Chapter VIII
The Death Penalty

A. Introduction

The Special Rapporteurs' mandate deals not only with "extrajudicial" executions, but also with executions that may follow a judicial route, where courts impose the death penalty in violation of international law standards. The imposition of the death penalty would in such a case be an "arbitrary" execution.

Even though there are strong indications that the use of the death penalty globally is in decline,[1] this form of punishment continues. It involves the deliberate and pre-meditated killing by the state of an individual in its custody who does not at that time present an imminent threat to anyone, and as such threatens to undermine the value placed on life.

The death penalty has for the last half a century had a precarious and shrinking foothold in international law, but it would be premature to say that it is commonly accepted that all judicial executions are arbitrary deprivations of life, and thus unlawful. The International Covenant on Civil and Political rights, for example, does not prohibit its imposition for the "most serious crimes", provided certain procedural and other conditions are met.

A strong pre-occupation of the mandate has been to act against unlawful impositions of this form of punishment and to make clear the distinction between the lawful and unlawful use of the death penalty.

Among other requirements, the death penalty may only be applied: where the trial fully respected fair trial standards; for crimes that meet the "most serious" threshold; to persons who are not in a protected group, such as juveniles; and after the person sentenced has had the opportunity to seek pardon or commutation.

1. The Special Rapporteurs' mandate with respect to the death penalty

At various times, questions have been raised in multilateral and bilateral discussions about the propriety of the mandate considering the death penalty. Special Rapporteur Alston addressed the question directly and explained why and how the mandate covers the death penalty.

> ***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶3)***
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> 3. [...] My mandate is not abolitionist, but the death penalty falls within it with regard to due process guarantees, the death penalty's limitation to the most serious crimes and its prohibition for juvenile offenders and the mentally ill.

Special Rapporteur Heyns largely followed the same line of reasoning for arguing that the death penalty falls within the scope of the mandate, although—as will be discussed below—he would take the position that the mandate was indeed abolitionist in the sense that international law requires states to move progressively towards the abolition of this form of punishment over time.

> ***Report to the General Assembly (A/70/304, 7 August 2015, ¶69)***
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> 69. The death penalty falls within the scope of the Special Rapporteur's mandate because the imposition of the death penalty in violation of international law standards constitutes an arbitrary execution and thus a violation of the right to life as protected, for example, in article 6 (1) of the International Covenant on Civil and Political Rights.

1 During the period covered by this book, the trend observable since the mid-1990s continued in some respects. Between 2004 and 2016 the number of states around the world that had abolished the death penalty in law increased from 85 to 104, the number that were viewed as "abolitionist in law or practice" increased to around 160. However, over the same time period, on account of an increased number of executions in Iran, Iraq, Saudi Arabia and Pakistan the total number of executions outside of China, a number which had been in steady decline, increased from fewer than 400 in 2004 to a high of more than 1500 in 2015.

There was also a clear justification for the mandate's consideration of the death penalty in that it had always been asked to do so by the Human Rights Council and its predecessor, the Commission on Human Rights, as was highlighted by both Special Rapporteurs:

Report to the Commission on Human Rights (E.CN.4/2005/7, 22 December 2004, ¶55)

55. The Commission on Human Rights has consistently requested the Special Rapporteur to monitor the implementation of all standards relating to the imposition of capital punishment. Previous Special Rapporteurs have recalled that the death penalty must under all circumstances be regarded as an extreme exception to the right to life, and that the standards pertaining to its use must therefore be interpreted in the most restrictive manner possible. Similarly, full respect for fair trial standards is particularly indispensable in proceedings relating to capital offences.

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶13-15)

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. These requirements were elaborated by the Economic and Social Council in its resolution 1984/50 on safeguards guaranteeing protection of the rights of those facing the death penalty.

14. The requirement of non-arbitrariness in the context of the death penalty has a procedural component, centred on the requirements of legality and fair trial. It also has a substantive component that entails, among other requirements, imposition only for the most serious crimes, minimum standards of protection for vulnerable groups, and equality and consistency.

15. In its resolution 17/5, the Human Rights Council requested the Special Rapporteur to continue to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto.

2. The Special Rapporteurs' engagement on the death penalty

In his 2016 report to the Human Rights Council, Special Rapporteur Heyns analysed the way in which he had engaged during the preceding year with the death penalty.

Report to the Human Rights Council, Observations on communications (A/HRC/32/39/Add.3, 17 June 2016, ¶¶24-34)

III. Tabulation (B) of cases transmitted to States concerning alleged violations of death penalty safeguards

24. Because of the urgency of the cases brought to his attention, the Special Rapporteur sends many communications concerning the unlawful application of the death penalty.

25. In its resolution 17/5, the Human Rights Council requested the Special Rapporteur in carrying out his mandate "[t]o continue to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol

thereto;". In this respect, the Special Rapporteur has included the following table on the status of individuals who were the subject of concern with regard to the application of the death penalty in the present report. He urges all concerned States to provide updated information on the status of the subjects of these urgent appeals.

26. Tabulation (B) provides details on the 50 cases transmitted to Governments with regards to alleged violations of death penalty safeguards, including identity of the individuals concerned, the charges brought against them, the alleged violations of death penalty safeguards, and an update on the current situation of those individuals (whether executions had taken place or not).

A. Violations alleged

27. In Tabulation (B) of cases transmitted to States concerning alleged violations of death penalty safeguards, the violations are classified into the following categories:

a) Fair trial concerns.
b) Not "most serious crimes".
c) Extraction of confession under torture
d) Juvenile at time of offense.
e) Execution of a person with intellectual or psychosocial disability.
f) Imposition of the death penalty by Federal Government for facts which occurred in abolitionist state.
g) Assistance of abolitionist State in the investigation of crimes that may result in the imposition of the death penalty in another State.

D. Observations on Tabulation (B)

28. It should be noted that the communications the Special Rapporteur sends to States on the subject of the death penalty are in ways the most straightforward to follow-up upon on the basis of a desk-based review. The Special Rapporteur expresses his continued gratitude to various civil society and advocacy organisations who facilitate this follow up. Establishing, at the very least, whether an individual has indeed been executed subsequent to a communication being sent to the Government provides a helpful reference to whether the sending of these urgent appeals is effective in ensuring that States abide by international standards, prospectively, in their application of the death penalty. According to available information, executions were registered in 8 of the 15 countries addressed in Tabulation (B).

29. The death penalty is a barbaric punishment which, viewed from the perspective of State practice, is in steady, irrevocable and terminal decline. The Special Rapporteur has argued elsewhere that international law is in principle abolitionist, in the sense that it requires at least the progressive abolition of the death penalty.[2] However, in several States there have been steps taken to re-introduce capital punishment, while in a handful of other States it remains a common practice, and, regrettably, one that often takes place in flagrant violations of established international law protections.

30. As indicated in the table below, the main alleged violations covered in the cases transmitted to Governments during the reporting period were: fair trial concerns in judicial procedures leading to the imposition of the death penalty (43); the imposition of the death penalty for crimes which do not meet the threshold of the "most serious crimes" (13); extraction of confessions under torture (14); juvenile at time of offense (13); execution of a person with intellectual or psychosocial

2 Christof Heyns and Thomas Probert "The right to life and the progressive abolition of the death penalty" in *Moving Away From the Death Penalty: Argument, Trends and Perspectives* (United Nations publication, Sales No. E.15. XIV.6).

disability (7); assistance of abolitionist State in the investigation of crimes that may result in the imposition of the death penalty in another State (1); and the imposition of the death penalty by Federal Government for facts which occurred in abolitionist state (1).

31. The Special Rapporteur is concerned about the alarming number of cases in which the death sentence was allegedly imposed following judicial procedures that fall short of international standards of fair trial and due process, a necessary requirement for the lawful imposition of this type of punishment. Forty-three out of the 50 communications considered in Tabulation (B) address this issue. One of the most dangerous abuses addressed in communications appears to be the use of the death penalty for crimes that are not the "most serious". During the past year, the Special Rapporteur sent 13 communications about the imposition of the death penalty for various offences that do not meet this threshold.

32. In this connection, the Special Rapporteur particularly highlights the imposition of the death penalty for drugs offences. In 2015, the World Day Against the Death Penalty was used to underscore the extent of this problem. Moreover, earlier this year, the Special Rapporteur joined a demarche of several Rapporteurs to the UN General Assembly Special Session on drugs in which they made clear that 'the application of capital punishment for drug-related offenses directly contravenes international human rights law' and urged States 'to make immediate commitments towards its full abolition.'[3]

33. The Special Rapporteur has also frequently sent communications regarding the planned execution of individuals who must be protected from the death penalty (20): most commonly those suffering from a psycho-social disability (7 communications), or those who have been convicted for crimes committed as juveniles, in some cases those who are still juveniles (13 communications). In this latter case, the Special Rapporteur underlines that the burden of proof should rest on the prosecution to demonstrate that a defendant was an adult at the time the crime was perpetrated.

34. The Special Rapporteur is also concerned about the number of instances in which he has addressed allegations of a capital sentence being proposed against an individual after a "trial" in or before which evidence has been derived from torture (14 communications). This manifestly undermines the credibility that the sentence is being imposed after a fair trial. In addition, 26 communications address overall allegations of torture of individuals who have been sentenced to death.

3. The declining use of the death penalty, moratoria, and progressive abolition

At various points during their mandates, the Special Rapporteurs have drawn attention to the declining use of the death penalty:

Follow-up Report on the United States of America (A/HRC/20/22/Add.3, 30 March 2012, ¶¶7-9)

7. According to available figures, some 3,251 people are currently on death row in the United States.[4] It is widely acknowledged that innocent individuals have very likely been sentenced to

3 Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nation General Assembly Special Session on Drugs New York, 19-21 April 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19828&LangID=E.

4 NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, Winter 2011, p. 1, available from http://naacpldf.org/files/publications/DRUSA_Winter_2011.pdf.

death and executed in the United States.[5] The 2008 country visit focused largely on the death penalty in Alabama and Texas, both of which have extremely high rates of executions.[6] The Special Rapporteur concluded that, in both states, there was a "shocking lack of urgency with regard to the need to reform glaring criminal justice flaws."[7] Information received for the present report does not indicate that reform proposals are under way.

8. Nevertheless, some positive steps should be underscored with respect to other states. People continue to be exonerated,[8] and figures available suggest a continuous decline in death sentences over the past decade.[9] Evidence of growing frustration with the death penalty can be gleaned from opinion polls, the fact that fewer death sentences are being handed down by juries, and legislative activity has increased with a higher number of bills calling for an end to the death penalty in several states.[10] Senate Bill 3539, adopted on 9 March 2011, abolished the death penalty in Illinois, bringing the number of states which have abolished the death penalty to 16 out of 50,[11] thus taking a step in the direction of a worldwide effort to abolish the death penalty. Furthermore, the sentences of 16 individuals on death row were commuted to life imprisonment without parole.[12]

9. Notwithstanding these developments, the problems identified in the mission report persist.

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶20, 22-23)

20. The legal space and public opinion surrounding the death penalty in all but a handful of countries have moved over the decades towards greater restrictions on the death penalty, including to the point of abolition.

[...]

22. The General Assembly, the Council of Europe, the Organization for Security and Cooperation in Europe, the African Commission on Human and Peoples' Rights and, in August 2012, the Inter-American Commission on Human Rights have called for moratoriums on the use of the death penalty.

5 Report of the Special Rapporteur, Philip Alston, A/HRC/11/2/Add.5, 27 May 2009, para. 7; also Death Penalty Information Center (DPIC), *The Death Penalty in 2010: Year End Report*, December 2010, p. 3, available from http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf.

6 Equal Justice Initiative fact sheets on death sentencing and execution rates in Alabama, available from http://www.eji.org/eji/node/357; for number of people executed see DPIC, *Facts about the Death Penalty*, available from http://www.deathpenaltyinfo.org/documents/FactSheet.pdf; for number of people on death row in Texas, see Texas Department of Criminal Justice, Offenders on Death Row, available from http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html.

7 A/HRC/11/2/Add.5, *supra* note 5, summary, p. 2.

8 For number of people exonerated, see DPIC, *Facts about the Death Penalty, supra* note 6; and for exonerations due to DNA testing, see Innocence Project, *250 Exonerated, too many wrongfully convicted*, available at: http://www.innocenceproject.org/news/250.php.

9 DPIC, *The Death Penalty in 2010, supra* note 5, pp. 3-4; for executions and death sentences halved since 2000, see Richard Dieter, *Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty Five Years after its Reinstatement in 1976* (DPIC, 2011), p. 2.

10 Dieter, *Struck by Lightning, supra* note 9, p. 2; also DPIC, Recent legislative activity, available from http://www.deathpenaltyinfo.org/recent-legislative-activity. Controversy over lethal injections has contributed to slowing down executions, see DPIC, *The Death Penalty in 2010, supra* note 5, p. 1; and Brandi Grissom, "A Drug Used in Executions Becomes Very Hard To Get" in *The New York Times*, 6 February 2011.

11 DPIC, *States With and Without the Death Penalty*, available at: http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

12 See Illinois Government News Network, Statement from Governor Pat Quinn on Senate Bill 3539, 9 March 2011, available at: http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265.

23. Those calls notwithstanding, the death penalty remains a reality. In many cases, domestic law and practice run counter to international standards, while in others the information needed to make this assessment is kept secret.

Special Rapporteur Heyns occasionally drew attention to positive developments in the progressive abolition of the death penalty:

Press Release by the Special Rapporteur responding to the commutation of more than 300 death sentences in Zambia (22 July 2015) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

UN rights experts hail Zambia's move away from death penalty, but warn of "areas of concern" in Africa

GENEVA (22 July 2015) – Two United Nations human rights experts welcomed a recent decision by the President of Zambia, Edgar Lungui, to commute the death sentences of 332 individuals to life imprisonment. The UN Special Rapporteurs on summary executions, Christof Heyns, and on torture, Juan E. Méndez, also encouraged the Zambian authorities "to take a step further by removing all reference to the death penalty in the country's laws."

President Lungui commuted the sentences after his visit to Mukobeko Maximum Security Prison, which despite a capacity of 51 inmates, houses hundreds.

"By commuting these death sentences, the Zambia puts a stop to mental and physical pain and suffering, and takes an important step towards ensuring respect for the inherent dignity of the human person," Mr. Mendez said.

"This decision is in line with the trend in Africa – as in the rest of the world – to move away from the death penalty. As the Secretary General of the UN has said, there is no room for this form of punishment in the 21st Century," Mr Heyns said.

However, the experts warned of continuing areas of concern regarding the death penalty in Africa. In Egypt, they noted, hundreds of defendants at a time are sentenced to death in unfair mass trials. "Even though the execution rate is lower, these trials clearly do not meet international standards," they said.

The situation in the Gambia is also worrying: after abruptly ending a longstanding moratorium and hanging nine people in 2012, it has now been proposed that the number of offenses punishable by death be expanded. "This proposal, if adopted, would be in stark contrast to the trend away from capital punishment elsewhere on the continent," they underlined.

