

# DEATH PENALTY: TRANSCENDING THE DIVIDE

Materials of international conference  
Minsk, 10 March 2016



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International conference “Death Penalty: Transcending the Divide” represented a timely opportunity to share worldwide experiences both from countries that are still applying the death penalty as well as states that are not. The participants discussed related complex issues related to the function of the court system, existing judicial guaranties, crime control as well as sociological and psychological roots of the most serious crimes and the impact of the death penalty. This event attracted national and international experts in different fields, such as psychology, sociology, criminology, law etc. to ground the future dialogue on the use of the death penalty in an impartial and balanced analysis of the existing status-quo in the country and elsewhere.

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# INTERNATIONAL CONFERENCE

## “DEATH PENALTY: TRANSCENDING THE DIVIDE”

Minsk, 10 March 2016

### BACKGROUND

Following the second Universal Periodic Review (UPR) cycle in 2015, Belarus has accepted a number of recommendations on the death penalty issues.

Belarus Government took important steps towards implementing a number of UPR recommendations, as well as paid increasing attention to the existing international trends in the capital punishment practice. The parliamentary working group on death penalty was created in 2010 and started raising public awareness regarding the importance and complexity of the death penalty issue.

Today an estimated 160 Member States of the UN have either abolished the death penalty or do not practice it. At the same time some states continue applying death penalty for offences that sometimes do not meet the threshold of most serious crimes or persist in imposing this sanction on children.

Taking into account the international law framework, although Article 6 of the International Covenant on Civil and Political Rights (ICCPR) permits the use of the death penalty in limited circumstances, it also provides that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.” The Second Optional Protocol to the ICCPR adopted in 1989 abolishes the death penalty. General Assembly repeatedly urges Member States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death. The UN Economic and Social Council also adopted Safeguards guaranteeing protection of the rights of those facing the death penalty.

## OBJECTIVE

Building on the promising results of the first two UPR cycles, as well as promoting a comprehensive engagement of all stakeholders in the process of implementation of the 2nd cycle UPR recommendations, the United Nations in Belarus, in partnership with the Ministry of Foreign Affairs of the Republic of Belarus and with support from the British Embassy in Minsk, agreed to organize an international conference, which would bring together national and international expertise to look at use of death penalty in theory and practice by means of an impartial multidisciplinary approach towards application of capital punishment around the world. The event will gather experts, as well as decision makers, representatives of the civil society and international development partners to define a compromise solution towards debating and considering issues of the application of capital punishment.

This international conference will represent a timely opportunity to share worldwide experiences both from countries that are still applying death penalty as well as states that are not. The participants will discuss related complex issues of court system functioning, existing judicial guaranties, deterrence as well as sociological and psychological roots of the most serious crimes and the impact of death penalty. This event will attract national and international experts in different fields, such as psychology, sociology, criminology, law etc. to ground the future dialogue on the use of death penalty in an impartial and balanced analysis of existing status-quo in the country and elsewhere.

The main goal of the conference is attaining a better public awareness on a host of issues related to death penalty. Additionally, this initiative aims at introducing an interdisciplinary approach to providing a comprehensive and impartial analysis of the death penalty theory and practice around the world.

# WELCOMING REMARKS

**Mr. Valentin Rybakov,**

*Deputy Minister of Foreign Affairs of the Republic of Belarus*

Ladies and Gentlemen,

On behalf of the Ministry of Foreign Affairs of the Republic of Belarus, I am happy to welcome you as guests and participants in the today's event, the international conference on the death penalty.

First of all, I would like to thank Mr. Sanaka Samarasinha, the UN Resident Coordinator in Belarus, and his team for their active role and leadership in the preparation of the conference as well as the British side represented by Ambassador Extraordinary and Plenipotentiary of the United Kingdom Ms. Fionna Gibb for the financial support of the event.

Allow me to extend a special welcome to Mr. Stavros Lambrinidis, EU Special Representative for Human Rights, and Mr. Andrea Rigoni, Rapporteur of the Parliamentary Assembly of the Council of Europe, dignitaries from Switzerland and the Czech Republic as well as the representatives of the Office of the UN High Commissioner for Human Rights and OSCE/ODIHR who have come to Belarus and to our event, in particular.

I am confident that your stay in Belarus including the participation in the conference and the bilateral contacts will further strengthen the common understanding and constructive collaboration between the Republic of Belarus and European institutions and countries.

We welcomed the recent decision of the EU Council to lift most of the sanctions against Belarus. Belarus has always been and remains open to discussing the most complex and controversial issues including human rights and the use of the death penalty in particular. However, as consistently emphasized by the Belarusian side at all levels, the solution to problems should not be sought through confrontation and imposition of views but through dialogue based on mutual respect.

We are open to such dialogue and hope to develop it together with our European partners.

The issue of the use of the death penalty in Belarus has always drawn the attention of European institutions and international organizations.

It is commonly known that under international law the use of the death penalty is not universally banned. The International Covenant on Civil and Political Rights, to which Belarus is a state party, places certain limitations on the use of the death penalty: “sentence of death may be imposed only for the most serious crimes; 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” (Article 6 of the Covenant).

Belarus placed even more severe limitations on the use of the death penalty than provided for by the International Covenant: the death penalty shall not be imposed on persons who committed crimes under eighteen years of age, all women and men who reached the age of 65 by the time of sentence.

Moreover, Belarusian national legislation, specifically the Constitution, regards the death penalty as a temporary measure. Until abolished, the death penalty can be used pursuant to a sentence as an exceptional measure of punishment for certain most serious crimes involving intentional taking of human life under aggravated circumstances.

With this constitutional provision in view, the Republic of Belarus on the international arena has assumed a balanced position regarding the use of the death penalty. When deliberating on the moratorium on the use of the death penalty at the UN General Assembly our country traditionally abstains from voting.

Within the two cycles of the universal periodic review of human rights, Belarus accepted a number of recommendations regarding the consideration of a moratorium on the death penalty.

At the same time, as you know, in the 1996 referendum, the majority of Belarusian citizens voted to retain capital punishment. Repeated opinion polls show that the death penalty is still perceived by society in different ways; the majority continue to support it. We cannot ignore that fact when engaging in dialogue with European partners.

The role of public opinion and the expert community regarding this issue is great and therefore we find it important to discuss the problems related to the death penalty from different perspectives. This is precisely why we have not curtailed discussions of the issue; quite the opposite, we strive to develop them in the most productive way.



It is my belief that the wide array of expert opinions both in favor and against the death penalty, which we will be able to learn during the conference, will help achieve its key objective, i.e. to transcend the divide, and to set the stage for open dialogue about the use of the death penalty.

I would like to wish all participants an interesting discussion and a fruitful exchange of views.

Thank you.

**Mr. Sanaka Samarasinha,**  
*UN Resident Coordinator in Belarus*

Ladies and gentlemen, good morning. I would like to express my gratitude to all today's speakers and give my special thanks to Mr. Lambrinidis who is with us today, I am happy you could join us. I would also like to thank Mr. Schwarzenberg who has been here several times. It is very important given his proactive role on the matter we are discussing today. Mr. Rigoni, many thanks for joining us here. I am happy to see you again. Nikolay Samoseiko, I am glad to see you here and am very happy you will share your expert commentary with us.

There are many people from different countries present. I would like to express my gratitude to the Embassies for their help in arranging it, especially the Italian Embassy, the Swiss Embassy, the U.S. Embassy. And, finally, my dear friend and colleague, Fionna. The British Embassy has provided excellent support for the event.

The EU delegation, thank you very much, it would be impossible to realize the event at such a level without your support. We highly appreciate the role of the international community. Taken all in all, we are now in Belarus, and death penalty issue should be discussed by the Belarusian people and it is them who should take steps towards solving it. I believe that leadership demonstrated by the Ministry of Foreign Affairs, and the Foreign Minister in particular, does matter. I have discussed these issues with him in the recent months and, Valentin, your presence here is also an evidence of the important role of the Ministry of Foreign Affairs. As we have previously discussed with Mr. Makei, it is an important indicator that Belarus believes that the government should and will take the lead on human rights issue, because it is the Government that is a party to all Conventions you have signed. The Ministry of Foreign Affairs has always been a reliable and entrusted counterpart of the United Nations. We have been present here for almost a quarter of a century. Last year, in October we signed a very important document. Many of you know that we signed the United Nations Development Assistance Framework on rendering assistance in the field of development, which has an essential pillar on democratic governance and human rights.

When we discuss democratic governance and human rights, it is important to distinguish them from politics, because when we speak about human rights there often appears a tendency to politicizing.

I would like to move towards a discussion which builds on facts and experience rather than political views. I am sure that today's discussion will be shaped exactly in this way. Today's relations between Belarus and other UN member states allows us to hold an evidence-based discussion, even on the most sensitive issues.

In view of the above, I hope it will not be just another event. We hope that this dialogue will continue beyond the hall of the Renaissance hotel in schools, sitting rooms, your homes, in cities like Pinsk, Baranovičy, Miory, and not only here in Minsk. This is particularly important, as Valentin Rybakov said, there are certain perceptions and opinions. The referendum took place 20 years ago but based on my personal experience from such countries as the Republic of South Africa and the USA, and my home country Sri Lanka, public opinion is usually formed without comprehensive understanding of the complexity of problems associated with death penalty. And I hope that as we move forward, this event will be the first step towards a broader program of awareness raising and dialogue based on mutual respect not only with experts but also with all stakeholders so that we could really build up the understanding of problems and study the experience of different countries. There are 165 out of 193 countries and territories around the world which do not have death penalty either by abolishing it or by imposing moratorium which implies that de facto they don't apply it. In different countries these issues are being discussed, and eventually people have found the direction to move in. I would like to stress that this is still an unresolved issue, and it is Belarus' discretion to decide how to move on this way. And we as the international community, as the United Nations stand ready to support you by sharing experience and providing technical assistance, and to certainly share our ability to bring different parties together. I would like to wish us success and mutual respect so that this event is useful to us and we could participate in and benefit from a fruitful dialogue.

Thank you very much!

**Ms. Fionna Gibb,**  
*British Ambassador to Belarus*

I am thankful to Valentin Rybakov and the Government of Belarus as well as UNDP for organizing the conference. This is yet another step towards having a dialogue about this issue, raising awareness and building on the work performed in Belarus by the parliamentary group on the death penalty set up six years ago. We are lucky to have such a group of speakers at the conference. I am deeply grateful to the entire international community. We will share experience and exchange views regardless of our respective positions on the death penalty. As Valentin Rybakov said, there are different opinions about the death penalty in Belarus. For example, it took Great Britain 15 years for the parliament to eventually impose a moratorium in 1965, which means we needed a certain amount of time to achieve a result. It is very important for our debates and discussions to be open and free and for us to be able to better understand the complexity of the issues related to the death penalty. I hope everyone will be able to speak their mind, ask questions, and express their opinion whatever attitude they maintain.

I want to focus attention on Mr. Sanaka's words that we have made one more step today but we have to keep following that path. I wish Belarus all the best on this path and for dialogue to continue.

Thank you very much.

# KEYNOTE SPEECHES: PERSPECTIVES ON DEATH PENALTY

**Mr. Stavros Lambrinidis,**  
*EU Special Representative for Human Rights*

Excellencies, ladies and gentlemen,

It is a pleasure for me to be here at a historic moment in this very important debate, the first open international discussion on the death penalty topic in Belarus.

Let me begin by looking at the death penalty trends in Europe and around the world: Once you examine them, you will realize that the debate on the moratorium or the abolition of the death penalty has become much less controversial as the years have gone by. The vast majority of countries today in the world have either in law abolished the death penalty or established moratoriums.

Just to give you a sense of the numbers: In 1945, only eight countries had abolished the death penalty. Thirty years later, in 1978, that number had increased to only 16. But in 2016, it was over 150; today, a hundred and fifty countries in the world have abolished the death penalty or stopped it through moratoriums.

Eight – sixteen – a hundred and fifty...

It is increasingly the case that countries in the world abolish as opposed to don't. In the case of Europe, the European Union, of course, all its twenty-eight Member States have abolished the death penalty. But the Council of Europe as well has – everyone in Europe has abolished the death penalty. And it is very important that we have the chance today to have this reasoned discussion here in Belarus, the only European country that still retains it.

Now, having looked at the trends, let us look at the “who”. Who is abolishing the death penalty? Are there any particular traits in the cultures, in the religions, in the political systems of those countries that are abolishing? The answer to that question is a resounding “No”. Neither those that have abolished the death penalty or placed moratoriums – the vast majority –, nor those that still retain the penalty have any unique unifying cultural or political characteristics.

Russia and Germany, Kazakhstan and the United Kingdom, Greece and Azerbaijan, but also South Africa, Morocco, and so many other diverse countries don't apply the death penalty. In a similar cultural polyphony, the majority of the United States, but also Saudi Arabia and Iran, still apply the death penalty. So when it comes to the "who", one thing is clear: This is not a regional, cultural, or political divide, a case of the "West" versus the "East," or the "South" versus the "North."

When one looks at the countries that have abolished, one more thing becomes clear: All of them are still plagued by very serious crime. In Paris a few months ago there was the most heinous terrorist attack recently in Europe. And yet France was and remains a country that has abolished the death penalty. In other words, countries that have stopped executing have decided to do so in spite of the fact that they often face as much serious crime as those who continue to execute. Retentionist countries cannot claim that they need the death penalty because they are somehow plagued by more serious crimes than others. And it would, of course, be absurd to claim that abolitionist countries somehow "like" criminals more than others and thus choose to keep them alive. So it is something more, something different, that influences a country's decision on the death penalty.

I submit to you that looking at the facts of what the death penalty achieves and what it doesn't can help us understand what has led such a large number of countries to abolish it or to put in place moratoriums.

So after having examined the trends, and having looked at the "who" has abolished or has in place moratoriums, let us now look at the "why." Why has abolition become the norm in the majority of countries?

Well, I can speak to you about Europe, and I will very briefly, but, of course, different countries around the world have different experiences and histories and even in the European Union we have different experiences. It is quite interesting to see that in the EU you have had the anti-death penalty movement more vibrant and the death penalty gradually abandoned usually after major war and destruction – after World War II the discussion gradually became much more earnest, for example – and also after the fall of either repressive or dictatorial regimes. The extreme arbitrariness of extreme power got many Europeans to realize that the death penalty could also be arbitrarily imposed.

Take for example the case in Greece, my own country. The death penalty existed until 1974. Between 1967 and 1974 Greece had a terrible dictatorship. In 1974 the dictatorship fell. And the dictators were brought to court. And the court tried them and found them guilty and sentenced them to death. The prime minister of Greece at that time, a man called Konstantinos Karamanlis, said: “We will not execute them, we will commute their death sentences to life in prison.” The public opinion in Greece at the time, as you can imagine, was initially shocked, if not furious. In the country where democracy was born, dictators took over. And, yet, a court decision to put them to death was reversed by the decision of the leader of the country who said “No”. But in a matter of weeks – not months, not years – the public opinion had turned entirely around. People were now proud that, indeed, the oldest democracy in the world had managed, in principle, to punish in the harshest way possible, through a life sentence, the dictators without, however, falling to their level, without killing them.

In France, when President Mitterrand abolished the death penalty, back in the 80s, the public opinion was against as well. But he took the leadership position, and, as in the case of Greece, the majority of the public opinion changed entirely very quickly thereafter.

So, one “why”, why you abandon the death penalty, has to do with your personal experience, with your country’s experiences, with your region’s experience. And with strong leaders who can take the moral high ground.

But in addition to any personal or historical reasons, there are also facts that one looks at – and laws – and reaches the conclusion much more often than not, that the death penalty should not be applied – as we can discern from the wide world-wide trend towards abolition.

The first fact is the international legal obligation to the right to life. Governments have the obligation to preserve it, not to take it away. Similarly, governments have the obligation under international law to not impose cruel and unusual punishment even on the worst criminals. These obligations stem from the fundamental “human dignity” of every human being, even of someone who has committed the most atrocious crime, as recognized in human rights discourse.

“But,” some people argue, “how can you say this?! Someone who raped and murdered a young child, someone who placed a bomb that

killed hundreds of innocents... What human dignity do they have left? Why should we respect or care about that?"

I answer to those who tell me this: "I understand your anger. I can talk to you about international obligations and norms, but you will still be angry. So I ask you for a moment to think not about the human dignity of any criminal, but about your human dignity."

Dear friends, as much as I may hate him, I refuse to execute the worst killer in the world, not because of their dignity, but because of mine. I will not allow a killer to turn me into a killer. I will not give them that satisfaction. I will not give them that power over me.

But there are other facts too that weigh into the death penalty debate, and I am sure that they will be unfolded in the next hours in this exceptional conference, but here are three of them, briefly:

First, the death penalty does not deter the most serious crimes.

Extensive studies, done in different countries and regions of the world, have shown that there is no scientific evidence to prove that the death penalty has a direct correlation with reducing serious crime, or that abolishing it increases serious crime. For all those who want to ensure that whatever punishment is meted out, it is at least a punishment that will reduce serious future crime, the death penalty has not been proven to be such a punishment.

Second, civilized societies don't only want to punish, as they should, the guilty. They also have an obligation to ensure that they do not punish the innocent.

Yet, the death penalty, like any other penalty, is imposed by people: By human courts, by human judges, by human witnesses who say, "I saw him or her, he did it" or, "I didn't see him, he didn't do it." By human defense lawyers who may be good or not, by police and public prosecutors who may be biased or not.

As a consequence, no court system in the world is perfect. But on the other hand, the death penalty is, in its own terrible way, "perfect," in that it eliminates a defendant once and for all. So, it is irreversible. If a mistake is made, and if the mistake is discovered, that person who was wrongfully executed can never be brought back. On the other hand, if that person is in life in prison, and a mistake is made, they can be let go, as they should.



Have courts been proven to convict innocent people to death? The answer is, yes, in hundreds of cases. Even the United States that still retains the death penalty and has in place perhaps the longest and most extensive and expensive appeals procedures, and in other countries with advanced jurisdictions as well, it has been revealed over the years through DNA and other uncovered evidence that hundreds of people have been sentenced to death wrongfully. One can only expect that the problem of false convictions would be even greater in jurisdictions that are not well trained, not well funded and resourced, or not independent.

In sum, the irreversibility of the punishment, that can convict not only certified killers but also innocent defendants to death, should make it clear that it should be abolished or a moratorium be imposed as a first step.

Third, the death penalty discriminates against the poor and marginalized citizens in a society and is thus patently socially unfair. Virtually everywhere in the world where the death penalty is applied, if you look at the statistics, you see that it is mostly imposed on the poor (who can least afford good lawyers), the marginalized, the minorities. Whether I am black in the United States or poor in another country... Think about it. It makes sense. Because, as we discussed above, human beings are the ones making the decisions to prosecute and to convict. And thus racial and other biases can never be taken out of the equation.

In other words, it is also deeply socially unjust to have the death penalty in place.

There are more facts to discuss against the death penalty, but let us turn our attention to another argument that often comes up. Many people will say, "I understand the facts, but what about our public opinion, which wants the death penalty...."

I would argue to you, first, given the example of Karamanlis, given the example of Mitterrand and so many others, as discussed above, that, indeed, the public opinion is important to this debate. The people in our countries have opinions and voices. But, of course, strong leadership is not always, especially on issues as sensitive as this, one that follows but one that leads public opinion. It is also difficult to place the burden for such a complicated question on the public, because

depending on the facts and the way you ask the question, the views produced can be very different.

If you ask people the question, “Are you in favor of someone who raped a ten-year-old child and killed it to be put to death?”, then chances are that the answer would be “yes.” If, on the other hand, you ask someone, “Given the fact that hundreds of innocent people have been proven to have been put to death, and we could never bring them back, would you be in favor of abolishing the death penalty?”, then chances are that the same people might again tell you “yes.”

So how one asks the question is very important. And while Sanaka is absolutely right, the death penalty debate should not be politicized, nevertheless politicians and governments who have to make these decisions also have to be very careful not to pass the responsibility for this difficult issue to the people. But to accept the responsibility and to talk to the people, to listen to the people, and also to educate and lead as well. Not simply to say, “Ok, well, we have nothing more we can do. You know, the people spoke, so it’s over.”

Dear friends, finally, the experience in Belarus:

This is an important debate and discussion today because given the trends and facts in Europe and the world, an interesting question that I would like to discover the answer to may not be so much why has Europe abolished the death penalty but rather why is Belarus still retaining it, why it hasn’t so far abolished it or imposed a moratorium itself. Why is Belarus the only country in Europe that still retains it? I hope that the facts today will be able to move this debate forward.

I know that Belarus’s constitution has a provision that stipulates that the death penalty is there until abolished, in other words, a provision that implies that it is temporary and that it will be abolished. The question is not so much whether but, rather, when. And, of course, the Constitutional Court has ruled on the right of the parliament or the president to make a decision on a moratorium on the death penalty themselves and to take leadership on that.

There was indeed a referendum on the death penalty in the country twenty years ago, and that was underlined to me yesterday when I met with the Parliament. It is true, and, as I said, it is very important to listen to the voice of the people and to discuss with them, but also to keep in mind how those questions – what asked and how asked – can

influence the answer, as can the circumstances at the time, and how they may have changed.

At the time of the referendum, there was at least one very important fact that doesn't exist today, and that is that at that time in Belarus the law provided for no life sentence. The maximum sentence, and I stand to be corrected if wrong, was at the time fifteen years. And only two years after the referendum did the law finally establish a life-in-prison sentence.

And, indeed, this provision is very important. Because all those of us who say that the worst criminals should not be executed, all those who have abolished the death penalty, are not saying that those convicted should be let out to roam free. We say that you need to have a life sentence, the strongest sentence possible, which you actually apply, for those people that a rule-of-law court after independent and impartial procedures finds guilty.

Today Belarus has a life sentence in its books. It is a very different scenario than twenty years ago. And I expect that a very open debate, like the one we are having today, would probably have brought about a different understanding of the total picture.

Now, at the same time, it is very important to bring this discussion closer to the people. As Sanaka said, "After this conference today in Minsk we have to go to the grassroots. We have to discuss all over." This is a process that will take time. And it will take also the participation not of politicians alone but also of the people and of civil society.

I met yesterday with members of civil society including members of Vyasna who have been working for many years on the issue of the death penalty. It is very important for everyone who has had experience in this field in Belarus to be able to participate in our discussions, and to be able then to go and sound out and talk to the people on the ground, because this is the kind of discussion that is necessary in a democracy.

Also, I would hope that it would be self-evident that there needs to be at least a temporary moratorium on the issue of death sentencing and executions, while this important process of discussion and examination goes on in Belarus. It would make little sense to have embarked on this discussion to examine whether or not to adopt a moratorium and, at the same time, to have courts pass down death sentences, or to have people executed, while this discussion is taking place.

Belarus has made a very important decision, on which I congratulate the foreign ministry, the foreign minister himself, and of course the president and the government as a whole, which is to have a very serious and thorough debate on this topic. It has to be done – I hope, I would believe – in an atmosphere where the death penalty, at least throughout the debate and, hopefully, afterwards, would not be applied.

Dear friends, one final thought:

We have all seen around the world today a different kind of execution. Those who commit it think they are absolutely justified to do so. There's no doubt in their minds that they are right. They cut heads off people, and they hold them in front of cameras on YouTube. All of us who have seen this have been shocked. Some people are trying to turn this world into a very bloody one. They are trying to make us insensitized to revenge, insensitized to violence. They are trying to drag us down to their level. Are we going to let them?

I submit to you that it is a civilized nation's, a civilized people's obligation to say, "No... You may kill; but we won't... As much as we hate you, we won't..." And that doesn't just go for them. It goes for everyone.

Some people say, "I am not asking for too much when I ask to retain the death penalty. I only ask for justice, for 'an eye for an eye.'" But think about it, if we apply this principle too far – an eye for an eye – in the end, we will all be blind.

I think, and I hope, that we can welcome Belarus as one of the champions in this effort, as one of the champions of a moratorium on the death penalty, and I will be very pleased, very proud, if we can count on Belarus as a partner in this effort.

Thank you very much.

**Mr. Andrea Rigoni,**  
*Parliamentary Assembly of the Council of Europe (PACE)*

Dear colleagues, ladies and gentlemen!

It is with enthusiasm that I have accepted the invitation to speak on behalf of the Parliamentary Assembly of the Council of Europe as the rapporteur on the situation in Belarus. I am also sending you regards from Meritxell Mateu, general rapporteur of the Parliamentary Assembly of the Council of Europe on the abolition of the death penalty.

The work of the Parliamentary Assembly of the Council of Europe on the abolition of the death penalty is ongoing. I am referring not only to the member states and to the observer states but also to the countries that have the status of collaborating partners of the Parliamentary Assembly, specifically, Morocco, Kyrgyzstan, the Palestinian National Council and recently Jordan, which have the ‘partner for democracy’ status.

The status of Special Guest to the National Assembly of the Republic of Belarus under the Parliamentary Assembly of the Council of Europe was suspended 19 years ago in 1997. The years that followed saw alternating sanctions against and convergence with Belarus; serious problems with democracy and human rights stood in the way of restoring this special status. I shall not recount the still existing challenges we can and should address together. We shall focus on the topic of the conference.

Far back in June 2009, I personally submitted a report to the Assembly in Strasbourg in order to restore the status of Special Guest to the National Assembly of the Republic of Belarus only on one condition – the abolition of the death penalty. Unfortunately, back then Belarus did not seize that chance.

However, since then it has shown interest in various conventions of the Council of Europe by acceding to 10 of them in the area of culture, education, international law, the fight against corruption, trafficking in persons, the fight against doping in sport and counterfeit medications.

This is a very important endeavor, which should be seen through, and serious commitments will have to be made with regard to democratic standards, human rights and the state of law, which are at the core of our work in Strasbourg.

Numerous signals have been coming to us from Minsk over the last year: the release of so-called political prisoners, good diplomatic relations with neighboring countries, a constructive dialogue with the European Union, and these are only some of the examples.

These positive signals contrast with the persistent problems related to the respect for freedom of expression, meeting of association and almost regular sentences of death.

The death penalty is a temporary measure provided for by Article 24, which sadly is growing into a permanent one. As we know, a simple decision of the President or the Parliament would be enough to impose a moratorium.

