstrated and, also, that this punishment is inhuman, may be used for oppression and precludes rehabilitation, recommended the "universal and definitive abolition of the death penalty". 57/ It was also recommended to replace capital punishment by other sanctions and, as a means of implementing this, to suspend immediately the application of the death penalty in the retentionist States.

78. Recently, at the Symposium on Human Rights and Fundamental Freedoms in the Arab Homeland, held at Baghdad from 18 to 20 May 1979, a strong position against the death penalty was expressed. The representatives of the League of Arab States, their specialized bodies, several international organizations concerned with human rights and numerous professional and people's organizations jointly recommended abolition of capital punishment (A/C.3/34/11). Efforts to this effect were also taken by intergovernmental and non-governmental organizations, notably by the Council of Europe and by Amnesty International.

79. The European Committee on Crime Problems of the Council of Europe conducted a review of the situation regarding the death penalty in Western Europe, and a survey of Nobel Prize winners on the question of capital punishment. 58/ A similar report was submitted to the Parliamentary Assembly of the Council of Europe by the Legal Affairs Committee. 59/ The Parliamentary Assembly recently took a firm position on

55/ See also I. A. Beristain, "El Catolicismo ante la pena de muerte", La Pena de Muerte, Seis Repuestas (Madrid, Boletín Oficial del Estado, 1978).

56/ The Churches in International Affairs, Report 1970-1973 (Geneva, Committee of the Churches on International Affairs of the World Council of Churches, 1974); J. J. Migliver, "The conversion of the churches", paper presented at the Interdisciplinary Conference on Capital Punishment, April 1980, Georgia State University, USA; A. Jessup, "The abolition of capital punishment", summary of the debates during the twelfth session of the General Assembly of the United Nations, Quaker Program at the United Nations, April 1958.

57/ Pena de Morte, Coloquio Internacional Comemorativo Do Centenario Da Abolição Da Pena De Morte em Portugal, Coimbra, 11-16 September 1967.

58/ The Death Penalty in European Countries, (Strasbourg, Council of Europe, 1962); N. Kunter, "Le problème de l'abolition de la peine de mort", Annales de la Faculté de Droit d'Istanbul, No. 43, 1980, p. 6.

59/ "Report on the abolition of capital punishment", document 4509, March 1980.

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this issue, condemning capital punishment in peace-time as inhuman, and called on the members maintaining it to abolish it. The Assembly also recommended that the European Convention on Human Rights should be amended to make the death penalty illegal. An unequivocal position on this issue was also taken in the American Convention on Human Rights which states that "in no case shall capital punishment be inflicted for political offences or related common crimes".

80. A large number of non-governmental organizations have opposed capital punishment for a long time. At the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1975, 26 non-governmental organizations in consultative status with the Economic and Social Council submitted a joint statement calling, *inter alia*, on all Governments that retain capital punishment to cease employing it. 60/ In 1977, Amnesty International organized an international conference on the abolition of the death penalty at Stockholm, attended by delegates from all regions of the world. This conference adopted a declaration condemning the death penalty as the ultimate cruel, inhuman and degrading punishment which was in violation of the right to life. It pointed out, also, that the death penalty was frequently used as an instrument of repression against opposition, racial, ethnic, religious, and under-privileged groups, and that the imposition of the death penalty was brutalizing to all involved in the process. Amnesty International has continued its campaign against the death penalty with the publication of a comprehensive report on this matter, 61/ and issues a monthly world-wide survey of developments in the field of capital punishment, reporting particularly on death sentences and executions.

60/ *The Death Penalty*, (London, Amnesty International, 1979), p. 203; see also the decision adopted by the World Federation of United Nations Associations at its 23rd plenary meeting, in May 1971 (PA.23/decision(A)).