The independent experts noted that President Lungui's decision supports previous steps towards the abolition of capital punishment in the Zambia, where a presidential moratorium on the death penalty has been maintained since 1997. However, they called on the Zambian authorities to vote in favour of the UN General Assembly's resolution calling for a global moratorium, rather than abstaining, as they have in the previous four votes.

According to the Special Rapporteurs, three-quarters of the world States have abolished the death penalty in law or in practice and the same applies to Africa. In 2014 only four States in the region are known to have conducted executions. Earlier this month, the Togolese Republic became Africa's 12th state party to the 2nd Optional Protocol of the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty.

> Moreover, the African Commission on Human and Peoples' Rights has consistently called for the abolition of the death penalty over the last two decades. The Commission has drafted a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty.
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> "These are very significant steps by the Commission, and if the Protocol is adopted soon by the African Union and opened for ratification by African States, that will give a renewed emphasis to the process of putting the era of the death penalty behind us," the UN experts stressed.[13]

During the course of his mandate, Special Rapporteur Heyns increasingly articulated the view that international law *per se* provided that the right to life required the progressive abolition of the death penalty and that the mandate was by implication in that sense abolitionist. The approach that international law requires the progressive abolition of the death penalty was also endorsed in 2018 by the UN Human Rights Committee in its General Comment 36 on the right to life.[14]

In his 2016 report to the General Assembly, Heyns set out his reasoning:

> ***Report to the General Assembly (A/71/372, 2 September 2016, ¶¶38-43)***
>
> ***A. Progressive abolition of the death penalty***
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> 38. The death penalty falls within the scope of the Special Rapporteur's mandate because the imposition of the death penalty in violation of international law standards constitutes an arbitrary deprivation of life.
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> 39. Article 6 (2) of the International Covenant on Civil and Political Rights, by requiring that States that still apply the death penalty do so only for the most serious crimes, has long been understood to provide a foothold for the death penalty in extreme cases. That foothold, however, has shrunk over the years. The category of most serious crimes is now understood to cover at most intentional killing – murder (see A/67/275, para. 35). The Special Rapporteur has promoted the view that it is no longer tenable to describe international law as "retentionist", but instead that it requires the progressive abolition of the death penalty.[15]
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> 40. Moreover, there is a growing view that the death penalty constitutes torture, cruel or inhuman treatment (prohibited in article 7 of the International Covenant on Civil and Political Rights) and violates the right to dignity (see A/67/279, para. 36). Article 6 (6) of the Covenant provides that nothing in article 6 shall be invoked to delay or to prevent the abolition of capital punishment by any State Party. The fact that the death penalty may have a foothold in article 6 (2), dealing with the right to life, may thus not serve as an argument against the contention that it constitutes a violation of those other rights.
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> 41. The practice of the vast majority of States has been to move away from the death penalty, if not in law (although more than half have done so), then at least in practice (80 per cent have now abolished it in law or in practice). Whereas retentionist States could in the past have argued that there was strong State practice to justify the use of the death penalty as a limitation on the right to life, that argument has largely lost its force. It should be noted that three States alone were responsible for 89 per cent of the executions documented in 2015 (excluding China, from which reliable figures are not available).

13 *Editors' Note:* The African Commission has faced difficulties in securing the adoption of this Protocol among member States in Addis Ababa. Nonetheless it remains a firm part of the agenda of the Commission's Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa.

14 Human Rights Committee, General Comment No.36: Article 6 (right to life), CCPR/C/GC/36, (2018), para. 51.

15 See Heyns and Probert, *supra* note 2.

42. The Special Rapporteur is of the view that the point has been reached where the death penalty can no longer be regarded as compatible with the prohibition of cruel, inhuman or degrading treatment. Even if that is not yet the case, authorities with decision-making power concerning the death penalty should recognise that the world is moving in that direction, requiring at least the progressive abolition of the death penalty. That was the approach followed by the African Commission on Human and Peoples' Rights in its recent general comment on the right to life.

43. International law already allows only very limited space for the death penalty, prohibiting, for example, mandatory death sentences or the imposition of the death penalty on children. Ensuring that the legal system complies with all the relevant safeguards should not be incremental: that is an immediate obligation. However, at least incremental steps to further reduce the scope of the application of the death penalty are required. This would be the case, for example, where a State executes fewer people every year; reduces the number of "most serious" crimes for which the death penalty may be imposed; or implements a moratorium.

In 2015, in a joint op-ed in the *Wall Street Journal*, Special Rapporteur Heyns and the Special Rapporteur on torture and other cruel, inhuman or degrading punishment or treatment, Juan Mendez, argued that the United States should adopt a federal moratorium on the death penalty:

'Time to Kill the Federal Death Penalty' (5 November 2015, Wall Street Journal)

Capital punishment, once a key issue in U.S. presidential races, has hardly been mentioned in this one. That is testament to the fact that America, like the rest of the world, is moving away from the death penalty. Most of the work for abolition in the U.S. is happening in the states, but there are steps the federal government should take to hasten the death penalty's end.

In June the Supreme Court ruled 5-4 in *Glossip v. Gross* that Oklahoma's use of the sedative midazolam in lethal injections did not violate the Eighth Amendment's prohibition of "cruel and unusual punishments." But in a lengthy dissent, Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, argued that it is time for a "full briefing on a more basic question: whether the death penalty violates the Constitution."

Justice Breyer writes that the death penalty today "involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose." Perhaps that is why, he continues, "most places within the United States have abandoned its use."

Since 2007 seven U.S. states have abolished capital punishment, taking the number of states without a death-penalty statute to 19 plus the District of Columbia. Nearly three-quarters have either abolished the death penalty or haven't carried out an execution in at least eight years.

While executions are becoming less frequent—with 35 executions in 2014 compared with 98 in 1999—the U.S. is still one of the five most prolific executing countries in the world, in the company of China, Iran, Saudi Arabia and Iraq. This has high symbolic value world-wide. Countries with much less circumspection in their legal processes invariably justify their use of the death penalty by citing the U.S.

Yet after decades of investigation by researchers, there remains no proof that the death penalty has any higher deterrent value than the alternatives. An extensive study in 2009 by criminologists at the University of Texas at Dallas revealed the flaws in earlier studies claiming a deterrent effect and "found no empirical support for the argument that the existence or application of the death penalty deters prospective offenders from committing homicide."

Despite the sophistication of the U.S. legal system, in the past 20 years more than 100 individuals on death row in federal and state prisons have been exonerated. And despite scientific efforts to implement capital punishment in a "humane" fashion, time and again executions have resulted in degrading spectacles, including the botched lethal injection in April 2014 that took more than 40 minutes to kill Oklahoma inmate Clayton Derrell Lockett and prompted *Glossip v. Gross*.

Clearly, even with modern advancements, the death penalty is inherently flawed. U.S. government officials often say their hands are tied, since this is a matter largely decided by state law. Yet the U.S. could declare a moratorium on the death penalty for federal crimes. Some would argue that an unofficial moratorium is already in place. The federal government hasn't executed anyone in 12 years, since Louis Jones Jr. in 2003, despite 50 federal death sentences having been handed down since then.

Adopting an official federal moratorium on the death penalty, through executive order if need be, would send a powerful message about the value of life and the inhumane and flawed nature of executions.

B. Legal Framework: Restrictions on the Death Penalty

While international law does not currently prohibit the death penalty absolutely, it does strictly limit its application. This section contains writings by the Special Rapporteurs on both the substantive and procedural safeguards surrounding the death penalty.

Report to the General Assembly (A/70/304, 7 August 2015, ¶71)

71. [...] [W]hile a shrinking number of States still retain this form of punishment, the International Covenant on Civil and Political Rights and international law more broadly create a number of safeguards designed to regulate the death penalty.[16] These safeguards can generally be described as concerning the crime [...] that it be the "most serious"; the process, underlining that there must be a trial that conforms strictly with standards of fairness set down elsewhere; and the offender, protecting certain groups, such as those under 18, pregnant women or persons with mental or intellectual disabilities.

1. Fair trial safeguards

One of the most important safeguards against the arbitrary application of the death penalty is a trial that meets the most scrupulous standards of fairness. A trial that does not do so, in addition to violating the individual's rights in terms of Article 14 of the ICCPR, will also constitute a violation of the right to life.

Report to the General Assembly (A/67/275, 9 August 2012, ¶25)

25. It is arbitrary to impose the death penalty where the proceedings do not adhere to the highest standards of fair trial. Pursuant to article 6 (2) of the International Covenant on Civil and Political Rights and general comment No. 6 of the Human Rights Committee, the death penalty may be imposed only in accordance with law not contrary to the provisions of the Covenant and pursuant to a final judgement rendered by a competent court. Furthermore, proceedings must include all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the Covenant. According to the Committee in *Reid v. Jamaica*, a violation of article 14 standards in

16 The protections set out in article 6 (2), (4) and (5) of the International Covenant on Civil and Political Rights are further elaborated in the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the Economic and Social Council in its resolution 1984/50 of 1984 ["the UN Safeguards")

a case where a sentence of death is imposed also constitutes a violation of article 6 (see CCPR/C/51/D/355/1989).

i. Mandatory sentencing

One of the most directly arbitrary interferences with fair trial rights is mandatory sentencing. Mandatory death sentences are imposed by statute and remove the trial court's discretion to consider mitigating or extenuating factors. This results in the blanket application of the death penalty regardless of the offender's individual circumstances. The Special Rapporteurs have highlighted the unlawfulness of such mandatory sentencing regimes in communications, reports, and expert opinions.

In 2005, Special Rapporteur Alston communicated with the Government of Singapore in relation to the mandatory death penalty imposed on a young Australian man found guilty of drug trafficking. The Special Rapporteur's initial urgent appeal letter set out in detail both the local and international law relevant to the mandatory death penalty.

> ***Urgent appeal sent to the Government of Singapore (15 March 2005)***
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> Mr. Nguyen Tuong Van, a 24-year-old Australian national of Vietnamese origin is reportedly under sentence of death at Changi Prison in Singapore. He was reportedly arrested in Changi Airport in December 2002, whilst in transit from Cambodia to Australia. He was later charged and convicted of drug-trafficking involving just under 400 grams of pure heroin. In March 2004 he was sentenced to death by a Singapore Court for trafficking heroin. On 20 October 2004, the Court of Appeal dismissed his appeal against his conviction and upheld the death sentence. Mr Nguyen appears from the record to have been 21 at the time of the offence, to have been a self-employed computer salesman, to have had no prior criminal record and no prior involvement in the drug trade, and to have confessed almost immediately to his possession of drugs. His stated reason for having agreed with a third-party to carry drugs was his need to assist his brother to pay outstanding legal fees in Australia.
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> [...]
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> I am aware that the Government of Singapore has previously stated that "the death penalty is primarily a criminal justice issue, and therefore is a question for the sovereign jurisdiction of each country" (E/CN.4/2001/153, para. (c)). By the same token, however, matters relating to the functioning of the criminal justice system are legitimate matters of international concern when questions of non-compliance with international standards are raised in good faith.
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> The principal concern in the present case relates to the application of a mandatory death penalty. Making such a penalty mandatory and thereby eliminating the discretion of the court generally makes it impossible to take into account mitigating or extenuating circumstances and eliminates case by case determinations of an appropriate punishment in light of all the circumstances of the case. Whatever considerations might be appropriate in relation to other forms of mandatory sentencing, its use in the death penalty context raises fundamentally different issues because the right to life is at stake and because once the sentence has been carried out it is irreversible.
>
> It is my understanding that, since 1975, the death penalty in Singapore has been imposed as a mandatory sentence for a range of specific drug trafficking offences. The consequences of this approach were spelled out by Kan Ting Chiu J. in the High Court in the present case when he observed that "where the legislature has by the proper exercise of its powers prescribed that for offences involving large quantities of drugs the offenders shall be punished with death, the punishment will be imposed without hearing pleas in mitigation …" (*Public Prosecutor v. Nguyen Tuong Van*, No. CC 43/2003, 20 March 2004, para. 84 of the Judgment issued by the High Court).

Both at the trial and at the appeal stage, Mr. Nguyen Tuong Van challenged the constitutionality of the mandatory sentence of death as provided for by s 33 and the Second Schedule of the Misuse of Drugs Act. The arguments were based on Articles 9(1), 12(1) and 93 of the Constitution of Singapore, which deal, respectively, with fundamental liberty of the person, equal protection of the law, and the vesting of judicial power in the courts. In the High Court Kan Tin Chiu J. dismissed this argument by noting that he was bound by the decision of the Privy Council in *Ong Ah Chuan v. Public Prosecutor* which upheld the mandatory death penalty. On appeal the defendant noted that a number of Privy Council cases had reversed this interpretation of the law, primarily in light of the evolution of human rights standards in the intervening two decades. In terms of timing, only one of the relevant later cases (*Reyes v. The Queen*), an appeal from Belize, was available to the trial judge. He observed, however, that that case had relied upon the prohibition of torture and inhuman or degrading treatment or punishment contained in the Belize Constitution and concluded that it was distinguishable from the present case because, as the Appeal Court put it, "there is no equivalent in [the Singapore] Constitution nor in any local Act of Parliament".

The judgment of Lai Kew Chai J, on behalf of the Court of Appeal, in this case did, however, address the more recent Privy Council decisions. Thus the Court noted that: "The appellant's arguments on unconstitutionality made reference to several very recent Privy Council decisions on the mandatory death penalty. These decisions, in turn, made reference to international jurisprudence dealing with 'the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment'" (*Nguyen Tuong Van v. Public Prosecutor* [2004] SGCA 47, para. 59). The Privy Council decisions included *Watson v The Queen* [2004] UKPC 34 as well as *Reyes v The Queen* [2002] 2 AC 235. The Appeals Court noted that in "both *Watson v. The Queen* and *Reyes v The Queen*, the mandatory death penalty in respect of certain classes of murder was ruled unconstitutional as a violation of the prohibition against cruel or inhuman treatment or punishment. In *Matthew v The State and Boyce v The Queen*, the Privy Council would have ruled the same way but for certain "saving provisions" in the relevant national Constitutions which preserved pre-existing national laws" (para. 83).

In paragraph 29 of *Watson v The Queen* the Law Lords indicated that "It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did on behalf of the Board in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674, that there is nothing unusual in a death sentence being mandatory. As Lord Bingham pointed out in Reyes, p. 244, para. 17, the mandatory penalty of death on conviction of murder long predated any international arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary." The Privy Council further observed that "The march of international jurisprudence on this issue began with the Universal Declaration of Human Rights which was adopted by a resolution of the General Assembly of the United Nations on 10 December 1948 (1948) (Cmd 7662). It came to be recognised that among the fundamental rights which must be protected are the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment."