Why should we exclude Belarus? The country is at the crossroads and I am not referring to the choice between East and West. Belarus should find its balance in the international context and take the side of law and, above all, the right to life.

As the Italian lawyer Norberto Bobbio said, “The State has the privilege and the advantage of the monopoly of power and should feel responsible for that privilege and for that advantage.” I perfectly realize that this reasoning may be stigmatized as naïve moralism, useless preaching but we shall try to provide rationale for our antagonism to the death penalty. There is only one rationale – the commandment ‘Thou shalt not kill.’

I am wrapping up and I hope to receive the up-to-date information about the activities of the working group on the abolition of the death penalty headed by Mr. Samoseiko.

As I have always said, the position of the Council of Europe and the Parliamentary Assembly on the death penalty is in line with our values and cannot be subject to negotiation. However, the goal is for Belarus to accede to the Council of Europe. We hope to accelerate this process with the help of Belarusian political leaders.

**Mr. Nikolai Samoseiko,**  
*Member of House of Representatives,*  
*Chairman of the Working Group*  
*on the death penalty in the National Assembly*  
*of the Republic of Belarus*

Good morning, dear friends. First of all, I would like to express my gratitude to those who found time to attend today's conference. It is truly important because an event of such scale, such level is being held practically for the first time. I think that the outcome of our conference will serve the purpose mentioned by the previous speakers, those who spoke in the beginning about the first steps, I am referring to the continuation of the dialogue about such a burning issue as the death penalty, the practice of the death penalty in the Republic of Belarus.

My role today, unlike the previous speakers, apparently does not come down to providing pros and cons with regard to the retention of the death penalty in the Republic of Belarus; moreover, I am deeply convinced that the presence or absence of the death penalty in any country does not center around pros or cons but morals and ethics. Therefore, it seems that my role is not to make excuses or objections but to tell you what has been done, what is being done, and what is planned in this area. With such a large audience, it is worth giving some historical background. Most of you are aware of the stages and milestones the Republic of Belarus went through with regard to this issue. For some it may come as a revelation, others might discover something new. I shall try to answer the question asked by Mr. Lambrinidis, "Why the Republic of Belarus still hasn't abolished the death penalty?"

So, the Republic of Belarus is indeed the last state both in the post-Soviet and European area that retains the death penalty. At the National Referendum in 1996, 80.44 percent of the respondents voted for the retention of the death penalty in the Republic of Belarus. I do not think that this should be regarded as the non-democratic attitude of Belarusians since it reflected the response of Belarusians to the rampant crime and economic instability in those specific years. Moreover, back then society was experiencing drastic changes. As we know, drastic changes are always accompanied by reappraisal of values, dissatisfaction, dissent, violence and a rapid rise in crime.

Under such circumstances to abolish one of the deterrents, albeit not always an effective one, I am referring to the preventive effect of the death penalty, would mean to strengthen those destabilizing processes.

It is also worth pointing out, as was mentioned by Mr. Lambrinidis, that only two options were put to the referendum: to retain or to abolish the death penalty. There is no doubt that if there had been such options as imposition of a moratorium on the death penalty, life sentence, most likely, the outcome would have been different; even more so, considering that life imprisonment as an alternative to the death penalty only appeared in the Criminal Code in 1997. The relevant sentence was first passed in 1998. And the maximum term of imprisonment for such crime back then was 15 years. We can add here the passivity of thinking and reluctance to give up something deeply rooted, which back then, incredible as it may seem, was the death penalty. In view of the above circumstances, the outcome of the referendum did not come as a surprise. Moreover, it seems worth mentioning, that the predominance of those who are in favor of retaining the death penalty is a phenomenon, which is characteristic not only of Belarusian society. Even today, opinion polls including those taken in the countries where the death penalty is abolished de jure and de facto show that in some places the majority are still in favor of reinstating the death penalty. According to the latest data, reinstatement of the death penalty is supported by Great Britain with around 60 percent, Italy with around 80 percent, Germany also with 60 percent and France with 58 percent. Incidentally, in Kiev, not in Ukraine, an opinion poll was held in 1995 on the eve of the referendum in the Republic of Belarus, and the situation was similar. In the Republic of Belarus, as I said before, it was 80.44 percent and in Kiev 81 percent. This figure with over 80 percent of supporters of the death penalty was also characteristic of the countries in the post-Soviet area. However, over the 20 years, a number of significant events related to the practice of the death penalty in the Republic of Belarus have occurred. Firstly, in 1999, the new Criminal Code was adopted where the number of crimes, for which such punishment can be administered, was reduced more than twofold. Out of 14 articles, 12 are applicable in time of peace and two only in time of war. In practice, in most cases since 1961 the death penalty had been imposed only for aggravated murder and



starting from around 1981 only in those cases. As a result, the number of persons sentenced to death, from the time of introduction of life imprisonment, has decreased 15 times compared to today: 47 persons in 1998 and 1-2 persons in recent years. In 2012, the death penalty was not imposed in the country at all. As for the supposedly preventive effect of the death penalty, it should be pointed out that recent years have seen a significant drop in the number of persons convicted for aggravated murders. The example of the Republic of Belarus gives weight to the words of Mr. Rigoni that the death penalty is not a deterrent.

After the signing of Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms concerning possible abolition of the death penalty not only in time of peace but also in time of war by the CE member states in May 2002, parliamentary hearings on Political and Legal Issues of the Abolition of the Death Penalty in the Republic of Belarus were held in the House of Representatives of the National Assembly of the Republic of Belarus and attended by representatives of the Parliamentary Assembly. Those parliamentary hearings crystallized into recommendations for a number of ministries and agencies. For instance, the Council of Ministers was then recommended to scrutinize the issue of the death penalty in the state on the premise of a phased transition from declaration of a moratorium on its use to subsequent declaration of a moratorium on death sentences by courts and total abolition of capital punishment. We understand perfectly that imposition of a moratorium on death sentences was nothing short of interference in judicial work but nevertheless such recommendations were accepted.

In 2003, the Parliament of the Republic of Belarus requested that the Constitutional Court check the constitutionality of the provisions of criminal law that allow for the use of the death penalty. In March 2004, the Constitutional Court considered the above matter, commented on the temporary nature of the death penalty and recognized the provisions of Articles 48 and 59 of the Criminal Code of the Republic of Belarus as unconstitutional. Punishment such as the death penalty is set in law as a temporary measure for certain most serious crimes involving endangerment of human life until such time as it is abolished. This means that the eventual abolition of the death penalty

in the Republic of Belarus is legislated both in the Constitution of the Republic of Belarus and in the Criminal Code. And the second important conclusion, which can be drawn from the determination made by the Constitutional Court of the Republic of Belarus in March 2004, is that the decision to abolish the death penalty or to impose a moratorium on the execution of death sentences can be taken by the President or the Parliament.

This begs the question why with all the reasons in place the process that started in 2002 at the Parliament hearings that continued in 2003–2004 stalled. It seems that this was because at that time the Parliament of the Republic of Belarus did not have the global goal of imposing a moratorium or abolishing the death penalty but limited themselves to initiating changes to the Criminal Code of the Republic of Belarus by submitting a petition to the Constitutional Court.

The Parliament returned to the issue of the death penalty practice in the Republic of Belarus in February 2010 when the working group on the death penalty as a punishment tool was created. Leaping ahead, I can tell you that the group was set up at the fourth convocation of Parliament whereas at the fifth convocation the group renewed its work in a different composition in December 2013. The objective of the working group then was not to argue the need to abolish or to retain the death penalty but to raise awareness among public at large about the aspects of such punishment. Representatives of the working group periodically appear in mass media, attend workshops, talk shows, and round tables on the issue. The most significant ones include a round table held in 2010 in Minsk titled Towards Abolition of the Death Penalty in the Republic of Belarus organized through the Council of Europe's Department for Capacity Building in Law and Human Rights. A round table on Religion and the Death Penalty was held in June 2013. The next significant event is today's conference.

In 2009-2010, after a long period of cooling down, the relations between the Council of Europe and the Republic of Belarus somewhat thawed. I would like today's dialogue on this important topic to be absolutely candid and the talking points to be perceived correctly in order to understand the roots and the depth of the issue. Why have I mentioned it? In 2010, the Republic of Belarus was practically in the same situation as it is today and as Mr. Rigoni said "...even closer."

We addressed the issue if not of abolition then a moratorium on the death penalty but that subject was discontinued due to the following circumstances. After the events of December 2010, the attitude of the Council of Europe towards Belarus changed; the imposition of additional sanctions, including canceling a number of projects, led to 'freezing' of the issue of abolition or imposition of a moratorium on the death penalty. Only in 2012 did we go back to where we had been before.

The working group that I mentioned was set up in the Parliament in February 2010, although we planned to create it back in 2009. However, the resolution of PACE that followed in 2009 regarding the return of Special Guest status to Belarus only on the condition of abolition or a moratorium on the death penalty slowed down the creation of the group. Why? One needs to be familiar with the Belarusian way of thinking and I hope today we have all realized that ultimatums and sanctions do not deliver positive effect, if anything they yield negative results.

I fully agree with Mr. Rigoni that while before we were looking each other in the eye, we now have to be seeing eye to eye. Therefore, my old-time message, rather than complaint, to our European partners is now history and today we need to discuss this issue together and move in the same direction.

The second circumstance that slowed down the process is the terrorist act in the subway in 2011. Any terrorist act affects public opinion, and at that time supporters of the death penalty strengthened their position drastically and their numbers grew.

And thirdly, we should keep in mind the proverbial public opinion. We are well aware of the fact that most countries in both the post-Soviet area and Europe, where it was decided to abolish the death penalty, did not hold a referendum on the issue. It was a political decision. Today, it is no use debating whether the 1996 referendum was necessary or not. The referendum took place and we cannot dismiss public opinion. Indeed, the implementation of human rights, I agree with Mr. Lambrinidis, should not depend on personal opinion. But there is another view that public opinion is always harsher than the law. And we cannot completely ignore the outcome of the referendum. There is a small caveat though – people voted on the abolition

or retention of the death penalty in the Republic of Belarus. The issue of imposing a moratorium on the execution of death sentences does not require a referendum. Incidentally, there is an ongoing discussion whether a referendum on the total abolition of the death penalty is required or not because abolition is enshrined in the relevant article of the Constitution, which can be amended only through a referendum; on the other hand, the same article states that it is a temporary measure. Researchers have an ongoing debate on this issue.

The Republic of Belarus understand and knows clearly what European partners expect from it – to make a political decision.

When I became the leader of the Working Group on the Death Penalty in the Republic of Belarus, the existence of the axiom that “the opinion of parliamentarians is a reflection of public opinion” came as a revelation to me. Before that, I regarded it as a catchpenny phrase. It turns out this axiom is there for a reason. Not by a long shot does everyone in the Belarusian Parliament support the abolition of the death penalty in the Republic of Belarus. That is why the goal of the working group, which at present continues its efforts, is not only to change public opinion but also to work with the deputy corps. Sure, today we can take the liberty of raising the issue of imposing a moratorium on the execution of death sentences in Belarus in the Oval Hall. But I cannot guarantee that the outcome will be positive.

I share the view of the previous speakers that our conference should trigger further dialogue on the existence in the Republic of Belarus of such concept as the death penalty. Moreover, the content of today’s conversation should not be kept within this audience only. I attended various events in other countries but they were not appropriately covered in the Republic of Belarus. If we want, as Mr. Sanaka Samarasingha said, to raise the cultural and public awareness on this issue, such events should be held in Belarus with broad involvement of the mass media. I would like to reiterate that the contents of today’s talks should not only be confined within these walls.

In conclusion, I would like to say that today we should indeed be seeing eye to eye not only with regard to the death penalty but democratic values, respect of human rights. We are counting on the help and understanding of our European partners.

Thank you.

**Mr. Karel Schwarzenberg,**

*Head of the Foreign Affairs Committee of the Chamber of Deputies  
of the Parliament of the Czech Republic,  
former Minister of Foreign Affairs of the Czech Republic*

Ladies and gentlemen, it is a great honor for me to be in Minsk because Belarus is a special place. Those who studied history know that Belarusians are the only nation, apart from Roma and Jews, who suffered most in the 20th century. We were overwhelmed when we learned the death toll. I am surprised that the country where so many people died still practices the death penalty. And it is disappointing. Several years ago, we discussed this topic hoping that the death penalty would be abolished or at least suspended for a certain period. A couple of months ago when sanctions against Belarus were lifted, on that very day a death sentence was executed. I was shocked by that incident, and originally I wanted to suggest that we have a dialogue on the death penalty without talking politics. However, in my opinion, it is impossible not to talk politics when discussing this issue because the stakeholders working in this area know that changes in any country can be achieved only if politicians are involved because it is they who are empowered to change laws and bring changes to life. We should appeal to the President and the Government asking them to accelerate the process and change their minds, which would make the country a sound European state where there is no place for the death penalty. At this stage, Belarus is a sad exception. We can be having a dialogue on the death penalty infinitely but let us be mindful of human rights too. A dialogue is a means, not a goal. A dialogue serves to achieve progress and not just to hold different conferences and meetings. Enough of them have already been held, unfortunately, to no avail. If we focus only on dialogue, nothing will change.

In the 20th century, suffering was also endured by the family members of the people who were kept in prison. They were punished indirectly, especially, that was the case with German Nazis. Today we should keep in mind the families of those who are subjected to the death penalty. In addition to those who are on a death row, there are their family members who receive no information about when and where their father, son or brother was executed. Was he executed at all? Where is he buried? The family are not informed about this and

are not allowed to attend the burial. It means that this is a punishment for the families too. It is inhuman to treat families that way, who have already sustained a severe punishment. I remember what that meant for people in my day, for people who survived concentration camps and went through the communist regime. Obviously, countries should strive towards abolishing the death penalty and that requires the necessary environment. Education can help us cultivate aversion in people to the death penalty.

I remember when in 1960-1970s the death penalty was being abolished many were against it, but, ladies and gentlemen, our job, whoever we are, is to enlighten. We should not be finding excuses not to take concrete actions. Human rights are fundamental rights. The right to life is a fundamental right. This right should not be affected by the political sentiments even of the majority. Someday we will be held accountable for our deeds and we should act according to the responsibility conferred on us: whether we are political or religious leaders, government officials, bishops or common priests. If public opinion goes against human rights, it is our task to change it, and if we did not do so, it means we have failed. Sometimes we have to be braver and more courageous. I can assure you, and it was mentioned by the gentlemen who spoke before me, that in the countries where the death penalty was abolished the crime rate did not increase. If you are so advanced in your development that you are ready to kill, then there is nothing I can say. But the decision to kill someone is such a heavy burden and that should be always kept in mind. Sometimes people may not realize what they are doing, e.g. they could be under the influence of drugs. Therefore, let us not limit ourselves to discussions but let us take specific steps. Too much time has passed and we have spent it on discussions. It is time we took action.

Ladies and gentlemen, I am sorry for being too blunt but I am very saddened by the absence of quick action in both this country and other states where we have already used too much time on discussing.

Thank you for inviting me to this event.

# PRESENTATION OF TRANSITION PERIOD OF COUNTRIES THAT MOVED TO A MORATORIUM OR ABOLITION OF THE DEATH PENALTY

**Mr. Zaved Mahmood,**

*Expert on the Abolition of Death Penalty,*

*Office of the UN High Commissioner for Human Rights (OHCHR)*

Excellencies,

Ladies and gentlemen,

Let me begin by thanking the Ministry of Foreign Affairs of Belarus and the United Nations in Belarus for inviting the Office of the United Nations High Commissioner for Human Rights (OHCHR) to attend this conference. As part of the United Nations System, OHCHR opposes the use of the death penalty in all circumstances, and urge those States that still retain and execute this punishment to move swiftly towards its abolition.

Immense progress has been made towards the abolition of the death penalty since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, which recognizes that everyone has the right to life. In 1948, only 14 countries had abolished the death penalty. By 1966, when the International Covenant on the Civil and Political Rights (ICCPR) was adopted, to which Belarus is a State party since 1973, there were still only 26 abolitionist countries. In this context, the drafters of the Covenant attempted to restrict the scope of the death penalty and the introduction of strict conditions for its limited use in paragraph 2 of Article 6 of the Covenant. Nevertheless, Article 6 of ICCPR was not meant to justify the continuing use of the death penalty. Paragraph 6 of article 6 of ICCPR makes this clear when states that *'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ...Covenant'*. In 1989, the adoption of the Second Optional Protocol to the ICCPR, aiming to abolish the death penalty gave a clear signal confirming the direction already given by paragraph 6 of Article 6 of the Covenant.

The trend towards abolition of the death penalty has tremendously increased in recent years, in particular since the adoption of first moratorium resolution in 2007 by the UN General Assembly. Currently, around 170 countries in the world have either fully abolished the death penalty, or introduce moratorium or do not practice it for than ten years. This trend continues. Just in the last year (2015), five countries completed the abolition process. During recent Universal Periodic Review (UPR) process of the UN Human Rights Council many States, including Belarus, committed to advance the abolition of the death penalty through dialogue and public consultations. OHCHR warmly welcomes these developments.

### **Reasons to abolish the death penalty**

Excellencies,

Why should we aim for the universal abolition of the death penalty? Let me discuss briefly various reasons that the Secretary General of the United Nations outlined in his recent reports to the General Assembly and the Human Rights Council.<sup>1</sup>

The first and overarching reason is that the death penalty is hardly reconcilable with human rights. Its abolition contributes undoubtedly to the enhancement and progressive development of human rights, starting with the most sacred of all, the right to life.

Many countries around the world<sup>2</sup> whose people have been the victims of the most heinous crimes, including crimes against humanity, war crimes and/or genocide, or crimes of terrorism have abolished the death penalty or do not use it. In so doing, these countries have endorsed the importance of pursuing justice in a context where so many individuals lost their lives but of doing so while respecting the right to life. This right cannot be undermined by the thirst for vengeance.

In many countries, abolition or the imposition of a moratorium is frequently informed by a stated conviction that the death penalty is cruel, inhumane and degrading, either *per se* or as applied. It may be theoretically possible to use the death penalty without running foul of

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<sup>1</sup> See A/HRC/30/18, A/69/288, A/67226.

<sup>2</sup> For instances – Argentina, Cambodia, Germany, South Africa, Sierra Leone, Guatemala, Rwanda, Russia, Norway – just a few to name.



the absolute prohibition of torture and cruel, inhuman or degrading treatment, but the scrupulous conditions that States must apply for that purpose make its application not worth the effort. Even with such conditions, States cannot guarantee that in all cases the prohibition of torture will be scrupulously adhered to.

In addition, the application of the death penalty often leads to a violation of the right to equality and non-discrimination. The decision whether to sentence the convict to death or other punishment is often arbitrary, disproportionate and devoid of predictable rational criteria. In this “judicial lottery”, the odds are often stacked against the poor, membership of a minority and other common targets of discrimination.

Another reason for abolition is the final character of the death penalty. Whenever the death penalty is used, there is a grave risk that individuals are executed for crimes they did not commit, as shown by too many instances of individuals who were exonerated after conviction. In his recent statement, the High Commissioner for Human Rights stated, (and I quote), *“No judiciary, anywhere in the world, is so robust that it can guarantee that innocent life will not be taken, and there is an alarming body of evidence to indicate that even well-functioning legal systems have sentenced to death men and women who were subsequently proven innocent. This is intolerable.”*<sup>3</sup> (Unquote)

### **Rights of victims of crimes and the myth of deterrence**

Dear Colleagues,

Some authorities and individuals refer to the rights of victims of crimes to justify the retention of the death penalty. They further argue that the State has a responsibility to hear the voice of victims while ensuring that justice is rendered to them, and to their families. Indeed, States must ensure the voices of those victims in whose name the death penalty was being carried out are heard and make them part of the process of moving towards abolition.

Around the world, there are several initiatives that involved victims of crimes and their families in the abolition process. Research from across regions of the world showed that not all victims’ families felt that killing the accused, executing the offender, brought closure to

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<sup>3</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15101&LangID=E>

them. They don't often want the death penalty, but rather expects to see justice done effectively and efficiently. Execution of the perpetrator represents vengeance – an emotion that many would argue brings no closure, but brutalises all involved.

Victims of crimes and their families have rights, which must be respected. Among them is the right to see effective investigations and proper retribution for the crimes they have endured. They also have a right to demand redress for the harm that they have suffered, through judicial and administrative mechanisms that are expeditious, responsive, fair, and accessible. The dignity of victims and their families must be acknowledged by all law enforcement and judicial personnel, with compassion and respect maintained at all times. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was adopted more than 30 years ago in 1985, clearly states these and other rights of victims of crime, and outlines the measures that should be taken to secure them. States could do far more to realise these principles in practice.

So indeed, victims have a right to justice. But the death penalty is not just. They have a right to remedy. But the death penalty restores nothing. We need to work to end unnecessary delays in judicial processes. But we must also agree that the cruelty of the death penalty, its incompatibility with basic human rights and dignity, and the potential for irreversible error, make it an unjust punishment that will bring victims no relief.

Another reason for abolition relates to lack of merit of the common assertion that the death penalty has a deterrent effect. There is no evidence that the death penalty reduces or deters crime more than any other form of punishment. The certainty of punishment, rather than its severity, deters potential wrongdoers. To curb crimes, the focus should therefore lie on reforming the justice system and rendering it more effective, while also ensuring that it is humane.

### **Measures to abolish the death penalty**

In his recent reports and statements, the Secretary General of the United Nations urged all States that still retain it to introduce a moratorium, as a first and crucial step, until the death penalty is fully abolished. While doing so, States should do more than simply cease executions. For example, any action that might lead persons to be

sentenced to death should be set aside. State law officials should no longer seek the death penalty; and judges should consider agreeing not to impose it. This could be done, for example, through a directive from the highest judicial body of the country. Such initiatives have led to the full abolition of the death penalty in many countries.<sup>4</sup>

In addition, the possibility of pardon or commutation frequently proves to be highly important to the process of the abolition of the death penalty. Because, it is often through executive intervention that the first steps towards abolition take place.<sup>5</sup> In his last report to the General Assembly, the Secretary General recommended, “*Heads of State and Government and other responsible State authorities should exercise their constitutional and/or legal authority to commute or pardon death sentences.*”<sup>6</sup>

Dear Colleagues,

Abolishing the death penalty is a long process for many countries, which often comes to closure only after a period of difficult and even acrimonious national debate. For the effectiveness and transparency of such debates, the public should be provided with information and accurate statistics covering all aspects of the argument on criminality and the various effective ways to combat it, short of the death sentence.

In accordance with international human rights jurisprudence, the continued lack of transparency on the part of some national authorities concerning the numbers of persons who have been sentenced to death or executed is incompatible with human rights. States should refrain from carrying out executions in secret and strive to take all measures necessary to guarantee access to information on the death penalty, including advance notice to family members regarding the date of execution. UN human rights treaty bodies, in particular the Human Rights Committee and the Committee against Torture, as well as special procedure mandate holders including the Special Rapporteur on the human rights situation in Belarus, expressed concerns at the

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<sup>4</sup> Yearly supplement of the Secretary-General to his quinquennial report on capital punishment (A/HRC/30/18), paragraph 57.

<sup>5</sup> Article 6(4) of ICCPR states: anyone sentenced to death should have the right to seek pardon or commutation of the sentence.

<sup>6</sup> A/68/288.

secrecy surrounding the procedures relating to the death penalty at all stages in Belarus.<sup>7</sup> It was recommended that the Government of Belarus should remedy the secrecy and arbitrariness surrounding executions so that family members do not have added uncertainty and suffering.<sup>8</sup>

Excellencies,

We often hear that abolishing the death penalty would go against the sentiments of the public. Human progress does not stand still. Popular support for the death penalty today does not mean that it will still be there tomorrow. There are undisputed historical precedents where laws, policies and practices that were inconsistent with human rights standards had the support of a majority of the people, but were proven wrong and eventually abolished or prohibited.

In this regard, principled leadership - both domestic and international levels, is an essential factor to ensuring progress towards a world free of the death penalty. Many leaders have recognized the continued risk of executing innocent people, as well as other powerful arguments for abolition, including the discriminatory and arbitrary nature of judicial processes and the danger of death penalty being used as a tool of political repression. They showed how deeply incompatible the death penalty is with human dignity. Experience also shows that leadership has been very important in overcoming domestic opposition to abolition in several countries.

I conclude my presentation by quoting from another statement of the Secretary General, where he stated,;“*The death penalty has no place in the 21st century. Together, we can finally end this cruel and inhumane practice everywhere around the world*”.<sup>9</sup>

OHCHR sincerely hopes that this international conference will contribute to advance the abolition of the death penalty in Belarus. OHCHR stands ready to support Belarus in this endeavour.

Thank you for your attention.

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<sup>7</sup> See CCPR/C/79/Add.86; See also A/HRC/29/43 of the Special Rapporteur on the situation of human rights in Belarus.

<sup>8</sup> CAT/C/BLR/CO/4, paragraph 27.

<sup>9</sup> <http://www.ohchr.org/EN/newyork/Stories/Pages/Deathpenaltyhasnoplacein21stcentury.aspx>.

**Ms. Nicole Wyrsh,**  
*Ambassador, Special Envoy for Human Rights,*  
*Federal Department of Foreign Affairs, Switzerland*

The presentation explained the Swiss experience or way of abolishing the death penalty in 1942/92 and explained how Switzerland nowadays perceives the death penalty in the world.

Abolishing death penalty wasn't an easy or quick decision in Switzerland; it required a rather long process, with back and forth movements. In the 1930s, Swiss legal experts played the decisive role, when they decided to drop the death penalty altogether, when devising a new – unified – penal code for the whole country. The broad Swiss public and politicians did not engage heavily into this debate, but rather accepted the view of a majority of jurists that, since the death penalty was hardly used anymore, it had outlived its purpose. Whereas abolition for ordinary crimes thus happened quite early in 1942, it took fifty more years for the death penalty to be taken out of the military penal code in 1992; the end of the cold war and a peaceful surrounding helped to definitely bury the death penalty in Switzerland. Nowadays, the Swiss Constitution (of 2000) includes a sentence that forbids the use of the death penalty. It would thus be difficult to reintroduce it in Switzerland, where the debate however resurfaces every once in a while, in particular when a particularly heinous crime has been committed.

