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H.E. Mr. Narendra Modi
Prime Minister of the Republic of India
152 South Block
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India

Dear Prime Minister Modi:

I write on behalf of the New York City Bar Association to convey our strong support for the recommendations contained in the August 2015 report of the Law Commission of India regarding the abolition of the death penalty.¹ As the Law Commission Report notes, international human rights law principles and the practices of a majority of nations recognize that capital punishment violates the inherent right to life of individuals, as well as anti-discrimination principles and the ban on cruel, inhuman and degrading treatment.

The Association is a 145-year-old independent nongovernmental organization of more than 24,000 members in New York City, throughout the United States, and in over fifty other countries. Our membership includes judges, prosecutors, government officials, defense lawyers, and scholars of international and domestic law. The Association has a long history of engagement in legal issues to promote human and civil rights, the rule of law, and the due process rights of criminal defendants and detainees, particularly through its Committee on International Human Rights, which investigates and reports on human rights concerns around the world, including within the United States.

For decades, principally through the work of its Committee on Capital Punishment, the Association has advocated to end capital punishment in the United States at both the state and federal levels. Indeed, the Association's research and advocacy activities have addressed many of the same substantive and procedural deficiencies with capital punishment that the Law Commission itself has raised in its report. For example, our work has highlighted, among other concerns, the procedural and scientific flaws that can lead to wrongful convictions in capital cases and the ways in which application of the death penalty can violate non-U.S. nationals' right to consular access. The Association also was part of a successful campaign to establish a

¹ Law Commission of India, Report No. 262, The Death Penalty 39 (Aug. 2015) [hereinafter "Law Commission Report"], <http://lawcommissionofindia.nic.in/reports/Report262.pdf>.

moratorium on the death penalty by the State of New York, and more recently, we have urged federal prosecutors to limit the circumstances in which they seek the death penalty.

International Law and Treaties Support Abolition of the Death Penalty

As the Law Commission recognized, capital punishment violates fundamental and well-established human rights norms that are a part of customary international law. The Universal Declaration of Human Rights enshrines the individual right to life, while Article 6 of the International Covenant on Civil and Political Rights, which India has ratified, prohibits the arbitrary deprivation of life.² In recognition and furtherance of the right to life, both the United Nations and regional human rights bodies have promulgated protocols that abolish the death penalty within signatory states.³ The Constitution of India accords respect to these tenets of international law by containing, as a Directive Principle of State Policy, a provision directing the government to “endeavor to foster respect for international law and treaty principles in the dealings of organized people with one another.”⁴ In addition, the Supreme Court of India has provided that the Constitution and statutes should be interpreted in light of India’s obligations under international law.⁵

The global trend towards abolition has increased in recent years. While thirty-five years ago only sixteen countries prohibited capital punishment, by the end of 2014, 140 countries were abolitionist in law or practice.⁶ In addition to abolition by individual nations, no international criminal tribunal since Nuremberg has adopted the death penalty as punishment for the serious crimes of genocide, war crimes, and crimes against humanity.

The Death Penalty in India

The Law Commission Report raises serious concerns that the death penalty is being imposed upon wrongfully accused individuals in India. In several cases, the Supreme Court of India has reversed the findings of multiple lower courts and acquitted individuals who had been sentenced to death.⁷ Poor investigative techniques by police, forced confessions, torture of suspects while in custody, and the lack of effective legal representation all heighten the likelihood that innocent people may be executed.⁸

² Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, U.N. Doc. A/810, art. 3 (Dec. 10, 1948) [hereinafter “UDHR”] (“Everyone has the right to life, liberty and security of person.”); Int’l Covenant on Civil and Pol. Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by India Apr. 10, 1979), art. 6.1 [hereinafter “ICCPR”] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); *see also* American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 144, art. 4.

³ Second Optional Protocol to the Int’l Covenant on Civil and Pol. Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, G.A. Res. 44/128 (entered into force July 11, 1991); *see also* Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, OAS Treaty Series No. 73, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 80 (1992) (prohibiting application of the death penalty in State Parties to the protocol); Protocol 13 to the European Convention on Human Rights (prohibiting the death penalty *in all circumstances* among signatory states).

⁴ India Const. arts. 51(c), 253.

⁵ *See, e.g.*, People’s Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 568.

⁶ Law Commission Report, *supra* note 1, at 39.

⁷ *Id.* at 156-161.

⁸ *Id.* at 149-150.