In relation to the present case the Singapore Court of Appeal opted not to "examine each [of these cases] in detail" (para. 83) and, after a brief recitation of some passages from the Privy Council, concluded "However, we are of the view that the mandatory death sentence prescribed under the MDA is sufficiently discriminating to obviate any inhumanity in its operation. It is therefore constitutional." This conclusion was not, however, based upon any analysis which might have shown that the sentence is discriminating in the sense of taking account of the circumstances of the individual. The fact that the law discriminates on the basis of the quantity of drugs involved does not address the concerns raised by the Privy Council nor those reflected in international standards.

The Court of Appeal did not specifically cite, nor did it address, the directly relevant observations of the Privy Council contained in the case of *Boyce and Joseph v. The Queen*. In that case the

constitutional validity of the mandatory death penalty law of Barbados was upheld, but the majority opinion carefully limited the grounds for its finding to the terms of the Constitution of Barbados.

More pertinent to the present case is the fact that, on the basis of a systematic review of international legal standards, the majority observed that the maintenance of the mandatory death penalty ' will … not be consistent with the current interpretation of various human rights treaties to which Barbados is a party' (See Judgment of the Lords of the Judicial Committee of the Privy Council, Privy Council Appeal No. 99 of 2002, Judgment of 7 July 2004, para. 6). The same conclusion was repeated in more forceful terms in the minority judgment on behalf of four Law Lords who stated that: "the jurisprudence of the Human Rights Committee, the Inter-American Commission and the Inter-American Court has been wholly consistent in holding the mandatory death penalty to be inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment. … The appellants submitted that 'No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms,' and this assertion has not been contradicted"(para. 81(3)).

In light of this review of relevant legal standards I would respectfully request Your Excellency's Government to take all necessary steps to avoid an execution which is inconsistent with accepted standards of international human rights law.

Alongside the communication sent to the government of Singapore, Special Rapporteur Alston also issued a press statement:

Press statement by the Special Rapporteur (15 November 2005)

Philip Alston, the Special Rapporteur on extrajudicial, summary or arbitrary executions of the United Nations Commission on Human Rights, today called on the Government of Singapore not to proceed with the planned execution of Nguyen Tuong Van. Mr Nguyen was sentenced to death for attempting to traffic just under 400 grams of pure heroin through Changi Airport in December 2002.

Mr. Alston, a law professor at New York University, said that the execution of Mr Nguyen would violate international legal standards relating to the imposition of the death penalty.

The principal problem, according to Alston, is the mandatory nature of the death penalty. "Making such a penalty mandatory – thereby eliminating the discretion of the court – makes it impossible to take into account mitigating or extenuating circumstances and eliminates any individual determination of an appropriate sentence in a particular case", Alston noted. "The adoption of such a black and white approach is entirely inappropriate where the life of the accused is at stake. Once the sentence has been carried out it is irreversible."

In the Nguyen case, the Singapore Court of Appeal considered a range of cases decided by the Privy Council. But, according to Alston, "it failed to examine the most relevant case of all" (*Boyce and Joseph v. The Queen*, decided in 2004). In that case four of the Law Lords endorsed the statement that "No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms."

Professor Alston noted that the Singaporean Government had, in the past, stated that "the death penalty is primarily a question for the sovereign jurisdiction of each country". He indicated, however, that matters relating to the functioning of the criminal justice system are legitimate matters of international concern when questions of non-compliance with international standards are involved.

> Noting the longstanding commitment of the Singaporean courts to the rule of law, Alston called upon the Government of Singapore to take all necessary steps to avoid an execution which is inconsistent with accepted standards of international human rights law.

Special Rapporteur Heyns addressed the issue of the mandatory death penalty in his 2012 report to the General Assembly:

> ***Report to the General Assembly (A/67/275, 9 August 2012, ¶¶61-65)***
>
> 61. Legislation that leaves courts with no choice but to impose death sentences for specific crimes violates various human rights standards. A mandatory death sentence, even where killing was intentional, necessarily fails to take into account mitigating circumstances that might otherwise show the specific crime to be less serious (A/HRC/4/20, para. 55). A further problem is that mandatory sentences are often prescribed for crimes that do not meet the "most serious" requirement.
>
> 62. A mandatory sentence also undermines the separation of powers between the legislative and judicial organs of the State, at least in the context of capital crimes. The legislature essentially takes the judiciary's decision as to the most appropriate sentence in all like cases.
>
> 63. The Human Rights Committee has found that mandatory death sentences violate the "most serious crimes" provision (CCPR/C/70/D/806/1998, para. 8.2). Regional systems, including the African Commission on Human and Peoples' Rights, have likewise concluded that a death sentence may not be imposed without consideration of the circumstances of the offences and characteristics of the offender.[17]
>
> 64. Although at least 29 States retain a mandatory death sentence for specific offences, there is growing State consensus that it is unlawful as an arbitrary deprivation of life: at least 18 States have rejected it since 2008. A number of domestic courts have found a mandatory death sentence to be arbitrary and/or inhumane and therefore unconstitutional. Some have held it in violation of the rights to life and fair trial, and the principle of separation of powers.[18]
>
> 65. In addition, a handful of States, including Bangladesh, Guyana, India, Kenya, Malawi and Uganda, have recently turned against mandatory death sentences for specific crimes. The Deputy Prime Minister of Singapore has expressed opposition to its imposition for some minor drug-related crimes. mandatory sentence should be eliminated for any and all potential capital offences, these developments are notably in the right direction.

In an Expert Declaration (*amicus curiae*) submitted jointly with other experts in 2015 to the High Court of Malawi in its re-sentencing of three offenders previously sentenced on the basis of the mandatory death penalty, Special Rapporteur Heyns elaborated on the range of mitigating circumstances that should be considered.

17 *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, para. 31, African Commission on Human and Peoples' Rights, 2004; Boyce v. Barbados, paras. 57-63, Inter-American Court of Human Rights, 20 November 2007.

18 See DPIC, Mandatory Death Penalty, available at: www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm.

Expert Declaration of Christof Heyns (with Sandra Babcock and William Schabas) in the High Court Of Malawi in the matter of The Sentence Re-Hearings Conducted In Accordance With Kafantayeni v. Attorney General, Twoboy Jacob v. Attorney General, and Yasini Mclemonce v. Attorney General (February 2015, ¶¶13-18, 20-42)

IV. Capital Sentencing Procedures

13. A number of jurisdictions around the world have adopted practice guidelines to govern the capital sentencing process, particularly in those countries that have moved from a mandatory to a discretionary sentencing regime. We highlight here just a few of these procedural rules, namely: (1) the need to give proper notice to the defence whenever the death penalty may be sought; (2) the need to give the defence time to investigate and present mitigating evidence; and (3) the presumption in favour of life, which requires that the prosecution beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors that justify the imposition of a more lenient sentence.

A. Notice and Time to Prepare

14. The requirement that an offender is entitled to reasonable notice of whether the prosecution intends to ask for the death penalty is fundamental to a fair sentencing proceeding. This requirement goes hand in hand with a second fundamental component of a fair sentencing hearing; namely, that the defence be given adequate time to investigate and present any available mitigating evidence. Both of these requirements are implicit in Article 14 of the International Covenant on Civil and Political Rights. There is also a highly practical reason to impose such a requirement: the preparation of capital cases is extraordinarily time- and resource-intensive. Where the prosecution does not intend to seek the death penalty, the mitigation presented by the defence will likely be less extensive, and the court may not see the necessity of ordering a comprehensive mental status evaluation. On the other hand, if the prosecution intends to request the imposition of a death sentence, the defence will be entitled to prepare a full case in mitigation. In Malawi, that may entail driving to the offender's home village, interviewing family, friends, and neighbours, interviewing prison officers regarding the offender's behaviour in prison, obtaining collateral information necessary to support a mental health evaluation, and working with a psychologist or psychiatrist to ensure they receive are able to conduct a thorough assessment of the offender's mental health and intellectual functioning.

B. Burden of Proof

15. Rules regarding the burden of proof at a capital sentencing proceeding derive primarily from three related principles: (1) that capital punishment requires special justification, (2) that it should be reserved for the worst, exceptional cases, and (3) that it should apply only where reform or rehabilitation of the offender is impossible. Taken together, these three principles establish a presumption in favour of life. *See Queen v. Reyes*, [2002] A.D. 2002, para. 20 (Belize, Oct. 25, 2002) ("it is the imposition of the death penalty rather than its non-imposition . . . that requires special justification"). The Eastern Caribbean Court of Appeal elaborated further on this principle: "The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offense calls for no other sentence but the ultimate sentence of death." *Trimmingham v. The Queen*, (St. Vincent, Oct. 13, 2005).

16. In *State v. Makwanyane*, the Constitutional Court of South Africa stated unequivocally that "the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused." *State v. Makwanyane*, 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). Moreover, the death sentence could only be applied "where there [was] no reasonable prospect of reformation

and the objects of punishment would not be properly achieved by any other sentence." *Id.* The effect of this is to impose on the prosecutor not only an exacting substantive standard—that the offense was exceptionally odious—but also a demanding procedural and evidentiary standard. On the other hand, the prosecutor will have also to prove in the negative, beyond a reasonable doubt, that mitigating factors do *not* exist. *See Moise v. The Queen,* [2005] Crim. App. No. 8 of 2003 (St. Lucia, Nov. 12, 2003). If the defendant has succeeded in positing the reasonable possibility that a mitigating factor exists, the prosecutor will not have met that burden. *See State v. Nkwanyana*, 1990 (4) SA 735 (AD), para. 27 (South Africa, Sep. 18, 1990). This rigorous burden of proof for the prosecutor at the sentencing stage follows from the concern of ensuring that the death penalty truly is reserved only for the most exceptional cases.

V. General Principles of Mitigation

A. No Exhaustive List of Factors to Consider

17. At the outset, we should make clear that there is no set prescription for the categories of mitigating evidence that must be considered in each and every case. The personal, cultural, psychological, and social circumstances of each individual offender will vary intensely; any attempt at an exhaustive list would necessarily leave out other relevant possibilities. For this reason, the Supreme Court of Belize in *Reyes v. The Queen* stated that "[t]he need to have regard in the exercise of discretion whether to sentence an offender to death or life imprisonment would . . . preclude a list of predetermined special extenuating circumstances." *Queen v. Reyes*, [2002] A.D. 2002, para. 19 (Belize, Oct. 25, 2002). …

18. In general, however, sentencing authorities must consider the personal character and record of the offender, the circumstances that shaped the offender's conduct, the particular manner of the offense in question, and the possibility of reform or rehabilitation of the offender. *Downer and Tracey v. Jamaica*, Inter-Am. Comm'n H.R., Report No. 41/00, OEA/Ser.L/V/II.111, doc. 20 rev. para. 212 (2000). As the Inter-American Commission on Human Rights has stated, this is the "*sine qua non* to the rational, humane, and fair imposition of capital punishment."

[...]

B. Facts of the Crime

20. The first threshold that must be met before a sentencing authority can impose the death penalty is the singular and severe criminality of the particular case. Courts around the world have applied the principle that the death penalty should be imposed only for the "worst of the worst" offences. Before abolishing altogether the death penalty, the South African Constitutional Court reserved the death penalty for "the most exceptional cases." *State v. Makwanyane*, 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). In *Kigula & Others v. Attorney General*, the Ugandan Constitutional Court quoted from the Privy Council's decision in *Reyes v. The Queen*: "If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case." *Kigula & Others v. Attorney General*, [2005] UGCC 8 (Uganda, Jun. 9, 2005). In the words of the Indian Supreme Court, the death sentence ought only to be imposed in the "rarest of the rare" cases of murder, where "the alternative [punishment] is unquestionably foreclosed." *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, para. 207 (India, May 9, 1980). The Judicial Committee of the Privy Council made clear in *Trimmingham v. The Queen* that "[i]n considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour."

21. As an illustration of how narrowly the foregoing principle has been construed, one need only to look to the facts of cases decided by the Indian Supreme Court, the Judicial Committee of the Privy Council, and Caribbean appellate courts. In 1999, the Indian Supreme Court vacated the death sentence of individuals convicted of burning four men to death in front of their parents. *See Manohar Lal & Another v. State*, (1999) Supp (5) SCR 506 (India, Dec. 17, 1999). The Court commuted the sentences to life imprisonment, notwithstanding "the most gruesome nature" of the crime, after finding that actions "triggered only by a demented psyche" did not reach "the narrowest region" of criminality for which the death penalty is reserved. In *Trimmingham v. The Queen*, the Privy Council found that even the brutal murder and decapitation of an elderly victim did not justify the imposition of the death penalty. *Trimmingham v. The Queen*, [2009] UKPC 25, para. 21 (St. Vincent, 2009). Caribbean courts have refused to impose the death penalty even in cases where the crime was extremely heinous, so long as there existed at least one mitigating factor. For example, in the St. Christopher and Nevis case *Fox v. The Queen*, the judge refused to sentence to death a man convicted of intentionally murdering his girlfriend and her mother because he demonstrated evidence of diminished responsibility. *See Fox v. The Queen*, [2002] 2 AC 284 (St. Christopher & Nevis, Mar. 11, 2002). In *Harry Wilson v. The Queen*, the Court of Appeal in St. Vincent and the Grenadines commuted to life imprisonment the death sentence of a man who had murdered his two-year-old daughter, and had attempted to kill his eldest daughter and their mother, because the offender had: (1) no prior criminal record, (2) behaved well in prison, and (3) demonstrated capacity for reform. *See Harry Wilson v. The Queen*, paras. 1, 20, 32–34 (St. Vincent, Nov. 28, 2005).

22. Of course, many homicides that meet the legal definition of murder are not nearly as aggravated as those described above. In those cases, the appropriate range of punishment will range from a term of years to life imprisonment, depending on the strength of the mitigating evidence presented at sentencing. We now turn to the individualised factors relevant to consideration of the offender's "moral culpability."[19]

C. Capacity for Reform: Behaviour Prior to the Offence

23. The corollary to the above principle—that the death penalty can be imposed only for "the worst of the worst" offences—is that only those individuals who are truly incapable of reform may be subjected to capital punishment. In the words of the Privy Council, the court must find that there is "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." *Trimmingham,* [2009] UKPC 25. Indeed, the concept of "the worst of the worst" suggests an individual so irredeemable as to fit no longer within the social fabric. For an individual who demonstrates the potential for reform, however, the penalty of death—and potentially even the penalty of life imprisonment—would be excessive. Accordingly, "the possibility of reform and social re-adaptation of the offender" is an internationally recognised mitigating circumstance in sentencing. This would seem particularly relevant in Malawi, whose Constitution lists the rehabilitation of prisoners as a specific aim of the penal system. *See* Malawi Const. art. 163.

24. If the death penalty ought to be reserved only for those incapable of reform, then an offender's past behaviour is essential to assess properly the likelihood of rehabilitation or the depth of an offender's danger to society. This is especially significant in light of other factors, such as remorse

19 The term "moral culpability" has been used by the United States Supreme Court to describe the inquiry that must be undertaken before deciding on the appropriate sentence in a capital case: "Our line of cases in this area has long recognised that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263 (2007).

and good post-crime behaviour, which may demonstrate, when viewed together, that an offender is unlikely to pose a danger to society and that his crime was out of character. The critical point here is that an offender's character or record may cut against a characterization of an offender as singularly deserving of capital punishment: the fact that an offender has little or no criminal record, was a productive member of society, is remorseful, or has been a model prisoner, may all tend to show that she is not inclined toward criminality and thus can be rehabilitated into the social fabric.