61/ *Ibid.*

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## VII. POSSIBLE FURTHER STEPS FOR THE ABOLITION OF CAPITAL PUNISHMENT

81. The General Assembly in its resolution 2857 (XXVI) affirmed that the main objective to be pursued is that of progressively restricting the number of offences liable to the death penalty, with a view to the desirability of eventually abolishing this punishment in all countries. The following paragraphs consider possible ways of achieving this goal. There seems to be several different avenues which may lead to the abolition of capital punishment. Which one of these will be taken by any given country depends on its specific historical, cultural and political conditions, particularly on the convictions and the leadership of the Government, the attitudes expressed by public opinion, and the present role of capital punishment in the country's crime control policies.

82. Historically, a large proportion of abolitionist countries seem to have abandoned capital punishment as a matter of general policy, in accordance with basic principles of human rights. Among these countries are several Latin American and Western European nations, and also several newly independent States such as Cape Verde and Solomon Islands. Other countries have renounced capital punishment after a period of time during which the death penalty was used for the suppression of political dissent, for example, Austria, the Federal Republic of Germany, Italy and, most recently, Nicaragua, Portugal and Spain. Despite their importance for the history of the abolition of capital punishment, these examples, because of their atypical circumstances, can hardly serve as a guide-line for the planned abolition of capital punishment.

83. Typically, there are two positions which may be taken; both of them would eventually lead to the abolition of capital punishment. One is based on explicit procedures emphasizing moral leadership in which the Government takes the initiative and on the relevant factual information to be used in social policy making. The other is a less conspicuous procedure which avoids making the abolition of capital punishment a political issue, taking into account the frequently retentionist attitude of the general public.

84. The first procedure focuses on the collection of evidence, such as empirical data and the opinion of experts concerning capital punishment. It has been used primarily in common law countries, but it could also be followed by nations with other legal systems. It usually provides for:

(a) The establishment of a high-level fact-finding commission at either the national or regional level;

(b) A moratorium on capital punishment until the appropriate authorities make a formal decision on the commission's recommendations.

85. The moratorium not only emphasizes the importance of the commission's work and the Government's commitment not to take any irreversible decisions before having considered the commission's recommendations; it also represents a compromise acceptable to both retentionists and abolitionists. A moratorium can guarantee to

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retentionists that the issue will be opened again and, at the same time, it reassures abolitionists that until the necessary factual evidence, which usually is in their favour, is collected, the question will not be decided. After all, a moratorium is designed to establish empirically the beneficial nature of a social measure on which there is no ideological consensus. 62/

86. The following major areas might be considered by such fact-finding commissions on capital punishment:

- (a) The evidence for and against the general deterrent effect of capital punishment;
- (b) The experience of other countries with the abolition of capital punishment;
- (c) The evidence on discrimination against ethnic minorities and economically disadvantaged groups in the imposition of the death penalty;
- (d) The arbitrariness and fallibility of judicial procedures and the history of miscarriages of justice in capital cases;
- (e) The condition of prisoners awaiting execution;
- (f) The humanitarian, social, political, and financial cost of retaining capital punishment compared to the cost of its abolition;
- (g) The factors that determine public opinion on capital punishment;
- (h) The opinion of social philosophers, religious leaders, and other experts and socially relevant groups concerning the political, moral, and ethical questions concerning capital punishment.

87. After the publication of the report of such a commission and its discussion in the news media and in public meetings, it might then be the task of the Government to introduce legislation repealing the death penalty statutes partially or completely.

88. The other, less conspicuous procedure makes use of the power to commute death sentences to long-term imprisonment by granting pardons or executive clemency. This power exists in virtually all countries and is most often exercised by the heads of States acting on the advice of a government official or some other consultative body.

89. A Government which is opposed to capital punishment but, for some reason or other, prefers not to make a political issue out of its abolition, may use the power to grant pardons or amnesty to abolish capital punishment *de facto*. Several countries, both industrialized and developing ones, have regularly commuted death sentences to long-term imprisonment and have thereby established a tradition of not executing capital offenders.