This said, one of the reasons why Switzerland today considers the death penalty to be anachronistic, is precisely linked to the fact that justice systems find their most basic justification in standing over emotional reactions. In fact, Switzerland today sees it as contradictory or illogical for a State to apply the same method for the prevention of criminality and violence that criminals are using. States need to find and use other, truly efficient, tools and means, when it comes to promoting a safe and thriving society, in which the numbers of crimes and killings are kept as low as possible thanks to proven methods, such as a non-corrupt police using innovative community policing methods.

In sum, the death penalty was never directly put to a popular referendum in Switzerland – a strange coincidence for a country that has a semi-direct democracy and is very frequently asking its population for its opinion. In the case of the death penalty, legal experts

took the lead in the dialogue around abolition, and this was considered to be ok, all the more so, as indeed most of the work involved in death penalty abolition is experts' work: defining alternative sanctions for the different crimes that incurred the death penalty. This technical work is important and helps advance the process, as well as supports the ultimate decision to be taken in most countries by political decision-makers – usually Parliaments, and sometimes also Presidents.

Today, Switzerland strongly believes that it is in each and every country's own national interest to get rid of the death penalty. Clearly, it has been widely shown that the death penalty has no merits – no use in preventing criminality or terrorism - but that it inevitably always leads to problems in places where it is still applied. Switzerland expresses its best wishes for the work done by the experts and politicians in Belarus who are discussing this important issue, and remains at disposal to continue sharing thoughts and experiences.

**Mr. Igor Miroshnichenko,**  
*Director of division of National Preventive Mechanism  
for prevention of torture and other cruel,  
inhuman and degrading treatment  
under the Ombudsman in Almaty city and Almaty Oblast,  
Kazakhstan*

Various studies conducted at the request of parliaments, national leaders or professional organizations and NGOs confirm the inexpediency of the death penalty.

Most regrettably, history has seen a good many cases where innocent people were executed.

National NGOs in partnership with international NGOs and researchers provide detailed and objective information about the absence of the deterrent effect of the death penalty.

Such studies have contributed significantly to the abolition of capital punishment.

International pressure also plays an important role. There is a growing movement to abolish the death penalty, which builds on the resolutions adopted by the UN General Assembly and the former UN Commission on Human Rights. Its successor, the Human Rights Council, regularly raises the issue of the death penalty in its expert assessment of human rights within the system of the universal period review (UPR). Authoritative statements urging to universal abolition coming from the Council of Europe, the European Union, the UN and individual member states are important and convincing.

The UN Special Rapporteur on extra-judicial, summary or arbitrary executions regularly expresses concern over the violation of international standards and guarantees regarding the death penalty and restrictions on its practice.

The development of international documents on human rights also promoted the abolition of the death penalty in many countries.

The recognition of October 10 as the World Day against the Death Penalty and the World Congress against the Death Penalty held every three years are examples of the international pressure from civil society.

Public backing of the death penalty has decreased.

Governments should play a decisive role in the national discussion on the abolition of the death penalty. Most countries that abolished the

death penalty did so despite public protests and eventually people have quickly come to understand this reform.

Espen Barth Eide, the ex-Minister of Foreign Affairs of Norway, said, “It is no longer a question of if we will achieve full abolition but of when and which countries will be the last to take this step?”

Over the last decades, more and more countries have recognized that states that killed people undermined human values and respect for human rights. At the moment, the step towards the abolition of the death penalty can be observed in all regions of the world regardless of the political system, religion, culture or traditions. At present, the task is to provide assistance to those states that retain the death penalty in abolishing this punishment for all crimes and under all circumstances.

There is a whole range of steps, which can be taken by states to achieve that goal.

In Kazakhstan, a termless moratorium on the death penalty has been in force since December 17, 2003, and on January 1, 2004, capital punishment was replaced with life imprisonment. The Presidential Decree *On the Imposition of a Moratorium on the Death Penalty in the Republic of Kazakhstan* aims to implement the provisions of the legal policy of the Republic of Kazakhstan *On Further Humanization of the Criminal Law* and is a natural extension of the course towards the restriction of the death penalty practice enshrined in program documents.

The Legal Reform Program endorsed by the President of the Republic in March 1994 clearly outlined the phased abolition of the death penalty. Already in the first years of Kazakhstan’s independence, the death penalty for theft, counterfeiting, violation of the rules of foreign currency exchange, banditry, actions aimed at disrupting the operation of correctional facilities, rape and bribery was statutorily abolished.

At present, Article 47 of the Criminal Code of the Republic of Kazakhstan states:

“The death penalty, i.e. execution by firing squad, as an exceptional measure of punishment shall be established for crimes of terrorism entailing the loss of human life and for most serious crimes committed in time of war subject to the right of the convicted person to petition for mercy.



The death penalty shall not be imposed for crimes committed by persons below eighteen years of age, women, men at the age of 63 and over.

Upon imposition by the President of the Republic of Kazakhstan of a moratorium on the death penalty, the execution of death sentences shall be suspended for the duration of the moratorium.

The death sentence shall be executed not earlier than one year after the entry of the sentence into legal force and not earlier than one year after the revocation of the moratorium on the death penalty.

As clemency, the death penalty may be commuted to a life sentence or imprisonment for a specified period with the service of the sentence in a high-security correctional facility. In the case of revocation of the moratorium on the death penalty, the persons sentenced to death shall have the right to intercede for mercy irrespective of whether they interceded for it before the imposition of the moratorium or not.”

According to the Constitution, the death penalty shall be retained for crimes of terrorism entailing the loss of human life and for most serious crimes committed in time of war.

Many human rights activists hoped that with the adoption of the new code, this issue would be fully resolved but regrettably it has been retained as a form of punishment in the Criminal Code; only the number of legally defined crimes, for which the death penalty is imposed, has been reduced from 18 to 17, which means this is the only change that has been introduced.

According to the data of the Center of Legal Statistics and Information under the General Prosecutor’s Office of the Republic of Kazakhstan, 61 persons in 1997, 63 persons in 1998, 63 persons in 1999, 40 persons in 2000, 39 persons in 2001 were sentenced to death. A total of 266 persons were sentenced to death over the above period. On average, over the period from 1997 to 2001, this punishment was applied to 53 persons per year.

Before the moratorium, the death sentence in Kazakhstan was imposed on 536 citizens. The last execution of such sentence occurred in 2003. All those sentences had been executed since 1990. Around 100 persons in Kazakhstan are serving a life sentence.

In 2007, 31 convicted persons had their death sentence commuted to life imprisonment.

At the same time, Kazakhstan has been consistently and progressively moving towards the abolition of the death penalty. At first, there were discussions on this issue followed by a moratorium, and now the number of legally defined crimes is being reduced.

“The death penalty and its practice, as shown by most studies, do not have any deterrent effect. Kazakhstan is proof to that: the death penalty has not been used in Kazakhstan for 12 years and it has not affected the crime rate in the country.”

No one has the right to take a human life. All criminals have the right to life. There should be punishments, which do not entail the deprivation of life.

Life imprisonment serves all purposes of a criminal sanction, which is restoration of social justice, redemption of the convicted, prevention of new criminal offenses by both the convicted and other persons. Punishment does not aim to inflict physical suffering or abase human dignity.

A modern civilized state should use laws to show that a human life is the basic value. It is not the state that gives life but the state should value and protect it.

If the state puts a human life above all, only then a citizen will understand the value of that life.

What is the reasoning behind a moratorium? Nobody can prevent a miscarriage of justice, which results in the death of a human being. In case of a judicial error, an innocent person will be put to death. And such cases occur around the world. As a lawyer, I dread this. The quality of justice and investigation leaves much to be desired. A reform of the judicial system is required.

It is worth pointing out that in Kazakhstan there have been regular discussions about the revocation of the moratorium especially after serious crimes, which cause strong public reaction.

Public opinion on this issue has split: some are in favor while others are against it. Every year around 8 to 10 persons are sentenced to life.

The main argument of the opponents of the abolition of the death penalty is why maintain murderers at the expense of taxpayers? But then why should we maintain all criminals at all? Shall we pay for the “good” criminals and not for the “bad” ones? Can a human life be evaluated in monetary terms?

After execution by firing squad, the relatives of the victims can only get moral satisfaction and even that is not always the case. The victims of a criminal cannot be brought back to life but financial aid can be at least received from the criminal. Throughout the life sentence, the criminal offender can make payments under a lawsuit and provide material assistance to the relatives of the victim.

At present, there are over one hundred persons sentenced to life in Kazakhstan. Practically all of them are serving the sentence in facility UK-161/3 (a high-security correctional facility) in the town of Zhitikara, Kostanay Region, commonly called *The Black Eagle*. For good conduct, persons sentenced to life can be released on parole after 25 years.

This right cannot be exercised by persons whose death sentence, as clemency, was commuted to life imprisonment and by pedophiles.

### **Life imprisonment as an alternative to the death penalty**

*“The sentence of life imprisonment is also unique in that the words, which the judge is required to pronounce, do not mean what they say. Although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner’s detention depends on a series of recommendations... and executive decisions.”*

Lord Mustill, 1994

Life imprisonment is the most severe criminal punishment, which can be administered in those countries where there is no death penalty or it was decided not to use it.

In the absence of the death penalty, life imprisonment acquires a symbolic meaning and may be regarded as the most extreme punitive sentence. Despite the fact that the term “life imprisonment” in different countries may have a different meaning, a common attribute is the indefinite term of sentence.

Article 46 of the Criminal Code of the Republic of Kazakhstan:

Life imprisonment may be imposed for most serious crimes as well as an alternative to the death penalty. Life imprisonment shall not be imposed on persons who committed a crime below eighteen years of age, women, men at the age of sixty-three years old and over. As clemency, life imprisonment may be commuted to imprisonment for a specified period.

Departmental regulatory and legal framework:

In accordance with the Penal Enforcement Code of the Republic of Kazakhstan, persons sentenced to life and persons for whom the death penalty, as clemency, was commuted to life imprisonment shall serve the sentence separately from other convicted persons in a high-security correctional facility (Art. 140 of the PEC of the RK).

The procedure for the service of the sentence by persons sentenced to life is regulated in more detail by departmental regulatory acts of the Ministry of Internal Affairs of the Republic of Kazakhstan.

### **Admittance of Persons Sentenced to Life**

Admittance of persons sentenced to life and persons sentenced to death (hereafter, PSL and PSD) shall be performed by the administration of the facility, the associate warden on duty, the operational and security personnel.

To prevent unlawful actions on the part of the convicted persons, controllers from the reserve group shall be in attendance.

The medical officer shall conduct a visual inspection of the convicted persons, after which the convicted persons shall be placed in cells in the quarantine unit, one person per cell, where they shall be subjected to medical surveillance for up to 15 days and a medical examination shall be carried out.

Psychologists of the facility shall review the personality of the newly arrived convicted persons and work on their adaptation to the new settings. Persons prone to suicide, intentional self-infliction of harm and other unlawful actions are identified. Following the review, a profile of each newly arrived convicted person is made and recommendations on how to deal with them are made to the relevant services of the correctional facility.

Conditions of the service of the sentence in a high-security correctional facility for persons sentenced to life.

Article 141 of the PEC of the RK dated 05.07.2014.

On arrival at the high-security correctional facility, all convicted persons shall be placed in the usual conditions of the service of the sentence.

Transfer from the usual conditions of service to the alleviated conditions of the service of the sentence shall be performed after at least ten years of service.

Convicted persons recognized as habitual violators of the established order of the service of the sentence and serving sentence in the usual and alleviated conditions shall be transferred to the stringent conditions of the service of the sentence.

Repeated transfer to the usual or alleviated conditions of the service of the sentence shall be made after at least ten years of the service of the sentence in the stringent conditions.

Conditions of the service of the sentence in a high-security correctional facility for persons sentenced to life.

Convicted persons have the right to a daily walk with a duration of:

- 1) one hour if serving the sentence in the stringent conditions;
- 2) one hour and a half if serving the sentence in the usual conditions;
- 3) two hours if serving the sentence in the alleviated conditions.

Conditions of the service of the sentence in a high-security correctional facility.

Article 140 of the PEC of the RK.

Convicted persons serving sentence in the usual conditions shall live in dormitories or cells.

They shall be allowed:

- 1) to spend up to two monthly specified rates each month;
- 2) to receive three parcels or three packages per year;
- 3) to have three short-term and one long-term visits per year.

Convicted persons serving sentence in the alleviated conditions shall live in dormitories or cells.

They shall be allowed:

- 1) to spend up to seven monthly specified rates each month;
- 2) to receive four parcels or four packages per year;
- 3) to have three short-term and one long-term visits per year.

Convicted persons serving sentence in the preferential conditions may live and freely move outside the secure perimeter but within the borders of the territory. They shall be allowed:

- 1) to have three long-term visits per year;
- 2) to have an unlimited number of short-term visits.

Convicted persons serving sentence in the stringent conditions shall live in cells.

They shall be allowed:

1) to spend each month the money kept on the temporary cash accounts in the amount of up to two monthly specified rates on food products and items of daily necessity;

2) to receive one parcel or one packages per year;

3) to have three short-term visits per year;

4) to have a daily walk with a duration of one half and a half.

Internal regulations.

155. PSL and PSD shall:

1) move around the grounds of the facility only with a convoy and hands handcuffed behind their backs and blindfolded (except when in the walking yard, bathing booths, working and living cells);

2) keep items and articles in the cell in accordance with the List of items and articles, which PSL and PSD are allowed to keep in cells.

156. PSL and PSD who committed crimes when serving their sentence shall not be transferred to the investigative detention facility. Investigative actions shall be carried out at the place of the service of the sentence.

157. Medical assistance to PSL and PSD shall be provided in a special temporary cell located in the corridor of the station where the required assistance is given to the convicted person. To prevent the transfer of convicted persons outside the facility, the facility shall furnished with special rooms where the surgical table, the dental chair, the x-ray machine are equipped with a bar for handcuffing the convicted persons.

PSL and PSD who have a severe case of tuberculosis and somatic patients shall be kept in cell-type isolation wards of the facility. A lineup of this type of convicted persons during the visits of the cells by the prison administration shall not be required.

In my opinion, life imprisonment is a very harsh punishment; many human rights activists and lawyers in Kazakhstan, Russia say that it is much harsher than the death penalty.

Anatoly Kosichenko from the Institute of Philosophy, Political and Religious Studies spoke in favor of the preservation of the current state of affairs. "Philosophy values life but it is possible only in a clearly defined system when society understands this as a whole. And what about most heinous crimes? The Russian experience shows that persons

who were sentenced to life ask for the death penalty to be executed. It is also unbearable. It turns out it is not quite humane either.”

This statement is yet another confirmation of the theory that the execution of the punishment in the form of a life sentence requires changing the regime and conditions, in which the given category of persons are kept.

The following should be mandatorily provided for by regulatory documents:

**General principles of treatment of persons sentenced to life:**

- Principle of individualization – taking into account of the diversity of personal characteristics of PSL when preparing individual plans for the service of the sentence.

- Principle of normalization – this measure aims to counter the risk of institutionalization resulting from long-time imprisonment.

- Principle of responsibility – convicted persons should be given the opportunity to bear personal responsibility in the prison’s everyday life.

- Principle of protection and security – clear differentiation of the risks posed by convicted persons to society, themselves, other inmates, persons working with them or visitors of the prison.

- Principle of non-isolation – non-differentiation between persons sentenced to life and persons sentenced to long-term imprisonment based only on their terms of service.

- Principle of progression – individual planning of the life of the convicted person should be aimed at progressive advancement in the prison system.

**Practical implementation of the principles:**

- Planning of the term – development of the plan of the service of the sentence with active involvement of the convicted person and in close cooperation with the supervision authorities after release and other agencies.

- Risk and need for determinations – imprisonment planning should include assessment of risks and needs.

- Protection and security in the correctional facility – prison surveillance should be based on the use of dynamic security, i.e. the personnel should build positive relations with inmates based on firmness

and fairness combined with understanding of their personal situation and risks.

- Special categories of persons sentenced to life – this recommendation contains detailed proposals on managing special groups of inmates (foreign citizens, elderly persons, women, children, serious patients, etc.).

- Countering the harmful impact of life imprisonment and long-term imprisonment – connection with the outside world, education, work, access to newspapers, radio and television, visitations.

- Management of the reintegration of persons sentenced to life and long-term imprisonment into society – provision of support to convicted persons in overcoming the transit from long-term imprisonment to law-abiding life in society.

At present, without psychological programs of engagement with that category of persons, psychologists and counselors of the facility *Black Eagle* are trying to make adjustments to the inner world of the convicted person, to bring him to the realization of the gravity of his deeds and soul-searching. By keeping convicted persons from suicide and new crimes, we set their minds on the possibility of release on parole. This is a great incentive for them. Sometimes we lie to them because when, as clemency, death penalty is commuted to life imprisonment or being convicted for pedophilia, they cannot be released on parole and shall be kept in prison until their biological death. In this case, correction of personality for the reintegration into society loses its meaning.

Article 72 of the Criminal Code of the Republic of Kazakhstan

A person serving life imprisonment imposed by the court may be released on parole if the court recognizes that the person does not need to serve the sentence any further and has actually served at least twenty-five years of imprisonment. If a person serving a life imprisonment imposed by the court has met all the prerequisites of the procedural agreement, such person may be released on parole after the actual service of at least fifteen years of imprisonment.

Release on parole shall not be applied to a person, for whom, as clemency, the punishment in the form of the death penalty was commuted to life imprisonment; to a person convicted for terrorist or extremist crimes entailing death of human beings; a person convicted for crime against sexual the integrity of minors.



In my line of duty, I had to talk to each person sentenced to life. Those were persons who were originally sentenced to life and convicted persons who, as clemency, had their death penalty commuted to life imprisonment. The main question I asked them, "Tell me, were you afraid that for that crime you could be executed by firing squad or sentenced to life?" And the answer invariably was, "No, we hoped we wouldn't be caught!"

Then I realized one thing – a criminal shall never be deterred by the harshness of punishment; a criminal can be stopped by the inevitability of punishment.

To achieve that goal, we need reforms in the law-enforcement and judicial areas. We should completely reconsider our approaches to training, education and recruitment of judges, investigative personnel, prosecutors and prison staff.

We should make sure that only professional, competent and decent people hold these positions. These people's thinking should be based on the principles of humanity and justice.

I understand that this is a very difficult task but any civilized country should endeavor to achieve it.

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## DEATH PENALTY: OVERCOMING DIFFERENCES AND WAYS OF ITS CANCELLATION

*The article examines the law and practice relating to the use of the death penalty. It reflects changes in the criminal legislation in this area in recent years. It analyzed the development of the crime situation, which influenced the dynamics of the death penalty. The influence of the conclusions of the Constitutional Court on amendments of the Criminal Code of the Republic of Belarus. The optimal solutions to the issue of abolishing the death penalty in Belarus.*

**Introduction.** The issue of the death penalty as a penal sanction for most serious crimes was the subject of thorough discussions during the preparation of the new Constitution of Belarus in 1990-1994. It is commonly known that not only in tsarist Russia but also after the overthrow of the monarchy and in the Soviet period, decisions were made to abolish the death penalty. However, these humane acts did not last long and the state went back to reinstating this punishment. In the draft Constitution prepared by the working group in September 1991, the issue of the death penalty was addressed as follows: a citizen of the Belarusian SSR (at that time the law on renaming our state into the Republic of Belarus had not been passed yet) has the right to life. No one can be deprived of life otherwise than under the sentence of the court as an exceptional measure of punishment in the cases explicitly provided for by law (art. 57 of the draft) [1, p. 65]. This means that a broad formulation was used, which left it in the hands of lawmakers to define “the cases” when deprivation of life could be imposed by the court. In the draft editions reviewed at the meeting of the constitutional commission on September 30, 1991 [1, p. 88] and the draft passed in the first reading on November 11, 1991 [1, p. 116]; the subsequent drafts of April 6, 1991 [1, p. 142]; of October 8, 1992 [1, p. 165] the respective provisions (art. 24, art. 25) had the following wording: the right to

life shall be an undeniable right of each person. The Republic shall protect against unlawful infringement on life and health of a person. That wording showed the intent to avoid any mentioning of the death penalty (deprivation of life by court decision). However, the wording, specifically “the Republic shall protect against unlawful infringement on life and health of a person,” could be interpreted even more broadly than in the first draft, i.e. the one prepared in September 1991.

**Main part.** An edition of the article (incidentally, under number 24) that was close to the current text of article 24 of the current Constitution first appeared in the draft Constitution as of March 11, 1993. According to art. 24, each person shall have the right to life. The State shall protect the life of a person against any unlawful infringements. Until abolished, the death penalty can be used in accordance with the law as an exceptional measure of punishment for most serious crimes and only in pursuance of a court sentence. The article referred to ‘most serious’ crimes [1, p. 188]. In the draft as of May 4, 1993, the first two parts of article 24 remained unchanged while the third part was amended as follows: until abolished, the death penalty can be used in accordance with the law as an exceptional measure of punishment for very serious crimes and only in pursuance of a court sentence [1, p. 210]. That wording, being more precise, was used in the final draft of the Constitution adopted by the Supreme Council of the Republic of Belarus on March 15, 1994.

The reference to the death penalty as a form of a penal sanction in the Constitution of the Republic of Belarus was due, first all, to the crime rate. The death penalty was meant to be imposed not only for aggravated murder but also for certain other crimes. At present, in accordance with article 59 of the Criminal Code of the Republic of Belarus, the death penalty in the country as an exceptional measure of punishment shall be allowed in the form of execution by firing squad for certain very serious crimes entailing intentional taking of human life under aggravated circumstances (until such time as the death penalty is abolished). Specifically, it is envisaged for an act of terrorism against a foreign national; international terrorism; genocide; crime against human security; use of weapons of mass destruction; violation of war laws and customs; lucrative or contract killing or murder involving robbery, extortion or banditry; terrorism, high

treason; conspiracy or other actions aimed at seizure of power; act of terrorism; diversion; murder of a law-enforcement officer. The death penalty cannot be administered to women and men who committed crimes below eighteen years of age or who reached the age of 65 by the time of sentence.

If we refer to the statistics of murders, which most precisely reflected the overall crime situation, we shall see continued growth of such crimes at the end of the 20th century. In the Soviet time, in certain years their number did not exceed 300 (from 1961 to 1969 except 1963 when 313 murders were committed). Then an increase in those crimes followed. From 1980 to 1984, more than 500 murders had been committed annually. The introduction in 1985 of the so-called alcohol prohibition law allowed reducing the number of murders to 339 at the end of 1986; in 1987 their number was even lower – 335. Then, with the start of “perestroika”, a persistent and significant growth in that type of very serious crimes could be clearly observed: from 567 in 1989 to 952 in 1994, the year of adoption of the Constitution of the already independent Republic of Belarus. (In 1993, 885 murders were committed). Against that background, the developers of the draft Constitution could not propose to citizens the second edition of article 24. I can say that there were not any particular objections to the death penalty either in the working group or in the constitutional commission.

It took many years for the leaders of our country to curb the crime including such extreme forms of it as murders: from 1995 through 2006, the number of annually committed murders was well above one thousand or in certain years was very close to that figure. The year 1998 saw the highest number of murders – 1228. In 2003-2004, i.e. the period preceding the adoption by the Constitutional Court of the Republic of Belarus on March 11, 2004, of Resolution N. 3-171/2004 *On the Conformity of the Provisions of the Criminal Code, Which Provide for the Death Penalty as a Punishment, to the Constitution of the Republic of Belarus and the International Treaties of the Republic of Belarus* [2], 1057 and 989 murders respectively were committed.

Naturally, in late 1990s and early 2000s our criminal law underwent certain changes towards its humanization. As it was mentioned before, in 1999, the new Criminal Code (the CC) of the Republic of Belarus was

adopted. The number of legally defined crimes, for which punishment in the form of the death penalty could be imposed, was reduced as was reduced the range of persons, to which it could be administered. As an alternative to the death penalty, it preserved life imprisonment, which was introduced as early as 1997. (Although, lawmakers, for some reason, did not give in the CC the definition of either ‘imprisonment’ or ‘life imprisonment’ while they did give the definition to the ‘fine’, ‘correctional labor’).

When identifying its position, the Constitutional Court proceeded, first of all, from the text of the constitutional provision (art. 24). Its clarification and the determination of the vector of implementation of the constitutional provisions in the current legislation, in my opinion, were significantly affected by the crime rate and to a certain extent by the outcome of the advisory referendum of November 24, 1996, on the possible abolition of the death penalty. As you know, 80.44% of citizens who participated in the referendum on that issue voted against its abolition.

When preparing the Resolution, the Constitutional Court conducted deep analysis. It pointed out that since 1917 the death penalty had been abolished three times: in 1917, in 1920 and in 1947. However, each time after a certain period after the adoption of the acts on the abolition of the death penalty, its practice was reinstated, which, given certain historic conditions, was attributed to the need to strengthen control over very serious crimes. In accordance with the Criminal Code of the BSSR of 1928, that punishment could be imposed for 60 kinds of crimes. In the CC of 1960, the range of crimes, for which the death penalty could be imposed, was significantly reduced but still remained quite broad. That punishment was envisaged for over 30 kinds of crimes (including war crimes) including those not entailing the intentional taking of a human life. At the same time, both the CC of 1928 and the CC of 1960 enshrined the temporary nature of the death penalty.

Starting from 1990s, lawmakers, following the international trends, have moved towards consistent narrowing of the scope of application of the death penalty by removing it, first of all, from the sanctions in those articles of the CC that impose responsibility for crimes not entailing the intentional infringement on human life. Narrowing of the scope of application of the death penalty was performed in parallel

to the expansion of the range of persons, to whom such punishment could not be applied.

The CC of the Republic of Belarus adopted on July 9, 1999, and brought into force on January 1, 2001, provides for the death penalty as an exceptional measure of punishment (art. 59). At the same time, the scope of application of that punishment in the CC was reduced more than twofold compared to the previous CC. It may be imposed only for very serious crimes entailing intentional deprivation of human life under aggravated circumstances.

