

## The Millennium Declaration and the Death Penalty abolition

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### *1. Introduction.*

‘Like a tragic shadow, the death penalty accompanies humanity...’ With these words, Marino Barbero began his book on the death penalty that was published in Buenos Aires, in 1985<sup>1</sup>. He gave his first lectures on the topic in 1964, at the height of the Franco Dictatorship, immediately after the execution of a communist leader; a vain attempt to reaffirm the Dictator’s authority in defiance of the world’s opinion and the Pope’s. The book would have begun in another spirit, had my teacher been alive at the time of the United Nations’ resolution in favour of a moratorium, which gained a sufficiently large majority for the first time in 2007. He would certainly have preferred to begin his book with the assertion that “the history of the death penalty is the history of its abolition”<sup>2</sup>.

Indeed, the movement driving the progressive abolition of the death penalty that developed after the Second World War has intensified over the first decade of the new Millennium.

In this speech, I wish to approach the question of thought and action directed against the death penalty within the framework of the ideas of the United Nations;

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<sup>1</sup> Barbero Santos, Marino.: *Pena de Muerte (El ocaso de un mito)*. Buenos Aires. Ed. Depalma. 1985; Also from the same author: *La pena de muerte, problema actual*, en *Anales de la Universidad de Murcia*, XXII, 2. 1963-64. p. 79 y ss.

<sup>2</sup> Henry Donnedieu de Vabres quoted in Elías Neuman’s book: *La pena de muerte en tiempos del Neoliberalismo*. Instituto Nacional de Ciencias Penales (INACIPE). México. 2004. p. 89.

above all, since the adoption of the Millennium Declaration and the presentation of its key objectives in the year 2000.

*2. From the universal Declaration of Human Rights to the 2007 UN Resolution on the moratorium on executions.*

The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, is a central part of progress towards a concept of world government that emanates from the Charter of San Francisco. Peace, international order, the sovereignty of the people and human rights are fundamental values in the international political landscape. They reflect an overwhelming reaction to the causes and underlying conditions of the Second World War. The hope that the new world order would last longer than the League of Nations established in Versailles, in 1919<sup>3</sup>, was more than fulfilled. The United Nations has prevented more than a couple of world wars since then, although it could not avoid the so-called “Cold War”, which started immediately after the Universal Declaration of Human Rights in 1948. The limitations of the Declaration may be found in that “tension” generated by the “Cold War”: in the content and the scope of some of its rights –such as those that affect the Right to Life- and above all, in the decision not to support the creation of a jurisdictional mechanism to monitor the application of human rights by the respective countries, along the lines of what would later be known as Regional Human Rights Committees and Courts. No such mechanism was created at that time. It was only established, albeit with numerous limitations, after the approval of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights<sup>4</sup>.

It is well known that the question of the abolition of the death penalty was kept off the agenda of the United Nations in its early decades. Article 3 of the Universal Declaration of Human Rights proclaimed the Right to Life and omitted all references to the exception of the death penalty, so as not to obstruct the path of those states committed

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<sup>3</sup> Macmillan, Margaret.: *Paris 1919. Seis meses que cambiaron el mundo*. Ed. Tusquets. Barcelona 2005. The original title is “*Peacemakers. The Paris Conference of 1919 and its Attempt to End War*”. London. Ed. John Murray. 2001.

<sup>4</sup> See all in the study of Roger Norman y Sara Zaidi: *Human Rights at the UN. The political history of universal justice*. United Nations Intellectual History Project Series. Indiana University Press. 2008.

to abolition. However, the proposal of the Soviet Union to include full abolition of the death penalty during peacetime did not prosper<sup>5</sup>.

The matter was raised once again in the Covenant on Civil Rights, which was intended as a mechanism to guarantee compliance with Human Rights in the signatory countries: nobody could be arbitrarily deprived of the right to life, but the Covenant acknowledged that the death sentence was an exception to this. Nevertheless, it announced some limitations on capital punishment, which subsequently resulted in a productive debate.

