

The death penalty, terrorism and international law



The best – the only – strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.
Sergio Vieira de Mello, former UN High Commissioner for Human Rights, 2002

Introduction

In many countries, a significant percentage of death sentences are imposed for terrorism-related offences. At the same time, new and revised anti-terrorism legislation in many states has broadened the activities considered 'acts of terrorism'. Together, these developments have heightened the risk that the death penalty is used arbitrarily, unlawfully and discriminately. Of the many concerns about the use of the death penalty in countering terrorism, this briefing focuses on two international standards: the restriction of the death penalty to crimes which constitute the 'most serious' in international law, and the right to the guarantees of due process.

'Terrorism' and international law

Since 1963 a number of United Nations (UN) 'terrorism-related' conventions and protocols¹ have been adopted which oblige states to criminalise certain acts.² However, none of them require (or even mention) the imposition of the death penalty as a punishment. Furthermore, none of them provide a definition of 'terrorism' and the concept remains undefined in international law. The ongoing lack of international agreement on the definition of terrorism means that each country uses different definitions when prosecuting 'terrorism-related offences'. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UNSR Counter-terrorism) has highlighted that some of the definitions are

vague, overly broad and 'may give rise to adverse consequences for human rights'.³ Vague and broad drafting of terrorism-related offences is particularly problematic in relation to the death penalty, which must be restricted to the 'most serious crimes', as discussed below.

The death penalty and international law

The global community is moving away from the use of the death penalty: 'In 1977, only 16 countries had abolished the death penalty for all crimes. As of December 2010 that figure stands at 96 and more than two thirds of the countries in the world have abolished the death penalty in law or practice.'⁴ At the UN General Assembly in 2012, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (UNSR Torture) concluded that there is an evolving standard whereby states and judiciaries consider the death penalty to be a violation *per se* of the prohibition of torture or other cruel, inhuman or degrading treatment, and that a customary norm prohibiting the death penalty under all circumstances is in the process of formation.⁵

The UN legal infrastructure emphatically does not require the imposition of the death penalty and the guidance issued by the United Nations Office on Drugs and Crime (UNODC) insists that counter-terrorism measures be based on human rights standards.⁶ In relation to penalties or sentences for offences created by international conventions, it has

1 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1980 Convention on the Physical Protection of Nuclear Material; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purpose of Identification; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

2 United Nations Office on Drugs and Crime, *Legislative Guide to the Universal Legal Regime Against Terrorism*, 2008, page 5 (accessed 28 August 2013 at: <http://www.unodc.org/documents/terrorism/LegislativeGuide2008.pdf>).

3 UN Commission on Human Rights, 62nd Session, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 28 December 2005, E/CN.4/2006/98, para 27.

4 Amnesty International, 'Figures on the death penalty', *Amnesty International website* (accessed 24 February 2014 at <http://amnesty.org/en/death-penalty/numbers>). On 20 December 2012 the UN General Assembly adopted its fourth resolution calling for a moratorium on executions; 111 states voted in favour, 34 abstained and 41 voted against, indicating increasing support since the first resolution in 2007 (resolution accessed 24 February 2014 at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/176).

5 UN General Assembly, 67th Session, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (SR torture interim report), 9 August 2012, A/67/279 (accessed 24 February 2014 at: <http://www.refworld.org/docid/509a69752.html>).

6 UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 9 August 2012, A/67/279, page 5 (accessed 28 March 2014 at: <http://www.refworld.org/docid/509a69752.html>).

been persuasively argued that where a treaty is silent it should be assumed that human rights law will fill the space.⁷ Furthermore, established international law prohibits countries from reintroducing the death penalty or expanding the offences which carry the death penalty: countries that have the death penalty for terrorism-related offences may well break this rule if they change their definitions of terrorism and add new offences.⁸