India's broad application of the death penalty may also violate Article 6(2) of the ICCPR, which provides that the death penalty only be imposed for the "most serious crimes." The U.N. Human Rights Committee has stated that this provision must be "read restrictively to mean that the death penalty should be a quite exceptional measure."⁹ The U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (the "UN Safeguards"), adopted by the UN Economic and Social Council in 1984, defines "most serious crimes" as "intentional crimes with lethal or other extremely grave consequences."¹⁰ U.N. General Assembly Resolution 62/149 calls upon states "To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed." The Indian Penal Code, however, provides for the death penalty in a variety of non-homicide cases. Capital offenses include kidnapping for ransom, rape, and drug trafficking.¹¹

Several aspects of the manner in which the death penalty is carried out in India may also implicate international prohibitions against cruel and inhuman treatment. Article 5 of the UDHR, Article 7 of the ICCPR,¹² the U.N. Convention Against Torture, and other regional human rights instruments prohibit the infliction of torture or cruel, inhuman and degrading treatment or punishment.¹³ "Deliberate and premeditated destruction of a human being by the State authorities" causing "physical pain" and "intense psychological suffering" as a result of the "foreknowledge of the death," may constitute inhuman and degrading punishment.¹⁴ In addition, the prolonged incarceration associated with death penalty cases, such as the years-long delay noted by the Law Commission Report during the trial and appeals process, has been held by the Judicial Committee of the Privy Council and the European Court of Human Rights to constitute cruel, inhuman, or degrading punishment.¹⁵ The Report also highlights the rampant use of solitary confinement for death row prisoners, even though the Supreme Court of India has found the practice to be unconstitutional. These aspects of capital punishment in India violate international mandates that, "[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."¹⁶

Moreover, the Law Commission Report highlights discrimination against particular groups in India as a result of biases that persist in the attitudes of police and in the criminal

⁹ Human Rights Committee, General Comment 6, Art. 6 (16th Session, 1982), at ¶ 7; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

¹⁰ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984) [hereinafter "UN Safeguards"].

¹¹ Law Commission Report, *supra* note 1, at 31-32.

¹² UDHR art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); ICCPR art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.")

¹³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/708, 1465 U.N.T.S. 85, arts. 1, 2, 16 [hereinafter "Convention Against Torture"].

¹⁴ Al-Saadoon & Mufdhi v. United Kingdom, No. 61598/08, at ¶ 115 (Eur. Ct. H.R. Mar. 2, 2010), available at <http://www.bailii.org/eu/cases/ECHR/2010/282.html>.

¹⁵ Law Commission Report, *supra* note 1, at 29-31, 202-08; Pratt v. Attorney General for Jamaica, 4 All E.R. 769 (Privy Council, 1993); Soering v. United Kingdom and Germany, 11 Eur. H.R. Rep. 439 (Eur. Ct. H.R., Series A, Vol. 161, July 7, 1989).

¹⁶ UN Safeguards Art. 9.

justice system.¹⁷ Empirical data presented to the Law Commission demonstrated that over 75% of the prisoners on death row in India belonged to religious minorities and “other backwards classes” (castes that have been historically economically and socially disadvantaged), while over 90% of those sentenced to death for terror offenses are religious minorities or Dalits.¹⁸ The data also confirmed that almost three-quarters of death row inmates were economically vulnerable, as judged by their occupations or landholdings.¹⁹ Discriminatory application of the death penalty violates numerous human rights instruments, including Article 26 of the ICCPR, which states: “[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as *race*, colour, sex, language, religion, political or other opinion, national or *social origin, property, birth* or other status.”²⁰

The Law Commission Report also noted that India imposes capital punishment on individuals with mental illness.²¹ The UN Safeguards prohibit the imposition of the death penalty on “persons suffering from . . . extremely limited mental competence, whether at the stage of sentence or execution.”²²

Finally, the Report also raises grave concerns about capital defendants’ due process rights in India. Many defendants accused of a capital crime do not possess the economic means necessary to mount a vigorous defense.²³ Moreover, the death penalty is applied inconsistently among different judges, across different geographic regions and even among co-defendants in the same case. The Law Commission also found discrepancies in the way appeals of death sentences for co-defendants in the same case were handled, and that grants of clemency appeared to depend on the ideology and personal views of the President and government at the time.²⁴ Finally, where the Supreme Court of India imposes the death penalty in the first instance, the lack of any appeal violates Article 14.5 of the ICCPR and the UN Safeguards.²⁵

As the Law Commission Report exhaustively documents, the death penalty suffers from serious infirmities—lack of a sufficient penological justification, ambiguous legal standards, inconsistent and arbitrary application, and an ever-present risk of executing the innocent. The Association respectfully urges the Government of India to abolish the death penalty, consistent

¹⁷ Law Commission Report, *supra* note 1, at 147–49.

¹⁸ *Id.* at 149.

¹⁹ *Id.* at 150-151.

²⁰ ICCPR art. 26 (emphasis added); *see also* UDHR art. 7 (mandates the equality of all persons “before the law and are entitled without any discrimination to equal protection of the law.”); Convention Against Torture art. 1(1) (forbids torture and the infliction of severe pain and suffering “based on discrimination of any kind.”); Int’l Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (ratified by India Dec. 3 1968), art. 5 (requires parties to “guarantee the right of everyone, *without distinction as to race*, . . . equality before the law”).

²¹ Law Commission Report, *supra* note 1, at 191–92.

²² UN Safeguards art. 51, ¶ 1(d).

²³ Law Commission Report, *supra* note 1, at 149–55.

²⁴ Law Commission Report at 125-128, 138-139, 143-144, 186, 190.

²⁵ ICCPR art. 14.5 (“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”); UN Safeguards art. 6.

with prevailing norms of international human rights law and the practices of a growing majority of nations throughout the world.

Respectfully,



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