Even before the adoption of the Covenant, in 1957, the Third Committee agreed to undertake a study of all aspects relating to capital punishment in the world, which was entrusted to Marc Ancel, President of the Société Internationale de Défense Sociale and a member of the penal section of the French Institute of Comparative Law<sup>6</sup>. A further study by Norval Morris emerged some years later, in 1967. These were followed by the all-important reports of Roger Hood and William Schabas, who has just completed his most recent report this year. The Secretary General of the U.N. presented a global report in 1971, which was followed by a draft resolution that referred to the restriction of the offences for which the death penalty should be imposed and called for its full abolition. This resolution gave way to a stream of reports commissioned by the Secretary General and relevant resolutions that continue to this day. As early as 1973, a firm position appeared in the report from the Secretary General: “the United Nations has gradually shifted from the position of a neutral observer, concerned about, but not committed on, the issue of capital punishment, to a position favouring the eventual abolition of the death penalty”<sup>7</sup>.

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<sup>5</sup> For more details see Schabas, W.: *Las Naciones Unidas y la abolición de la pena de muerte*, Yorke, J.: *La evolución del discurso de los derechos humanos del Consejo de Europa: la renuncia al derecho del soberano a imponer la pena de muerte* y Manacorda, S.: *La abolición de la pena capital en Europa: el círculo virtuoso de la política criminal y los riesgos de ruptura*. In: *Hacia la abolición universal de la pena capital*. Schabas, W., Biglino, P. y Arroyo Zapatero, L. (Eds.). Tirant Lo Blanch. 2010. Also you can find referents in the works of professor Hood, R.: *The Death Penalty. A World-wide perspective*. 4<sup>th</sup> Edition. Oxford. 2008 y en Lerch, M.: *Menschenrechte und europäische Außenpolitik, Eine konstruktivistische Analyse*. Ed. Vs Verlag für sozialwissenschaften. 2004.

<sup>6</sup> See the reports of Marc Ancel: *The death penalty Part I: Evolution until 1960 and Part II: Evolution from 1961 to 1965*. Department of Economic and Social Affairs New York, United Nations. 1968. Also available in Spanish and French. For an European context, see Marc Ancel,,: *La peine de mort dans les pays européens*. Rapport. Conseil de l'Europe. 1962.

<sup>7</sup> In Schabas, W.: *The abolition of the death penalty in International Law*. 3<sup>rd</sup> Ed. Cambridge. 2002. The report which is referred to in the text is: UN Doc. E/5242 par. 16 February 1973.

Since then, the issue of the death penalty and its abolition have been studied and debated from the standpoint of standards in criminal law -in the Social Defence “Branch”, today the Commission of Crime Prevention- and, from the perspective of the standards in human rights -in the Human Rights Committee, now the Council on Human Rights. Relevant moments in that debate were the Economic and Social Council in 1975, the 1977 General Assembly, and, especially, the Caracas Congress on Crime Prevention and General Assembly, in 1980, where the death penalty was discussed more intensely than any other matter, turning it into a stage upon which its strongest supporters made a stand.

All the same, the debate at the Caracas Congress in 1980 led to the drafting of the “Safeguards” on the application of capital punishment for the subsequent United Nations General Assembly. They were intended to influence those states that still made use of capital punishment. As is well known, these UN “safeguards” barred the legitimate use of the death penalty for anything other than “the most serious crimes”; for offences committed by minors under 18 years old or pregnant woman; and at all times insisted on its non-retrospective nature; a fair and just trial; mandatory appeals procedures; its suspension until all other appeals procedures and possibilities of a pardon were exhausted; and, finally, it stated that, if inevitable, the execution of the prisoner should be carried out in a way that causes the minimum possible suffering. The definitive text was agreed in 1989 (esc. Res. 1989/64)<sup>8</sup>.

In the meantime and closely related to these events came the debate and the drafting of the Second Optional Protocol to the International Covenant on Civil and Political Rights, in 1989, that aimed to abolish the death penalty directly. As pointed out by William Schabas<sup>9</sup>, the vote perhaps reflected the optimistic atmosphere surrounding the demise of the former Eastern bloc countries. In the same year, the Assembly approved the Convention on the Rights of the Child, the wide-scale ratification of which, with the notable exceptions of the USA and Somalia, has universalized the

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<sup>8</sup> Regarding the “safeguards” see, especially Bernaz, Nadia.: *Le droit international et la peine de mort*. La documentation Française. Paris, 2008. Also see Amnesty International study: *Capital Error: The death penalty versus the human rights*. Editorial by *International Amnesty*. 1999 / “*Error Capital: la pena de muerte frente a los derechos humanos*”. Editorial *Amnistía Internacional*. EDAL. 1999.