62/ Jayewardene, *op. cit.*

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90. Instead of commuting the death sentences of individual offenders as a matter of policy, which could raise criticism from certain pressure groups in favour of capital punishment, Governments could also use festive occasions such as national or religious holidays, the birthday of the head of State, or government anniversaries to declare an amnesty for persons under the sentence of death. Amnesty on such occasions is likely to be perceived as an extraordinary gesture of mercy and generosity rather than as a routine policy and as such, is less likely to provoke criticism.

91. Eventually, the regular commutation of death sentences will lead to a firmly established abolitionist tradition. Such a tradition would not only reduce public support for capital punishment, but can also provide the experience that the death penalty is, in fact, not necessary at all to maintain law and order.

92. Some countries may not yet be ready to abolish capital punishment. It is important that these States, as long as they retain capital punishment, should treat capital offenders according to the rules of due process of law, and respect the relevant resolutions of the United Nations regarding the imposition of capital punishment and the treatment of offenders in general. In particular, there are the resolutions calling for the repeal of obsolete death penalty statutes which are no longer used in practice, for the provision of facilities for the medical and social investigation of the cases of all capital offenders, and for the most careful legal procedures in capital cases, including the right to appeal a death sentence and to petition for pardon. Indigent persons should be provided with legal counsel in all stages of the proceedings, and executions should not be carried out until a final decision on all appeals and on the petition for pardon has been made. The passing of death sentences in summary trials, which is still observed in some countries, certainly goes against the spirit of General Assembly resolution 2393 (XXIII) and Economic and Social Council resolution 934 (XXXV).

93. It would be desirable that appeals against death sentences be lodged automatically and that the review should not only deal with the factual and legal questions concerning each particular case, but should also examine whether the death sentence is not an excessive punishment when compared with the sanctions imposed for similar offences by other courts in the country. Furthermore, the introduction of statutory minimum periods of time between the end of the appeals process and the decision on a pardon for the condemned person could allow the emotions raised by the offence to calm down, so that a more generous attitude towards the petition for pardon could be adopted.

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# VIII. CONCLUSIONS

94. In its resolution 2393 (XXIII), the General Assembly noted that there was a world-wide tendency towards a reduction in the number and categories of offences for which capital punishment could be imposed, that there was an over-all trend towards fewer executions, and that there was a strong trend in most countries towards the abolition of capital punishment, or at least towards fewer executions.

95. Desirable as these trends were in view of the objectives stated in the international acts by the Member States that capital punishment should be abolished in all countries, the results of the research conducted by the Secretariat, as well as by other organizations, indicate that at present, there might well be a trend towards an increase in laws creating capital offences, in the number of death sentences imposed, and in the number of executions in many countries. While a few countries have recently abolished capital punishment, it remains extremely doubtful whether there is any real progress towards the restriction of the use of the death penalty, as noted by the General Assembly in its resolution 32/61. Therefore, further efforts are necessary to achieve this stated objective: the ultimate abolition of capital punishment in all countries.

96. As mentioned above, the use of capital punishment is apparently a result of the traditional attitudes and common-sense beliefs that the death penalty is needed to maintain law and order, to react to particularly outrageous offences, and to deter the general population from committing certain crimes. An illusion seems to prevail that the processes and mechanisms involved in the social control of criminality cannot exist without it, especially when one takes into account the fact that it has been so for centuries. For centuries its application has given also testimony of judicial errors. They became tragic reminders that human judgement is not infallible.

97. The "problem" of the death penalty is important because it is an issue which may put those who follow traditional but not always substantiated views against those who wish to act on the basis of scientific understanding. <sup>63/</sup> The confrontations of these two approaches revealed that the former in the light of the latter apparently turned out to be wrong. But it does not mean that the "problem" has been solved. It would be overly optimistic to assume that capital punishment will soon be totally abolished. This penalty is still regarded in many countries as an efficient or at least acceptable way of ridding society of certain types of problems - whatever the experts may have to say about it. The legislator does not need "grand" evidence to abolish the death penalty. Everything that could be said for and against the death penalty has already been said. Any new evidence probably will not bring about the solution of the question of capital punishment. To abolish or to retain the death penalty remains a matter of moral and political choice, a choice which may, perhaps, no longer be avoided.