The Constitutional Court determined that when assessing the issue of the abolition of the death penalty the legal system of the state, its traditions and history, the environment, in which the legal provisions were made and amended, as well as the current crime rate should be taken into account. It was pointed out that despite the use of the death penalty and other harsh punishments, there had been an increase in the number of criminal infringements on human life in the country. At the same time, the preventive role of the death penalty and the correlation between its practice and the murder rate could not be actually observed. To the contrary, the growth in the number of aggravated murders, for which by law the death penalty can be imposed, occurred in those years when that punishment was used to a relatively large extent. For instance, from 1994 to 1998 the number of persons sentenced to death increased (25, 37, 29, 46, 47 persons) but at the same time there was an increase in the number of persons convicted for aggravated murders (278, 345, 411, 480, 517 persons). However, despite the fact that in 2002 four persons were sentenced to death, in 2003 the number of murders reported in the country including attempted murders, decreased by 104 crimes compared to 2002.

The Constitutional Court stated that neither practice nor research had identified the correlation between committed murders and the extent of the use of the death penalty in the country and had determined the degree of its deterrent effect. This fact also holds true in other countries, which became one of quite compelling arguments in favor of the abolition of the death penalty. By nature, the death penalty cannot ensure the achievement of other goals of criminal responsibility: redemption of the criminal and prevention of new crimes, which can be committed by the criminal.

The Constitutional Court emphasizes that when addressing the issue of the use of the death penalty, it is impossible to completely avoid an erroneous conviction of a person for the crime, for which the death penalty is imposed. And it should be mentioned that there have been such cases in the contemporary history of our country (BSSR).

The Constitutional Court believes that to ensure the safety of society, to prevent relapse into crime of persons who commit intentional infringements on life under aggravated circumstances, the state has sufficiently effective penal and legal means, which allow isolating criminals from society and by doing so prevent them from committing new crimes. In particular, such measures against murderers in the Republic of Belarus as in many other countries include life imprisonment or imprisonment for up to 25 years. These are the punishments that are preferred by the courts when imposing sentences on persons convicted for most serious crimes entailing intentional deprivation of life under aggravated circumstances. The share of imprisonment in the array of punishments administered for the above crimes is higher than 90 percent. For instance, it was 96 percent in 2001, 95 percent in 2002 and 96 percent in 2003. Life imprisonment in those years was imposed respectively in 2.3%, 4.2% and 2.6% of all convictions for such crimes. At the same time, the preferred use by the courts of imprisonment as a penal sanction against serious offenders who infringe on human life does not undermine the safety of society and the performance of crime fighting tasks.

The Constitutional Court pointed out that the fulfillment of the task of protecting society from criminal infringements and, first of all, from intentional infringements on human life should be facilitated by the improved performance of law-enforcement authorities aimed, among others, at the best implementation of the principle of unavailability of punishment, the increased rate of detection of such crimes, and ensuring the balanced criminal policy with regard to criminals who infringe on human life.

The Constitutional Court took into consideration the fact that neither the abolition of the death penalty nor declaration of a moratorium on its use or execution, which occurred in other former Soviet countries, whose crime rate and dynamics did not have significant differences, did not cause an outbreak of crime and an increased murder rate.

Neither did the crime rate worsen in the Republic of Belarus in 2000–2003, when the use of the death penalty was kept to a minimum. At the same time, the number of convictions for aggravated murders in those years, compared to the years when the death penalty was used to a comparatively larger extent, decreased.

It was also emphasized that in accordance with article 8 of the Constitution, the Republic of Belarus recognized the priority of the accepted rules of international law and ensured the conformity of the national laws thereto. In view of the above, the Republic of Belarus cannot but take into account the trends and processes related to the abolition of the death penalty taking place globally or stay on the sidelines of those processes. In the preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989 the States Parties to the Protocol noted that abolition of the death penalty contributed to enhancement of human dignity and progressive development of human rights. The State Parties are convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life. Article 1 of the Protocol states that no one within the jurisdiction of a State Party to the Protocol shall be executed (clause 1); each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction (clause 2). The Parliamentary Assembly of the Council of Europe established a practice of imposing on candidate states the requirement to implement a moratorium on the execution of the death penalty, to remove this punishment from the national law, to sign and ratify Protocol 6 to the European Convention concerning the abolition of the death penalty.

According to Protocol 13 to the European Convention concerning the abolition of the death penalty in all circumstances signed by the member States of the Council of Europe on May 3, 2002, in Vilnius, the total abolition of the death penalty was proclaimed including the death penalty for acts committed in time of war or of imminent threat of war. The preamble of the Protocol states that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings. The total



abolition of this punishment in the member States was declared to strengthen the protection of the right to life guaranteed by the European Convention.

The Constitutional Court also noted that the decisions to abolish the death penalty in those states had been usually taken by their representative bodies or bodies for constitutional supervision. European constitutional courts made the relevant decisions at a time when their states had been admitted to the Council of Europe or when the issue of their admission to that organization had been predetermined. In this connection, for them the European Convention and protocols thereto were mandatory.

The Constitutional Court underlined that the Republic of Belarus, although not being a member state to the Council of Europe, in recent years had been taking a consistent and pro-active attitude towards the restriction of the death penalty both at the legislative level and in practice, which was in line with the requirements set forth in the international instruments. In principle, it came close to resolving this issue whereas accession to the Council of Europe and signing of the European Convention, protocols 6 and 13 thereto implies unconditional taking of the decision to abolish the death penalty.

Therefore, the Constitutional Court recognized clause 11 of part one of article 48 and article 59 of the Criminal Code of the Republic of Belarus as incompliant with the Constitution of the Republic of Belarus to the extent that they did not refer to the temporary nature of the death penalty. It is stated in the Determination that part three of article 24 of the Constitution of the Republic of Belarus, which establishes the possibility of the use of the death penalty as an exceptional measure of punishment until such time as it is abolished, allows for taking the decision to declare a moratorium on the use of the death penalty or to completely abolish this punishment.

Based on the text of this provision, the crime dynamics, the need to implement the Recommendations of the House of Representatives of the National Assembly of the Republic of Belarus on the death penalty adopted by the Resolution of the House of Representatives dated June 13, 2002, and taking into account that the Second Optional Protocol to the International Covenant on Civil and Political Rights has not been ratified by the Republic of Belarus, the issue of its full

membership in the Council of Europe has not been resolved and thereby the European Convention for the Protection of Human Rights and Fundamental Freedoms and protocols thereto has not been signed and ratified, which would, by virtue of articles 8 and 116 of the Constitution of the Republic of Belarus, ensure the primacy of international instruments over the national law, the Constitutional Court deems that in the current context the decision on the abolition of this punishment or – as the first step – the declaration of a moratorium on its use can be taken by the Head of the State or the Parliament.

How did the crime evolve in the aftermath of that Determination? It took some time but gradually the situation started to change for the better. 791 murders were committed in 2007. Over the next four years of employment of the author in the public prosecution system (2008–2011), the number of murders decreased almost twofold (by 49 percent) and equaled 404. Although, in recent years there has been a slight (insignificant) increase in those crimes: in 2013–2015, respectively 410, 434, 422 murders were committed. If we refer to the punishment for those crimes, the statistics over the last five years will be as follows: 3 death sentences and 4 life sentences in 2011; 0 and 4 in 2012; 2 and 2 in 2013; 2 and 0 in 2014 and 2 death sentences in 2015 (by the time of this review, one sentence has not entered into legal force). Incidentally, the absence of death sentences in 2012 did not have an adverse effect on the overall crime rate.

Therefore, it may be concluded that an apparent trend has established in our country towards the decrease in the number of death sentences: compared to 1997–1998 the annual number of sentences decreased by more than twenty times. The last five to eight years have been groundbreaking in resolving the issue of the death penalty in the Republic of Belarus. The Determination of the Constitutional Court of March 11, 2004, anticipated the general trend, which is typical of the evolving legal system and public consciousness. It was adopted in the midway of that trend and accurate perception of the constitutional provisions as well as the principles and rules of the international law.

In some cases, as an argument against the need to abolish the death penalty as a penal sanction the outcome of the 1996 referendum is mentioned.

However, we should keep in mind the non-coincidental ruling, which was approved by the President and the Supreme Council, that

unlike other matters put to the referendum (there were a total of seven matters), which were mandatory, the matter in question was of a consultative nature. Moreover, the discussions were focused on other matters related, first of all, to the two alternative laws on the alterations and additions to the Constitution as amended on March 15, 1994. The matter under review received much less attention. The referendum was held at a time when, as an alternative to the death penalty, the Criminal Code provided only for up to 15 years of imprisonment, i.e. a punishment, which is obviously not commensurate to the nature and degree of the social danger of willful murder under aggravated circumstances. Life imprisonment as an exceptional punishment alternative to the death penalty was introduced only in December 1997.

Therefore, in the current settings, we need to engage more with public and explain the upsides and downsides of the abolition of the death penalty in the Republic of Belarus. According to some data, the recent opinion polls show that a considerably smaller number of citizens are in favor of retaining the death penalty compared to the outcome of the 1996 referendum. It is reported that almost 33% of Belarusians are not aware of the death penalty practice in Belarus, of which 9.7% believe that the death penalty was abolished here; 7.1% reported that the death penalty had not been used for many years; 5.5% replied that there was a moratorium in force in the country; 10.5% had difficulty responding. Below are the results obtained by the authors of the research who studied the attitude of Belarusians towards the death penalty. When asked a direct question regarding the abolition of the death penalty, more than half of the polled Belarusian residents – 63.8% – spoke in favor of its use [3].

Over the last decades, there has been a global trend towards the abolition of the death penalty or its reduced use. In the countries neighboring on Belarus, people have not been executed for over 15 years. In Poland, the last death sentence was executed in 1988; in 1995 in Lithuania; in 1996 in Russia and Latvia; in 1997 in Ukraine.

**Conclusion.** If the death penalty were to be abolished in our country, what could be the first steps on that path? There can be a number of solutions to that issue: from radical to “incremental.” All of them fit well into the constitutional framework and do not require amending the Fundamental Law. It means there can be no delays based on those

grounds only. The key here is the political will of the head of the state (the President of the Republic of Belarus). Taking into account that our country is a presidential republic, it is up to the Head of the State to decide on the type and the time of decision.

He can consider the radical option – the total abolition of the death penalty by removing this sanction from the Criminal Code. All the more so because it will have to be done to be admitted to the Council of Europe in line with the current procedures. However, even without acceding to the Council of Europe, we can develop our laws with the best and acceptable standards in view.

The second option is to retain it but to make a decision in the form of a law or decree to suspend the execution of the pronounced death sentences. This, of course will, create additional “ordeals” for the convicted because of the awaiting of the execution of the sentence (note that in the US there are cases when the convicted wait for the execution of the death sentence for decades). At the same time, such persons can hope for survival. This option leaves room for response to the changes in the crime rate in future by retaining the possibility of using this exceptional measure of punishment with regard to both those, on whom such sentences had been passed, and those who committed an act punishable by the respective sanction.

The third option is to adopt a law on the temporary suspension of the application of the provisions of the Criminal Code that provide for the death penalty. There are two possible concepts of that law. The first one is to adopt the law on the temporary suspension of the application of the provisions on the death penalty until such time as the final decision is taken (without specifying the duration). (In our opinion, it is acceptable to resolve such an important issue at the level of the Plenum of the Supreme Court of the Republic of Belarus with the recommendation to courts not to impose this kind of punishment). The second one is to adopt the law abolishing the death penalty for a certain period of time, e.g. from December 31, 2016, to December 31 (July 1), 2017. Ahead of that date, the state can decide to prolong the decision (law) or, depending on the situation, not to prolong it and then the law automatically becomes null and void and the death penalty is automatically reinstated. However, it shall not be applied to those persons, who committed, during the moratorium, an act, for

which the death penalty was previously envisaged, but its use had been suspended.

We do not take other possible solutions of this issue off the table. However, the experience of both the counties of the western European democracies and former USSR states shows that the death penalty in the current settings is losing its meaning and more and more countries abolish it. The states that are members to the CIS, the Union State, and the Eurasian Economic Union abolished the death penalty at the constitutional level. This decision was taken many years ago in Russia, Kazakhstan, the Kyrgyz Republic, Uzbekistan, Mongolia, etc. The total number of countries where capital punishment is practiced, as reported by Amnesty International in its annual report for 2011, has decreased by more than one third over the last decade [4].

However, there are other practices as well. According to the human rights organization Amnesty International, in 2012, globally 628 prisoners were executed, which is two persons higher than in 2011. At least 1722 new death sentences were passed in 58 countries around the world. At the same time, 1923 persons were sentenced to death in 63 countries in 2011. According to the annual report of the organization published this April, the United States remains the only country in Northern and Southern Americas that uses the death penalty [5].

The abolition of the death penalty, in our opinion, can be accompanied, as foreign experience shows, by changes in the powers of law-enforcement officers and in the practices of the discharge of their duties. If we compare the practices of apprehension of alleged criminals in our country and the United States, Western Europe, we can observe larger discretion of police officers abroad. They more often use the deadly force of firearms against a person who poses a threat to the life and health of the police officer. If we compare figures related to the death penalty (here) and the death of people during apprehension, Belarus will look better. For example, according to publicly available sources, 461 persons became victims of US law-enforcement authorities in 2013. However, American experts working in the field of criminal justice report that the real figure is much higher because not every police department in the US provides data to the FBI [6].

In our opinion, the European standard requiring the abolition of the death penalty is acceptable to Belarus, as a European state. It would

be sound practice to take further steps in this direction by setting the appropriate law-enforcement practices, raising the legal awareness of citizens and reducing the crime rate, especially the rate of serious and very serious crimes. The Council of Europe, when requesting that our country abolish the death penalty as one of the prerequisites for admission to this international organization, in our opinion, should take into account the practices of admission of other states, for which a transition period was established to bring the national legislation in line with the European Convention for the Protection of Human Rights and Fundamental Principles.

The decision to abolish the death penalty in our country rests with the Head of the State and the Parliament of the Republic of Belarus.

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**Mr. Tadevush Kandrusovich,**  
*Archbishop, Metropolitan of Minsk and Mahiliou,*  
*Roman Catholic Church in Belarus*

## **DEATH PENALTY IN THE TEACHINGS OF THE CATHOLIC CHURCH**

Dear brothers and sisters, ladies and gentlemen!

1. First of all, allow me to thank the Parliamentary Assembly of the Council of Europe who organized today's conference "Death Penalty: Transcending the Divide" for the invitation. The issue of the death penalty is becoming ever more urgent because human life is the most valuable gift of God. God gives it and only He has the right to take it. Each day, globally the number of countries that practice the death penalty is diminishing. I hope that today's conference will also contribute to its abolition or at least to the imposition of a moratorium in Belarus.

2. Both the Catholic and the Orthodox Churches as well as other religions guard a human life and protect it. The Catholic Church regards it as holy and inviolable and therefore also stands up for persons sentenced to death. A special role in the protection of human life and the abolition of the death penalty belongs to Saint John Paul II.

Pope Benedict XVI and Pope Francis contributed greatly to this Godly cause.

3. In the Old Testament, we can find the premises for the death penalty. In the case of Cain, God says, "If anyone kills Cain, vengeance shall be taken on him sevenfold." (Gen. 4:15). In the New Testament, although Jesus does not speak out against the death penalty, He sets the premises for its abolition. In the case of the adulteress, Jesus says, "Let him who is without sin among you be the first to throw a stone at her." (John 8:7).

According to the traditional teachings of the Church, the death penalty does not contradict the law of God but at the same time it is not a directive. Its need is assessed depending on the circumstances. That is why throughout history the Church spoke in favor and against the death penalty.

To understand the teachings of the Church in this field, we should keep in mind the specific context of the age when they were proclaimed. Otherwise, we risk passing into fundamentalism and start thinking that the teachings of the Church are contradictory.

4. Supporters of the death penalty say that it is an act of justice. They also emphasize the obligation of the state to guarantee public order. Some refer to the idea of Saint Thomas Aquinas that the human being as an integral part of society has to serve it. Conversely, if he threatens public order and the common good, he entitles the society to remove him (<http://swiety.krzyz.org/okarze.htm>).

It is also difficult to agree with the argument that a criminal forfeits his human dignity and by doing so entitles society to kill him. Even a most serious crime does not deprive of human dignity because it belongs to the essence of the human being.

5. Opponents of the death penalty build their arguments on the belief that every human life is holy although the person himself might not always be such. Another argument is the irreversibility of the death penalty. Another important point is that death limits the time for penance, which in God's economy and mercy should be given to the human being even if he is a criminal. It is also significant that courts are not immune from errors. And if a person is killed, he cannot be raised from the dead and there will be no time to correct the judicial error and no time for penance.

While not rendering the evil committed by the criminal banal, it should be emphasized that society is threatened not by the existence of the criminal but only by his actions. Therefore, we should strive for eliminating the causes of crime and not the criminal. Therefore, the focus in the teachings of the Catholic Church is shifted to the re-socializing aspect of punishment.

Social studies show that the retention of the death penalty does not reduce the crime rate just as it does not grow in countries where it was abolished.

6. The encyclical *Evangelium vitae* of St. Joahn Paul II was groundbreaking in the field of protection of the God's gift of life and the abolition of the death penalty.

Whereas previously the Church taught about the justified right and obligation of the state to administer just punishment, even capital one,



for a serious crime, today in view of the capabilities in the possession of the state to prevent a serious crime and neutralize the criminal without depriving him of the possibility of redemption, such cases of the absolute need for the death penalty are rare if practically non-existent. (CCC. Compendium 469; EV56). John Paul II also teaches that in contemporary society the death penalty is not necessary and therefore can be abolished ([http://w2.vatican.va/content/john-paul-ii/it/audiences/2000/documents/hf\\_jp-ii\\_aud\\_20000913.html](http://w2.vatican.va/content/john-paul-ii/it/audiences/2000/documents/hf_jp-ii_aud_20000913.html)).

Pope Benedict XVI spoke against the death penalty and for the preservation of the God's gift of life; he also called for the criminal law to take into account both the human dignity of the convicted and maintaining of public order ([http://w2.vatican.va/content/benedict-xvi/it/audiences/2011/documents/hf\\_ben-xvi\\_aud\\_20111130.html](http://w2.vatican.va/content/benedict-xvi/it/audiences/2011/documents/hf_ben-xvi_aud_20111130.html)).

And Pope Francis says that the death penalty is the failure of law-based society. He teaches that the death penalty cannot be acceptable in the modern world and life imprisonment is a hidden form of the death penalty. Pope Francis quotes Fyodor Dostoyevsky that "to kill for murder is a punishment incomparably worse than the crime itself." (<http://www.polskieradio.pl/5/3/Artykul/1403609,Papiez-Franciszek-o-karze-smierci-jest-porazka-panstwa-prawa>).

7. Therefore, the Church is deeply convinced of the immoral nature of direct, intentional and freely committed killing of a human being (EV 57). It clearly and unequivocally advocates for every human life as the main principle of humanism, which achieves in Christianity its deepest motivation.

Therefore, for the Church the issue of the death penalty, first and foremost, is an issue of ethics. The significance of the fundamental principle of respect for life as a value outweighs the arguments about the effect of the death penalty in ensuring justice and maintaining public order. The right to life that stems from the Epiphany is indisputable. It is binding because it is a universal right without exception and should be respected in Belarus too, at least in the form of a moratorium.

Thank you for your attention.

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**Ms. Asunta Vivó Cavaller,**  
*Secretary-General,*  
*International Commission against the Death Penalty, Spain*

Dear Chair, dear fellow participants, dear friends,

It is an honour to be in Minsk, Belarus at this important conference organised by the United

Nations in Belarus (along with support of one of our Support Group Members, the United Kingdom) and have the opportunity to be part of this distinguished panel.

I am the Secretary General of the International Commission against the Death Penalty (or ICDP), which was established in October 2010 in Madrid. ICDP is composed of 17 Commissioners, who are persons of high international standing from all regions of the world. ICDP acts with total independence and neutrality and works under its President Mr. Federico Mayor. These eminent individuals include former presidents, prime ministers, government ministers, senior United

Nations officials, a former US state governor, a former judge and president of the International Court of Justice, and a leading academic. Due to the high moral standards of its members and its regionally balanced composition, the International Commission has a high visibility on the international level. It acts with full independence and strives for the highest attainable level of neutrality. The work of ICDP is supported by a diverse group of 18 States from the continents of

Africa, Asia, Europe, Americas who are committed to the abolition of the death penalty. The Secretariat is based in Madrid since 2015.

I would now like to focus on the experiences of two countries that have recently abolished the death penalty. I will describe the steps the governments took during their period of transition, the role that ICDP played in involving the key stakeholders as they moved towards eventual abolition of the death penalty.

The first country, I would like to highlight, is Suriname where ICDP worked closely with key stakeholders as the country moved towards abolishing the death penalty in domestic law in April 2015. We first interacted with Suriname during the Inter-Parliamentary Union-ICDP seminar of Parliamentarians entitled “Parliamentarians, a critical force in promoting the abolition of the death penalty” that we co-hosted in Geneva on 10 October 2013. One of the participants in

the panel discussion was Madame Ruth Wijdenbosch, the then Vice-President of the National Assembly of Suriname.

As a follow up to Madame Wijdenbosch's request that we visit Suriname whose parliament was considering the death penalty abolition bill, ICDP co-organized with UK's All Party Parliamentary

Group on the Death Penalty, a mission with a delegation comprising of ICDP Commissioner Ruth

Dreifuss and UK Member of Parliament Greg Mulholland. The delegation visited Paramaribo, Suriname on 12-13 February 2014 to discuss issues related to the abolition of death penalty with the Surinamese government. Suriname had not carried out an execution since 1927. The death penalty was, at the moment of the visit of our delegation, included in its Criminal Code. The Surinamese State Council (Staatsraad) was considering the draft of a revised Criminal Code, which would exclude the death penalty. Once passed by the Staatsraad, the next step would be to send the draft of the revised Criminal Code to the National Assembly (DNA) for approval of the legislation thereby formally abolishing the death penalty. During the visit, the delegation met with key stakeholders in the death penalty issue in Suriname.

Following up on this visit, ICDP Commissioner Ruth Dreifuss met Ambassador Henry L. Mac-Donald, Permanent Representative of the Republic of Suriname to the United Nations in New York on 28 March to request him to convey the international community's support for Suriname taking steps towards abolishing the death penalty.

Following this meeting, ICDP coordinated with the EU delegation in Suriname to organize a visit of

Baron Marc Bossuyt, a national from one of our Support Group members, Belgium, between 3 to 6 February 2015 to Paramaribo, Suriname. Mr Marc Bossuyt is the former Special Rapporteur who drafted the Second Optional Protocol to the International Covenant on Civil and Political Rights (Second Optional Protocol) in 1989. During his visit, Marc Bossuyt participated in a series of seminars with NGOs, legislation lawyers and politicians to discuss the bill that would eventually exclude capital punishment in Suriname and also move the country towards signing the Second Optional Protocol. I am happy to state that Suriname effectively abolished the death penalty for all crimes

in 2015. In March 2015, the National Assembly approved legislation formally abolishing the death penalty in Suriname. On 13 April, the criminal code in Suriname came into effect, which effectively abolishes the death penalty in that country. The Government of Suriname mentioned ICDP as one of the forces that pushed the country towards abolition. Earlier, ICDP also worked closely with Surinamese authorities, following which the country voted for the first time in favour of the United Nations General Assembly resolution on global moratorium on the use of the death penalty in 2014.

Countries need political leadership as they take steps towards abolition to the death penalty. In Suriname's case, strategic international pressure combined with the efforts of parliamentarians, diplomats, civil society organizations, lawyers, and importantly, the political leadership all helped as the country took the decisive steps towards abolishing capital punishment.

I would now like to focus on the second country, Mongolia. President Elbegdorj, shortly after assuming office as Mongolia's President, commuted death sentences and announced a moratorium on executions in January 2010. The last execution had been carried out in 2008. Mongolia is a founding member of ICDP's Support Group in October 2010 when the organization was launched in Madrid. In 2011, the then President of the ICDP's Support Group, Ambassador

Rafael Valle visited Mongolia to encourage its parliament to take steps to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights and since then, we have had close interactions with Mongolia's focal point on this issue. In March 2012, the Mongolian parliament voted for the country's accession to the Second Optional Protocol committing the country, initially internationally, to the abolition of the death penalty. ICDP welcomed this innovative step by President Elbegdorj's administration and he thanked us for our support. Since then, ICDP has regularly urged Mongolia to abolish capital punishment in its domestic law. Our Commissioners including Commissioner Hanne Sophie Greve met with Mongolian diplomats to discuss issues related to death penalty and encouraged its authorities to follow its international commitment to abolish capital punishment by removing death penalty in its domestic legislation. On 3 December 2015, ICDP was informed that

the Mongolian Parliament adopted a new Criminal Law, according to which the death penalty will be abolished for all crimes in its domestic law and this will come into effect from September 2016.

In Mongolia's case, political leadership, especially President Elbegdorj's crucial leadership and strong and consistent belief in abolition of the death penalty has been vital. The President underlined the need for his country to follow the worldwide trend towards abolition of capital punishment on several occasions in various international fora including in a memorable speech at the UN in New York on 30 September 2014.

Mongolia supported the UNGA resolution on the question of the death Penalty in the last three resolutions since 2010 including the last one in 2014.

In our experience, we have seen that capital punishment has been abolished even when public opinion favours the death penalty. This was the case, for example, in several countries including Canada, France, Germany, the UK and among the 19 states in the US which has repealed the death penalty. ICDP Commissioner Robert Badinter has described to us about this situation very vividly when he, in his capacity then as Minister of Justice, led the move to abolish the guillotine (death penalty) despite adverse public opinion. At the time of France abolishing the capital punishment, between 60 to 65% of the French population supported the retention of the death penalty.

Commissioner Badinter has often highlighted the important point that once the death penalty was abolished in France, as in most of the countries that have adopted the abolitionist path, the majority of the public has not opposed the decision to abolish capital punishment and the countries have, since, not resumed executions.

I would like to conclude my speech with the following statements:

- Every human life matters.
- Abolition of the death penalty requires leadership.
- The risk of executing innocent people has been recognized by political leaders when making decisions to abolish the death penalty.
  - In Belarus, while the debate is going on, ICDP encourages the government to establish a moratorium on executions and we call on its leadership to abolish the death penalty. The Belarus leadership could take steps towards eventual abolition of capital punishment by

abolishing it in its domestic legislation like Suriname or like Mongolia, it could initially accede to the Second Optional Protocol to the ICCPR thereby committing internationally towards abolition. A very good step would be to support the UNGA resolution on moratorium on executions starting with the resolution whose voting will take place at the end of 2016.