<sup>9</sup> Op. cit. p. 187-192.

prohibition on the use of the death penalty to punish crimes committed by children under the age of 18.

Also in 1989, the first prominent intervention of a Human Rights NGO took place -Amnesty International- with the publication of a widely read study entitled “When the State Kills”<sup>10</sup>. Mass-membership and grass-roots NGOs working in the field of human rights, whose strength and influence would not cease to grow, made their appearance in the sphere of international Human Rights policy, where the protagonists had formerly been governments and NGOs with links to the Crime Committee of the United Nations.

The abolitionist agenda continued to advance, but so did collaboration between the anti-abolitionist states. Thus, a group of Islamic states that called for the retention of capital punishment as a direct consequence of their religious laws threw its weight behind the imposing presence of the United States and China.

In 1944, the Italian Government had launched an initiative at the General Assembly in support of a universal moratorium which was soon accompanied by an international organization: *Hands Off Cain*. Three representatives of retentionism stood out during the debates: Pakistan, which headed the refusal to debate the question; Sudan, which described the death penalty as “a divine right according to some religions, in particular Islam”; and Singapore which led the anti-abolitionist coalition. The arguments they employed deserve some reflection: they affirmed “the sovereign right of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively,” and declared that there was no international consensus that considered the death penalty to be contrary to international law<sup>11</sup>.

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<sup>10</sup> Amnesty Internacional: *Cuando es el Estado el que mata... Los derechos humanos frente a la pena de muerte*. Editorial Amnistía Internacional. Ed. Amnistía Internacional. Madrid. 1989 / English edition also available: “When the state kills... The death penalty vs. human rights” Editorial and published by Amnesty International – 01.Jan.1989

<sup>11</sup> Regarding Sharia law, you can consult: Bassiouni, CH.: “*Death As A Penalty In The SHARI'A*” in “*Towards universal abolition of the death penalty*” / Spanish edition : “*La muerte como castigo en la Shari'a*”, En: *Hacia la abolición universal de la pena capital*”. Schabas, W., Biglino, P. y Arroyo Zapatero, L. (Eds.). Tirant Lo Blanch. 2010. p. 315-317. Also see Schabas, W.: *Islam and the Death Penalty*, William & Mary Bill of Rights Journal. N° 9. 2000. p. 223-236.

While this matter was under discussion at the General Assembly, a contentious debate took place in the Security Council over the exclusion of the death penalty from the list of penalties in the Statutes for the International Criminal Tribunal for Rwanda, which had not taken place before the approval of the Statute of the International Criminal Court for the Ex-Yugoslavia, a year earlier, in 1993. Finally, all the statutes of the ad-hoc Tribunals, as well as the International Criminal Court were adopted with the exclusion of the death penalty, despite these Jurisdictions having been conceived for the most serious of crimes.

In 1996, renewed efforts by the abolitionists led to the adoption of favourable resolutions by the Commission on Crime Prevention and Criminal Justice, and in the following year by the Commission on Human Rights, which affirmed that it was “convinced that abolition of the death penalty contributes to the enhancement of human dignity and to progressive development of human rights”. In 1988, the Commission proposed a resolution for a general moratorium. In response, 51 states formed a group of “hardline retentionists”, which expressed their rejection in the same sense as the earlier position held by Singapore concerning the absence of any international consensus on abolition due to differences between religions and judicial systems. The standoff took place at the 1999 General Assembly, at which the European Union presented a resolution to apply the Safeguards and also urged ratification of the Second Optional Protocol on the abolition of the death penalty, the progressive restriction of the death sentence and the establishment of a moratorium with a view to complete abolition. But the proposal of the European Union was defeated by the “hardline retentionist” states led this time by Egypt and Singapore, which reiterated the inexistence of any universal consensus and expressed the view that the death penalty is a matter for criminal justice and is not a human rights issue.