25. Foreign jurisprudence comports with this reasoning. The U.S. Supreme Court has held that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 275 (1975). Moreover, any aspect of an offender's character or record may serve as a mitigating factor. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The South African Constitutional Court noted in *State v. Makwanyane* that "[e]very relevant consideration should receive the most scrupulous care and reasoned attention" when determining whether to impose a death sentence. *State v. Makwanyane*, 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). It follows that a court may take into account a defendant's past when assessing the likelihood of future criminality or future reform.

26. An offender's character and reputation in the community may be considered as mitigating evidence. In the Botswana case *State v. Mpelegang*, for example, the High Court explicitly held that the character of the accused is a mitigating factor: "A first offender and/or an accused person who is shown to have been previously of good character can expect to have these facts influence his sentence to his benefit." *State v. Mpelegang*, 2007 (3) BLR 706 (HC) (Botswana, Oct. 26, 2007). Likewise in *Reyes*, the Supreme Court of Belize considered evidence of the offender's good character and reputation within the community as mitigating evidence. Relying on testimony from the defendant's community, the Court noted "the prisoner's good character [and] good standing in his community and reputation for help and kindness" in mitigating the sentence. *See Queen v. Reyes*, [2002] A.D. 2002, para. 34 (Belize, Oct. 25, 2002).

27. Foreign courts have also invoked the absence of a criminal past to mitigate the sentences of offenders. The Supreme Court of India, for example, considered the defendants' lack of a criminal history in declining to impose the death penalty. *See Mulla & Another v. State of U.P.* (2010) 3 SCC 508, para. 49 (India, Feb. 8, 2010). A more pertinent and robust expression of this principle comes in the Belizean case *Reyes v. The Queen*, where the Supreme Court of Belize took heed of testimony offered on behalf of the defendant and concluded that a "remarkable picture of a hard-working, religious and family-centred and non-violent person without any previous brush with the law emerges." *See Queen v. Reyes*, [2002] A.D. 2002, para. 30 (Belize, Oct. 25, 2002). The defendant's generally amiable and favourable character, in tandem with his lack of past criminality, compelled the Court to mitigate the sentence.

D. Capacity for Reform: Post-Crime Behaviour, Prison Record, and Remorse

28. Although post-crime behaviour is not relevant to an offender's culpability, it bears directly on her capacity for reform. Together with offender's pre-crime behaviour and reputation in the community, post-crime behaviour can be a useful predictor of the offender's potential for rehabilitation and reform. To that end, the sentencing court must consider the offender's behaviour after conviction as well as evidence of the offender's behaviour while awaiting and during trial. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1 (1986).

29. The Privy Council and Caribbean courts have regularly considered post-crime behaviour as mitigating evidence in the process of sentencing. After the Privy Council abolished Belize's mandatory death sentence in *Reyes*, the Supreme Court of Belize determined during resentencing that the offender's attendant circumstances did not justify the imposition of the death penalty. In

making this determination, the Court considered that a former superintendent at the prison where the offender was detained "gave evidence of [the offender's] quiet disposition as a model prisoner and testified also of his expression of remorse." *See Queen v. Reyes*, [2002] A.D. 2002, para. 30 (Belize, Oct. 25, 2002). This evidence helped to impel the Court to regard the defendant's crime as "quite out of character," and the offender's sentence was reduced. *Id.* at paras. 34–35.

30. African Courts have also considered post-crime behaviour during sentencing. In *Uganda v. Bwenge Patrick*, the High Court of Uganda considered evidence that "although the applicant had been incarcerated for an unreasonably long period, he had remained in contact with his family." *Uganda v. Bwenge Patrick*, 03-CR-SC-190/1996, H. Ct Uganda Holden at Kampala (Nov. 11, 2009). Furthermore, in *Adam Jino v. Uganda* [2010] UGCA 27, the Court of Appeal of Uganda considered evidence that the appellant, who sought review of his aggravated robbery conviction and subsequent death sentence, was apologetic and repentant and would not waste "an opportunity… to reform and turn into a good citizen." *Adama Jino v. Uganda*, [2010] UGCA 27 (Uganda, Jun. 23, 2010).

31. The consideration of post-crime behaviour goes hand in hand with post-crime sentiment: namely, remorse. In tandem with the past and post-crime behaviour of an offender, the presence of remorse may corroborate the offender's capacity for reform, for it undermines the characterization of an offender as habitually and immutably dangerous. Indeed, the presence of remorse may suggest that the criminal act was aberrant and unlikely to be repeated.

32. Jurisprudence from foreign jurisdictions supports this general principle. In the United States, for example, the Supreme Court has established that the "circumstances of the offense together with the character and propensities of the offender" must be factored into the assessment of a suitable sentence. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (citing *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)). "Any aspect of a defendant's character or record" may be proffered as a mitigating factor in such an analysis. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The United States' approach focuses on the *predictive* element in sentencing; remorse is crucial here, for it demonstrates an offender's internalised conviction of the wrongness of his or her criminal act. As an emotional or psychological state, the presence of remorse indicates the offender's potential for rehabilitation. Remorse was cited by the Supreme Court of Belize in *Reyes v. The Queen*, in which the court considered testimony given by a prison superintendent, the petitioner's church pastor, and the petitioner's niece that described the petitioner's profound sense of remorse. *See Queen v. Reyes*, [2002] A.D. 2002, paras. 30, 34 (Belize, Oct. 25, 2002). His remorse was a crucial factor in impelling the Court to regard the petitioner's crime as "quite out of character." *Id.* at para. 34.

33. Ugandan courts have also taken remorse into account prior to imposing sentence in capital cases. In *Kigula & Others v. Attorney General*, the Supreme Court of Uganda invalidated the mandatory death penalty, holding further that courts ought to consider before sentencing whether a murder occurred "in circumstances that the accused person deeply regrets" and whether the accused "is remorseful." *Attorney General v. Kigula*, [2009] UGSC 6, para. 18 (Uganda, Jan. 21, 2009). Subsequently, in the case of Bwenge Patrick, the court heard evidence of the prisoner's remorse for his crime, and the judge accordingly commuted the sentence to two additional years, with the second served under probation. *See Uganda v. Bwenge Patrick*, 03-CR-SC-190/1996, H. Ct Uganda Holden at Kampala (Nov. 11, 2009). A similar result was reached in *Adam Jino v. Uganda*, in which the Court of Appeal of Uganda found that a repentant appellant, for whom "an opportunity . . . to reform and turn into a good citizen would not be wasted," deserved a reduced sentence. *See Adama Jino v. Uganda*, [2010] UGCA 27 (Uganda, Jun. 23, 2010). In these Ugandan cases, as well as in *Reyes*, remorse went hand in hand with the implicit assumption that the offenders were not incorrigible and dangerous wrongdoers, but rather individuals capable of reform.

E. Mental Impairments, Childhood Deprivation and Hardship

34. Irrespective of severity, the presence of a mental disorder is recognised as one of the most important mitigating factors during sentencing. That is to say, even when an offender's mental disorder is not so severe that it bars her prosecution, it is nonetheless a relevant mitigating circumstance at sentencing. In *Tido v. The Queen*, the Privy Council—quoting the Court of Appeal of the Bahamas in the same case—noted that offenders may "be suffering from mental illness . . . which may not attain the level of insanity under the McNaughten Rules, but would be sufficiently weighty as to cause justice to be tempered with mercy." *Tido v. The Queen*, [2011] UKPC 16, para. 34 (Bahamas, Jun. 15, 2011). This principle was reinforced in *Regina v. Gurrie*, in which the Supreme Court of Grenada concluded that while the offender could not invoke a diminished capacity defence, the offender's mental state would nevertheless be considered during sentencing. *See Regina v. Gurrie*, Claim No. GDAHCR 2010/0113, para. 78 (Grenada, Dec. 13, 2013). Similarly, in *Moise v. The Queen*, the Eastern Caribbean Court of Appeal chastised the trial court for failing properly to weigh a psychologist's report that the offender was intellectually impaired. The sentencing court had dismissed the report on the grounds that it shed no light on the offender's state of mind at the time of the crime. The Court of Appeal observed:

> It is apparent that these are considerations of the state of mind of the Appellant, which are relevant to the trial process rather than to the sentencing process. This was in error because the question is not whether the Appellant's mind was impaired at the time of the act, so as to afford him a Defence to the charge of murder, but rather, whether or to what degree his state of mind should impact on his sentence for the crime of murder. [2005] Crim. App. No. 8 of 2003, para. 38 (St. Lucia, Nov. 12, 2003).

These cases make clear that evidence of mental impairments as mitigation does not *excuse* the offender for his criminal behaviour, but rather serves to *explain* his conduct.

35. There are three reasons courts have found various types, forms, and degrees of mental disorders as mitigating during sentencing even where they are not severe enough to bar prosecution or execution. First, as a fundamental matter, "the scope and concepts of mitigating factors in the area of death penalty must receive a liberal and expansive construction by courts." *Bacchan Singh v. State of Punjab*, (1980) 2 SCC 684, para. 207 (India, May 9, 1980). As such, courts have recognised that if sentencing is to be considered "rational, humane, and rendered in accordance with the requirements of due process," then various factors, including mental health, must be considered during sentencing. *Spence v. The Queen*, [2001] Crim. App. No. 20 of 1998.

36. Second, since courts during sentencing must consider an offender's ability to reform and socially readapt, courts have recognised the importance of considering an offender's mental health during sentencing, including whether an offender's mental disorder may be stabilised, minimised, or cured through medication or other therapeutic treatment. *See Lockhart v. the Queen* [2011] UKPC 33 (Bahamas, Aug. 9, 2011).

37. Lastly, since courts recognise the death penalty is only to be imposed on offenders whose offenses constitute "the worst of the worst," courts have always been mindful of whether an offender's mental impairments affected his behaviour at the time of the offence—even where he did not meet the legal definitions of "insanity" or "incompetence". In *R v. James (Patrick)*, for example, the High Court of Saint Lucia followed this principle by commuting an offender's death sentence to a term of years after a medical report revealed the offender may have been suffering from mental illness when the offense was committed. *See R v. James (Patrick)*, [2001].

38. Keeping these three principles in mind, courts have continuously found various types, forms, and degrees of mental disorders to be mitigating during sentencing. In a resentencing hearing by the High Court of Uganda in *Bwenge Patrick*, the High Court considered the offender's impaired

mental state at the time of the offense as well as the offender's history of alcohol addiction to be critical in resentencing the offender to a term of years. *See Uganda v. Bwenge Patrick*, 03-CR-SC-190/1996, H. Ct Uganda Holden at Kampala (Nov. 11, 2009). Furthermore, in *Reyes*, the Supreme Court of Belize found the offender's depressive illness at the time of the offense to be crucial in commuting the offender's death sentence to life imprisonment. *See Queen v. Reyes*, [2002] A.D. 2002, para. 13 (Belize, Oct. 25, 2002).

39. Courts in the United States have emphasised the mitigating value of mental impairments as well as evidence of deprivation, hardship or child abuse in the sentencing process. In *Williams v. Taylor*, the U.S. Supreme Court held that a defendant's constitutional rights were violated after the defendant's attorney failed to investigate and present evidence that the defendant was "borderline mentally retarded," as well as evidence that the defendant had suffered mistreatment, abuse, and neglect during early childhood. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Likewise, in *Brewer v. Quarterman*, the United States Supreme Court reversed a lower court's judgment after it found the state court in the case did not provide the sentencing jury with an opportunity to decide whether the defendant's depression, troubled childhood, and substance abuse might have provided a legitimate basis for imposing a sentence on the defendant other than death. *See Brewer v. Quarterman*, 550 U.S. 286 (2007).

F. Pre-trial and Appellate Delay

40. Both pre-trial and appellate delays have been cited by numerous courts in Africa and in the Caribbean as mitigating factors justifying a more lenient sentence. In particular, courts have recognised that a reduction in sentence is sometimes the only appropriate remedy for pre-trial delays. The High Court of St. Lucia concluded in *Coecillia St. Romaine v. Attorney General* that "if at trial there is a conviction then the trial judge should *always* consider a reduction in the severity of the sentence in light of the delay." *Coecillia St. Romaine v. Attorney General*, [2010] Claim No. SLUHCV 2010/1100 (St. Lucia, May 30, 2012) (quoting *Gibson v. Attorney General*, [2010] CCJ 3 (AJ) (St. Vincent, Aug. 16, 2010) (emphasis added). In a judgment of the Privy Council in *Procurator Fiscal v. Watson*, Lord Millet observed that:

> The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in sentence." *Procurator Fiscal v. Watson*, [2002] UKPC D1, para. 129 (Jan. 21, 2002).

Lord Millet's statements in *Fiscal* were reiterated in *Paul v. Attorney General*, when the High Court of Malawi explained that it "agree[d] with the observations of Lord Millet" and encouraged the trial court to consider the defendant's sentence in light of the pre-trial delay. *Paul v. Attorney General*, [2011] MWHC 10 (Malawi, Oct. 25, 2011). Similarly, courts in Kenya and Uganda have acknowledged that pre-trial delays should be considered during sentencing. *See Republic v. Milton Kabulit*, [2012] Crim. Case No. 115 of 2008 (Kenya, Jan. 26, 2012); *Muhwezi Jackson v. Uganda* [2014] UGCA 52 (Uganda, Dec. 18, 2014).

41. In addition to pre-trial delays, any significant delay during the appellate process may also justify the reduction of an offender's sentence. *See S v. Michele* [2009] ZASCA 116 (South Africa, Sep. 25, 2009); *S v. Jaftha* [2009] ZASCA 117 (South Africa, Sep. 25, 2009). This will be an important factor to consider in Malawi, given the delay between the issuance of the *Kafantayeni* judgment and its implementation. In *S v. Karolia*, the Supreme Court of Appeal of South Africa explained that a court may consider, in substituting a sentence for the one imposed originally imposed, whether a delay between sentencing and a hearing of the defendant's appeal may justify a lighter sentence. *See*

S v. Karolia, [2006] SACR 75 (South Africa, Mar. 27, 2014). In *Malgas v. S*, the Court reiterated its holding in *Karolia* that a delay in the hearing of a defendant's appeal may be remedied by a reduced sentence. *See Malgas v. S*, [2013] ZASCA 90 (South Africa, May 31, 2013). *See also Vivian Rodrick v. State of West Bengal*, 1971 AIR 1584 (India, Jan. 27, 1971) ("[I]nordinate delay in the disposal of the defendant's appeal" may, by itself, "be sufficient for imposing a lesser sentence of imprisonment for life.").