- Belarus can join the rest of Europe in abolishing capital punishment making the continent completely free of executions. By doing so, Belarus will send a strong signal that it respects human dignity of its nationals and their fundamental right to life as it joins and further consolidates the global trend towards abolition of the death penalty.

- ICDP Commissioners are willing to help Belarus like they did in Suriname and Mongolia as they took steps towards abolishing the death penalty in their countries.

**Mr. Giancarlo Penza,**  
*Professor, Community of Sant'Egidio, Italy*

Since the second half of the 1990's the fight against capital punishment has become one of the spheres of global engagement and a priority of the Community of Sant'Egidio, going along with the political main-lines of the Italian government.

We think that death penalty contradicts a rehabilitative conception of justice. Pope Francis spoke very clearly in this sense in his address to the United States Congress last September: "This conviction has led me, from the beginning of my ministry, to advocate at different levels for the global abolition of the death penalty. I am convinced that this way is the best, since every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. Recently my brother bishops here in the United States renewed their call for the abolition of the death penalty. Not only do I support them, but I also offer encouragement to all those who are convinced that a just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation".

We think, moreover, that death penalty legitimizes in some way a culture of death, while claiming to want to defend human life. An "eye for an eye" justice is not the best way to lower the amount of violence in a society. In some circumstances it disproportionately affects political, ethnic, religious and social minorities.

Let me quote also the problem of the "fake justice". In the US the Innocence Project showed, through DNA cases, how often wrongful convictions happen. 250 cases overturned, 17 capital cases. One out of 3 was a sentence based on "eye witnesses", fake. Many others on "confessions". This means that it is a virus. Even when we may think that the evidence is so clear that no doubt can be raised, instead, more than in case out of 3 it can be a "mirage" of justice and not justice. Fake justice. "It is never clear why some first degree murder defendants are brought with capital charges and other no. It often depends on geography, more than on crime, even inside the same state. It is unequal administration". It is what Justice Stevens, a Supreme Court member in America stated when the death penalty was re-introduced in 1976/77: and he had been in favour.



Many societies believe in principle in restorative justice. For sure Western countries and countries where the Enlightenment and Christianity have played a role. Or Muslim countries, where mercy and families forgiveness has a role. But in practice many societies or states apply only a justice based on retribution. The say: “ it is to give justice back to the families who have had a loss”. And to punish crime. But there is no closure for families. The wound remains open for long years of appeals and detention, and of course freezes in hatred when closure is really needed. There are now strong movements of victims’ families saying, as Journey of Hope here, : “Not in my name”, “ Only forgiveness heals”.

Over the years the Community has become a leading player in the battle for a universal moratorium and the abolition of the death penalty all over the world. But never has the Community of Sant’Egidio planned its action at a theoretical or ideological level: the members of the Community have started their commitment with their own concrete approach to the death row inmates, through visits, correspondence, legal defense and the humanization of prison conditions. We have walked for years in prison corridors and death rows. Relations of friendship, experiences of visits and exchange of letters between us and people sentenced to death started. In these years Sant’Egidio promoted the defense of over 300 people sentenced to death in different parts of the world. From the 90s until today around 50 countries – we have worked together with other actors – have abolished the death penalty. Everything started with a dream ... but the dream continues: we dream of a truly human world, a world without the death penalty!

Sant’Egidio contributed to the founding in 2002 in Rome, at the Community’s headquarters in Sant’Egidio square, of the World Coalition against the Death Penalty.

It promoted the worldwide movement of Cities for Life, Cities against the Death Penalty: since November 30, 2000, each year more than 1,600 cities, including many capital cities, in more than 85 different countries have celebrated the International Day of Cities for Life, which takes place every year on November 30 – on the anniversary of the first abolition of the death penalty on the part of a State, the Grand Duchy of Tuscany, on November 30, 1786. The event is centered on the simultaneous enlightenment of the Coliseum and of other symbols

monuments all over the world. The Coliseum in Rome, lit up in special colours, has become a universal symbol of the abolition struggle. It involves not only the municipal authorities, but also humanitarian groups and activists on a city to city basis.

It drafted an appeal for a Universal Moratorium endorsed by leaders of the world's major religions as well as more than five million people, believers and non-believers, in 153 countries, which was presented to the United Nations on the eve of the historic vote in the General Assembly in a resolution rejecting the death penalty as a means of justice, in 2007. Italy and Europe strongly supported this resolution. At that time 103 countries voted it. But the number of countries which voted in favor of the moratorium has constantly increased in time: it reached 110 countries in 2012, and in December 2014, 116. Who voted against the resolution were only less than 50. The others abstained.

It supported and negotiated with death penalty countries to bring them around to abolition, from Burundi to Gabon, from Uzbekistan to Kazakhstan: with this purpose, it promotes each year at least one International Conference of Justice Ministers as a laboratory of dialogue and an international workshop on the issue of abolition, which year after year involves both "retentionist" and abolitionist countries in a common meeting-ground. Last February we made the ninth edition. On this occasion pope Francis himself raised again the idea of an universal moratorium, speaking at the Angelus of February 21. I like to remember his words: "The Extraordinary Jubilee of Mercy is a propitious occasion to promote in the world a growing maturity for ways to respect life and the dignity of each person. Because even a criminal has the inviolable right to life, a gift of God. I appeal to the consciences of leaders, that they come to an international consensus aimed at abolishing the death penalty. And to those among them who are Catholic, may they carry out an act of courage, giving an example that the death penalty not be applied in this Holy Year of Mercy. All Christians and men and women of good will are called today to work towards abolishing the death penalty, as well as improving prison conditions, in respect of human dignity and of those people deprived of freedom".

I would like to spend a few words on the complexity of the world we live in, a world where a number of violent and dramatic events

are spawning, out of any possible control - I consider especially the more recent years of our history. Let us consider the proliferation of wars and their nature: it is a deterioration compared to the same mode of warfare laid down in the Geneva conventions on prisoners and wounded people. We are doubtless faced with the most inhuman wars. This can be seen in the exhibition of acts of cruelty, until yesterday hidden by those who committed them, and instead used today as a weapon in a global time: to massacre and to show horror (women and men, humiliated, forced from their homes, stripped, shot or worse) this is real terrorism. And this is the worship of violence, that terrorizes and conquers. The execution of the other, exhibited dramatically as a form of «death penalty», now pretends to become full of meanings and messages – in the case of the Islamic State messages against the West.

In front of this new type of barbarism that seeks a value in the gruesome execution of human beings, can a State continue to do the same - albeit with methods seemingly more «educated» or «modern»? Is the not, perhaps, one additional reason to distance oneself from such inhuman practices or, at least, to seriously re-examine the issue of the death penalty?

Nevertheless, the struggle against the death penalty has recently made great strides: in 1948 only 14 countries had abolished the death penalty, the majority in South America; in the Seventies only 20; while today there are 160 nations of the world, which by law or in fact no longer runs. Seven times what was happening 50 years ago! United States are changing. 20 American States abolished death penalty and other 7 don't use it since more than ten years. In the last seven years, after thirty years of paralysis, 7 American States abolished death penalty: New Jersey, New Mexico, Connecticut, Maryland, New York, Illinois – Obama's State – and Nebraska. We are at the lowest level of executions since twenty years. (Recently, Equatorial Guinea, Pakistan and in the United States the states of Washington, Maryland and Connecticut have imposed the moratorium while El Salvador, Gabon and Poland acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at abolition).

In a globalized world such as ours - but globalization does not mean justice –contradictions and inequalities can actually increase. For this reason there is an increasing need for constructive dialogue and of

courageous solidarity, a strong call of collaboration in defense of life, at all levels, all actors working together: from law enforcement bodies, to judges, media people, teachers, NGOs, EU, countries, civil societies re-activated. I think it is the time to call every country for a time off, a time to reflect.

**Mr. Ikrom Saipov,**

*Chief Consultant of the National Human Rights Centre, Uzbekistan*

Distinguished Chairperson!

Representatives of international organizations!

Dear conference participants!

Ladies and gentlemen!

Allow me to greet you on behalf of the National Human Rights Center of the Republic of Uzbekistan and to express my gratitude for the invitation to participate in the international conference “Death Penalty: Transcending the Divide.”

The critical goal of reforming the legal institutional framework is to implement consistent phased liberalization of the penal, criminal procedure and correctional law.

According to article 13 of the Constitution, democracy in the Republic of Uzbekistan is based on the universal human principles, in accordance with which “the human being, his life, freedom, honor, dignity and other unalienable rights represent the highest value.”

Article 24 of the Constitution says, “The right to life is an unalienable right of every human being. Infringement against it shall be regarded as the gravest crime.”

The liberalization of the penal policy and law-enforcement practices positively affect the social and political situation and the crime rate in the country.

The key objective of the liberalization of the legal institutional framework and the criminal justice system, which is being implemented in Uzbekistan, is to ensure gradual narrowing of the scope of application of the death penalty and its total abolition. Since the first years of independence, the Republic of Uzbekistan, in accordance with General Comment No. 6 of the UN Human Rights Committee, has gradually reduced the number of articles in the Criminal Code, for which the death penalty could be imposed.

In the 1994 Criminal Code, the death penalty as the maximum punishment for crimes was included in 13 articles. As a result of proactive actions of extrajudicial protection agencies, the Parliament of the Republic of Uzbekistan by adopting the law *On the Amendment of Certain Legislative Acts of the Republic of Uzbekistan* of August 29, 1998, excluded the death penalty as a punishment for the following five

types of crime: art. 119, part 4 (forcible satisfaction of sexual needs in unnatural form); art. 152 (violation of war laws and customs); art. 158, part 1 (infringement against the life of the President of the Republic of Uzbekistan); art. 242, part 1 (organization of a criminal conspiracy); art. 246, part 2 (smuggling) of the Criminal Code of the Republic of Uzbekistan.

Further reduction in the number of crimes, for which the death penalty could be imposed, occurred in 2001. In accordance with the law of August 29, 2001, the death penalty was established only for four crimes: premeditated murder under aggravated circumstances (art. 97, part 2); aggression (art. 151, part 2); genocide (art. 153) and terrorism (art. 155, part 3).

On December 13, 2003, at the 13<sup>th</sup> Session of the Oliy Majlis of the Republic of Uzbekistan, the death penalty was excluded for two more articles of the Criminal Code of the Republic of Uzbekistan – art. 151, aggression; art. 153, genocide. Therefore, the Criminal Code of the Republic of Uzbekistan had only two articles – art. 92, part 2 (premeditated murder under aggravated circumstances) and art. 155, part 3 (terrorism resulting in the death of a human being or other grave consequences) – which provide for the maximum punishment, i.e. the death penalty.

The total abolition of the death penalty became the key outcome of the reforms implemented in the Republic of Uzbekistan with the aim to liberalize and humanize the legal institutional framework. The Decree of the President of the Republic of Uzbekistan *On the Abolition of the Death Penalty in the Republic of Uzbekistan* adopted on August 1, 2005, provided for the abolition of the death penalty as a penal sanction from January 1, 2008, and its replacement with life imprisonment or long-term imprisonment.

In pursuance of this Decree, a wide range of legislative, outreach and preparatory activities were carried out in Uzbekistan in three areas aimed at the abolition of the death penalty.

Firstly, changes and additions were introduced into the penal, criminal procedure and correctional law removing the death penalty from the system of penal sanctions and replacing it with life or long-term imprisonment.

Secondly, a broad sensitization campaign was conducted among general population to strengthen the public understanding of the need to abolish the death penalty.

Thirdly, preparatory activities were carried out involving the construction of buildings and facilities, the creation of the required conditions of confinement of persons sentenced to life or long-term imprisonment and the training of personnel for working in those facilities.

Since the adoption of the Decree of the President of the Republic of Uzbekistan *On the Abolition of the Death Penalty in the Republic of Uzbekistan* of August 1, 2005, not a single death sentence had been executed, which means there was a de facto moratorium on the execution of death sentences.

On January 1, 2008, the death penalty was completely abolished for all crimes committed both in time of peace and war.

On the initiative of the President, on December 10, 2008, the Uzbek Parliament ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. Uzbekistan became the 67<sup>th</sup> state to ratify the Second Optional Protocol. At present, 81 states have ratified this Protocol.

Uzbekistan supported the adoption of UN General Assembly Resolution 62/149 on the moratorium on the use of the death penalty. Moreover, by participating in the 4<sup>th</sup> World Congress Against the Death Penalty (February 2010, Geneva), Uzbekistan supports the 2015 initiative of the European Union in favor of the universal moratorium on the use of the death penalty. The abolition of the death penalty in Uzbekistan gained global resonance. Not only did the European Union welcome the abolition of the death penalty in Uzbekistan on January 1, 2008, but expressed hope that this decision would inspire other countries to follow the example. International human rights organizations welcomed the abolition of the death penalty in Uzbekistan.

It should be emphasized that in countries such as Germany and Poland life imprisonment can be imposed for 5 crimes; 6 in in Belgium and the Russian Federation; 9 in Denmark; 11 in Georgia; 13 in Switzerland; 14 in Belarus; in 16 Japan and Azerbaijan; 17 in

Kazakhstan and Korea; 18 in France; 19 in Holland; 24 in Moldova, etc. while 2 in Uzbekistan.

On July 11, 2007, the Oliy Majlis of the Republic of Uzbekistan passed the law *On the Introduction of Amendments and Additions to Certain Legislative Acts of the Republic of Uzbekistan in View of the Abolition of the Death Penalty*. In accordance with that law, the relevant changes were made to the Criminal Code of the Republic of Uzbekistan (articles 15, 43, 50, 51, 58, 59, 60, 64, 73, 76, 97 and 155 of the Criminal Code).

Following the changes made to the Criminal code of the Republic of Uzbekistan, the punishment in the form of the death penalty was replaced with life imprisonment for two crimes – premeditated murder under aggravated circumstances (art. 97, part 2) and terrorism resulting in the death of a human being or other grave consequences (art. 155, part 3). The Criminal Code provides the definition to the term ‘life imprisonment’ (art. 51). According to art. 50 of the Criminal Code, long-term imprisonment is established for a period longer than twenty years but not exceeding twenty-five years. Life imprisonment and long-term imprisonment cannot be imposed on a woman, a minor and a man over 60 years of age. The Criminal Code also provides for the possibility of pardon for a person sentenced to life after serving 25 years of the sentence.

Men who are sentenced to long-term imprisonment shall serve the sentence:

- a) if they are convicted and sentenced to imprisonment for premeditated serious crimes and most serious crimes for the first time, in a medium-security correctional facility;
- b) if they previously served a sentence of imprisonment for a premeditated crime and were reconvicted for a premeditated crime, in a high-security correctional facility;
- c) if they are extremely dangerous repeat criminals, in a maximum-security correctional facility. Maximum-security correctional facilities are also used to hold persons sentenced to life and persons who had their life sentence commuted to imprisonment for a definite period.

The procedure and conditions of the execution of the punishment in the form of life imprisonment are specified in articles 136-139



of Chapter 24 of the Penal Correctional Code of the Republic of Uzbekistan.

Therefore, Uzbekistan will continue liberalizing and humanizing the penal law in line with the generally accepted principles and rules of the modern international law and the provisions of the Constitution of the Republic of Uzbekistan proclaiming the human right to life.

Uzbekistan will also support international and regional organizations in their efforts aimed at imposing a moratorium on the use of the death penalty and will urge other countries, which practice the death penalty, to abolish this punishment.

Thank you for your attention!

**Mr. Yakov Gilinsky,**  
*J. D., Ph. D., Professor, St. Petersburg's Juridical Institute  
of the General Prosecutor's Office, Russian Federation*

## **DEATH PENALTY: TO BE OR NOT TO BE**

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

Art. 3 of the Universal Declaration of Human Rights.

*Veneratio vitae (Reverence for life).*

A. Schweitzer

The life and liberty of a human being represent the highest values. No one has the right to take a human life. A killer may be deprived of freedom but not life. The state does not have the right to kill (the death penalty).

C. Beccaria in his essay *Of Crimes and Punishments* (1764) wrote about the unacceptability of the death penalty, its inefficiency and harmfulness, "The punishment of death is pernicious to society, from the example of barbarity it affords... Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?"<sup>1</sup>

The death penalty as intentional deprivation of human life is a murder. B. Shaw said, "Assassination on the scaffold is the worst form of assassination." The same was said by the famous Russian scholar M.N. Gernet, "the death penalty is the institute of legalized homicide." The entire Russian professorhood before 1917 spoke against the death penalty.

Many years of practice show that the use of the death penalty does not only fail to prevent most serious crimes but, conversely, contributes to the commission of such crimes. K. Marx in his article dated 28.01.1853 demonstrated that in the aftermath of each execution, there had been a sharp increase in the rate of those crimes, for which criminals had been executed. In Austria, Argentina and a number of other countries

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<sup>1</sup> C. Beccaria. *Of Crimes and Punishments*. 1764.

after the abolition of the death penalty there was a drop in the rate of crimes, for which it could be imposed. In 1965, a unique experiment was conducted in the United Kingdom – a five-year moratorium was imposed on the death penalty. As a result, the rate of crimes, for which the death penalty had been administered before the moratorium, did not grow and the death penalty was abolished.

The death penalty is an irreversible punishment. It means that in the event of a judicial error, no amends can be made if the death sentence is executed. Supporters of the death penalty in Russia often refer to the case of the serial killer A. Chikatilo. However, before that dreadful case was solved, two innocent persons had been executed for murders, which in fact had been committed, as we learnt later, by Chikatilo. And judicial errors are unavoidable in any state and any judicial system.

The presence or the absence of the death penalty in the penal law of a country shows how civilized the country is. Regrettably, the United States, where the death penalty is still retained in many states, is in my opinion is not exactly a civilized country.

The proclaimed functions of the death penalty include fight against crime, prevention of serious crimes, just retribution, protection of public, etc. However, it has been long known that neither the criminal justice nor punishment nor penitentiary facilities, let alone the death penalty, are capable of delivering the proclaimed functions (except for “retribution”). The institutes of criminal justice and punishments exist only insofar as public do not know what specific measures should be taken to reduce or curb crime. Those who support retaining the death penalty in Russia refer to atrocious serial murders and widespread contract killings committed by professional killers. Serial sexual murders are committed by persons with mental disorders (so called impulse control disorder), and a share of such persons is present in every population. The only real chance to prevent such crimes is early diagnostics and medical and psychological treatment of persons with such disorder. As for contract killings, being a killer is a trade, for him killing is a job, which is performed regardless of theoretically forthcoming punishment. It is a risky job. Therefore, the key task of hired killers is to minimize the possibility of punishment, which they usually successfully do... “It is erroneous to assume that all or most of

those who commit a grave crime such as murder do it after reasonable assessment of possible consequences”.<sup>2</sup>

As for *latent, hidden* functions of the death penalty, these are revenge, means of reprisal and intimidation, a symbol of absolute power, monopoly over life and death of citizens (in war, pursuant to a sentence, or by extrajudicial execution).

Regrettably, many countries still retain the death penalty. A good thing is that an increasing number of states abolish this “punishment.” The death penalty was totally abolished by 59 states in 1995; 70 in 1998; 80 in 2003; 90 in 2007 and 98 in 2014. Effectively, 140 states abandoned the death penalty or do not practice it. Unfortunately, 58 states still retain the death penalty.<sup>3</sup>

Russia is one of the above 140 states. The death penalty is retained in the list of punishments (art. 44, 59 of the Criminal Code of the Russian Federation) but has not been used since 1998 by virtue of the moratorium and the subsequent resolutions of the Constitutional Court. The last execution was carried out in September 1996, i.e. 20 years ago. Regrettably, there are still people who urge to reinstate the death penalty one day against pedophiles and another day against terrorists. But they forget that pedophiles, although criminals, are people with certain psychiatric disorders (impulse control disorder, sexual perversions) and suicide bombers knowingly accept death. They are not afraid of death. And most importantly we need to understand once and for all that the death penalty *per se* is a crime of murder, which is inadmissible in a modern civilized state, that it does not live up to hopes of “preventing” other crimes and is irreversible in the event of a judicial error.

It remains to hope for further decrease in the number of countries practicing the death penalty including, first of all, Belarus as a European state, the United States and Japan as developed modern countries and for the removal of the death penalty from the list of punishments in Russia.

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<sup>2</sup> When the State kills... The death penalty against human rights. M.: Progress, 1989, p. 36.

<sup>3</sup> Amnesty International. Death sentences and executions. 2015, p. 8.

# MULTIDISCIPLINARY APPROACH TO THE USE OF THE DEATH PENALTY

**Mr. Robert Dunham,**  
*Executive Director, Death Penalty Information Center,  
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Good afternoon! For 20 years I represented the interests of people sentenced to death. I would like to express my gratitude to the Government of the Republic of Belarus, the British Embassy and the UNDP for organizing this event and to thank the Department of State for arranging and paying for my trip. My ancestors are from Belarus and therefore it is with pleasure that I have come to my historical homeland and act as a speaker.

The Center, of which I am in charge, provides information on the death penalty. We are not a department of the US government; however, our data are supplied to the United States Government, the governors who impose a moratorium and the judicial system, the Supreme Court. We discuss serious issues related to the death penalty. Very often people debate on the morality of the use of the death penalty, whether in individual cases its use is justified. Even if we assume that the death penalty is moral, even we assume that the death penalty is justified in certain cases, this is only the beginning of the discussion. This is the question we need to discuss and work through all the time, effectively and accurately, without bias, with no room for error and discrimination. The multidisciplinary analysis of the use of capital punishment shows that the mechanism of its use does not follow those principles and if we look at the situation in the US, we will get a picture of what issues can and are already arising in other countries.

In the US, the death penalty is not a single policy. Each state has its own set of criminal laws. I am referring to an array of 50 different jurisdictions plus the District of Columbia as well as the Military Federal Government and the Armed Forces. Observable trends are a good example of what we should focus on when we assess the quality and effectiveness of decisions on the use of the death penalty.

The method or mechanism of use of the death penalty in the US has several levels with various agencies involved in the process. Firstly, decisions are taken locally. There is a federal law, which says who is subject to the death penalty, which criteria should be met. There are certain guidelines on how the process should be held followed by a trial by jury where it is decided whether the death penalty can be applied or not.

The United States is justly criticized for the fact that the convicted whither and are devitalized while being on the death row. And you see it yourselves, if you start visiting their cells. There is evidence that 156 people who were later acquitted and who would be dead by now if the appeal process were short and not long as in the US because this is the amount of time needed for new witnesses to come out, for example, witnesses who retracted their statements because of remorse. That is why the appeal process is very important to make sure or, at least, to attempt to make sure that we do not execute innocent people. As a rule, after a trial we ask the judge whether any errors have been made during the proceedings. After the trial, you are automatically entitled to lodge an appeal to a higher court. During that period, you have a possibility to ask new questions, provide new evidence, which have not been brought to court; you can raise doubts about the performance of your lawyer or any facts mentioned by the prosecution. And only then you can go to the federal court, which in the US can take a new look at the process and check whether any errors have been made. The law says that federal courts are limited with regard to what cases they can consider. If the case was considered by a state-level court, then it cannot be considered at the federal level. And even if constitutional errors were made, the case cannot be considered in the federal court. That is why lots of people in the United States were executed despite being wrongfully sentenced to death, because of procedural problems during the trial. Our country takes pride in the fact that we have a very effective appeal process. In many cases, it does help identify very serious judicial errors. Then you have the right to appeal to the Supreme Court, which decides whether it is going to consider the case and whether an injustice occurred in a specific trial.

Who is sentenced to death in the US? When I teach young lawyers, I say that we do not do math and graphs. Nevertheless, I am going to

show you a graph<sup>1</sup>. It is related to a case I followed in Philadelphia, which shows that persons who are subjected to the death penalty are racially discriminated. Professor David Baldus conducted a study on race and the use of the death penalty. The S-curves show all degrees of gravity of an offence. It describes what kind of defendant is most likely to get a death sentence. As a rule, it is a poor African American, at least of all a white woman. If the victim is a black person, the probability of the death sentence decreases. These aspects should be taken into account when considering the issue of the death penalty because judges are also human beings and we cannot be completely unbiased. We might not even suspect that we are biased but we examine all those figures, cases from state to state, from country to country – this is the picture we can observe. There are defendants who are more likely to be sentenced to death. And the probability goes even higher if the victim is a representative of the underprivileged population.

The next graph shows those who, nevertheless, are executed in the United States. This principle applies to all states. The US history shows that half of the victims were Caucasians. It means that in the United States you are more likely to be sentenced to death if you kill a representative of the privileged population.

What happens to persons sentenced to death? At the moment, there are 2943 persons on a death row. This is an astronomic figure – three thousand! Last year the number decreased. This was the first decrease in a generation. However, this is a graph over time. As you can see, there was a rise in the number of death sentences executed in 1990s. You can see further, what happens to persons sentenced to death after the death penalty was reinstated in 1980s. Over eight thousand people were sentenced to death but the most probable outcome, given the appeal process, is that your sentence will not be executed but overturned. There are still doubts among the relatives of those who were executed regarding the legality and fairness of the conviction. There is a trend, which shows that the use of the death penalty is decreasing. This is indicative of the fact that we are now living in the last period of the use of the justice system in the form it exists today in the US. Last year, we had less than 30 executions, which is the lowest rate over the

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<sup>1</sup> In this article, the author does not provide illustrations (diagrams, graphs, pictures).

last 20 years and less than 50 death penalties since the death penalty practice was reinstated in the US in 1980s. In the last 10 years certain social and judicial trends can be observed showing that the death penalty practice is on the wane.

You can see the pictures of five people who were wrongfully sentenced to death and acquitted last year. And these are no isolated cases. More than a hundred people were wrongfully sentenced to death; these are the cases we know about. And there are dozens of other people, about whom we do not know.