But after this setback, everything started to come together. In the first place, the new specialist NGOs brought old and new actors together in the *World Coalition* and in the *Ensemble*. They have organized a World Congress every four years since 2001; a truly international movement of social actors whose last gathering took place in Geneva, in April 2010, and was inaugurated by the six-monthly President of the European Union, Sr. Rodríguez Zapatero. There has been intense activity among regional and local NGOs in the intervals between the 2001 Congress in Strasbourg, the 2004

Congress in Montreal, the Paris Congress in 2007 and the congress held in Geneva last April. One of their key supporters is the European Union, which since 1994 has earmarked part of its Human Rights funding programme to the struggle for abolition<sup>12</sup>.

In fact, the “European initiative for Democracy and Human Rights” is an outstanding example of a busy pluridisciplinary instrument, holding meetings and making statements on the broad dialogue between China and the European Union; the situation in the Great Lakes region of Africa.

The activities carried out in the civil society of Arab countries are of great importance, and have resulted in the Declarations of Alexandria (2008) and Algiers (2009) and Madrid (2009) in which civil society from those states urged their Governments to comply with Resolution 62/149 of the United Nations General Assembly.

New actors have also emerged in force in the international institutional sphere. The actions of the *Special rapporteur for extrajudicial executions*, should be highlighted, a figure that since its creation in 1982, has to some extent dealt with the question of the death penalty, and the *High Commissioner for Human Rights*, a position that ever since it was occupied by Mary Robinson, has resolutely opposed capital punishment, criticized executions and called for a moratorium and the abolition of the death sentence.

This new climate encouraged an initiative by 85 countries, which delivered a statement to the United Nations in December 2006, declaring that “we firmly believe that the abolition of the death penalty contributes to the enhancement of human dignity, and the progressive development of human rights.” The final goal is its abolition and its restriction in those countries that maintain it, with the intermediate objective of a universal moratorium.

For the first time, the ensuing resolution was successful at the General Assembly which approved the Resolution on the moratorium on 18 December, 2007<sup>13</sup>, by 104

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<sup>12</sup> Sculier, C.: *Towards a universal moratorium on the use of death penalty. Strategies, arguments and perspectives*. Ed. World Coalition Against the Death Penalty. 2010. Version online <http://www.worldcoalition.org/modules/wfdownloads/singlefile.php?cid=56&lid=295>

votes in favour, 54 against and 29 abstentions. On 20 November, 2008<sup>14</sup>, it was ratified again by 104 votes in favour, 48 against and 31 abstentions. The final report from the Secretary General, presented in Vienna last May, was the work of William Schabas<sup>15</sup>. Two years after the General Assembly, on 21 December 2010, adopted the resolution on the moratorium on the use of the death penalty, by a recorded vote of 109 in favour to 41 against, with 35 abstentions. In other words, over three years, the number of States supporting the resolution has increased by five, and the number opposing it has decreased by 13, many of which now abstain.

Having come this far, it is evident that the Resolution on the Moratorium does not represent the *end of the history* of abolition; not least because 48 countries voted against it and 31 abstained, a majority of which still practice the death sentence. For those who consider that abolition is a matter of human dignity and human rights, the right path will be to continue the debate year after year, in order to reduce the group of states that abstain and, above all, the group of states that put up greater resistance by applying capital punishment and keeping it on their statute books. But it will also be necessary to approach the problem of the death sentence from other angles. This is precisely what the Spanish President Rodríguez Zapatero proposed on December 2009 in Madrid at the inauguration of the Congress that launched the Academic Network against Capital Punishment<sup>16</sup>.

Allow me to develop this argument here: it is a question of observing the development of what has been called the *power of ideas in the intellectual history of the United Nations*. We do not have to refer back to Winston Churchill to confront those who attach little or no value to the United Nations and who dismiss it as a *Talking Shop*, suggesting that its work is dissipated in fruitless discussions<sup>17</sup>. Churchill argued that

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<sup>13</sup> UN Doc.: A/RES/62/149. *Moratorium on the use of the death penalty* - Press release: 18. Dec.2007. Resolution adopted by the General Assembly [on the report of the Third Committee (A/62/439/Add.2)] on the 26 February 2008 - Votes: favorable 104 / against 54 / abstentions - 29

<sup>14</sup> UN Doc.: GA/SHC/3939. General Assembly reaffirmed the resolution on The Resolution on Death Penalty Moratorium – Adopted on 20th of November 2008 - Ratified by 105 votes in favour, 48 against and 31 abstentions.