International tribunals

The evolving customary norm is reflected by the sentences used by international tribunals. The International Criminal Court (ICC) has prosecuted some of the most serious offences that can be committed, including genocide and crimes against humanity, but the international community did not permit these offences to receive the death penalty in any circumstances. This decision follows a line of jurisprudence in international criminal law that has seen the death penalty increasingly excluded as a punishment. The most recent international criminal tribunals, for genocide and crimes against humanity committed in Rwanda, the former Yugoslavia, Sierra Leone and Lebanon, do not include the death penalty as a potential punishment; when tribunals have sought to reach 'completion' of their duties and transfer cases to national courts (as in the former Yugoslavia and Rwanda), they have done so on the condition that the national courts do not impose the death penalty. Though these decisions to preclude the death penalty were not intended to bind national courts more generally, international criminal law has proven to be influential at a national level. For example, Rwanda has gone on to abolish the death penalty altogether.⁹

Most serious crimes and international minimum standards

'Most serious crimes'

A key protection against the use of the death penalty for counter-terrorism is found in Article 6(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR): 'In countries which have not abolished the death penalty, sentence of death may be imposed only for *the most serious crimes*' (emphasis added).

UN bodies have elaborated on the meaning of 'most serious crimes'. The Special Rapporteur on extrajudicial, summary or arbitrary executions (UNSR Executions) has been clear that the interpretation of 'most serious crimes' requires a 'systematic and normatively persuasive response', because 'a subjective approach to this (...) issue is not viable'.¹⁰ This requirement constrains the extent to which a state may unilaterally determine what it considers to be a 'most serious crime'. A review of the jurisprudence led the UNSR Executions to conclude that the death penalty must be limited to 'the most serious crimes, in cases where it can be shown that there was an intention to kill, which resulted in the loss of life'.¹¹ In 2013, the UN Secretary General confirmed the international position that the death penalty should only be used for 'the most serious' crimes of 'murder and or intentional killing'.¹²

The 'most serious crimes' restriction in practice

In the 65 states where the death penalty is a sentencing option for terrorism-related offences, what counts as 'terrorism-related' varies widely. In some of these states the death penalty is available for acts which do not involve intentional killing, or can even be imposed for nonviolent activities.¹³ This is clearly a breach of the restriction of the death

7 Patrick Gallahue et al, *The Death Penalty for Drug Offences: Global Overview 2012: Tipping the Scales for Abolition*, International Harm Reduction Association, UK (accessed 24 February 2014 at: http://www.ihra.net/files/2012/11/13/Death_penalty_2012_Tipping_the_Scales_Web.pdf).

8 UN Economic and Social Council, Substantive Session of 2010, *Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, 18 December 2009, E/2010/10, para. 54 (accessed 24 February 2014 at: http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf). See also, for example, Article 4(2) of the American Convention on Human Rights, which states that 'The application of such punishment shall not be extended to crimes to which it does not presently apply'. The Inter-American Court of Human Rights has asserted that this establishes '...a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to states which have not decided to abolish the death penalty altogether as well as to those states which have done so' (I/A Court H.R., Advisory Opinion OC-3/83 of 8 September 1983, *Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights)*, (Ser. A) No. 3 (1983), paras. 56, 59).

9 Amnesty International, 'Rwanda abolishes the death penalty', *Amnesty International website*, 2 August 2007 (accessed 24 February 2014 at: <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>).

10 UN Human Rights Council, 5th Session, *Civil and Political Rights, including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 29 January 2007, A/HRC/4/20.

11 UN Human Rights Council, 5th Session, *Civil and Political Rights, including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 29 January 2007, A/HRC/4/20.

12 UN Human Rights Council, 24th Session, *Question of the death penalty: Report of the Secretary-General (Secretary-General's report)*, 1 July 2013, A/HRC/24/18.