<sup>63/</sup> Sutherland, op. cit., p. 528.

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98. 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 anti-criminal reaction of society to the capital offender should not exclude a priori the possibility of rehabilitation. <sup>64/</sup> Even if society wants to retain the death penalty for the sake of retribution, the issue still remains of the choice between doubtful lex talionis and fair and humane justice.

99. The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders has been called upon by the General Assembly to discuss the various aspects of the use of capital punishment and the possible restriction thereof, including a more generous application of the rules relating to pardon, commutation or reprieve, and to report thereon, with recommendations, to the General Assembly at its thirty-fifth session.

100. The present working paper has been prepared in order to facilitate this important task in line with the recommendations put forward in the resolutions adopted by the General Assembly and the Economic and Social Council on the issue of capital punishment. The experience of the countries which have abolished capital punishment and the failure of the proponents of the death penalty to provide conclusive evidence for its deterrent effect over and above the one obtainable by the threat of long-term imprisonment both indicate that the main consideration in this context need not be a concern for the effective enforcement of criminal law. Instead, the predominant question is whether the custom of taking life of a human being in the name of retribution, incapacitation, and an unsubstantiated deterrent effect on others can be abandoned out of respect for the dignity of every person and the right of life as stated in the basic postulates of the United Nations.

<sup>64/</sup> M. Ancel, "capital punishment in the second half of the 20th century", Review of the International Commission of Jurists, No. 41, June 1969.

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Annex

ABOLITIONIST STATES IN THE WORLD

- \* States which responded officially to the present survey. For non-responding countries, the information supplied in this table rests on research conducted by the Secretariat.
- \*\* Non-Member States.
- A Abolitionist by law.
- AO Abolitionist by law for ordinary crimes only.
- AC Abolitionist by custom for the past 40 years.
- ADF Abolitionist de facto at least for the past 10 years.
- D Federal nations divided on the issue; some States being abolitionist and others retentionist.

Country	STATUS					Year of abolition or year of last known execution
	A	AO	AC	ADF	D	
Australia*					X	1964
Austria*	X					1945
Belgium*			X			1918
Brazil*		X				1978
Canada*		X				1976
Cape Verde*	X					1975
Colombia*	X					1910
Costa Rica*	X					1882
Cyprus*				X		1969
Denmark*	X					1978
Dominican Republic	X					1966
Ecuador*	X					1887
Fiji*		X				1979
Finland*	X					1972
Germany, Fed. Rep. of	X					1949
Guinea-Bissau		X				....
Guyana				X		1970
Holy See**			X			....

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Country	STATUS					Year of abolition or year of last known execution
	A	AO	AC	ADF	D	
Honduras	X					1929
Iceland*	X					1928
Ireland				X		1954
Israel		X				1954
Italy		X				1944
Ivory Coast				X		....
Liechtenstein**			X			1798
Luxembourg*	X					1979
Madagascar				X		1960
Maldives				X		1952
Malta		X				1971
Mexico		X				1975
Monaco**			X			1847
Nepal*		X				1959
Netherlands		X				1870
New Zealand		X				1961
Nicaragua	X					1979
Norway	X					1979
Panama	X					1903
Papua New Guinea	X					1971
Peru		X				1978
Portugal*	X					1977
San Marino**		X				1948
Solomon Islands	X					....
Spain*		X				1978
Suriname			X			1929
Sweden*	X					1973
Switzerland**		X				1937
United Kingdom*		X				1969
Upper Volta				X		....
United States of America					X	1979
Uruguay*	X					1903
Venezuela*	X					1863

**END**