<sup>15</sup> UN Doc.: E/2010/10. Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. Report of the Secretary-General. 18. Dec. 2009. By comparison, the 2008 resolution was adopted by 106 in favour, and 46 against, with 34 abstentions. The final vote on the resolution occurred on Dec. 21, 2010: 109 countries voted for the resolution (+3 votes from prior resolution), 41 voted against (-5 votes), 35 abstained and 7 were absent.

<sup>16</sup> See the website of the International Academic Network against Death Penalty. (REPECAP): *World Coalition Against the Death Penalty, Newsletter, January 2011*. For the last NGOs' reports see <https://doc.es.amnesty.org>

<sup>17</sup> Jolly, J., Emmerij, L. and Thomas Weiss, G.: *The Power of UN Ideas: Lessons from the First 60 Years*. A Summary of the Books and Findings from the United Nations Intellectual History Project New York, May 2005. To read more online: <http://www.unhistory.org/PowerofUNTOC.pdf>.

“jaw-jaw is better than war-war”. More importantly, I would invite you to reflect on the fundamental role that the UN has played in the development of ideas and concepts. At the outset, they were considered incomplete or the property of certain economic and political orders. Today thanks to the nothing less than the United Nations, they form part of our modern definition of the human being in the Universal Community (S.Tharoor). Among them, the idea of the self-determination of peoples stands out; although sponsored by the League of Nations in the Treaty of Versailles, it was never applied beyond what might be called the civilized world, until the United Nations backed calls for large-scale decolonization in the second half of the 20th Century.

Up until some years ago, Human Rights might have appeared to be a privileged intellectual and political asset in developed countries that espoused capitalism; in short, a creation of cultural imperialism. Today, however, when human rights are still trodden underfoot in many parts of the world, it should be made clear that thanks to the ideas and the human rights monitoring work of the United Nations, the UN has become the most effective defender of millions of human beings against abuses of power.

These same ideas of peace, the prevention of war through negotiation, and of peace missions and legitimate intervention by the United Nations have not always been able to prevent conflicts in innumerable parts of the world, but they have prevented wars that might otherwise have rivalled the two World Wars that caused such immense suffering before its creation.

The idea of an end to impunity<sup>18</sup> and punishment of the most important abuses of power have been consecrated in the creation of ad hoc International Tribunals and the International Criminal Court; and by the strength of the principle of Universal Justice. After remaining on ice after Nuremberg on account of the Cold War, this principle has once again become an effective force, especially to justify the International Convention against Torture, and other similar agreements. The United Nations has also been the author of novel economic and developmental ideas, to the point of converting this duality into the *Human Development Programme*; which today lends special attention to

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<sup>18</sup> Regarding the idea of impunity see the study of Roth-Arriaza, N.: *The Pinochet effect: transnational justice in the age of human rights*. University of Pennsylvania Press. 2005. Above all the work of Bassiouni, CH.: *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*. Brussels. Ed. Intersentia, 2010.

the goal of poverty reduction. Nowadays, this same idea of human development also encompasses Human Rights and conflict resolution. Alternative approaches to the division between the fundamental Rights in the two Covenants –on the one hand, Political Rights, and on the other, Social Rights - are today being weighed up behind the scenes, to move towards a wider concept of human Security.

Even so, I would call your attention to the pragmatic ideas that we know as the Millennium objectives launched by the General Assembly and Secretary General Kofi Annan, in the year 2000 through the Millennium Declaration. Far from being rhetorical or purely programmatic and, despite the delays in their implementation, due in large measure to the 9/11 security crisis and the 2007 economic downturn, I believe that the ideas of the Millennium Declaration will be on the daily agenda in the international life and the actions of regional and bilateral organizations. The power of these ideas will have transformed the world by 2015, and will certainly transform the awareness of its inhabitants with regard to what we can expect from our governments and from ourselves. Furthermore, in this era of globalization, transport, information, and the organizational capacity to provide more opportunities than ever before are all available to civil society in our nation states, to overcome the “forces of evil” that everybody has to combat in each of our own countries and our legal orders.