42. The severity of a crime has not deterred courts from remedying a pre-trial or appellate delay with a reduction in sentence. In *Queen v. Lance Blades*, the defendant was convicted of murder but was nevertheless "afforded an appropriate reduction in sentence" after the Eastern Caribbean Supreme Court found there had been an "inordinate delay . . . in bringing the matter from the Preliminary Inquiry stage before the High Court for disposal." *Queen v. Lance Blades*, [2013] Crim. Case Nos. SLUHCR 2011/0041, 0042 (St. Lucia, May 29, 2013). This principle was reinforced by *Muhwezi v. Uganda*, in which the Court of Appeal of Uganda found "delaying to bring [a defendant charged with murder] to trial, may itself mitigate against the imposition of a death penalty." *Muhwezi Jackson v. Uganda*, [2014] UGCA 52, para. 15 (Uganda, Dec. 18, 2014). In setting aside the defendant's death sentence, the Court analogised the defendant's pre-trial delay to a delay in executing a death sentence. *See id.*

ii. Military courts

Another specific fair trial guarantee promoted by the interventions of the Special Rapporteurs is that military courts should not have the capacity to hand down death sentences to civilians.

Allegation letter sent to Hamas in the Occupied Palestinian Territory (16 November 2009) (with the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the torture and other cruel, inhuman or degrading treatment or punishment)

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the case of Saleem Mohammed Saleem al-Nabahin, who was recently sentenced to death by a military court in Gaza.

According to the information we have received:

> Mr. Saleem Mohammed Saleem al-Nabahin, aged 27, is a resident of al-Boreij refugee camp in Central Gaza governorate. Hamas security forces took Mr. Saleem al-Nabahin into custody at an unspecified date in mid-2008. In detention, he was subjected to torture at the hands of members of the Gaza Internal Security Forces and of the Izz al-Din al Qassam Brigades. A confession to the charges of collaboration with the enemy was extracted under torture.
>
> Mr. Saleem al-Nabahin was put on trial before the Permanent Military Court in Gaza on charges of "collaboration with hostile parties" under article 131 of the Palestinian Liberation Organization's Revolutionary Penal Code of 1979. On 8 October 2009, the Military Court found him guilty and sentenced him to death by hanging.
>
> On 13 October 2009, Mr. Saleem al-Nabahin filed an appeal against the judgment and sentence. Under the Revolutionary Penal Code which was applied by the court in this case the appeal lies not to a higher court but to the Head of the Militant Judiciary in his personal capacity.

[...]

With regard to the trial of Mr. Saleem Mohammed Saleem al-Nabahinby by a military court, we wish to bring to the attention of your Excellency's Government that international law also requires that in capital punishment cases the defendants' right to "a fair and public hearing before

an independent and impartial tribunal" (article 10 of the Universal Declaration on Human Rights) is scrupulously respected. The Human Rights Committee, in its general comment no. 32 to article 14 International Covenant on Civil and Political Rights, gives valuable guidelines in this respect. It notes that "[w]hile the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned." The Committee also notes that "the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14."

Furthermore, the former Commission on Human Rights has stated that "States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and that such courts apply due process procedures that are recognised according to international law as guarantees of a fair trial including the right to appeal a conviction and sentence" (Official records of the General Assembly, Fifty Sixth Session, Supplement 40 (A/56/40) para 76). In this connection, we would also like to refer to paragraph 51 of the general comment no. 32, in which the Human Rights Committee stated that "[t]he right of appeal is of particular importance in death penalty cases." As the appeal filed by Mr. Saleem Mohammed Saleem al-Nabahinby does not, according to the information received, lie to a higher court, but to the Head of the Militant Judiciary in his personal capacity, we would like to express our serious doubts as to the availability of an effective right of appeal.

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶30-32)

30. From the perspective of fair trial standards, the imposition of the death penalty, especially on civilians, by military courts and tribunals represents a worrying trend. In paragraph 22 of its general comment No. 32, the Human Rights Committee noted that the trial of civilians in military courts might raise serious problems as far as the equitable, impartial and independent administration of justice was concerned. Principle 5 of the Basic Principles on the Independence of the Judiciary provides that everyone is to have the right to be tried by ordinary courts using established legal procedures. The Working Group on Arbitrary Detention has concluded that military justice systems should be prohibited from imposing the death penalty under all circumstances (E/CN.4/1999/63, para. 80).

31. In many instances, military jurisdictions circumvent basic fair trial guarantees, including by not allowing individuals adequate preparation of their defence. In paragraph 6 of its general comment No. 32 (CCPR/C/GC/32), the Human Rights Committee reaffirmed that the guarantees enshrined in article 14 of the International Covenant on Civil and Political Rights were applicable to common and exceptional jurisdictions of a civil and military character and that: The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.

32. In recent years, the actual or potential use of the death penalty by such tribunals has been reported to be problematic in Bahrain, the Democratic Republic of the Congo, Egypt, Lebanon, the Occupied Palestinian Territory, Somalia and the United States. Military or other special jurisdictions are ill suited to ensuring full compliance with fair trial standards as required in capital cases (E/CN.4/1996/40, para. 107). They should not have the power to impose sentences of death on anyone.

iii. Right to seek pardon

The Special Rapporteurs have also underlined the importance of the procedural right to seek pardon or commutation of a death sentence as a vital guarantee of last resort, allowing a "safety valve" in the case of potential new evidence or changed circumstances. Moreover, in the context of progressive abolition, the granting of clemency represents a significant opportunity to reduce the use of the death penalty.

> ***Report to the Human Rights Council (A/HRC/8/3, 2 May 2008, ¶¶59-67)***
>
> 59. Under international law, any person sentenced to death has the right to seek a pardon or to seek the commutation of a death sentence to a less draconian one. This right is reflected in international and regional instruments as well as in the domestic practice of almost every country that applies capital punishment. Indeed its recognition is so widespread that it would be difficult to deny its status as a norm of customary international law.[20] As with many human rights norms, however, the more pertinent question concerns the content of the right and, in particular, the extent to which States are required to respect certain procedural safeguards in order to ensure the integrity of the right. This question has been highlighted in recent years at the international and national levels and it is now timely to draw upon these developments in order to better understand the implications of the right concerned.
>
> 60. For present purposes, the formulation contained in article 6 (4) of the International Covenant on Civil and Political Rights can be considered to reflect accurately the formulation of the right: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."[21] The right thus has two separate parts. The first is the right of the individual offender to seek pardon or commutation. This implies no entitlement to receive a positive response, but it does imply the existence of a meaningful procedure through which to make such an application. But this right can, with relative ease, be rendered illusory. This may be achieved through the adoption of various approaches that are designed to, or have the effect of, turning the relevant procedures into a formality as a result of which no genuine consideration is accorded to the case for pardon or commutation. The second part of the right is the need to ensure that amnesties, pardons and commutations are not precluded by actions taken by the legislature or other actors to eliminate the relevant possibilities from the spectrum of available remedies. This is a right which preserves the "sovereign" powers of the relevant State authorities and underscores the fact that, even when the judicial process has been exhausted, those authorities retain the right to opt for life over death for whatever reason.
>
> 61. It is pertinent to mention cases in which each of these component parts of the right have been threatened. The first part – the right to seek pardon or commutation – was raised by the Government of the United States in the *Avena* case before the International Court of Justice.[22] The Government argued that clemency procedures ensured that every person sentenced to death received a reconsideration of his or her case prior to execution. In response, while leaving open the possibility that a clemency process could be devised that would meet its requirements, the Court made clear that the procedures actually followed did not come close to providing the sort of safeguards required. Apart from their lack of procedural safeguards, the chances of a successful application in some States was close to zero.[23] The second part of the right has been jeopardised

20 The Inter-American Court of Human Rights, *Fermín Ramírez v. Guatemala*, Judgment of 20 June 2005 (Merits, Reparations and Costs), para. 109 concluded that "the right to grace forms part of the international corpus juris".

21 The same principle is reaffirmed in the UN Safeguards *supra* note 16, para. 7.

22 Case Concerning Avena and Other Mexican Nationals (*Mexico v. U.S.*), 2004 I.C.J. 12.

23 Nicholas Berg, "Turning a Blind Eye to Innocence: The Legacy of *Herrera v. Collins*", 42 *American Criminal Law Review* (2005) 121, pp. 145-46.

by developments in Guatemala, beginning with an initiative in 2000 which eliminated the law governing clemency,[24] and has culminated in a determined congressional push in 2008 to adopt a law on presidential clemency, which lacks procedural safeguards and introduces a tacit rejection rule if the President fails to act on a petition within 30 days.

62. Before examining the relevant international jurisprudence in this area, it is important to acknowledge the functions that a right to clemency, as it is sometimes called, plays within the legal system. Even though the right has been characterised as lying at "the borderland of legality"[25] because of the power it vests in the political authorities, it is nonetheless a part of the legal system in the broadest sense. Its serves:

a) As a final safety valve when new evidence indicating that a conviction was erroneous emerges but in a form that is inadequate to reopen the case through normal procedures;
b) To enable account to be taken of post-conviction developments of which an appeals court might not be able to take cognizance but which nevertheless warrant being considered in the context of an otherwise irreversible remedy;
c) To provide an opportunity for the political process, which is rightly excluded from otherwise interfering in the course of criminal justice, to show mercy to someone whose life would otherwise be forfeited.

63. The key question then is: what procedural safeguards are required to be followed in order to ensure that the right to seek pardon or commutation is respected in practice? The Human Rights Committee had an opportunity to respond to this question when it considered a claim that the procedural guarantees of article 14 of the International Covenant on Civil and Political Rights must be followed. In rejecting that claim, it observed that "States parties retain discretion for spelling out the modalities" as indicated by the fact that article 6 (4) itself prescribed no particular procedure.[26] The Committee did not, however, endorse the view that the modalities followed were irrelevant, as underscored by the fact that it then held that the relevant procedures in place in the State concerned were not "such as to effectively negate the right enshrined" in article 6 (4). In other words, it left open the possibility that procedures could be deficient.

64. In interpreting the relevant provision of the American Convention on Human Rights, the Inter-American Commission on Human Rights has recognised that the right to apply for amnesty, pardon or commutation of sentence must be read to encompass certain minimum procedural protections for condemned prisoners, if the right is to be effectively respected and enjoyed.[27] It concluded that the condemned person's procedural rights include rights (a) to apply for amnesty, pardon or commutation of sentence; (b) to be informed of when the competent authority will consider the offender's case; (c) to make representations, in person or by counsel, to the competent authority; (d) to receive a decision from that authority within a reasonable period of time prior to his or her execution; and (e) not to have capital punishment imposed while such a petition is pending decision by the competent authority.[28] The Judicial Committee of the Privy Council reached largely

24 In its observations on the situation in Guatemala the Human Rights Committee expressed its concern over the elimination of the right to pardon. Human Rights Committee, Concluding Observations: Guatemala, CCPR/CO/72/GTM, 27 August 2001, para. 18. The issue was subsequently taken up by the Inter-American Court of Human Rights in the case of *Fermín Ramírez v. Guatemala*, Judgment of 20 June 2005 (Merits, Reparations and Costs). The Court held that the failure of domestic legislation to identify any "State body [that] has the power to know of and decide upon the measures of grace" violated Guatemala's obligations under the Convention (para. 110).

25 Sarat and Hussein, "On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life", *Stanford Law Review* 56 (2004), p. 1312.

26 *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002), para. 7.4.

27 *Rudolph Baptiste v. Grenada*, Case 11.743 (13 April 2000), para. 121.

28 Ibid.; the last of these is also affirmed in the UN Safeguards, *supra* note 16, para. 8.

the same conclusions concerning the content of this norm, adding that the condemned person should normally also be given access to the documents provided to the pardoning authority.[29]

65. The need for such procedural safeguards to be considered an integral part of the right itself has also been underscored by cases dealt with by the Special Rapporteur. In some instances, the process for considering pardons has proven to be cursory or illusory, with the designated decision-making body failing even to meet or deliberate.[30] Furthermore, since secrecy diminishes the likelihood of due process, requirements to provide the condemned person with basic information regarding the process, such as the date of consideration of the petition and notice of the decision reached, help to safeguard the integrity of the process.[31]

66. Similarly, the Special Rapporteur has encountered situations in which the Government has considered a clemency application solely on the basis of a written report by the trial judge rather than on submissions by the condemned person.[32] Reliance on a report from the trial judge reflects an unduly limited understanding of the reasons that pardon and commutation should sometimes be granted. Evidentiary and procedural rules mean that certain considerations central to matters of mercy are marginalised or even excluded in the trial and appellate process. For example, commutation may be thought to be warranted because a murder was triggered by events that make it relatively understandable even if they do not suffice to excuse criminal liability, because a society's attitudes towards the death penalty have changed since trial, because exonerating evidence has arisen, or because a prisoner, though guilty of murder, has been successfully rehabilitated on death row. A trial judge's report on a case will not speak to these and other reasons that might move a Government to show mercy. Indeed, sometimes the circumstance that might suggest the desirability of pardon does not even come to pass until after the trial has finished. The safest guarantee that the possibility of pardon or commutation will achieve their goals is for the condemned person to have the opportunity to invoke any personal circumstances or other considerations that might appear relevant to him or her.

67. In conclusion, both law and practice demand that the "right to seek pardon or commutation" be accompanied by essential procedural guarantees if it is not to be turned into a meaningless formality that does little or nothing to further the purposes for which the right was recognised. Those procedural guarantees include the right of the condemned person to affirmatively request pardon or commutation; to make representations in support of this request referring to whatever

29 "The procedures followed in the process of considering a man's petition are ... open to judicial review ... [I]t is necessary that the condemned man should be given notice of the date when the [pardoning authority] will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken ... The fact that the [pardoning authority] is required to look at the representations of the condemned man does not mean that they are bound to accept them. They are bound to consider them ... It is ... not sufficient that the man be given a summary or the gist of the material available to the [pardoning authority]; there are too many opportunities for misunderstandings or omissions. He should normally be given in a situation like the present the documents." (*Neville Lewis, et al. v. Attorney General of Jamaica, et al.*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000, judgement of 12 September 2000.) See also the Judicial Committee in *Reckley v. Minister of Public Safety* (No. 2) [1996] 1 All ER 562 and *De Freitas v. Benny* [1976] A.C. 239.

30 Report of the Special Rapporteur, Bacre Waly Ndiaye, Mission to the United States, E/CN.4/1998/68/Add.3, 22 January 1998, para. 102; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1987/20, 22 January 1987, para. 45.

31 As the Special Rapporteur has observed previously: "The uncertainty and seclusion inflicted by opaque processes place due process rights at risk, and there have, unfortunately, been cases in which secrecy in the post-conviction process has led to a miscarriage of justice." Report of the Special Rapporteur, Philip Alston, Transparency on the Death Penalty, E/CN.4/2006/53/Add.3, 24 March 2006, para. 26.

32 See, e.g., Report of the Special Rapporteur, Philip Alston, Communications with Governments, E/CN.4/2006/53/Add.1, 27 March 2006, pages 232-242.

considerations which might appear relevant to him or her; to be informed in advance of when that request will be considered; and to be informed promptly of whatever decision is reached.