This is another example of the danger of using the death penalty not only in the US but globally. Last year we had only 28 executions, although this is a high figure, higher than in any other country. But this is the lowest rate over the last 20 years and very serious issues could be observed in 75 percent of those executions. In 70 percent of cases, those people evidenced psychiatric disorders, mental disability, therefore there were doubts regarding their guilt. Such people should not be subjected to the death penalty. And, according to the US Constitution, many of them should not have been sentenced to death. This happened due to errors in the judicial system, which had not been rectified during the trial. Despite the overall efficiency of the judicial system, despite our efforts to improve its quality, we make mistakes. In this case we are dealing with an unjust sentence, a death sentence because of an error.

Nebraska lawmakers voted to abolish the death penalty creating a legal gap because a referendum is being held there. A referendum is going to be held in the state of Utah. The state of Utah is going to vote today, in 10 hours they are going to vote on the abolition of the death penalty. And Utah is quite a conservative state, it is globally known as the state that "is going to use firing squads if lethal injection drugs become unavailable." Over a span of three weeks this legislative act came out of nowhere, it went through the Senate, the House of Representatives and today we are going to vote in the state on the abolition of the death penalty. This state might join other states where the death penalty has already been abolished. This is yet another proof that the political climate in relation to the death penalty in the US is changing. People who were fervent supporters of the death penalty 20 years ago are now saying that this is a scheme we cannot fully trust. We cannot risk human





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Ms. Andrea Wiktorin, Ambassador, Head of the Delegation  
of the European Union to the Republic of Belarus,  
Mr. Valentin Rybakov, Deputy Minister of Foreign Affairs  
of the Republic of Belarus (left to right)*

Photo: Gennady Zhinkov / BelTA



*Mr. Sanaka Samarasinha, UN Resident Coordinator in Belarus*

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Mr. Karel Schwarzenberg, Head of the Foreign Affairs Committee of the Chamber of Deputies of the Czech Republic,  
Mr. Nikolai Samoseiko, Chairman of the Working Group on the death penalty in the National Assembly of the Republic of Belarus (left to right)*

Photo: Vadim Zamirovsky / TUT.BY



*Mr. Tadevush Kandrushevich, Archbishop, Metropolitan of Minsk and Mahiliou Roman Catholic Church in Belarus,  
Mr. Siarhei Lepin, Archpriest, Chairman of the Synodic Information Department of the Belarusian Orthodox Church,  
Mr. Yuri Sanko, priest, Press Secretary of the Conference of Catholic Bishops of Belarus (left to right)*

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Photo: Gennady Zhinkov / BelTA



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Photo: Vadim Zamirovsky / TUT.BY



*Mr. Andrea Rigoni, representative of the Parliamentary Assembly  
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Photo: Vadim Zamirovsky / TUT.BY

lives. And taking into account over 150 people who were acquitted, we should understand that if we truly care for human life, then we cannot trust that political strategy. The courts in 7 states abolished the death penalty over the last decade, 4 governors imposed a moratorium on its use; there are states where the death penalty has not been used for 10 years. California has recently marked the 10-year anniversary of the non-use of the death penalty. At the moment, for the first time in the modern history of the use of the death penalty in the US we are at a level when most states either have abolished the death penalty by law or have not used it for over 10 years. These changes either reflect public opinion or stem from public opinion. Whereas in 1990s 86 percent of Americans supported the death penalty, now their number is 56%.

Support of the death penalty in the US has significantly decreased almost in all demographic groups. We are not referring to the political struggle with fervent supporters and opponents on both sides of the barricades. We are referring to the fact people change their views all the time and it is young people who oppose the death penalty today. It means that this form of punishment has become obsolete and that soon we are going to abandon it completely.

When Americans were asked whether they supported or opposed the death penalty, 56 percent were in favor of it. But the question was asked incorrectly! It is a case of dogma not politics. If you ask Americans, "What should be the punishment for murder?" the answer will be different – life imprisonment without parole, i.e. people are in favor of preserving life. Even here, in Belarus, if you ask, "You are in favor of the death penalty or life imprisonment," you will hear, "I am in favor of the death penalty if there is no alternative." But if there is an alternative, you will receive the true public opinion. This is what changed the situation in the US.

One of the points we have been discussing is prevention. Does the death penalty help prevent crime. This is a serious issue in the United States of America. And the National Academy of Sciences – the leading academic authority in the US – conducted an array of studies in the last 20 years and discovered no preventive effect. They have found no scientific proof of the preventive capacity. We can consider what the factors may be and find out what is really going on. And studies were conducted in New York University – one of the most prestigious

institutions. One of the issues, which we as global community should study more closely is the neuropsychological aspect of prevention, i.e. when I am referring to neuroscience, I mean the science of the brain. And when I analyze the perceptions of people sentenced to death over a span of 20 years, I can conclude that the death penalty is not a preventive factor. The human brain develops over the years, we gradually learn to consistently assess the effects, possible consequences of the punishment by death. And the areas of the brain responsible for those processes develop approximately at the age of 30. And if we look at the age group that accounts for the highest number of murderers, we will see that these are people who are not even 20. In effect, the area of the brain responsible for weighted decisions is not yet fully developed. And as far as social factors are concerned, these are people who are placed in an environment, which has an adverse effect on the development of the brain. These factors impede the development of the frontal lobes and therefore those people are physiologically less developed. The development of those areas will allow them to make decisions.

There is another interesting fact. Each year the murder rate was higher in the states that used the death penalty and not the ones where there was no death penalty. According to the rational perception of the world, in the states with the death penalty, the murder rate should have been lower. But it is the other way round. The difference between the number of murders in the states with the death penalty and the states without it is not so unequivocal. As a matter of fact, the issue is not in the presence of absence of the death penalty but in the fact that the states that did not abolish the death penalty had always had a higher crime rate than the states that abolished the death penalty. There is no preventive effect, at least in the US experience.

So, the issue of everyone's concern is if we are good-minded human beings, we do not want to jeopardize the life of innocent people that become victims of a judicial error. In many states, there are cases when innocent people were executed. Almost none of the states avoided executing an innocent person. No state is immune from it; it occurs across the United States. There is a constant risk that innocent people will be sentenced to death and executed. We have analyzed different characteristics of those cases and factors. The reason is that witnesses

who endeavor to tell the truth make mistakes. Or, for example, police and prosecution are trying to properly solve the case and have suspicions regarding a possible offender. And those suspicions might bring about leads, of which they were unaware. Therefore, without a proper identification procedure, there is a big risk of making a mistake in almost half of the cases in addition to the intentional violation of the rules, for example, suppression of evidence. And sometimes witnesses are unreliable or, which is even worse, commit perjury. Of course, we can improve the quality of the factual evidence, improve the procedures but we cannot change the human nature...

**Mr Parvais Jabbar,**  
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## **Constitutional Developments by the Courts Restricting the Application of the Death Penalty in the Commonwealth**

### **A. INTRODUCTION**

I am grateful for the opportunity to contribute to this important conference looking at the issue of capital punishment. I intend in the short time that I have to look at what has happened in other parts of the world, in particular, the Commonwealth, and the role that the courts have played in restricting the scope and application of the death penalty – as a precursor to full abolition.

What we have seen in the Commonwealth is a process whereby capital punishment has been restricted by embedding international human rights norms within national constitutions. This has had the effect of restricting the application of the death penalty and has saved hundreds of lives through a process of harmonisation of domestic and international standards by courts.

Whilst capital punishment is in retreat globally, the death penalty remains in force in many of those countries which were formerly part of the British Empire, but now retain independent status within the Commonwealth. A number of those former colonies still retain the Judicial Committee of the Privy Council in London as their final Court of Appeal and this is certainly the case for the majority of States within the English speaking Caribbean.

The Judicial Committee of the Privy Council entertains both criminal and civil (Constitutional) appeals for prisoners who have been sentenced to death. Many, if not all, of these cases require *pro bono* assistance and The Death Penalty Project, working with local lawyers and civil society has provided legal representation to hundreds of prisoners. These cases have not only highlighted miscarriages of justice within the criminal justice process, but have also led to significant developments in the laws restricting the imposition and use of the death penalty.



These developments in the Caribbean have in turn created strong, new legal precedents which have been relied on in other parts of the world resulting in further constitutional restrictions to the use of capital punishment in those regions. The death penalty is available in the Caribbean as a punishment upon the conviction of murder. Until the turn of this century, it was available as a mandatory sentence resulting in hundreds of prisoners being sentenced to death awaiting execution. When executions did not take place, this resulted in prisoners languishing on death row awaiting execution for many years not knowing when they would be called to the gallows. Execution is by hanging and conditions of detention were often appalling.

In a number of Commonwealth countries, governments have remained largely inactive in terms of reforming outdated death penalty laws. As a result, it has been the Courts who have been increasingly prepared to interpret domestic laws in accordance with international principles of justice and human rights. Over the last 30 years, through legal representation on behalf of prisoners facing the death penalty in the Caribbean, judicial activism has not only saved many from execution, but the Courts have also produced a rich source of jurisprudence on capital punishment based around evolving human rights context on a range of issues relating to the scope of the death penalty; minimum pre-trial guarantees and procedural safeguards in capital trials; delay; the right to seek pardon or commutation; prison conditions and the method of execution.

The courts have stopped short of prohibiting the death penalty itself, as the judiciary cannot declare the death penalty to be unconstitutional. This is because legal challenges to its lawfulness *per se* are precluded as the right to life is expressly qualified in all Caribbean Constitutions by the State's entitlement to impose the death penalty. Restriction has therefore been the key focus which is in conformity with the position of the death penalty under international law. Abolition is the ultimate aspiration under international law (see Article 6(6) of the International Covenant on Civil and Political Rights (ICCPR)), but pending such time, States have an obligation to progressively restrict the imposition and application of the death penalty.

The body of persuasive non-binding jurisprudence that has been created at an international level in recent years has been increasingly

made available to national constitutional courts who have in many cases adopted international human rights norms in domestic constitutional jurisprudence. Domestic laws that do not comply with international human rights norms on the death penalty have been invalidated in many cases, and as a result, criminal justice regimes are operating in closer conformity with international human rights norms – a process described as “the harmonization of death penalty regimes across borders”<sup>1</sup>.

In recent years, there have been a number of important legal developments resulting in the restriction of the death penalty.

## **B. THE DEATH ROW PHENOMENON**

The Pratt & Morgan<sup>2</sup> case concerned the plight of two condemned men who had been held on death row for more than fourteen years. In this landmark decision, the Judicial Committee of the Privy Council, greatly influenced by the European Court of Human Rights in their seminal judgment in Soering<sup>3</sup> and other international developments including a decision of the Inter American Commission on Human Rights in the Pratt & Morgan case, held that execution after long delay is inhuman.

It is settled law and practice in the Caribbean that the death sentence will not be carried out after a delay on death row of five years from conviction. As a result of this legal development, the death sentences of hundreds of prisoners in the Caribbean, who had been languishing on death row for many years, were commuted. Earl Pratt was eventually released on parole in May 2007.

In Uganda, the Supreme Court has accepted the new wave of national and international jurisprudence and in the seminal case of Kigula & 416 others v. Attorney General<sup>4</sup>, the Court held that delay

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<sup>1</sup> Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia, and the Caribbean*, Ashgate Publishing Ltd (2014).

<sup>2</sup> Pratt & Morgan v. Attorney General for Jamaica [1994] 2 AC 1.

<sup>3</sup> Soering v. United Kingdom [1989] 11 EHRR 439.

<sup>4</sup> [2009] UGSC 6.

of more than 3 years between the confirmation of a prisoner's death sentence on appeal, and execution, constituted inhuman or degrading treatment of punishment in violation on the constitution. Hundreds of prisoners who had been languishing on death row benefited from the decision.

### C. THE MANDATORY DEATH PENALTY

To impose an automatic death sentence without a proper sentence hearing has consistently been found to violate the American Convention on Human Rights, the Declaration of the Rights and Duties of Man as well as the ICCPR as it is deemed to be both arbitrary and cruel. The domestic courts in the vast majority of Caribbean states, and more recently countries in common law Africa, have adopted a construction of their respective constitutions consistent with international human rights obligations in declaring that the laws prescribing the mandatory death penalty are unconstitutional on a number of grounds:

#### *(i) The prohibition on inhuman and degrading treatment*

There is now a broad consensus that the mandatory death penalty violates the prohibition on inhuman and degrading treatment and punishment. In Reyes v. Queen<sup>5</sup>, the Judicial Committee of the Privy Council held that the imposition of a mandatory death sentence on all those convicted of murder was “disproportionate” and “inappropriate” and thus inhuman and degrading. As Lord Bingham observed,

*“to deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core right of which section 7 exists to protect”*<sup>6</sup>

In so doing, the Courts construed the domestic law to conform closely with international human rights norms.

In recent years the highest courts in Uganda and Malawi have concluded that imposing the death penalty with no discretion to

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<sup>5</sup> [2002] 2 AC 235.

<sup>6</sup> Ibid at para. 43.

impose a lesser sentence in appropriate cases violates the constitutional prohibition of inhuman or degrading treatment or punishment. This conclusion was reached by the Constitutional Court of Uganda, in Kigula & 416 Others v. Attorney-General (2005)<sup>7</sup> later affirmed by the Supreme Court of Uganda<sup>8</sup>; the Court of Appeal of Malawi<sup>9</sup>, in Twoboy Jacob v. The Republic<sup>10</sup>.

I have recently returned from Kenya where I appeared before the Supreme Court as an expert and amicus concerning a challenge to the mandatory death penalty for murder. This case may affect over 3,000 prisoners currently under sentence of death as well as 4,000 others who were commuted to life by the president in 2009.

The same conclusion was reached in 2010, in the case of Bangladesh Legal Aid and Services Trust v. Bangladesh (Shukur Ali)<sup>11</sup> where the High Court of Bangladesh declared unconstitutional Section 6(2) of the Women and Children Repression Prevention (Special) Act which provided for the mandatory death sentence for those convicted of killing a woman or child after rape. The High Court adopted the reasoning of the Judicial Committee of the Privy Council in Reyes<sup>12</sup> and noted Bangladesh's obligations under the ICCPR in reaching its conclusion.

***(ii) The arbitrary deprivation of life***

It is now clearly and firmly established in the United Nations Human Rights Committee's jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6(1) of the ICCPR, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.

This reasoning has since been followed in many subsequent cases determined by the United Nations Human Rights Committee

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<sup>7</sup> Constitutional Petition No. 6 of 2003, Judgment of 10 June 2005.

<sup>8</sup> See Note 5 above.

<sup>9</sup> Criminal Appeal Case No. 18 of 2006, Judgment of 19 July 2007.

<sup>10</sup> Criminal Appeal No.17 of 2008, Judgment of 30 July 2010.

<sup>11</sup> [2010] 30 B.L.D. 194 (High Ct. Div. of Bangladesh Sup. Ct.).

<sup>12</sup> See Note 6 above.

(UNHRC)<sup>13</sup>, most recently in the case of Johnson v. Ghana<sup>14</sup>, the first decision of the UNHRC in a complaint brought against Ghana under the Optional protocol to the ICCPR.

There is also case law to the effect that the mandatory death penalty violates not only the right to life and/or the prohibition of inhuman or degrading treatment or punishment but also the convicted persons right to a fair trial.

#### D. SENTENCING IN CAPITAL CASES

Once the mandatory sentence has been removed, arguably one of the most important developments has been in the area of sentencing and the use of discretion by the Courts. This is further underlined by the fact that this development involves consideration pre-sentence thus providing an opportunity for the Courts to provide an alternative to a death sentence.

As a result, the judiciary in the Caribbean have developed a number of important sentencing principles. In brief, they have established that: (a) the imposition of the death penalty requires special justification, (b) it should be reserved for “the worst of the worst” cases, and, (c) only where there is no possibility of reform and social re-adaptation of the offender.

In very general terms, there have been developments towards the restriction of the death penalty, and the introduction of new safeguards for its application in three key areas since the death penalty was made discretionary.

Firstly, as to the proper test to apply, there has been growing confirmation by the judiciary that the proper test is one that preserves the death penalty for the exceptional or worst cases, and applies the life sentence as the norm (sometimes varied to a lesser period).

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<sup>13</sup> See for example: Kennedy v. Trinidad and Tobago, (Communication No. 845/1998), U.N. Doc. CCPR/C/74/D/845/1998; Campo v. The Philippines, (Communication No. 1077/2002), U.N. Doc. CCPR/C/77/D/1077/2002; Lubuto v. Zambia, (Communication No. 390/1990), U.N. Doc. CCPR/C/55/D/390/1990/Rev.1; Chisanga v. Zambia, (Communication No. 1132/2002), U.N. Doc. CCPR/C/85/D/1132/2002; Mwamba v. Zambia, (Communication No. 1520/2006), U.N. Doc. CCPR/C/98/D/1520/2006.

<sup>14</sup> Communication No. 2177/2012; U.N.Doc. CCPR/C/110/D/2177/2012.

Both the Eastern Caribbean Court of Appeal and the Privy Council have now developed very restrictive criteria for the imposition of the death penalty. Over the past 12 months, many of these principles have been accepted by the judiciary in Malawi, who have undertaken a large number of sentencing hearings, after many years of delay since the mandatory death penalty was declared unconstitutional.

The key principles in the Caribbean were first formulated and applied by Lord Carswell in the case of Regina v Trimmingham<sup>15</sup> and can be expressed in two basic principles. The first is that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, “the worst of the worst” or “the rarest of the rare”. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. Before a Court imposes a sentence of death it must be properly satisfied that these two criteria have been fulfilled.

As as to relevant considerations, psychiatric and social inquiry reports have proved particularly important. In two recent decisions, Earlin White v The Queen (Belize)<sup>16</sup> and Maxo Tido v The Queen (The Bahamas)<sup>17</sup>, the Courts have confirmed that psychiatric and/or psychological reports must be considered before a death sentence can ever be imposed.

Finally, as to procedural issues, procedural guidelines in Reyes<sup>18</sup> and the Practice Direction of Byron CJ in the case of Mitchum and Others v DPP<sup>19</sup> are particularly important. The underlying principle is that the burden should be on the prosecution to give notice both of intention to argue for the death penalty, and of the basis on which they say the death penalty should be imposed. The Court confirmed that these procedural guidelines should be regarded as established law.

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<sup>15</sup> [2009] UKPC 25.

<sup>16</sup> [2010] UKPC 22.

<sup>17</sup> [2011] UKPC 16.

<sup>18</sup> R v Reyes (Unreported) Supreme Court of Belize, 25 October 2002.

<sup>19</sup> Eastern Caribbean Court of Appeal, unreported judgment of 3 November 2003.

As a result of these legal developments, very few individuals have been sentenced to death under the new discretionary systems. The strict application of the procedural guidelines coupled with adherence to the restrictive test has led to a transformation of the situation in parts of the Caribbean – the death penalty is only being imposed in the “rarest of rare cases”. There are currently no prisoners under sentence of death in Antigua & Barbuda, Belize, Dominica, Grenada and Jamaica, with only a handful of death penalty cases in the other Caribbean countries that have moved in recent years from the mandatory to a discretionary death penalty.

In Malawi, the change has been truly remarkable since the courts started resentencing those previously subjected to a mandatory death sentence. To date, the courts had completed 111 re-sentencing hearings out of a total of 168 cases with almost all prisoners receiving a determinate sentence of imprisonment, resulting in the immediate release of 91 prisoners. No prisoners have been re-sentenced to death or to whole life sentences.

#### **E. PARDONS AND PETITIONS FOR MERCY**

In the landmark decision of Neville Lewis and Ors v. Attorney General of Jamaica<sup>20</sup>, the Privy Council ruled that fairness was a fundamental requirement of the proceedings before the Jamaican Mercy Committee, the body which ultimately decides who should be executed and who should be granted mercy or a pardon.

In Neville Lewis, the Court adopted an approach to constitutional interpretation which was consistent with Jamaica’s international human rights obligations:

*“...Jamaica ratified the American Convention on Human Rights...and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state’s obligations under any such a treaty.”*<sup>21</sup>

The Privy Council insisted that all prisoners on death row (throughout the Caribbean) should be granted access to all the material put before the Mercy Committee and be given an opportunity to make informed representations. In addition, the Court held that it would be

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<sup>20</sup> [2001] 2 AC 50.

<sup>21</sup> Ibid, at pg. 78.

unlawful to implement the death penalty without regard to the decisions of international human rights bodies such as the UNHRC and the Inter-American Commission of Human Rights. The implications for those facing execution in the Caribbean is that the right to mercy must be effective and the rules of fairness must be observed.

The decision in Neville Lewis has clearly established and applied the principle that public authorities who make such important decisions as to whether or not a person sentenced to death should be executed, must observe basic rules of fairness.

In Chauhan v Union of India<sup>22</sup> in 2014, the Supreme Court of India summarised the applicable rules governing the consideration of mercy petitions in India. The Court concluded that “*judicial interference is the command of the Constitution*” when the exercise of the mercy power is lacking in due care and diligence and has become whimsical. The Court held that “*mercy jurisprudence is a part of the evolving standards of decency, which is the hallmark of the society*” and as such the courts will readily enquire into the mercy process where there are procedural violations and/or arbitrariness in the rejection of clemency petitions by the Executive.

## F. CONCLUDING REMARKS

The judicial activism and developments witnessed in recent years in a range of Commonwealth countries have been influenced by principles of international human rights law. Domestic and international standards on the death penalty have been harmonised. The Courts have outlawed executions after delay; introduced judicial review and natural justice at the mercy stage; struck down the mandatory imposition of the death sentence for murder as unconstitutional; and introduced a new restrictive approach to the imposition of the death penalty in murder cases.

The effect of these decisions has been to limit execution to a few isolated cases and to introduce very exacting safeguards for the application of the death penalty in those Caribbean states which are intent on retaining capital punishment. This has influenced and shaped the contemporary status of the death penalty in many other retentionist countries.

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<sup>22</sup> [2014] 3 SCC 1.



In the final analysis however, abolition of the death penalty will happen as a result of political and cultural changes, rather than by the judiciary. The process of “*judicial restrictionism*” I have summarised today has saved many individuals from execution and will ultimately further the global movement towards abolition, but to achieve the goal of complete abolition of the death penalty in the Caribbean and other Commonwealth countries, the Executive and Parliament need to take the lead together with civil society and informed debate. The question in Belarus as in the Commonwealth is no longer whether the death penalty should be abolished, but rather when and how this will take place.

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Dear colleagues!

There are many political, legal, economic, practical reasons explaining the appearance and existence of the death penalty and there are also many circumstances, which gradually narrow the grounds for using it, and fully or temporarily reject its practice at the moment.

At present, humanity has studied almost everything that is related to the death penalty. There are no more forbidden topics left. Suffice it to bring up a systematic yet still relevant treatise called *Study of the Death Penalty* written as early as in 1867 by Alexander Fyodorovich Kistyakovskiy (1839–1885), a prominent criminal law expert of the second half of the 19<sup>th</sup> century, professor at Kiev University.

Some of the postulates made in that treatise, as far as I can see, can be taken into account even today.

Here is what he says about the role and place of the state in the criminal policy, “An offender, however grave his crime, is too weak and feeble compared to the state. A captured offender no longer poses a threat to the state and the state has time and self-sufficiency and it is within its power to confine itself to depriving the offender of his freedom.”

He then explains why a human being is not afraid of death in general and the death penalty in particular, “When a person is contemplating a crime, he is taken over not by the fear of retribution but hope for impunity. Although self-preservation is innate to a human being and compels him to avoid trouble, adversities and death, this sentiment by no means suppresses other impulses. If the fear of death had absolute dominance over a human being, there would be no suicides, soldiers, seamen – humankind would be blind to risky and adventurous trips to far-away countries or harmful crafts. A human being often acts as if he were afraid of nothing; he abuses his energy; he plays with his life as if he could never die. The reason for such behavior lies in the accidental nature of dangers, which predisposes to oblivion, and the irresistible force of intrinsic impulses and passions, which blind the

person and obscure a dangerous future behind the proximate present. That is why a mine worker, a powder-mill worker, a soldier, a seaman often disregard death for a moderate salary. That is why an offender, despite the threat of the death penalty, under the influence of other impulses commits a crime. The fear of the death penalty has equal effect on both an honest person and a criminal and just as it does not deter the former from risky undertakings so it does not stop the latter from committing a crime.

You must agree, it is a very keen observation, that sums it up and there is nothing to add.

Kazakhstan is no exception and has found and followed its path towards solving the issue of the role and place of the death penalty in society and the state.

On November 28, 2005, Kazakhstan ratified the International Covenant on Civil and Political Rights of December 16, 1966, and by doing so committed itself to the obligations set forth in art. 6 this Covenant regarding the approaches to the legal regulation of death penalty-related issues in the national penal, criminal procedure and correctional laws.

It is notable that the Soviet Criminal Code of the Kazakh SSR almost fully echoed the basic provisions of art. 6 of the above Covenant regarding the death penalty.

The title of art. 22 of the Criminal Code “Exceptional Measure of Punishment – Death Penalty” and provisions thereof emphasized the exceptional nature of that punishment and the possibility of its total abolition in future. As a matter of fact, the death penalty by firing squad could only be used for crimes against the state provided for by the law of the USSR *On Criminal Responsibility for Crimes Against the State*, for aggravated murder specified in those articles of the criminal laws of the USSR and the Kazakh SSR that provide for the punishment for premeditated murder and in individual cases expressly provided by the USSR law for certain other most serious crimes.

Death sentences definitely could not be imposed on persons who at the time of the crime were under eighteen years of age and women who were pregnant at the time of the crime or by the time of the sentence. Moreover, the death penalty could not be used against a woman who was pregnant at time of the execution of the sentence.

Incidentally, provisions of art. 22 of the Criminal Code of the Kazakh USSR unlike the provisions of cl. 5 of art. 6 of the Covenant gave a detailed definition to the term ‘state of pregnancy,’ which excluded the possibility of the death sentence or the use of the death sentence against such women.

The current law of Kazakhstan continues the trend towards narrowing the scope of application of the death penalty and retaining it only for strictly defined types of most serious crimes.

According to cl. 2 of art. 15 of the Constitution of the Republic of Kazakhstan of August 30, 1995, as amended by the law of the Republic of Kazakhstan of May 21, 2007, “No one shall have the right to arbitrarily deprive a person of his/her life. The death penalty shall be established by law as an exceptional punishment for crimes of terrorism, which have resulted in death casualties, and also for especially grave crimes, committed in wartime, with granting to a sentenced person a right to appeal for pardon.”