The Millennium Declaration is structured around eight major sections:

1. Values and principles
2. Peace, security and disarmament
3. Development and poverty eradication
4. Protecting our common environment
5. Human rights, democracy and good governance
6. Protecting the vulnerable
7. Meeting the special needs of Africa
8. Strengthening the United Nations

After reading them carefully and going over the events of the last decade, I add my voice to those who say that the Millennium Declaration and the development goals

that arise from it might well constitute the third great United Nations document, after the Charter of San Francisco and the Universal Declaration of Human Rights.

The Millennium Development Goals are set out in a precise and appropriate way for quantitative measurement from their starting point and throughout the programme. They are as follows:

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality
5. Improve maternal health
6. Combat HIV/AIDS, malaria and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development

The perspicacity of these objectives is manifest. The human spirit rebels against a reality with so much economic violence inflicted on human beings, millions of whom are subjected to hunger by political and economic structures, which is quite unjustifiable in view of the wealth of the modern world; millions suffer from high mortality rates due to illnesses that human development and modern health systems have completely eradicated in a large part of the world, but which should be universally eradicated.

The human spirit also rebels against the brutal, and in other instances, refined discrimination against human beings because of the colour of their skin, or, what is more surprising, against women, whatever the colour of their skin. Male discrimination against females, on a par with hunger and illness, is gratuitous and avoidable: these are the most relevant plagues for humanity at the start of the Millennium. It is not a question, as the Declaration fully explains, of an age of social rights set against a past age of political rights. It is more a matter of surmounting the division that could not be resolved at the time of the 1966 Conventions, and that took three decades before it entered into force.

President Rodríguez Zapatero came to the meeting of academics, on 29 December in Madrid, to explain and to propose that those who are concerned and take action to abolish the death sentence for traditional reasons should make the effort to situate our goals in the framework of the new discourse and the discussion around the Millennium Development Goals. The fight against hunger is not an alternative to the fight for the Right to Life or for human dignity, but on the contrary, the fight against hunger ensures the groundwork, the basic necessities for human dignity and for human rights. It is from this standpoint that we have to reconstruct the content of Human Rights in the contemporary world, and of the same Right to Life, upon which the rejection of capital punishment is founded.

There is no need to revise the Millennium Declaration in order to reconstruct and complement the abolitionist stance. It is all a Declaration against violence, against the intrinsic violence of death by hunger, whether by action or omission; the violence of discrimination against women, which as we know, all too easily turns into criminal violence against women in the relationship between a couple; and the violence of leaving millions of people to die of an illness (i.e. malaria), because of a combination of avarice on the part of pharmaceutical companies and the countries that have a stake in them.

Two important calls to stop violence are made in the second section of the Declaration. Firstly, the call to promote peace, to end conflicts and to intervene in legitimate defence, preventing “let them die” and “let them kill” situations; two concepts that can hardly leave anyone feeling morally indifferent. And secondly, the call to take action against criminal violence, identified above all with international terrorism, arms of mass destruction, antipersonnel mines, cluster bombs, and the illegal traffic in small and light arms, etc.

There is no doubt that a large part of the arguments upheld by abolitionists may be integrated in that context of anti-violence, as for the majority of us it represents the emotion that rejects the death penalty, whether this means *killing in cold blood* or *cold-blooded killing*. Only the heart of the executioner feels no empathy when contemplating the act of capital punishment. It is a feeling that rejects the violence of the death penalty, despite its legality in any one country, despite it being considered legitimate from a

religious standpoint. It is that feeling which should become the objective of consensus between the countries of the world in the construction of the values and principles of the renewed world order. This is the proposal that I submit to you for your consideration. I do so in the hope that the Academic Network may concentrate its efforts with others to construct a value system deserving of the Millennium Declaration. A value system that will accompany progress in the field of human rights and that will enshrine the most important lesson the State may teach those who practice violence: the renouncement of capital punishment because we repudiate killing in cold-blood.

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