13 Death Penalty Worldwide database, accessed 24 February 2014 at: <http://www.deathpenaltyworldwide.org/>.

penalty to the most serious crimes. In July 2013, the UN High Commissioner for Human Rights expressed ‘serious concern’ about the use of the death penalty in counter-terrorism cases where the acts being prosecuted commonly ‘may not meet the threshold of “most serious crimes”’.¹⁴

In Vietnam, for example, the definition of ‘national security’ crimes is extremely broad. Article 79 of the Criminal Code, which carries the death penalty, ‘makes no distinction between violent acts such as terrorism, and the peaceful exercise of the rights to freedom of expression’.¹⁵ In Egypt, under Article 83(A) of the Penal Code, a wide range of violent, nonviolent and inchoate actions aimed at undermining Egypt’s independence, unity or territorial integrity can be construed as terrorism punishable by death.¹⁶

However, acts do not become a ‘most serious crime’ just because they are labelled as ‘terrorist’ or related to ‘national security’. International law has determined that in order to be classed ‘most serious crime’, the act must involve ‘intentional killing’. Importantly, the motivation for the intentional killing does not affect its seriousness. Terrorism-related killings are just as serious as killings committed for other reasons.

Where, despite the developing international norm prohibiting it, the death penalty continues to be an

available sentence, international minimum standards must be respected.¹⁷ A breach of these standards in the context of the death penalty, particularly the right to a fair trial,¹⁸ will not only be a breach of that law. It will also render an execution arbitrary and a breach of the right to life set out in Article 6(1) of the ICCPR and various regional conventions.¹⁹ While the right to life is not absolute (there are permitted circumstances in which lethal force can be used²⁰), it is non-derogable, which means that states cannot in any circumstances permit arbitrary deprivations of the right to life, and cannot reduce the protections afforded to those facing the death penalty.²¹

The right to a fair trial

The right to a fair trial is guaranteed in a number of international instruments.²² The UN Human Rights Committee has stated that the right to a fair trial underpins non-derogable rights, such as the right to life, and thus cannot be diminished where this would circumvent the protection of these non-derogable rights.²³ Where criminal justice systems are not capable of reliably respecting fair trial standards, to avoid the execution of innocent persons, the UNSR Executions has stated that states should impose a moratorium on the application of the death penalty for all offences.²⁴

14 UN Human Rights Council, 24th Session, *Question of the death penalty: Report of the Secretary-General (Secretary-General’s report)*, 1 July 2013, A/HRC/24/18.

15 International Federation for Human Rights, *The Death Penalty in the Socialist Republic of Vietnam: Special edition for the 4th World Congress against the death penalty*, International Federation for Human Rights, February 2010, page 4. See also Human Rights Committee, 75th Session, *Report of the Human Rights Committee, Volume I: Viet Nam, 2002, A/57/40 (Vol. I)*, page 68 at para. 82(7): ‘the Committee considers that the definition of certain acts such as opposition to order and national security violations, for which the death penalty may be imposed, are excessively vague and are inconsistent with article 6, paragraph 2, of the Covenant’.

16 Death Penalty Worldwide, ‘Egypt: Information correct as of: April 1, 2011’, *Death Penalty Worldwide website*, (accessed 24 February 2014 at: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Egypt>). See also Human Rights Committee, 76th Session, *Report of the Human Rights Committee, Volume I: Egypt, 2003, A/58/40 (Vol. I)*, pages 33 and 34 at para. 77(16): ‘The Committee considers that the effect of the very broad and general definition of terrorism given in Act No. 97 of 1992 is to increase the number of offences attracting the death penalty in a way that runs counter to the sense of article 6, paragraph 2, of the Covenant’.

17 International Covenant on Civil and Political Rights, Article 6 and Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by UN Economic and Social Council resolution 1984/50 of 25 May 1984.

18 UN General Assembly, 67th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Report of SR EJE)*, 9 August 2012, A/67/275, para. 25: ‘It is arbitrary to impose the death penalty where the proceedings do not adhere to the highest standards of fair trial’.

19 Report of SR EJE, para. 13: ‘For States in which the death penalty continues to be used, international law imposes stringent requirements that must be met for judicial killing not to be regarded as an arbitrary deprivation of life and therefore unlawful’. Inter-American Commission on Human Rights, ‘Norms and Principles of International Human Rights and Humanitarian Law applicable in Terrorist Situations’, *Inter-American Commission on Human Rights website*, para. 94 (accessed 24 February 2014 at: <https://www.cidh.oas.org/Terrorism/Eng/part.c.htm>): ‘the nonobservance of an individual’s right to the guarantees of the due process of law resulting in the imposition of the death penalty constitutes a violation of the right not to be “arbitrarily” deprived of one’s life, in the terms of the American Convention on Human Rights’.