In 2016, Special Rapporteur Heyns submitted an *amicus curiae* brief about the right to seek clemency to the African Commission on Human and Peoples' Rights in the case of a man facing the death penalty in Botswana.

Amicus curiae brief submitted by the Special Rapporteur in the case of Complaint on behalf of Patrick Gabaakanye who has been sentenced to death in Botswana to the African Commission on Human and Peoples' Rights (April 2016, ¶¶23-38, 40-42, 51-52)

23. The right to seek clemency is a settled principle of international human rights law. The principal sources in international law for the right to seek clemency are the International Covenant on Civil and Political Rights ('ICCPR', to which Botswana acceded in 1974)[33] and the American Convention on Human Rights ('ACHR').[34] Each of these treaties specifically mandates a clemency process in all death penalty cases.

24. What follows is a summary of the instances in which clemency has been considered against international human rights law norms, including as part of the protection of Article 4 of the African Charter. It is hoped that the Commission can glean from the same, a developing global consensus as to the need for the clemency process to be meaningful and effective, as well as fair and transparent.

(i) The right to seek clemency in international law, including the African Charter

25. The right to seek clemency is a feature of a number of UN resolutions concerning the rights of those facing the death penalty. The Economic and Social Council of the United Nations ('ECOSOC') was established pursuant to Article 7 of the Charter of United Nations and is one of the six principal organs of the United Nations. Botswana is an elected member of ECOSOC. In 1984 the ECOSOC passed a series of nine safeguards ('the UN Safeguards') guaranteeing protection of the rights of those facing the death penalty and which contain express provision for the right to seek clemency.[35]

26. The UN Safeguards state at paragraph 7 that: "Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment." Paragraph 8 of the UN Safeguards further preserves the right to seek clemency pending execution: "Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence". The UN Safeguards were later adopted by the UN General Assembly[36] and resolutions concerning their implementation were passed in 1989 and 1996, respectively. The 1996 resolution "Calls upon Member States in which the death penalty may be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty."[37]

27. Historically, there has been surprisingly little judicial guidance (both within Africa and internationally) regarding the clemency process itself. Article 6(4) of the International Covenant

33 The ICCPR has 168 state parties.
34 The ACHR has 23 state parties.
35 Resolution 1984/50 of 25 May 1984.
36 UN General Assembly (14 December 1984) Human Rights in the administration of justice, Resolution A/RES/39/118.
37 Resolution 1996/15 of 23 July 1996 – Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 5.

on Civil and Political Rights and the United Nations Safeguard No 7 both stipulate that "[a]nyone sentenced to death shall have the right to seek pardon or commutation of sentence"[38] but, few international or regional tribunals have had the opportunity to properly consider and rule on the procedural and substantive rights attendant in the clemency process. It would be desirable to establish a set of minimum standards governing the clemency process to ensure that the applicant's right to apply for clemency is meaningful. Given the African Commission's fundamental role in setting out the necessary procedural safeguards in capital cases, the Commission is particularly well placed to consider the minimum procedural requirements that ought to govern the clemency process.

28. The Commission's General Comment No.3, a document aimed at guiding States in understanding the "range of application of Article 4 of the African Charter,"[39] provides that Article 4 of the Charter should be interpreted (like Article 6 of the ICCPR) as including a right to seek clemency, underlining that "[t]hose sentenced to death have the right to seek clemency, pardon or commutation through a transparent process with due process of law."[40]

26. The Commission further stated, in forceful terms, the limitations imposed by Article 4 of the Charter in respect of carrying out the death penalty on certain categories of person: "Whatever the offense or the circumstances of the trial, the execution of...persons with psycho-social or intellectual disabilities, will always amount to a violation of the right to life."[41]

29. Following the adoption of General Comment No.3 by the Commission[42], it is clear that the scope of Article 4 of the African Charter encompasses the existence of a clemency process, the requirements of which are transparency, fairness and due process.

30. The Commission has not yet had the opportunity to adjudicate upon the compatibility or otherwise of national clemency procedures with Article 4 of the Charter. In light of the adoption of General Comment No.3 and the envisaged scope of Article 4 where clemency is concerned, the Commission may take the view that, given the number of states which retain the death penalty, the right to seek clemency assumes particular importance for the development of regional jurisprudence. Additionally, the Commission may be concerned as to whether (and if so, how) the scope of protection under Article 4 is affected by the fact of a Complainant's execution during the currency of the Commission's provisional measures.

(ii) The clemency process should be meaningful and effective

32. The Inter-American Commission has considered the requirements of clemency procedure against the requirements of the ACHR in a number of death penalty cases. In *McKenzie v. Jamaica*,[43] the Commission held that the right to seek clemency "encompasses certain minimum procedural guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed." The Commission's view was that the content of those guarantees included:

a) the right to be informed of when the deliberations would take place;
b) the ability to make representations personally or through a legal representative; and
c) to receive a decision within a reasonable time prior to execution.

38 Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, (OUP, 5th ed., 2015), p. 312.
39 See African Commission on Human and Peoples' Rights, *General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 2015, preface.
40 Ibid., para. 24.
41 Ibid., para 25.
42 *General Comment No. 3* was adopted by the ACHPR at its 57th Ordinary Session in The Gambia between 4th and 18th November 2015.
43 *McKenzie v. Jamaica*, Inter-Am. Comm'n. H.R. Case 12.023, Report No. 41/00 (13 April 2000), para. 228.

33. In finding that the Grenadian Constitution's provisions governing the Prerogative of Mercy violated Articles 4,5 and 8 of the ACHR, the Inter-American Commission found that they did not "guarantee condemned prisoners an effective or adequate opportunity to participate in the mercy process."[44] In particular, the Inter-American Commission stated that it found no evidence of "any right on the part of the offender to apply to the Advisory Committee, to be informed of the time when the Committee will meet to discuss the offender's case, to make oral or written submissions to the Privy Council or to present, receive or challenge evidence considered by the Privy Council."[45]

34. Since then, the Commission has reiterated and elaborated upon its previous decisions on clemency when it held in the case of *Medelin, Ramirez Cardenas and Leal Garcia*[46] that: "The right to apply for amnesty, pardon or commutation of sentence under inter-American human rights instruments, while not necessarily subject to full due process protections, is subject to certain minimal fairness guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed."[47] And:

> "The allegations of the parties indicate that the practice followed by the Texas Board of Pardons and Paroles when considering petitions filed on behalf of persons sentenced to death does not allow for opportunities to view the evidence submitted in opposition to clemency requests and that this body does not report on the reasons for its recommendation to reject a clemency petition. The State has not denied the assertion that there is no set of rules or criteria to be taken into account when making clemency determinations regarding death penalty cases in Texas. Therefore, the Commission finds that the procedure in place falls short of establishing minimal safeguards to prevent arbitrary decisions concerning evidence submitted either in favour or in opposition of a clemency request pending the execution of a death sentence."[48]

35. Roughly contemporaneous to *McKenzie v Jamaica*, the Judicial Committee of the Privy Council in *Neville Lewis and Others v. Attorney General of Jamaica,*[49] considered the appeals of four death row prisoners who contended that they were entitled, as part of their applications for mercy to the Jamaican Privy Council (JPC), to have access to the information that had been placed before the JPC and to make representations upon it. In accordance with section 91 of the Constitution of Jamaica, the JPC was obliged to consider a written report from the trial judge and such other information as the Governor General, acting on the recommendation of the Council, might require and cause to be forwarded to it before it advised him whether or not to exercise the prerogative of mercy.

36. In allowing the appeals of all four prisoners, the Privy Council held that whilst the merits of a decision to grant or not to grant a petition of mercy were not amenable to judicial review, "the states' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review"[50]. The Privy Council held in particular that:

> a) The decision to grant mercy or otherwise must be exercised by procedures which were fair and proper and amenable to judicial review.

44 *Rudolph Baptiste v. Grenada*, Case 11.743, Report No. 38/00 (April 13, 2000), para. 120.
45 Ibid., paras. 118-119.
46 IACHR, Report No. 90/09, Case 12.644, *Medellin, Ramirez Cardenas and Leal Garcia v. United States*, Admissibility and Merits (Publication), 7 August 2009.
47 Ibid., para. 150 (citing: IACHR, Case No 12.023 *McKenzie et al. v. Jamaica*, Annual Report of the IACHR 1999, para 228; Case No. 12.067 *Edwards et al. v. The Bahamas*, Annual Report of the IACHR 2000, para. 170).
48 Ibid., para. 152.
49 *Lewis and Others v. Attorney General of Jamaica* [2001] 2 AC 50.
50 Ibid. p. 79.

b) That in considering what natural justice required it was relevant to have regard to international human rights norms laid down in treaties to which the state was a party, whether or not they were independently enforceable in domestic law.
c) That, therefore, the condemned man was entitled to sufficient notice of the date when the JPC would consider his case for him or his advisers to prepare representations which the JPC was bound to consider before taking a decision, when a report by an international human rights body was available the JPC should consider it and give an explanation if it did not accept the report's recommendations, and the condemned man should normally be given a copy of all the documents available to the JPC and not merely the gist of them.
d) That the defects in the procedures adopted in relation to the applicants' petitions for mercy had resulted in a breach of the rules of fairness and of natural justice.

37. Subsequently, *Lewis v. Jamaica* was considered by the Inter-American Commission in the case of *Lamey v. Jamaica*,[51] in which the Commission found as follows: "In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the Convention."

38. The decision of *Knights v. Grenada*,[52] which was handed down by the Inter-American Commission on the same day as *Lamey*, extended the ruling in *Neville Lewis* throughout the Commonwealth Caribbean.

(iii) The clemency process must be fair and transparent

[...]

40. Where international jurisprudence is concerned, the lack of transparency surrounding the clemency procedure in Cyprus was considered by the European Court of Human Rights in the case of *Kafkaris* ... In a joint partly dissenting opinion, Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens highlighted the absence of a published procedure governing the criteria applied by the President in mercy applications in the country concerned, the absence of reasons for refusal of mercy and the overall "lack of a fair, consistent and transparent procedure" which in their view "compound[ed] the anguish and distress which are intrinsic in a life sentence."[53] It is worth noting that the death penalty *per se* is no longer considered compatible with the European Convention.

51 *Lamey v. Jamaica*, Case Nos. 11/826, 11/843, 11/846, 11/847, Report No. 49/01 (I.A.C.H.R. April 4 2001).
52 *Knights v. Grenada*, Report No. 47/01 (I.A.C.H.R. April 4 2001).
53 *Kafkaris v. Cyprus*, Application No. 21906/04, Partly dissenting judgement, 12 February 2008.

41. In the [African] Commission decision of *Spilg and Ditschwanelo (on behalf of Kobedi) v Botswana*,[54] the state was found to have violated Article 5[55] of the African Charter by reason of failing to provide the deceased prisoner and his family with the result of his unsuccessful clemency petition and the time and date of his execution. Citing *Interights v. Botswana*, the ACHPR held that: "...a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best he can, to face his ultimate ordeal." The failure to allow the deceased prisoner and his family "to have closure with the dignity of their last farewells" amounted to inhuman treatment within the meaning of Article 5 of the African Charter.

(iv) Minimum Safeguards for a Fair and Transparent Clemency Process

42. There is, inevitably, scope for varying levels of formality within clemency procedure and practice at national level. It seems clear, however, from the jurisprudence identified above that the components of a fair and transparent clemency process which complies with international human rights law include:

a) a published procedure as to the clemency process, including the criteria to be applied by the decision making body;
b) the right to be informed of when the decision making body's deliberations will take place;
c) the ability to make representations personally or through a legal representative;
d) the right to view adverse information submitted to the clemency authority;
e) reasons for an adverse decision; and
f) the right to receive a decision within a reasonable time prior to execution.

[...]

Conclusion

51. The right to seek clemency is firmly established in international human rights law. Commensurate with the significance of clemency as a final remedy in death penalty cases and as already underscored by the Commission in General Comment No.3, it has been accepted at the highest levels of international jurisprudence that the right to seek clemency is attended by minimum procedural safeguards.

52. The movement towards recognition of due process in clemency cases is a fundamentally important aspect of jurisprudential development concerning the right to life in international human rights law. Thus far, the clemency jurisprudence has emerged from cases where it was accepted that no procedures compliant with international norms were meaningfully adopted. There have been few opportunities to examine extant but inadequate clemency procedures. In light of the particular facts of the Claimant's case, wherein certain procedural safeguards have been granted but in a context where the signatory state proceeds in the absence of any published clemency procedure, refuses to permit a pre-execution mental health assessment, and carried out an execution during the currency of provisional measures the Commission is presented with an important opportunity to consider the proper scope and parameters of Article 4 of the Charter.

54 ACHPR Case No. 277/2003.

55 Article 5 of the African Charter protects "The right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

2. "Most serious crimes"

The foothold of the death penalty in the International Covenant on Civil and Political Rights is provided for in article 6(2), which states that '[i]n countries which have not abolished that death penalty, sentence of death may be imposed only for the *most serious crimes* in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant' (emphasis added). Clearly, much turns on the interpretation of the term "most serious crimes".

The Special Rapporteurs have examined in detail the history and meaning of the term "most serious crimes," and explained why it includes only intentional killings:

> ***Report to the Human Rights Council (A/HRC/4/20, 29 January 2007, ¶¶39-53)***
>
> 39. International human rights law provides that States which retain the death penalty can only impose it for "the most serious crimes". That phrase has thus assumed major importance in efforts to determine when the death penalty might acceptably be imposed. While its precise meaning has not been spelled out in treaty form, the debates over its drafting, principles of interpretation adopted subsequently, and the by now very extensive practice of international human rights mechanisms have all combined to clarify the meaning and significance of the phrase.
>
> 40. The first Special Rapporteur dealt with the issue of the "most serious crimes" as early as 1984 when he surveyed the death penalty legislation of States to assess the range of offences for which it was then imposed in practice.[56] The results of the survey contributed to the elaboration of the safeguards guaranteeing protection of the rights of those facing the death penalty, which were adopted by the Economic and Social Council later that year.[57] In his next report, the Special Rapporteur noted that these safeguards would "serve as criteria for ascertaining whether an execution is of a summary or arbitrary nature",[58] and he began to consider particular situations implicating the most serious crimes limitation.[59] In subsequent reports, the Special Rapporteur drew on the safeguards and their follow-up by the Council as well as on the jurisprudence of the Human Rights Committee in determining whether particular offences fell within or outside the scope of the "most serious crimes" requirement.[60] In communications with Governments, the Special Rapporteur has addressed death sentences for offences and conduct including[61] adultery,[62]

56 Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1984/29, 21 February 1984, paras. 38-40.

57 ECOSOC Res. 1985/50; see generally *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16, 25 January 1984.

58 Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1985/17, 12 February 1985, para. 24.