To this effect, the Constitutional Council of the Republic of Kazakhstan in Regulatory Resolution N. 10 dated January 30, 2003, *On the Official Interpretation of Clause 4 of Article 52; Clause 5 of Article 71; Clause 2 of Article 79; Clause 3 of Article 83 and Clause 2 of Article 15 of the Constitution of the Republic of Kazakhstan* gave the following clarification of cl. 2 of art. 15 of the Constitution, “When interpreting clause 2 of article 15 of the Constitution, one should proceed from its essence and the context of the provision in the structure of the Constitution... The provision on the exceptional punishment should be deemed restrictive as it applies only to most serious crimes and not crimes of other degrees of gravity. The specific elements of most serious crimes, for which the death penalty can be imposed, are defined by the criminal law. The law can impose punishments other than the death penalty for most serious crimes” (cl. 2 of the descriptive statement of reasons).

The Criminal Code of the Republic of Kazakhstan of July 16, 1997, the first Criminal Code of the independent Kazakhstan, is characterized by the principles of humanity with regard to the use of the death penalty.

More specifically, at the time of its adoption, art. 49 “Death Penalty” had the following provisions, “The death penalty, i.e. execution by

firing squad, as an exceptional measure of punishment shall be established only for most serious crimes infringing on human life and crimes committed in time of war or in combat, the high treason, crimes against peace and security of humankind and most serious war crimes (para. 1) (18 legally defined crimes).

The death penalty shall not be imposed for crimes committed by women and persons who were below eighteen years of age at the time of the crime and men who reached the age of 65 by the time of the court sentence (para. 2).

As clemency, the death penalty can be commuted to life imprisonment or imprisonment for twenty-five years with the service of the sentence in a high-security correctional facility (para. 3).

The death sentence shall be executed not earlier than one year after the entry of the sentence into legal force” (para. 4).

In other words, the provisions of art. 49 of the Criminal Code clearly showed the exceptional nature of this criminal punishment; its use for an expressly defined type of most serious crimes; strictly identified age, gender and mental characteristics of persons against whom it could be used; references to the alternative punishment (life imprisonment, imprisonment for a definite period) and the conditions of the service of the alternative punishment through resorting by the persons sentenced to death to the institute of pardon; procedure-related aspects of execution.

Soon after, art. 49 of the Criminal Code of the Republic of Kazakhstan as amended by laws of the Republic of Kazakhstan N. 529 of 10.03.2004 and N. 175-IV of 10.07.2009 with account for the requirements of cl. 1 of art. 15 of the Constitution of the Republic of Kazakhstan, was reworded as follows:

“The death penalty, i.e. execution by firing squad, as an exceptional measure of punishment shall be established for crimes of terrorism entailing the loss of human life and for most serious crimes committed in time of war subject to the right of the convicted person to petition for mercy (para. 1).

The death penalty shall not be imposed for crimes committed by women and persons who were below eighteen years of age at the time of the crime and men who reached the age of 65 by the time of the court sentence (para. 2).

Upon imposition by the President of the Republic of Kazakhstan of a moratorium on the death penalty, the execution of death sentences shall be suspended for the duration of the moratorium (para. 3).

The death sentence shall be executed not earlier than one year after the entry of the sentence into legal force and not earlier than one year after the revocation of the moratorium on the death penalty (para. 4).

As clemency, the death penalty may be commuted to a life sentence or imprisonment for twenty-five years with the service of the sentence in a high-security correctional facility. In the case of revocation of the moratorium on the death penalty, the persons sentenced to death shall have the right to intercede for mercy irrespective of whether they interceded for it before the imposition of the moratorium or not” (para. 5).

This article extended on all key aspects of the legal regulation of the death penalty as the most severe form of criminal punishment: its exceptional nature; its use for a narrow range of most serious crimes; the indication of the age, gender, mental characteristics of persons against whom it can be used; the effect of a moratorium, if imposed, on the execution of the death sentences; alternative forms of criminal punishment used to replace the death penalty as clemency; procedural issues related to the execution of the sentence including after the revocation of the moratorium; the unconditional right of the convicted to intercede for mercy in the event of the revocation of the moratorium.

For the purpose of further humanization of the state penal policy and in accordance with clause 1 of article 15 and clause 2 of article 40 of the Constitution of the Republic of Kazakhstan, on December 17, 2003, the President of the Republic of Kazakhstan adopted the Decree *On the Imposition of a Moratorium on the Death Penalty in the Republic of Kazakhstan*, wherein clause 1 expressly states, “A moratorium on the execution of the death penalty shall be imposed in the Republic of Kazakhstan until the issue of its total abolition is resolved.”

In other words, Kazakhstan chose to impose not a temporary but a termless moratorium on the execution of the death penalty, which is not yet abolished, and the execution of death sentences passed by the court is only suspended.

It also follows from the above that Kazakhstan did not follow the path of the total abolition of the death penalty because the majority of the population of our country believes that step is premature (see Comments of the state legal department of the Administration of the President of the Republic of Kazakhstan to Decree N. 1251 of the President of the Republic of Kazakhstan of December 17, 20003, *On the Imposition of a Moratorium on the Death Penalty*). That is why the Republic of Kazakhstan has not yet acceded to the Second Optional Protocol to the Covenant adopted by the UN General Assembly on December 15, 1989, aiming at the abolition of the death penalty.

There also other historical reasons, which may be viewed as enshrining the death penalty in the penal law of Kazakhstan.

If we refer to the common law practices of Kazakhs during the Kazakh Khanate period (15<sup>th</sup>–19<sup>th</sup> centuries), we will see that in that time there were no places of detention, the death penalty practically was not used; instead, penalties and fines for crimes were broadly administered.

Entry of Kazakhstan into alliance with Russia and accession to the USSR, the considerable effect of the all-union legislation on the national laws of Kazakhstan, the operation of the Criminal Code and the Criminal Procedure Code of the RSFSR in its territory, the large number of penal camps for prisoners from all over the USSR and resettlement of repressed ethnic groups from their habitual residences during Stalinism provided an objective basis for retaining the death penalty in the 1959 Criminal Code of the Kazakh SSR and the Criminal Codes of the Republic of Kazakhstan of 1997 and 2014.

On July 3, 2014, lawmakers in Kazakhstan adopted the new Criminal Code. Article 47 “Death Penalty” confirms and continues the policy of narrowing the scope of application of the death penalty and its use only for certain crimes with due account for the Constitution of the Republic of Kazakhstan.

The legally defined crimes, for which the death penalty can be imposed, are covered in articles 160, 163, 164, 168, 170, 175, 177, 178, 255, 437, 438, 439, 442, 443, 444, 455 of the Criminal Code of the Republic of Kazakhstan.

The legally defined crime, for which life imprisonment can be imposed, are covered in the same articles plus articles of the Criminal Code 99, 120, 121, 263, 286, 297, 298, 299, 408, 429 (a total of 27).

Moreover, part 2 of art. 47 of the Criminal Code, which repeats the provisions of part 2 of art. 49 of the now void Criminal Code of 1997, makes a clarification regarding related to the decreased age of men: “the death penalty shall not be imposed for crimes committed by persons below eighteen years of age, women, men at the age of 63 and over.”

Also, human considerations are ingrained in part 5 of art. 47 of the Criminal Code “As clemency, the death penalty may be commuted to a life sentence or imprisonment for a definite period (and not specifically 25 years as provided for by part 5 of art. 49 of the 1997 Criminal Code) with the service of the sentence in a high-security correctional facility.”

A number of significant guarantees for persons who committed crimes, for which, by penal law, the death penalty or life imprisonment is prescribed, is contained in the Criminal Procedure Code of the Republic of Kazakhstan of July 4, 2014 – the possibility of consideration of such cases on a petition of the defendant by one judge and ten jury members; mandatory, regardless of the will of the defendant, participation of the defense attorney in all stages of the criminal process; if the defendant is sentenced to death, the presiding judge shall explain to the defendant the right of the latter to intercede for mercy; the right to appeal against the death sentence; mandatory revision, under cassational procedure, of the death or life sentence that came into legal force (art. 52, 67, 69, 321, 424, 485, 631 of the Criminal Procedure Code).

Provisions regarding the service of the sentence by persons sentenced to death or life imprisonment in correctional facilities and the execution, if there are sufficient grounds, of the above forms of criminal punishment are contains in the Correctional Code of the Republic of Kazakhstan of July 5, 2014 – isolated and separate detention of convicted persons who, as clemency, had their death sentence commuted to imprisonment; non-transfer of persons who, as clemency, had their death sentence commuted to imprisonment to low-security correctional facilities; conditions of detention of persons who, as clemency, had their death sentence commuted to life imprisonment in high-security correctional facilities; procedure and conditions of the execution of the punishment in the form of the death penalty (art. 94, 96, 140, 158-160 of the Correctional Code).



Moreover, part 1 of art. 158 of the Correctional Code states that the person sentenced to death shall be kept in high-security settings and shall be isolated in a solitary-confinement cell.

Part 2 of art. 159 of the Correctional Code establishes the rights of the person sentenced to death: to enter into relationships under civil law and marital relationships (cl. 1); to receive qualified legal assistance and private visits from the lawyer without restrictions on the duration and number of such visits in settings, which would ensure their confidentiality (cl. 2); to receive the required medical aid (cl. 3); to receive and to send letters without limitations (cl. 4); to have monthly short conjugal visits or visits from close relatives (cl. 5); to have visits from a priest (cl. 6); to have daily walks with the duration of up to thirty minutes (cl. 7); to spend the monthly money on food products and items of daily necessity in the amount prescribed for convicted persons kept in maximum-security facilities (cl. 8).

Art. 160 of the Correctional Code governs the procedure for the execution of the death penalty by firing squad:

“The death penalty shall be executed in a nonpublic manner by firing squad. The death penalties of several persons shall be executed separately and in the absence of the others (para. 1).

The execution of the death penalty shall be attended by the prosecutor, the representative of the facility where the death penalty is executed, and the doctor (para. 2).

The death of the convicted person shall be pronounced by the doctor. A protocol on the execution of the death penalty shall be made and signed by the persons mentioned in paragraph two of this article (para. 3).

The administration of the facility that executed the punishment shall notify the sentencing court and the spouse or one of the close relatives of the convicted person about the execution of the death penalty. The spouse or the relatives shall be informed about the place of burial of the body two years after the burial (para. 4).

The administration of the facility shall send a standard-form message to the civil registry office and inform the spouse or the relatives where they can receive the certificate of death (para. 5).”

Part 1 of art. 159 of the Correctional Code contains important provisions stipulating that after the entry of the sentence into legal

force, within one year, the convicted person shall have the right to intercede for mercy according to the prescribed procedure. In the event of imposition of a moratorium on the execution of the death penalty by the President of the Republic of Kazakhstan, the convicted person, within one year, shall also have the right to intercede for mercy irrespective of whether they interceded for it before the imposition of the moratorium or not.

Therefore, pardon of citizens (either convicted persons or those who served their sentence) is the exclusive prerogative of the President of the Republic of Kazakhstan (cl. 15 of art. 44 of the Constitution of the Republic of Kazakhstan) and is implemented by commuting the death penalty to life imprisonment or imprisonment for a definite period. The President of the Republic of Kazakhstan can exercise this Constitutional right at his discretion.

The petition for mercy and the related materials are reviewed by the Pardon Committee under the President of the Republic of Kazakhstan, which serves as an advisory body to the President of the Republic of Kazakhstan (see Decree of the President of the Republic of Kazakhstan N. 140 of July 5, 2006, *On the Pardon Committee under the President of the Republic of Kazakhstan*).

The composition of the Committee is approved by the President. The Committee is chaired by the appointee of the President of the Republic of Kazakhstan. The Committee consists of the Deputy Prosecutor General who is in charge of the execution of punishments and rehabilitation of citizens and the chairperson of the Committee of the Correctional System of the Ministry of Internal Affairs of the Republic of Kazakhstan. In the absence of the chairperson, one of his deputies can participate with voting power in the work of the Committee. The Committee may also include members of the Parliament of the republic of Kazakhstan, representatives of non-governmental organizations and other persons. After reviewing the recommendations of the Committee, the President of the Republic of Kazakhstan issues decrees of pardon, which are not subject to appeal. The decrees of pardon are sent for implementation with regard to the persons sentenced to death to the Supreme Court and the General Prosecutor's Office of the Republic of Kazakhstan. The information on the implementation of the decrees of pardon issued by the President of

the Republic of Kazakhstan is provided to the Administration of the President of the Republic of Kazakhstan by the Prosecutor General of the Republic of Kazakhstan with regard to persons sentenced to death.

At the time of the imposition of the moratorium, 26 persons sentenced to death were kept in penitentiaries. After the imposition of the moratorium, between 2004 and 2006, five more persons were sentenced to death. The execution of their sentences as well as the sentences of the previously convicted persons was suspended. Since then there have not been death sentences. By the Decree of the President of the Republic of Kazakhstan of December 6, 2007, all convicted persons (31 persons), who fell within the scope of the moratorium were pardoned and had their death sentences commuted to life imprisonment. Persons sentenced to life are kept in cells in two correctional facilities located in Kostanay region of Kazakhstan. At the moment, 124 persons sentenced to life are serving their sentences in those facilities, of which 26 previously were sentenced to death (five of which died). Persons sentenced to life have not been released. Release on parole cannot be applied to persons who, as clemency, had their death sentence commuted to imprisonment (para. 8 of art. 72 of the Criminal Code); while at least 25 years should be served by a person sentenced to life as the principal form of criminal punishment.

Below is the summary of the trends in the legal regulation and practices of the death penalty in Kazakhstan.

First. The ratification by the Kazakhstan of the International Covenant on Civil and Political Rights as well as the imposition and legal implementation of a termless moratorium in Kazakhstan is the first step towards the total abolition of the death penalty.

Second. The significant decrease in the number of crimes, for which the death penalty can be imposed, is a persistent trend in the current legal practice, the Constitutional and penal law of Kazakhstan.

Third. The non-use of the death penalty in Kazakhstan after the imposition of the moratorium and, given the sufficient grounds, life imprisonment as the principal form of punishment is the characteristic feature of the modern criminal justice system.

Fourth. Humanism, interaction, systematic approaches are the key factors of the quality legal regulation of the death penalty-related

issues in the Criminal Code, the Criminal Procedure Code and the Correctional Code.

Fifth. Openness, transparency, visibility of the implementation of the provisions of art. 6 of the International Covenant on Civil and Political Rights is the constant and consistent position of Kazakhstan in its relations with the United Nations (See Resolution of the Government of the Republic of Kazakhstan N. 892 of June 12, 2009, *On the Approval of the Report on the Implementation by the Republic of Kazakhstan of the International Covenant on Civil and Political Rights*; Resolution of the Government of the Republic of Kazakhstan N. 1271 of December 3, 2014, *On the Approval of the Second Periodic Report on the Implementation by the Republic of Kazakhstan of the International Covenant on Civil and Political Rights*).

**Fr. Siarhei Lepin,**  
*Th. D., prof., chairman of Sinodal Information department,  
Belarussian Orthodox Church*

## THE ORTHODOX CHURCH AND THE DEATH PENALTY

Your Excellences, ladies and gentlemen, brothers and sisters!

The issue of the death penalty today is particularly relevant for Belarusians – Belarus, as repeatedly mentioned, is the only European state, which does not only pass death sentences but executes them too.

The Church is also involved in a certain way in the widespread public discussions of the expedience of the abolition of the death penalty. On the one hand, different civil institutes are invariably interested in the position of the Church, which is a sufficiently authoritative and reputable institute. On the other hand, priests and theologians, being citizens of their state, have the right to express their opinion and present their views on the issue. Sometimes it is an emotional opinion of a layman, sometimes it is quite a competently outlined position. The topic of justice has an inter-disciplinary status and can be the subject of the professional interest of theologians who study the field of law and ethics. In any case, the presence or the absence of the death penalty is not a dogmatic issue: the Christian doctrine and morality do not presume the existence of a single criminal code binding on all Christians around the world. Church-immanent laws pertain only to the issues of church discipline and the relevant retribution does not involve imprisonment, fines or corporal punishment. It means that only the issue of the death penalty but the issue of all other forms of punishment of a circular state are outside the church competence.

The Orthodox Church is the most numerous faith-based organization in the CIS area. Numerousness always presumes certain variability in opinions on social issues not directly related to the doctrine and cult. The topic of the death penalty is one of such issues. Over the two thousand years of existence of the Church of Christ, there have been contradictory views on this topic and different arguments have been provided even for formally similar opinions.

Naturally, I am not here today to give you a detailed analysis of the centuries-old development of the topic in all its contradictions

and variability. Firstly, it is a very specific issue and secondly circular community, as a rule, is not interested in the views of individual representatives of the Church but the view of the Church as a particular community, which can be taken into account and which can be relied on during social interactions.

I am authorized only to show the conventional denominator of all intra-church disputes, which has been identified based on today's realities, namely, the level of development of humanity in society, legal provisions, penitentiary systems, capabilities of educational and correctional facilities.

The Church expressed its attitude to the death penalty at the 2000 Bishops' Council in the document titled *The Fundamentals of the Social Concept of the Russian Orthodox Church*. Paragraph IX, part 3 is dedicated to the topic under discussion (the death penalty in particular and punishment in general).

In essence, this document states as follows (an abridged quotation):

*“A crime committed and condemned by law entails just punishment. Its meaning is to reform the offender, to safeguard society against the criminal and to suppress his unlawful actions. The Church without judging the person who contravened the law is called to take care of his soul. Therefore, it perceives punishment not as revenge but as means of internal purification of the sinner...”*

*In Christianity, good attitude towards prisoners for the sake of their reforming is deeply rooted. Lord Jesus compares doing good to prisoners to serving Him, “I was in prison and you came to me” (Mt. 25:36)... From time immemorial, the Russian Orthodox tradition has called for mercy to the fallen...*

*The revival of care for the soul of prisoners is becoming a most important area of pastoral and missionary activity in need of support and development.*

*The special form of punishment – the death penalty – was acknowledged in the Old Testament. There are no indications in the Holy Writ of the New Testament, the Lore and the historical heritage of the Orthodox Church that it should be abolished. At the same time, the Church often assumed the obligation to intercede before circular powers for mercy and mitigation of punishment on behalf of people sentenced to death.*

*Moreover, Christian ethics instilled in the minds of people an aversion to the death penalty...*

*The abolition of the death penalty provides more opportunities for pastoral work with the sinner to ensure his penance. It is also obvious that capital punishment cannot produce the appropriate educational effect, renders a judicial mistake irreversible, and causes controversial sentiments among population. Today many countries have legally abolished the death penalty and do not practice it. Keeping in mind that mercy towards the fallen is always preferable to revenge, the Church welcomes such steps from governmental authorities. At the same time, it recognizes that the issue of the death penalty or non-use of the death penalty should be addressed by society freely with account for the crime rate, the law-enforcement and judicial systems and, above all, from considerations of protecting the life of law-abiding members of society.”*

To put it in one phrase, the Orthodox Church is in favor of the abolition of the death penalty: restrain from such inefficient form of punishment allows for prevention of irrevocable mistakes and provides additional opportunities for pastoral soul-caring efforts.

The personal civil position of His Holiness Patriarch of Moscow and All Russia Kirill is not a secret,

“I am against the death penalty in modern Russian. Let us start making effective use of the judicial system. The court should be incorruptible and authoritative; the investigative authorities should work immaculately so that the presence of the death penalty in the criminal law does not become a way of reprisal against the undesirable.”

His now-deceased predecessor, His Holiness Patriarch of Moscow and All Russia Alexy II was even more categorical, “Our Church has always been in favor of preserving life in any form – either in the mother’s womb or that of a criminal.”

Here we should mention the position of the Belarusian Orthodox Church, which is under the authority of the Patriarch of Moscow. The BOC drew public attention to the issue of the death penalty back in the nineties. In 1996, ahead of the nationwide referendum where, among other issues, the death penalty was discussed, Metropolitan Philaret, now retired, urged the Belarusian people to reject the death penalty as contrary if not to the letter then at least to the spirit of the Gospel.

The current head of the Belarusian Church Metropolitan Pavel believes that the presence of the death penalty in laws is capable of serving as a deterrent for certain people and therefore its imposition may be provided for by law but he, too, spoke in favor of the moratorium and non-execution of the death sentences.

It is best to abolish the death penalty. As we can see, four hierarchs have one civil position – it is preferable to restrain from the death penalty – but each of them offers his own motivation. The Church, I repeat, welcomes public initiatives aiming at the abolition of the death penalty.

It so happens that the Church, because of its approach to addressing the issue of the death penalty, is criticized by both sides: by those who are in favor and those who are against it.

It is more or less clear why the former do not like our position: in the Old Testament, the death penalty is not only allowed but prescribed for 16 kinds of crimes; in the New Testament, there are no provisions, which would expressly prohibit the death penalty as the sentence of the court of law. Christ Himself gives His life and dies on the Cross. One of the criminals crucified alongside Jesus recognizes the justice behind the sentence imposed on him, “And we indeed justly; for we receive the due reward for our deeds.” (Lk. 23:41). Moreover, the Apostle Paul warns his contemporaries about the danger of not observing the law, “For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.” (Rom. 13:4).

Some authoritative theologians and even the saints of the past did not just tolerated the death penalty but were champions of it (St. Augustine, Ambrose of Milan, Joseph Volotsky). All Christian states of the past practiced the death penalty: it was used in the Byzantine Empire, Ancient Rus, the Great Duchy of Lithuania, the Russian Empire, all countries of Europe and even... in the Papal States. We have no reason to believe that today’s society is more Christian than in the past – to the contrary, we have grounds to believe the opposite. Supporters of the death penalty accuse the authors of *The Fundamentals of the Social Concept of the Russian Orthodox Church* of modernism (in this case, it



is a bad word) and in liberal indulgence to new ideas, following which, in their opinion, adds to the lawlessness in society.

How did the position of the Church displease opponents of the death penalty? The reason is that we only support initiatives aiming at its abolition or non-use but do not insist on and demand its abolition, the way we insist, for example, on zero tolerance to abortions. Why?

When the text of *The Fundamental of the Social Concept* that I quoted before was in preparation, members of the working group originally wanted to express a flat objection to the death penalty as a form of barbarity. However, Metropolitan Kirill (the current Patriarch) said, “Wait, the task of the Council is not to talk about our preferences but to show the position of the Church as a whole. Let us take an objective look at the church Lore, the church history. What was the position on this issue?” Indeed, in such documents, the Church cannot demand or even impose anything, which is not in the Holy Writ or the Lore.

Let me give you a few examples. The Church can and should support sports but it cannot insist on it as in matters of faith. We can and should have certain understanding of the laws of physics but we cannot substantiate them with references to church teachings. Church teachings are not the only thing that is significant and valuable to Christians.

Some try to derive the prohibition of the death penalty from the commandment “Thou shalt not kill” reasoning that you cannot take the life of a criminal because of that commandment. Such argument per se is very weak: if we perceive the commandment in the context of the entire Old Testament and the settings, in which it was given, we will see that it is not related to the death penalty (in the same way as to killing in just war or in self-defense) except those cases when the court passes a knowingly false death sentence. If we assume that the commandment “Thou shalt not kill” prohibits the courts from passing death sentences then the commandment “Thou shalt not judge” should call for abolition of courts on the whole.

Even if we do refer to the commandment “Thou shalt not kill” when justifying the prohibition of the death penalty, we do so because innocent people may be killed due to the imperfections of the earthly justice. In other words, seen in that light, the death penalty is not admissible not because criminals should not be executed but because

innocent people should not be executed. By agreeing to the death penalty, we agree to statistical errors, which, according to different estimates, can be as high as 5-15%, which is absolutely unacceptable.

However, *The Fundamentals of the Social Concept* insist that the gospel teachings have prepared the public to realize the need for the abolition of the death penalty. We should recall those places in the Holy Writ where Christ, although not condemning the death penalty on the whole, insisted on its non-execution, for example, in the story of the woman caught in adultery, who according to the Judean law should have been stoned; or in the story when the apostles wanted, referring to the precedent with Elijah the Prophet, to put to death the village of the Samaritans who refused to welcome Jesus and His disciples. Christ rebuked them, "Ye know not what manner of spirit ye are of!" Which means demanding of reprisal is the result of certain lack of knowledge, imperfection, inferiority (personal or social).

Based on our axiomatics, we cannot make the prohibition of the death penalty a logical necessity (only probable one) but we can render the death penalty unnecessary. A Christian cannot be the initiator of reprisal; he should be repulsed by the idea of killing an unarmed and "secured" person; he cannot be appeased or his loss cannot be compensated by the death of another person. A Christian cannot willingly become an executioner or wish that fate on others; the executioner's job cannot but harm one's spiritual health. In the ideal world, there wouldn't be anyone to make laws providing for the death penalty or demanding it by law; there wouldn't be anyone to pass death sentences if there were other possibilities to safeguard society; there wouldn't be anyone to become an executioner and to accept the risk of executing the innocent.

Even supporters of the death penalty say that it is an exceptional punishment imposed only in special cases when other punishments are not appropriate. However, modern technologies and capabilities of penitentiary systems (at least in time of peace) have all necessary means of safeguarding society from most dangerous convicted offenders; in light of which and with account for other risks, the death penalty becomes a cruel, dangerous and excessive punishment.

Decisions to isolate and to reform the offender are improved through technical, scientific and educational progress. Hypothetically, we can

assume that in the old days the level of public consciousness, the development of the systems of justice and peacekeeping technologies made it impossible to do without the death penalty. Just as the level of development of science and technology at one time did not allow the man to fly. But today the picture is very different. Everything is evolving: just as we find certain perceptions of our ancestors (including the saints) in the field of natural sciences outdated, so the execution of death sentences can be perceived by us as an archaism, heritage of the barbarian times, which has not yet outlived itself.

In conclusion, I would like to emphasize that in our country the politicization of the abolition of the death penalty can only harm the cause. If we politicize the assistance in the development, say, of chess in Belarus, it will bring only trouble to chess players. Let us separate the political struggle from the efforts aimed at the abolition of the death penalty because, among other reasons, faith-based organizations by law cannot engage in politics and participate in the struggle for power or against it.

Metropolitan of Minsk and Zaslavl, Patriarchal Exarch of All Belarus Pavel asked me to wish you all well and to thank you for the standing interest shown by the state, international community, and civil institutes in the position of the Orthodox Church.