20 See, for example, Article 2(2) of the European Convention, which states: *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

21 See, for example, Inter-American Commission on Human Rights, ‘Norms and Principles of International Human Rights and Humanitarian Law applicable in Terrorist Situations’, *Inter-American Commission on Human Rights website* (accessed 24 February 2014 at: <https://www.cidh.oas.org/Terrorism/Eng/part.c.htm>).

22 The right to a fair trial is guaranteed in Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and Peoples’ Rights, Article 13 of the Revised Arab Charter on Human Rights as well as in the Rome Statute and Common Article 3(1)(d) of the Geneva Conventions. Certain aspects of the right hold the status of customary international law.

23 Human Rights Committee, 72nd Session, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11 (accessed 25 February 2014 at: <http://www.refworld.org/docid/453883fd1f.html>).

24 Human Rights Council, 14th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 20 May 2010, A/HRC/14/24, para. 51(a).

Due process rights in practice

Trials in terrorism-related cases often fall well below standards of due process.²⁵ The UNSR Counter-terrorism has repeatedly noted over a number of years the fair trial shortcomings in terrorism-related cases. He has emphasised, with some force, that any authority looking to use the death penalty for terrorist crimes is obliged to ensure that full fair trial rights under Article 14 of the ICCPR are guaranteed, both during the trial and for all stages preceding and succeeding the trial.²⁶

The UNSR Counter-terrorism expressed particular concern about cases where the executive has a broad discretion in referring suspects to military or special courts and where the executive holds the ultimate power to review the decisions of those courts. He suggests that such courts are characterised by 'lower fair trial guarantees', including, in addition to the concerns expressed above, 'inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail' as well as the use of extra-legal practices to obtain evidence. The UN Working Group on Arbitrary Detention has concluded that military justice systems should be prohibited from imposing the death penalty under all circumstances.²⁷

Ensuring full adherence with fair trial rights is absolutely necessary where the potential punishment is death. However, even fair trials can produce wrong outcomes, meaning that the only sure way to prevent an innocent person being put to death is to remove the death penalty as an option for punishment.

25 United Nations Counter-Terrorism Implementation Task Force, 'Right to a Fair Trial', *United Nations Counter-Terrorism Implementation Task Force website* (accessed 25 February 2014 at: http://www.un.org/en/terrorism/ctitf/proj_righttotrial.shtml).

26 UN General Assembly, 63rd Session, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 6 August 2008, A/63/223.

27 Commission on Human Rights, 55th Session, *Report of the Working Group on Arbitrary Detention*, 18 December 1998, E/CN.4/1999/63, para. 80. See also Commission on Human Rights, 55th Session, *Report of the Working Group on Arbitrary Detention: Mission to Peru*, 11 January 1999, E/CN.4/1999/63/Add.2.

Conclusion

International law has no agreed definition of terrorism. But in both law and practice, the world is clearly moving away from using the death penalty as a sentence, for even the most serious crimes. This is most clearly seen by looking at the International Criminal Court, which prosecutes the most heinous international crimes but does not include the death penalty as an available sentence. However, where it continues to exist, the death penalty may only be imposed for the most serious offences and only when rigorous international standards are met.

UN human rights entities are united in expressing their reservations about the use of the death penalty for 'terrorist' offences, while critical analysis shows that the label of 'terrorist' is frequently misused and does not assist in the analysis of whether a crime is 'most serious'. Furthermore, those tried for 'terrorist' offences are rarely afforded the fair trial rights that the international standards demand, meaning that death sentences passed are likely to be arbitrary. In summary, the use of the death penalty breaches many of the standards that governments have committed to uphold, including in the face of terrorism, and is neither an appropriate nor legitimate response to terrorist threats and actions.

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