59 Ibid., paras. 31-38.

60 *See, e.g.*, Report of the Special Rapporteur, Bacre Waly Ndiaye, E/CN.4/1997/60, 24 December 1996, para. 91: "[The UN Safeguards state that] the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. The Special Rapporteur concludes from this, that the death penalty should be eliminated for crimes such as economic crimes and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences."

61 This list is not comprehensive. In the earlier years, especially, the communications addenda to the reports of the Special Rapporteur often do not include the full text of communications, at times making the determination of the norms at issue difficult from today's vantage point.

62 Report of the Special Rapporteur, Philip Alston, Mission to Nigeria E/CN.4/2006/53/Add.4, 7 January 2006, para. 35; Report of the Special Rapporteur, Philip Alston, Follow-Up to Country Recommendations, Sudan, E/CN.4/2006/53/Add.2, 27 March 2006, para. 150; Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2003/3, 13 January 2003, para. 60; Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2000/3, 25 January 2000, para. 70.

apostasy,[63] blasphemy,[64] bribery,[65] acts incompatible with chastity,[66] corruption,[67] drug possession,[68] drug trafficking,[69] drug-related offences,[70] economic offences,[71] expressing oneself,[72] holding an opinion,[73] homosexual acts,[74] matters of sexual orientation,[75] manifesting one's religion or beliefs,[76] prostitution,[77] organization of prostitution,[78] participation in protests,[79] premarital sex,[80] singing songs inciting men to go to war,[81] sodomy,[82] speculation,[83] "acts of treason, espionage or other vaguely defined acts usually described as 'crimes against the State'",[84] and writing slogans against a country's leader.[85] The range of offences involved invites an inquiry into the underlying normative rationale, and suggests that problems of non-compliance have remained widespread. It is clear that a subjective approach to this important issue is not viable, in the sense that a vast array of offences might understandably be classified by any given individual or Government as being among the "most serious". But such an approach would render the relevant international law standard meaningless. As a result a systematic and normatively persuasive response is essential.

41. The basic requirement was first introduced in article 6 (2) of the 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 in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

42. This provision supplemented that prohibiting the arbitrary deprivation of life, in article 6(1):

63 E/CN.4/2006/53/Add.2, *supra* note 62, para. 150.
64 Report of the Special Rapporteur, Bacre Waly Ndiaye, E/CN.4/1994/7, 7 December 1993, para. 475.
65 Ibid., para. 209.
66 E/CN.4/2006/53/Add.1, *supra* note 32, pp. 87-88.
67 E/CN.4/1994/7, *supra* note 64, para. 209.
68 Report of the Special Rapporteur, Philip Alston, Communications with Governments, E/CN.4/2005/7/Add.1, 17 March 2005, para. 721.
69 Report of the Special Rapporteur, Asma Jahangir, Country Situations, E/CN.4/1999/39/Add.1, 6 January 1999, para. 236; Report of the Special Rapporteur, Asma Jahingir, Communications with Governments, E/CN.4/2004/7/Add.1, 24 March 2004, paras. 524-525.
70 Report of the Special Rapporteur, Bacre Waly Ndiaye, A/51/457, 7 October 1996, para. 107.
71 Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2002/74, 9 January 2002, para. 114; Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2001/9, 11 January 2001, para. 83; A/51/457, *supra* note 70, para. 107.
72 E/CN.4/2006/53/Add.1, *supra* note 32, pp. 307-317 (Yemen).
73 Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations, E/CN.4/1998/68/Add.1, 19 December 1997, para. 227; E/CN.4/2006/53/Add.1, *supra* note 32, pp. 307-317.
74 Report of the Special Rapporteur, Asma Jahangir, Communications, E/CN.4/2002/74/Add.2, 8 May 2002, para. 546; E/CN.4/2006/53/Add.2, *supra* note 62, para. 150; E/CN.4/2006/53/Add.1, *supra* note 32, pp. 108-110.
75 E/CN.4/2000/3, *supra* note 62, para. 70.
76 E/CN.4/1998/68/Add.1, *supra* note 73, para. 227; E/CN.4/2006/53/Add.1, *supra* note 32, pp. 307-317; E/CN.4/2002/74, *supra* note 71, para. 114; E/CN.4/2001/9, *supra* note 71, para. 83.
77 E/CN.4/2000/3, *supra* note 62, para. 70.
78 Report of the Special Rapporteur, Asma Jahangir, Communications, E/CN.4/2000/3/Add.1, 12 February 2003, para. 110.
79 Ibid., para. 111.
80 E/CN.4/2002/74/Add.2, *supra* note 74, para. 456.
81 Report of the Special Rapporteur, Philip Alston, Mission to Sudan, E/CN.4/2005/7/Add.2, 6 August 2004, para. 56.
82 E/CN.4/2006/53/Add.4, *supra* note 62, para. 35.
83 E/CN.4/1994/7, *supra* note 64, para. 209.
84 E/CN.4/2002/74, *supra* note 71, para. 114; E/CN.4/2001/9, *supra* note 71, para. 83; E/CN.4/2000/3, *supra* note 62, para. 70.
85 E/CN.4/2002/74/Add.2, *supra* note 74, paras. 338, 342.

> "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."[86]
>
> 43. It has been much commented upon that neither term – "arbitrarily deprived" or "most serious crimes" – is further defined in ICCPR. In this regard, various sources are illuminating. And while the *travaux préparatoires* are but a supplementary means of interpretation, they do assist in understanding the ordinary meanings of these terms.
>
> 44. One insight that emerges from the *travaux* of article 6 of ICCPR is that the concepts of arbitrariness and of the "most serious crimes" serve to add a requirement of substantive justice to the requirements of formal legality and due process. An early version of the article stated that it "shall be unlawful to deprive any person of his life" with the one exception being upon "conviction of a crime for which this penalty is provided by law".[87] Notably, this version, which implied that the legality of an execution would be determined solely within the domestic legal order, was rejected. A number of delegates pointed out that it would permit what amounted to arbitrary killing to be masked by the trappings of law.[88] Various substantive limits on the scope of death penalty laws were thus introduced, including a prohibition of arbitrary deprivations of life (with "arbitrarily" meaning either "illegally" or "unjustly"[89]), a prohibition of death sentences for other than the "most serious crimes", and a requirement that any such deprivation be consistent with ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide.[90] To determine

86 The provisions protecting the right to life in the American Convention on Human Rights also specify that "[n]o one shall be arbitrarily deprived of his life" (art. 4(1)) and that the death penalty "may be imposed only for the most serious crimes" (art. 4(2)) but also states that, "In no case shall capital punishment be inflicted for political offenses or related common crimes" (art. 4(4)). With respect to the African regional human rights system, "Although the African Charter of Human and Peoples' Rights is silent on the subject of capital punishment, the African Commission on Human and Peoples' Rights has called upon states that maintain the death penalty to 'limit the imposition of the death penalty only to the most serious crimes.'" William A. Schabas, "International law and the death penalty: reflecting or promoting change?", in Hodgkinson & Schabas (eds.) *Capital Punishment: Strategies for Abolition* (2004), p. 46.

87 *See* Marc J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights* (1987), pp. 113-145.

88 *See, e.g.*, Commission on Human Rights, Summary Record of 152nd Meeting, E/CN.4/SR.152, 11 April 1950, paras. 12-13 ("His delegation's view [was] that the word 'law', as understood in the covenant, referred exclusively to laws which were not contrary to the principles of the [Universal] Declaration [of Human Rights]. … Unless such a formula was included, the text of article 5 [now 6] would be acceptable to any dictator, as there would be nothing to prevent him from enacting laws contrary to the spirit of the Declaration."); Commission on Human Rights, Summary Record of 140th Meeting, E/CN.4/SR.140, 30 March 1950, para. 38 ("[T]he greatest danger to be guarded against was that of actions of the State against the individual. … Comparatively primitive and incautious in their methods until recently, totalitarian states had since become very careful to preserve an appearance of legality while arbitrarily killing their opponents.").

89 Draft International Covenants on Human Rights, A/2929, 1 July 1955, p. 83, para. 3. *See also* Manfred Nowak, *CCPR Commentary* (2nd revised ed. 2005), pp. 127-128: "Although the term 'arbitrarily' was criticised as too vague, the HRComm [Human Rights Commission] ultimately opted for it after lengthy discussion. … [In the Third Committee of the General Assembly:] Despite strong criticism of the vagueness of the word 'arbitrarily' and a Dutch proposal that Art. 6 be drafted along the same lines as Art. 2 of the ECHR, the majority insisted on the formulation adopted by the HRComm, even though its meaning had not been clarified. Several delegates took the opinion that arbitrarily was synonymous with the term 'without due process of law' common in Anglo-American law. Others argued that it contained an ethical component, since national legislation could also be arbitrary. The Committee of Experts, which had taken up the interpretation of this term at the request of the Committee of Ministers of the Council of Europe, concurred with the view of the Chilean delegate in the HRComm that arbitrary deprivation of life contained elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness*."

90 A/2929, *supra* note 89, pp 83-84. The recognition that a death sentence cannot be imposed "contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide" indicates another key limitation on what may constitute a capital crime. Under international law, each individual may as of right exercise liberty of movement; choose his or her own residence; leave any country; enjoy

whether a particular offence falls among the most serious crimes, thus, requires interpretation and application of the relevant international law rather than of the subjective approach opted for within a given State's criminal code and sentencing scheme.

45. Another key insight to be drawn from the *travaux* relates to the apparent imprecision of the terms used to define the scope of the right to life. The report of the Secretary-General to the General Assembly on the draft Covenant identified three views that had been advanced during the drafting of ICCPR. The first was that the right to life should be expressed in absolute terms and that "no mention should be made of circumstances under which the taking of life might seem to be condoned".[91] This view was widely rejected as unrealistic in the context of a binding legal instrument.[92] The second view was that the provision should "spell out specifically the circumstances in which the taking of life would not be deemed a violation of the general obligation to protect life",[93] and a number of detailed enumerations of exceptions were provided by those holding this view. Others considered, however, that even if agreement could be reached on each particular exception, "any enumeration of limitations would necessarily be incomplete".[94] The third view – which prevailed – was that a general formulation should be adopted that provided a principled basis for distinguishing permissible and impermissible deprivations of life.[95]

46. The approach adopted was that only one exception—the death penalty—would be expressly specified. It was considered that the concepts of arbitrariness and of the most serious crimes, while complex, were nonetheless accessible to legal reasoning.[96] It was noted, moreover, that inasmuch as they had juridical meaning, these concepts could be clarified and given precision through subsequent jurisprudence. It was submitted that the views of the body established to implement ICCPR, the Human Rights Committee, along with the comments of States and the consideration of world public opinion would clarify these concepts as concrete cases arose.[97]

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individual and family privacy; think freely, adopt a religion or belief of his or her choice; manifest his or her religion or belief in worship, observance, practice and teaching; hold opinions without interference; express him or herself freely; seek, receive and impart information and ideas of all kinds; assemble peacefully; associate with others; form or join a trade union; marry and found a family; take part in the conduct of public affairs; to vote, and to stand as a candidate for election. ICCPR, arts. 12, 17, 18, 19, 21, 22, 23, 25. The exercise of these and other human rights cannot be punished with death; indeed, such conduct cannot be punished at all. Even when the enjoyment of a right might be subjected to a legitimate limitation or derogation, its exercise cannot be considered to rise to the level of a "most serious crime" for which the death penalty might be imposed. See also E/CN.4/2006/53/Add.1, *supra* note 32, pp. 307-317; E/CN.4/1998/68/Add.1, *supra* note 73, paras. 221-227; Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd ed. 1999), p. 220.

91 A/2929, *supra* note 89, p. 82, para. 1.

92 Ibid., p. 82, para. 1.

93 Ibid., p. 82, para. 2. This same basic debate also played out over the more specific concept of the most serious crimes. The term "most serious crimes" was "criticised as lacking precision" and some suggested the explicit exclusion of particular categories of offences from the concept (page 84, para. 6). However, exhaustively enumerating examples proved as difficult in the abstract as it had under the broader rubric of arbitrary deprivation.

94 Ibid., p. 82, para. 2; *see also* E/CN.4/SR.140, *supra* note 88, paras. 2, 13.

95 A/2929, *supra* note 89, p. 82, para. 3.

96 See, e.g., E/CN.4/SR.140, *supra* note 88, para. 3 ("The precise significance of the word 'arbitrarily' had been very fully discussed by the Commission on Human Rights and by the Third Committee of the General Assembly and it had been concluded that it had a precise enough meaning. It had been used in several articles in the Universal Declaration of Human Rights and referred both to the legality and the justice of the act.").

97 On the contemplated role of the HRCtte and of world public opinion, *see, e.g.*, Commission on Human Rights, Summary Record of 139th Meeting, E/CN.4/SR.139, 30 March 1950, para. 8: "As the Commission intended to include implementation measures in the covenant, it would provide for an international body to focus world public opinion on the acts of countless signatories to the covenant. That international body and public opinion would easily judge what was arbitrary and what was not." On the role of States, *see, e.g.*, para. 45: "In time a sort of jurisprudence on the subject would certainly be established based on the comments of governments, and it would subsequently be possible to supplement the covenant in the light of that jurisprudence." The sense of this observation was clarified

47. In essence this is the same approach that has been used in relation to all of the terms which have required jurisprudential development in order to give operational clarity to the norms of human rights law, many of which are inevitably and sometimes intentionally relatively open-ended. The evolving jurisprudence in relation to the terms "arbitrary" and "most serious crimes" has developed along two tracks. First, the evaluation of particular sentencing schemes has facilitated incremental clarification without requiring attempts to arrive at an exhaustive enumeration. Second, expert and intergovernmental bodies that have had the time to focus on the concept in light of the whole corpus of international human rights law have proven capable of more precisely defining the scope of the "most serious crimes" in terms of general principles. Moreover, there has been a fruitful interaction between the two modes of jurisprudential development.[98]

48. The first major attempt to clarify the "most serious crimes" provision on the level of principle was that undertaken by the Economic and Social Council in the early 1980s, resulting in the safeguards. These were drafted by the Committee on Crime Prevention and Control of the Council. Its preliminary draft included a provision specifying that, "Capital punishment may be imposed only for the most serious crimes." At the Council's request, the Secretary-General commented on that draft. He noted the "persistent disparity in the number of offences liable to the death penalty" and observed that the norm remained "unclear and open to differing interpretations". As a result, he proposed the following reformulation in order that article 6 (2) of ICCPR and article 3 of the Universal Declaration of Human Rights "may be properly applied":

> "Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should be limited to intentional lethal offences. Accordingly, it should be excluded for offences which are considered to be of a merely political nature, or for cases in which the political nature of the offence exceeds its criminal aspects."[99]

49. The provision ultimately adopted by the Economic and Social Council and the General Assembly largely adopted this approach:

> "In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."[100]

50. The safeguards drafted by the Committee were adopted by the Economic and Social Council and subsequently by the General Assembly,[101] and the Secretary-General was requested by the Council to report on the implementation of the safeguards by States.[102] The reports of the Secretary-General have clarified the meaning accorded in practice to the phrase "intentional crimes with lethal or other extremely grave consequences". While noting that it has given rise to "wide interpretation by a number of countries", the Secretary-General concluded that "the meaning of intentional crimes and of lethal or other extremely grave consequences is intended to imply that the offences should be life-threatening, in the sense that this is a very likely consequence of the action".[103]

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by the delegate's observation that the list of particular non-arbitrary deprivations of life proposed by some for inclusion in the text of the ICCPR would, despite its exclusion, "form one of the basic elements in any jurisprudence of that sort."