## CLOSING REMARKS

**Mr. Andrei Taranda,**  
*Deputy Director for Global Policy  
and Humanitarian Cooperation Department,  
Ministry of Foreign Affairs of the Republic of Belarus*

In my opinion, an open and frank discussion took place today and it will certainly contribute to further strengthening the dialogue between all the stakeholders, those who are involved in the discussion on the issue of the death penalty. It seems to me, some interesting information was presented; different opinions and judgments, which indicate the global trend to move towards abolishing the death penalty were voiced. At the same time, various points of view on the role of public opinion and its consideration when deciding whether to introduce a moratorium were presented.

I would also like to extend my gratitude on behalf of the leadership of the Ministry of Foreign Affairs of the Republic of Belarus, which due to the exigencies of work could not attend the final part of our event – the Ministry of Foreign Affairs holds a panel with the participation of the Prime Minister of the Republic of Belarus. I thank all speakers and participants of the conference who made a significant contribution to the discussion on the issue of the death penalty.

I want to separately thank Mr. Samarasinha, the UN Resident Coordinator, his team, especially Victor Munteanu and Natallia Karkanitsa, with whom we have worked closely over the past few months in order to successfully hold this conference. I would also like to thank the translators.

Thank you.

**Mr. Sanaka Samarasinha,**  
*UN Resident Coordinator in Belarus*

There are different arguments for and against the application of death penalty but the arguments for are actually not effective. From my personal working experience in Sri Lanka, I'm convinced that there is no added value in keeping death penalty in any country. Based on what has been said today, I came to a conclusion that there is a consensus in terms of a global tendency to suspend the application of death penalty rather than keep it.

The second conclusion I came to, based on what I heard today, is that the decision on in which direction and at what pace to move forward is up to Belarus and its citizens. It is also quite obvious that one of the issues Belarus has to overcome is public opinion. It is not the only existing problem, but nevertheless we have to consider this factor while trying to help Belarus move ahead.

Finally, meanwhile Belarus and Belarusians are getting ahead and will join 160 countries in the world that abolished death penalty by either abolishing it completely or by introducing a moratorium, what can we as the international community do? I think that what we have started today and what has been going on for many years should be continued, but in quite a concrete way. It is not enough to gather as an expert community and discuss something. Experts are already convinced that death penalty needs to be abolished in general.

Our task is to go to the people, listen to the people, and work with them. I asked myself a question: how can the international community help Belarus in finding the right way – to keep or not to keep, to apply or not to apply death penalty? And I came to a number of concrete conclusions. They go in line with the principles and views of the Belarusians who spoke today, including Mr. Samoseiko. Firstly, the presentations made today should be published if the authors do not object. And when they're published you, the ones present here, should go to the people and listen to them, therefore I set the following objective to you: use social media and you will reach two goals. You will help Belarusian people understand that there exists an ongoing dialogue, and I hope they will join it. This will also help the world understand that this dialogue is possible in Belarus as well.

Secondly, I think it is quite obvious that additional research is needed to supplement what has been already done in Belarus, as Aleh Hulak, Chairman of the Belarusian Helsinki Committee has already said. But even more can be done to understand whether the so-called deterrent effect really exists. The evidential base received from other countries shows that there is no such effect.

Moreover, we need to study deeper how the public sees and understands this problem, as well as the opinion of family members both of those sentenced to death and victims of crimes. It has been over 20 years since the referendum took place, and maybe perception has changed.

Thirdly, it is also obvious from what we have heard today that there exists a need for public information and dialogue. Nikolai Samoseiko and I have already said that we have support from the Parliament, the MFA, the Presidential Administration, Ministry of Justice, Office of Prosecutor General, Ministry of Internal Affairs – everyone who is present here.

I think we need to join our efforts in organizing this public awareness-raising campaign, which shouldn't take the form of a propaganda or have some ideological background. This campaign should be based on concrete facts. We could also get Orthodox and Catholic church involved, other confessional organizations, civil society, research circles, media representatives. I want to invite all of you to participate in an awareness-raising public campaign that should go beyond Minsk, and be conducted in the regions.

Regarding sharing expert opinions, our colleague from Kazakhstan spoke about the change in behavior of prosecutors and investigators.

I also think that we can establish a focused sharing of expert opinions from lawyers to lawyers, from judges to judges, parliamentarians to parliamentarians on this specific issue. It is also very important for the international community to turn to the UN, the EU, Vatican, Orthodox Church and the President with a coherent messaging asking for temporary suspension of death penalty. I think it is also one of the possibilities. We are currently working on the action plan on human rights, we will get more information on this plan throughout the coming weeks. And this work must also be included into the national action plan before it is finalized. We need to facilitate the continuation

of this activity. Ministry of Foreign Affairs has done an incredible job conducting the Universal Periodic Review, and the Parliament led by Mr. Samoseiko also provided assistance with death penalty issues. Maybe we should pay attention not only to the dialogue on death penalty, but to human rights as well. Ministry of Foreign Affairs and the United Nations can start a project that would eventually lead to establishing a Human Rights Institute, and this will be the next step in development.

Finally, in June the implementation of the action plan within the UNDAF will start, one of the pillars of which is providing assistance to Belarus in applying international regulations. Human rights issue is the key aspect. And in June – the timeframe is still being discussed – I'd like to bring together the interested representatives of the international community, representatives of key public justice system institutions, stakeholders and representatives of civil society, and invite them to participate in the development of this program, to provide resources and facilitate in its implementation. Therefore, everyone interested in taking part in this process, please, let us know. Together with our reliable partner, the MFA, we will try to realize it. The timeframes will be specified and I think the start will be made in June.

Nikolay Samoseiko, Andrey Taranda, we are always at your service, you are all part of the UN. Please, use our assistance. Together we will be able to resolve this issue in accordance with the principles of mutual respect and dialogue.

## BIOGRAPHIES OF THE EXPERTS

**1. Mr Zaved Mahmood** is currently working at the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva. He advises on the abolition of the death penalty and other rule of law related issues, including accountability, human rights investigations and witness protection. Since 2010, he has been also working as the pen-holder for reports on death penalty issues of the UN Secretary General to the General Assembly and the Human Rights Council. On behalf of OHCHR, he participated numerous international conferences on the death penalty. Previously, he served at the UN Human Rights Office in New York, the UN Mission in Sudan, the UN Assistance Mission in Afghanistan and UNICEF Innocenti Research Centre in Florence, Italy. Mr. Mahmood studied international law, human rights and politics in Austria, Bangladesh, Germany, France and the United Kingdom.

**2. Ms Nicole Wyrsh**, Ambassador, member of the Swiss diplomatic service since 1989, has held a variety of positions and posts on nearly all continents, including Asia, Africa, Latin America and Europe. She has also worked with former GATT Director-General Arthur Dunkel on world trade issues and related developing country interests. With the “African Cotton Initiative” launched at the World Trade Organization, she contributed to highlighting the need for a fairer world trade system in the interest of all countries, rich and poor. She is currently acting as Special Envoy for Human Rights, based at the Swiss Foreign Ministry in Berne; in this capacity, she is also spearheading the Swiss engagement towards universal death penalty abolition.

**3. Mr Igor Miroshnichenko**, Expert on development of penitentiary systems in Central Asia. Director of division of National Preventive Mechanism for prevention of torture and other cruel, inhuman and degrading treatment under the Ombudsman of Kazakhstan in Almaty city and Almaty Oblast. Chief of Operative Department of the Prison Service of the Ministry of Justice of the Republic of Kazakhstan (2007–2009). Governor of maximum security prison for high security prisoners including those sentenced to life (2003–2007).



**4. Mr Grigory Vasilevich**, the retired Chairman of the Constitutional Court of the Republic of Belarus (1997-2008), Doctor of Jurisprudence, professor, Honored Jurist of the Republic of Belarus. From 2008 to 2011, Prosecutor General of the Republic of Belarus. From 1986 he worked in the Secretariat of the Supreme Council of the Republic of Belarus and from 1989 he was a Head of Legal Department of the Secretariat. He was directly involved in drafting absolute majority of laws from 1989 to 1994. From 1998 till now, he has been the Head of the Chair of Constitutional Law of the Department of Law in the Belarus State University. He wrote more than a hundred books and monographs; over one thousand research papers including the international ones.

**5. Ms Asunta Vivó Cavaller**, Secretary General for the International Commission against the Death Penalty (ICDP) since 2010. ICDP is an organization, comprised of 17 Commissioners and supported by 18 countries from all over the world. Before joining ICDP she was a human rights adviser to Government of Spain and worked in the Death Penalty (Abolition) program at Amnesty International. Ms Asunta Vivó Cavaller has a Master's degree in European Studies, has graduated in law.

**6. Mr Giancarlo Penza**, Professor, Member of Human Rights Commission for the Global Campaign Against Death Penalty following especially the event of International Congress of Ministers of Justice since 2008. He's in charge of International Meeting of Interreligious Dialogue organized since 1986 by Pope John Paul II and the following annual event organized by Community of Sant'Egidio. He has been especially involved in the relations with the Patriarch of Ethiopian Church. He's been involved in peace-keeping resolution conflict as a member of the Department of External Relations Peace Strategy of Sant'Egidio since 1992.

**7. Mr Ikrom Saipov** is currently a Senior Advisor of the Department of International Cooperation in the National Center of the Republic Uzbekistan on the Human Rights; a lawyer in the Public Opinion Center "Ijtimoiy Fikr.", a Senior Researcher of the Center of Legal Studies under Tashkent State Law University. He is currently preparing his Doctor's Dissertation. He wrote over 20 research papers in International Public Law, International Human Rights, Constitutional Law and International Law Enforcement Organizations.

**8. Mr Yakov Gilinsky**, J.D., Ph.D., Professor of the Chair of Criminal Law, the St. Petersburg's Juridical Institute of the Academy of the General Prosecutor's Office of Russian Federation; Head of the Chair of Criminal Law, the Russian State Pedagogical University, St. Petersburg; Dean of Faculty of Law, the Baltic Institute of Ecology, Policy and Law. Member of the European Society of Criminology (ESC), of the International Sociological Association (ISA), of the International Penal and Penitentiary Foundation (IPPF). The author of more than 560 articles, book chapters and books, including in English, French, German, Hungarian, Italian, Norwegian, Polish, Russian, Japanese, etc. In 2000 Mr Gilinsky was awarded the International medal «Leaders for the New Century».

**9. Mr Robert Dunham** became the Executive Director of the Death Penalty Information Center in March 2015. Mr. Dunham has more than two decades of experience as a capital litigator and teacher of death penalty law. Before becoming DPIC's Executive Director, he was one of the leading capital appellate lawyers in Pennsylvania, arguing on behalf of the Commonwealth's death-row inmates in its state and federal courts and in the United States Supreme Court. Mr. Dunham served as Director of Training of the Capital Habeas Unit of the Philadelphia federal defender's office from 1999 to 2009; and as an assistant federal defender in the Harrisburg federal defender's capital habeas unit from 2009 until March 2015. He holds a B.A. in Philosophy from the University of Pennsylvania and is a graduate of the Georgetown University Law Center, where he served as managing editor of the Georgetown Law Journal.

**10. Mr Parvais Jabbar** specializes in domestic and international human rights law as it relates to the death penalty. He has represented prisoners under sentence of death before the Judicial Committee of the Privy Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the United Nations Human Rights Committee. He has assisted local lawyers in appeals before the Supreme Courts of Uganda, Kenya and Malawi in constitutional cases concerning the death penalty. He has also been involved in international delegations looking into death penalty reform both in China and Taiwan. Parvais is a member of the UK Foreign &

Commonwealth Office Minister of State's Expert Group on the death penalty and a founder member of UK Foreign & Commonwealth Office Pro Bono Panel representing British Nationals facing the death penalty. In 2008 he was the recipient of the Pro Bono Lawyer of the Year award by the Society of Asian Lawyers. In 2012 he was awarded an MBE for his services to international human rights.

**11. Mr Omer Fisher** joined OSCE/ODIHR in 2010 as Human Rights Advisor, working mainly on freedom of peaceful assembly. He is currently Deputy Head of the OSCE/ODIHR Human Rights Department. Between 2003 and 2010 he worked at the International Secretariat of Amnesty International in London as Researcher on the Balkans and as Senior Research Policy Advisor.

**12. Mr Marat Kogamov**, Doctor of Jurisprudence, professor. From July 2012 till now he has been Director of Research Institute of Criminal Procedures Research and Counteraction of Corruption under the Kazakh Humanitarian-Juridical University; additionally from 2014 he is, in parallel, Director of the Institute of Scientific Expertise and Analysis. Currently, he is also a member of the State Commission under the President of the Republic of Kazakhstan on Human Resource Policy in the law enforcement agencies; a member of Legal Council at the "Nurotan" political party; a member of the Research and Consultancy Council at the Supreme Court; a member of the Commission on election of the members of the Coordination Council at the Human Rights Commissioner (Ombudsman); Deputy Chairman of the Public Consultation Council at the Prosecutor General of the Republic of Kazakhstan. He is a Colonel of Justice, Tax Police and Financial Police of the Republic of Kazakhstan. He is the Honored Serviceman of the Ministry of Internal Affairs of the Republic of Kazakhstan. He published over 250 papers including Comments to the Criminal and Procedural Code of the Republic of Kazakhstan 2014.

**LAW ON THE ABOLITION  
OF THE DEATH PENALTY  
OF 9 OCTOBER 1981**

**Exchange of opinions  
between Europe and Taiwan on human rights**

**Mr. Robert Badinter,**  
*ex-Minister of Justice of France*

**ABOLITION OF THE CAPITAL PUNISHMENT:  
FRENCH EXPERIENCE**

France was not a country of supporters of the abolition of the death penalty despite what its great literature made us believe. If there were a Nobel Prize for Legal Literature, we would have received it for the works of Albert Camus and Victor Hugo but that is not the case. France had a particular attachment to the guillotine. In my opinion, it was a perverse attachment but an attachment nonetheless. In the morning of the day when I, on behalf of the Government and President of France Francois Mitterrand, submitted the draft law on the abolition of the death penalty to the National Assembly, the opposition newspaper published an extensive statistical survey, in which 63% of Frenchmen were in favor of the retention of the death penalty and 32% were in favor of its abolition, i.e. two thirds against one third of the population. This was a question of courage; it did not yield votes. This was not an argument, which could ensure you the majority of votes, for a simple reason: people think of themselves as a victim and never as a murderer. Neither do they think that their sons might become murderers. This is a thought capable of driving a person completely mad. However, it is there. Victims have parents just like murderers do. Taste for killing or the ancient death instinct, which lives deep inside the human being, is difficult to overcome. Very difficult.

Once a friend of mine, a philosopher, said, "I know only two creatures, which kill to kill. Not to gain power over the tribe or win over

the most beautiful female or to get the best lump of food but to kill. And these two creatures are a man and a rat.” And he deduced, “A man is a rat to another man.”

There is a grain of truth in it. Personally, I am not convinced of the goodness of the human being; I cannot say I am a follower of Jean-Jacques Rousseau. But I do know that conquering the death instinct is true progress, which humanity can achieve with regard to itself. It is, among other, because of that ancient death instinct, a heinous crime serves as a constant consequence of the awakening of the cave dweller in the human being. Just like a rat, which I mentioned before, he is capable of going for the throat. A heinous crime awakens the death instinct. The death instinct is satisfied by capital punishment.

It is completely opposite to what we call the concept of humanity. The abolition of the death penalty has an ethical implication. And what makes it significant is the refusal to fall in the steps of the killer, to follow his blood path. This is the meaning of the abolition of the death penalty.

A man should not be a rat to another man. A human being should overcome this phase. This is one of those great, rare achievements of humanity – freedom from the basic instinct; from the impulse, which drives the person to think about death. It is by abandoning this impulse and not to promote crime, society will learn to respect what constitutes the quintessence of humanism, i.e. human rights, and first of all the right to life.

You know, it is difficult but it can be achieved. Without difficulties, there can be no progress. In my opinion, the death penalty – and I verified it during trials by jury – has the unbearable taste of judicial lottery. If dark-skinned people judge a white-skinned person, the result will be X. If dark-skinned people judge a dark-skinned person, the result will be W; and if white-skinned people judge a white-skinned person, the result will be Y.

We can rely on their opinion, which will never be the ultimate truth much as we would like it because it is not. I recently mentioned that during a period of serious terrorism-related tension in society there will undoubtedly be more sentences than before, which are not related to terrorist activity. Add here the irreversibility of the death penalty, let alone judicial errors. One needs only to look at the mistakes made

by the US justice revealed by DNA tests to see that the person found guilty is innocent. Justice is administered by human beings, and human beings are capable of errors, this is obvious.

I knew people who did not want the death of their parents or children to cause another death. They did not want it for religious reasons but they are always worthy of infinite respect.

Let me remind you that in the case of the death penalty you are dealing with an injustice, a poison. It is incredible that a country can accept the idea that if you were born rich, received better education, you are less likely to be sentenced to death than if you were born poor, in a poor family, did not receive education and live in community without a chance of success. This latent discrimination is unbearable with regard to the very concept of justice.

With the death penalty it is the same. Finally – and I must mention it – the death penalty is racism, it has a deeply racist nature. I became personally certain of it when I was getting ready for the debates on the abolition of the death penalty in the French Parliament. I reviewed all death sentences from 1900 to 1981 and left aside the death sentences imposed in wartime, by military courts and on political grounds. I analyzed common-law cases. And I came to the conclusion that the number of executed death sentences imposed on dark-skinned or indigenous population of the French empire for the same crimes was three times higher than the number of sentences imposed on white-skinned residents of the French parent state. The chances were three times higher for dark-skinned people or population of North Africa! Was it because their crimes were more serious or was it because they had dark skin or were North Africans? We will never have the answer, but this should suffice to justify the abolition of the death penalty. However, we are aware of hidden practices, which allow for easier use of the death penalty against dark-skinned persons than against a white person in white community. And they agree with idea and dare call it justice! There is no room for justice here; justice is possible only if the death penalty is abolished and so-called justice is prevented from spreading its poison! Time is required for public to realize that. Naturally, if a completely disgusting crime is committed, supporters of the death penalty are bound to come up. Even I sometimes ask myself questions knowing that people are not familiar with the actual state

of things and that today we have many years of experience in this field. But the choice was made correctly; it was chosen not to allow the human impulse to kill his own kind to awaken. It is even more frightening when this desire to kill disguises as justice.

We have no other option other than the total abolition of the death penalty, a human being should not be killed.

The first principle of society is to respect another person's life; without it, all other basic principles and all other human rights shall not hold out.

# Universal Abolition of the Death Penalty

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## A Swiss Perspective

### Swiss Motivation

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“I don’t believe that taking another human life is conducive to anyone’s inner peace” - Didier Burkhalter, Foreign Minister of Switzerland





## Swiss Motivation

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### Sharing experiences - History of abolition in Switzerland

- Cantonal criminal justice – decreasing use of the death penalty, abolition in a growing number of cantons
- Unification of the Swiss (federal) criminal code and **partial abolition (1942)**
- WWII and Switzerland's last executions (1944)
- Full abolition (1992)**
- Swiss Constitution (2000)



## Speaking with each other

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## **Key partners**

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- Judiciary and legal experts
- Political decision-makers
- Academia
- Artists, Journalists, Activists



## **Activities**

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- Political dialogue
- Experts' exchanges
- Strategic litigation
- Exchanges among Parliamentarians and decision-makers
- Investigating the public opinion
- Awareness raising and informing in an objective way



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Federal Department of Foreign Affairs FDFA

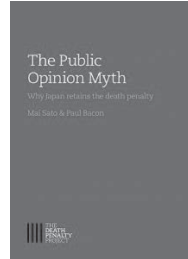
Directorate of Political Affairs DP  
Human Security Division  
Peace, Human Rights, Humanitarian Policy, Migration

## WINDOWS ON DEATH ROW

ART FROM INSIDE AND OUTSIDE THE PRISON WALLS



Cornell University  
Law School



Universal Abolition of the Death Penalty | A Swiss Perspective

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Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Federal Department of Foreign Affairs FDFA

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## Issues for discussion

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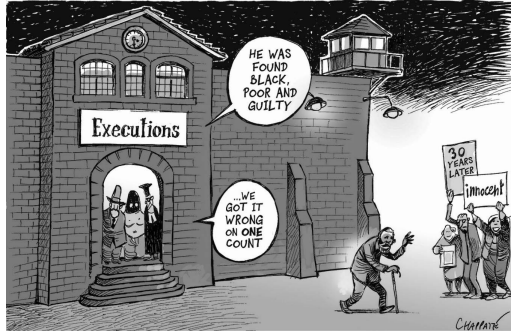
- State killings are illogical
- No proven deterrent effect
- Irreversible in case of judicial errors
- Arbitrary and/or discriminatory application
- Risks and costs only, no effective use

Universal Abolition of the Death Penalty | A Swiss Perspective

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## Let's talk

### U.S.A.: The Innocents On Death Row



© Chappatte in The International New York Times - Globe Cartoon

**Mr. Omer Fisher,**  
*Deputy Head, Human Rights Department,*

Office for Democratic Institutions and Human Rights, OSCE


The presentation gives an overview of the standing OSCE commitments on the death penalty, the current state of affairs with the death penalty in the OSCE region as well as related activities of the OSCE Office for Democratic Institutions and Human Rights. Additionally, it contains information about the basic international human rights standards related to the death penalty including standards related to the right to life, the right to a fair trial, rights of the child, non-discrimination, prohibition of torture and ill-treatment.

osce.org/odihr

# Death Penalty: Transcending the Divide

10 March 2016, Minsk  
Omer Fisher, Deputy Head  
Human Rights Department  
ODIHR – OSCE Office for Democratic Institutions and Human Rights

**OSCE** Organization for Security and  
Co-operation in Europe



## OSCE commitments

**Vienna 1989:** "(...) 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 international commitments (...)

**Copenhagen 1990:** "The participating States will exchange information (...) on the question of the abolition of the death penalty and keep that question under consideration. The participating States will make available to the public information regarding the use of the death penalty..."

The above commitments were acknowledged in the documents adopted at high-level meetings in **Moscow 1991**, **Helsinki 1992**, **Budapest 1994**.



## The status of the death penalty in the OSCE region (March 2016)

- States that abolished the death penalty (52)
- States that abolished the death penalty de facto (3)
- States that retain the death penalty (2)



## Role and activities of ODIHR

- **Assisting** in the exchange of information between the participating States and public;
- **Raising** the level of transparency in matters related to the use of the death penalty;
- **Documenting** the relevant changes;  
**through:**
  - **Tracking** the status of the use of the death penalty in the OSCE region;
  - **Publishing** annual background papers on the death penalty in the OSCE region;
  - **Discussing** the relevant issues at the Human Dimension Implementation Meetings and other fora.



## Legal provisions on the use of the death penalty

### **Right to life** (Article 6 (2) ICCPR)

- Only for the most serious crimes;
- 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;
- The right to seek pardon or commutation of the sentence;
- Can only be carried out pursuant to a final judgment rendered by a competent court.



## Legal provisions on the use of the death penalty

### **Fair trial** (Article 14 ICCPR)

- Fair and public hearing by a competent, independent and impartial tribunal;
- Presumption of innocence;
- Equality before the courts and tribunals;
- Minimum guarantees of legal defense;
- The right to have the sentence reviewed by a higher tribunal.

### **Right to communication and access to consular officers** (Article 36 [a, b, c] of Vienna Convention, 1963)

- Communication with nationals of the sending State, visiting of places of detention, clarification of rights, legal representation.



## Legal provisions on the use of the death penalty

### **Principle of non-discrimination** (Article 5(a) International Convention on the Elimination of All Forms of Racial Discrimination)

- The right to equal treatment before the tribunals and all other organs administering justice;
- Challenging of the judge if the trial participant has reasonable doubts regarding the partiality of the judges;
- Commitments of states to investigate accusations and take all possible measures to reduce the risk of discrimination especially in the cases related to the use of the death penalty;





## Legal provisions on the use of the death penalty

**The right to freedom from torture and inhuman or degrading treatment and punishment** (Article 7 ICCPR; Article 3 ECHR; Articles 1 and 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

The death penalty as cruel, inhuman and degrading punishment:

- The rule of exclusion of evidence obtained through torture;
- Carrying out of sentences of death on minors, persons with mental disorders, pregnant women, elderly persons and persons sentenced to death by an unfair verdict;
- Death penalty by stoning, execution by lethal gas and other execution methods;
- The "death row syndrome" combined with harsh conditions of imprisonment.



## Legal provisions on the use of the death penalty

**Rights of the relatives of persons sentenced to death:**

Violation of the absolute prohibition of tortures or degrading treatment and punishment (Article 7 ICCPR, Article 3 ECHR; Articles 1 and 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article)

- Failure to give prior notice about the scheduled time and place of the execution of the death sentence;
- Failure to provide information about the location of the grave;
- Secret execution of the death sentence is in violation of international standards on human rights.



## Legal provisions on the use of the death penalty

### Children of parents sentenced to death

Ensuring best interests of the child (Article 3 Convention on the Rights of the Child)

- **2013** Resolution of UN HRC on the rights of children of parents sentenced to the death penalty or executed. The Resolution recognizes the negative impact on children of the imposition and carrying out of the death penalty on their parents and recommends that states provide required protection and assistance to such children;
- **2014** Report of the UN Secretary General *Question of the death penalty*. States that still impose the death penalty should recognize the urgency of ensuring a protective environment for children of parents sentenced to death or executed; preventing their discrimination and stigma, and providing them with the services and the recovery and reintegration measures they require.



### Standards aiming at recognizing the death penalty as a punishment, which in essence violates the prohibition of torture and other cruel and inhuman treatment and punishment

- 2012 – Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – “A customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation;”
- 2014 and 2015 Resolutions of the UN HRC;
- Supplementary report of the UN Secretary General (July 2015).



## ODIHR: further actions

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- To further track the situation with the use of the death penalty in the OSCE region;
- To urge the participating States to consider the total abolition of the death penalty both in law and in practice.



**Thank you for attention!**



*Научное издание*

**СМЕРТНАЯ КАЗНЬ:  
ПРЕОДОЛЕНИЕ РАЗНОГЛАСИЙ**

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