98 A particularly significant example is that the recognition that mandatory death sentences were *per se* violations of human rights law stemmed from a gradual understanding through the adjudication of concrete cases that the "most serious crimes" limitation did not fully capture the concept of the non-arbitrary imposition of capital punishment.

99 *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16, 25 January 1984, paras. 40-43.

100 UN Safeguards, *supra* note 16, para. 1.

101 ECOSOC Res. 1984/50 (25 May 1984); GA Res. 39/118 (14 December 1984).

102 ECOSOC Res. 1990/51 (24 July 1990).

103 *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the*

51. With respect to particular offences, the Commission on Human Rights and the Human Rights Committee have determined that a wide range of specific offences fall outside the scope of the "most serious crimes" for which the death penalty may be imposed.[104] These include: abduction not resulting in death,[105] abetting suicide,[106] adultery,[107] apostasy,[108] corruption,[109] drugrelated offences,[110] economic crimes,[111] the expression of conscience,[112] financial crimes,[113] embezzlement by officials,[114] evasion of military service,[115] homosexual acts,[116] illicit sex,[117] sexual relations between consenting adults,[118] theft or robbery by force,[119] religious practice,[120] and political offences.[121] The last of these has presented particular complexities, inasmuch as offences against the State or the political order are often drawn broadly so as to encompass both non-serious and very serious crimes and ambiguously so as to leave the Government discretion in defining the offence. Instances in which the Committee has expressed concern that offences carrying the death penalty are "excessively vague",[122] "imprecise",[123] "loosely defined",[124] "so broad [as to encompass] a

death penalty, E/2000/3 (31 March 2000), para. 79. Additional insights are provided by the views of the European Union. After reviewing the resolutions of the GA and the provisions of the ICCPR and the UN Safeguards, in its *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1988), the European Council determined that, among the minimum standards that should be met by all States maintaining the death penalty, is: 'Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The death penalty should not be imposed for nonviolent financial crimes or for non-violent religious practice or expression of conscience.' In keeping with the *erga omnes* character of the right to life, the EU has elected to make *démarches* to non-EU countries regarding practices deviating from this and other minimum standards. (*See* Roger Hood, *The Death Penalty: A Worldwide Perspective* (3rd ed. 2002), pp. 16-18.)

104 This kind of legal offence-specific legal analysis also takes place at the national level. For a number of papers working out the implications of the most serious crimes standard for particular offences, ranging from illegally raising capital to smuggling precious metals, within a single legal system *see The Road to the Abolition of the Death Penalty in China: Regarding the Abolition of the Non-Violent Crime at the Present Stage* (Press of Chinese People's Public Security University of China, 2004).

105 CCPR/CO/72/GTM, *supra* note 24, para. 17.

106 Report of the Human Rights Committee, A/50/40, 3 October 1995, para. 35.

107 Human Rights Committee, Comments on Reports Submitted, CCPR/C/79/Add.25, 3 August 1993, para. 8.

108 Human Rights Committee, Concluding Observations, Sudan, CCPR/C/79/Add.85, 28 October 1997, para. 8.

109 CCPR/C/79/Add.25, *supra* note 107 para. 8.

110 A/50/40, *supra* note 106 para. 35; Report of the Human Rights Committee, A/55/40, 18 October 2000, para. 13.

111 Human Rights Committee, Comments on Reports Submitted Algeria,, CCPR/C/79/Add.1, 25 September 1992, para. 5; CCPR/C/79/Add.25, *supra* note 107 para. 8.

112 CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).

113 CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).

114 CCPR/C/79/Add.85, *supra* note 108, para. 8.

115 Human Rights Committee, Concluding Observations, Iraq, CCPR/C/79/Add.84, 19 November 1997, para. 11.

116 CCPR/C/79/Add.85, *supra* note 107, para. 8.

117 Ibid., para. 8.

118 CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).

119 CCPR/C/79/Add.85, *supra* note 107 para. 8; Human Rights Committee, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29 April 2005, para. 13.

120 CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).

121 Human Rights Committee, Concluding Observations, Libyan Arab Jamahiriya, CCPR/C/79/Add.101, 6 November 1998, para. 8.

122 Human Rights Committee, Concluding Observations, Vietnam, CCPR/CO/75/VNM, 5 August 2002, para. 7; CCPR/C/79/Add.101, *supra* note 121 para. 8.

123 Comments by the Government of the Syrian Arab Republic on the concluding observations of the Human Rights Committee, CCPR/CO/71/SYR/Add.1, 28 May 2002, para. 9.

124 Human Rights Committee, Concluding Observations, Cameroon, CCPR/C/79/Add.116, November 1999, para. 14.

wide range of acts of differing gravity",[125] or "couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria"[126] have included legislation regarding "opposition to order and national security violations",[127] "attacks against the internal security of the State"[128], "categories of offences relating to internal and external security",[129] "secession, espionage or incitement to war",[130] a broadly written definition of terrorism,[131] and various other political offences.[132]

52. The Human Rights Committee has reached conclusions regarding the principled content of the "most serious crimes" provision that are consistent with, and give further refinement to, those expressed in the safeguards and the comments of the Secretary-General. In one of its earliest general comments, the Committee observed that: "[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. ... The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure."[133] This analysis has been greatly refined over the ensuing decades through the insights provided by dealing with the host of concrete situations discussed above, and a review of its jurisprudence today suggests more precise conclusions. First, the Committee has thus far only found cases involving murder not to raise concerns under the most serious crimes provision.[134] Second, it has consistently rejected the imposition of a death sentence for offences that do not result in the loss of life.[135] Third, the Committee's conclusion that the death penalty may not be mandatory even for murder suggests that a most serious offence must involve, at a minimum, intentional acts of violence resulting in the death of a person.[136] Indeed, the

125 Human Rights Committee, Comments on reports submitted, Egypt, CCPR/C/79/Add.23, 9 August 1993, para. 8.

126 Human Rights Committee, Concluding Observations, Democratic People's Republic of Korea, CCPR/CO/72/PRK, 27 August 2001, para. 13.

127 CCPR/CO/75/VNM, *supra* note 122, para. 7.

128 Human Rights Committee, Concluding Observations, Togo CCPR/CO/76/TGO, 28 November 2002, para. 10.

129 A/55/40, *supra* note 110 para. 13.

130 CCPR/C/79/Add.116, *supra* note 124, para. 14.

131 CCPR/C/79/Add.23, *supra* note 125, para. 8.

132 CCPR/CO/71/SYR/Add.1, *supra* note 123, para. 9; CCPR/CO/72/PRK, *supra* note 126, para. 13; CCPR/C/79/Add.101, *supra* note 121, para. 8.

133 Human Rights Committee, *General Comment No.6* (1982) (emphasis added); *see also Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983 (1985), para. 14.

134 In a series of communications concerning the extradition of persons to a country in which they could face the death penalty, the HRCtte evaluated whether extradition would expose the communication's author "to a real risk of a violation of Article 6, paragraph 2 [of the ICCPR]" in the destination country, and it did not find a violation where the crime in question was murder. *Kindler v. Canada*, Communication No. 470/1991, para. 14.3 (1993) (no violation where extradition was for "premeditated murder, undoubtedly a very serious crime"); *Chitat Ng v. Canada*, Communication No. 469/1991, para. 15.3 (1994) ("The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes."); *Cox v. Canada*, Communication No. 539/1993, para. 16.2 (1994) (no violation where extradition was for "complicity in two murders, undoubtedly very serious crimes"). *See also Roger Judge v. Canada*, Communication No. 829/1998 (2003) (finding extradition to violate ICCPR, art. 6 where extraditing country had abolished the death penalty, regardless whether extradition was on a most serious crime).

135 This has been stated explicitly in the concluding observations on some country reports. *See* CCPR/C/79/Add.25, *supra* note 107 ("In the light of the provision of article 6 of the Covenant, requiring States parties that have not abolished the death penalty to limit it to the most serious crimes, the Committee considers the imposition of that penalty … for crimes that do not result in loss of life, as being contrary to the Covenant."); CCPR/CO/83/KEN, *supra* note 19, para. 13 ("[T]he Committee notes with concern … that the death penalty applies to crimes not having fatal or similarly grave consequences, such as robbery with violence or attempted robbery with violence, which do not qualify as 'most serious crimes' within the meaning of article 6, paragraph 2, of the Covenant.")

136 *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2-3.

Committee and the Commission have rejected nearly every imaginable category of offence other than murder as falling outside the ambit of the most serious crimes.

53. The conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting these provisions is that the death penalty can only be imposed in such a way that it complies with the stricture that it 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.

Special Rapporteur Heyns returned to the question of most serious crimes in his report on the broader subject of the death penalty to the General Assembly in 2012. He was particularly interested in placing emphasis on the need to see the category as a narrowing one:

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶34-35, 45-47)

34. A key determinant of the scope of the legitimate use of the death penalty is the range of crimes for which it may be imposed. Pursuant to article 6 (2) of the International Covenant on Civil and Political Rights, in countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes.

35. The scope of article 6 (2) has been articulated restrictively. The first of the safeguards guaranteeing protection of the rights of those facing the death penalty see para. 13) provides that capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The Human Rights Committee has found the imposition of the death penalty for crimes that do not result in loss of life incompatible with the Covenant (CCPR/C/79/Add.25, para. 8). As clarified by a previous mandate holder, these conclusions have been reflected in the current international legal interpretation of the term "most serious crimes" as limited to crimes involving lethal intent and resulting in death – in other words, intentional killing (A/HRC/4/20, paras. 54-62 and 66).

[...]

45. Given the room for progressive restriction built into article 6 (2), State practice must be considered in order to understand the current permissible scope of the "most serious crimes" provision. This approach is grounded in the normative framework of customary international law and in general principles of treaty interpretation (see article 31 (3) (b) of the Vienna Convention on the Law of Treaties).

46. State practice in the context of the most serious crimes should be established not only by considering legislative provisions, but also by looking at the crimes for which executions are currently carried out in practice. That States describe a particular crime as a capital offence in their statute books, but in practice have it there largely for symbolic reasons and do not execute anyone for it, spoils rather than supports an argument that it is acceptable to execute for that crime.

47. State practice in respect of intentional killing suggests that retentionist States regard it as falling within the category of "most serious crimes": all States that continue to carry out executions find it acceptable to do so for intentional killing. As measured by State practice, however, there is no consensus among States to support the death penalty for crimes that do not involve lethal intent

See also E/CN.4/1998/68/Add.3, *supra* note 30, para. 21: "The notion of most serious crimes was later developed in the [UN] Safeguards guaranteeing protection of the rights of those facing the death penalty, according to which the most serious crimes are those 'intentional crimes with lethal or other extremely grave consequences'. The Special Rapporteur considers that the term 'intentional' should be equated to premeditation and should be understood as deliberate intention to kill."

> and that do not result in death, such as drug-related offences or economic crimes. In reality, many of these death-eligible crimes are not prosecuted by retentionist States as capital offences and/or death sentences are not handed down for them. Even fewer States actually carry out executions for these offences.

In 2018, citing, among other sources, paragraph 35 from the above report, the Human Rights Committee provided in its General Comment No.36, that 'the term "the most serious crimes" must be read restrictively and include only crimes of extreme gravity involving intentional killing.'[137]

3. Protected groups

In addition to fair trial guarantees, international law also provides that certain groups should be protected from the death penalty completely, including persons who were below eighteen years of age at the time of the offence and persons with mental or intellectual disabilities.

i. Juvenile offenders

The prohibition against executing juveniles is firmly established in two fundamental international human rights treaties, the ICCPR as well as the Convention on the Rights of the Child. However, states do not consistently respect the prohibition on the execution of children, especially where the age of the accused is uncertain. The Special Rapporteurs have stated that in such cases, international law requires that the accused be given the benefit of the doubt.

In a 2007 urgent appeal sent to the Government of Iran, Special Rapporteur Alston deplored the high incidence of juvenile executions in that country.

> ***Urgent appeal sent to the Government of the Islamic Republic of Iran (27 December 2007) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)***
>
> We would like to draw the attention of your Government to information we have received regarding a young man identified as Behnood, who is at imminent risk of execution. He will reportedly be executed in the coming days following the confirmation by the Supreme Court of a death sentence. Behnood was convicted by a court in Tehran of murdering another boy during a street fight, when he was 17 years old.
>
> As your Excellency is aware this is not the first case of juvenile offenders being sentenced to death and/or facing imminent execution we have received regarding Iran. Indeed, this is the thirteenth occasion that we have written to your Government this year concerning executions of juvenile offenders. While we do not wish to prejudge the accuracy of the allegations regarding this specific case, we would like to draw your attention once again to the fact that the execution of Behnood as well as any further executions of juvenile offenders are incompatible with the international legal obligations of the Islamic Republic of Iran under various instruments which we have been mandated to bring to the attention of Governments. Article 37(a) of the Convention on the Rights of the Child to which Iran is a Party expressly provides that capital punishment shall not be imposed for offences committed by persons below eighteen years of age. In addition, Article 6(5) of the International Covenant on Civil and Political Rights to which Iran is a Party provides that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age.
>
> We would also like to underline that sentencing a juvenile to death in itself amounts to cruel, inhuman and degrading punishment, which is prohibited *inter alia* in the Convention on the

137 CCPR/C/GC/36, supra note 14, para. 35.

Rights of the Child, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In this connection, we would also remind your Excellency of the discussions of this issue that took place between your Government and the Committee on the Rights of the Child in January 2005, in which the delegation stated that all executions of persons who had committed crimes under the age of eighteen had been halted. This was reiterated in a *note verbale* from the Permanent Mission of the Islamic Republic of Iran on 8 March 2005 to the Office of the High Commissioner for Human Rights in which it was stated:

> "In recent years the enactment of the death penalty for individuals aged under 18 has been halted and there has been no instance of such punishments for the category of youth. The legal ban on under-aged capital punishment has been incorporated into the draft Bill on Juvenile Courts, which is at present before parliament for ratification."

We would respectfully reiterate our appeal to the Government of the Islamic Republic of Iran to take all necessary steps to avoid executions that would be inconsistent with accepted standards of international human rights law. This includes, most urgently, the suspension of the execution of Behnood and the commutation of his sentence.

In 2009, Special Rapporteur Alston further highlighted the sharp incongruence between settled law and state practice in relation to executing juvenile offenders:

Report to the Human Rights Council (A/HRC/11/2, 27 May 2009, ¶¶27-37, 42)

B. Upholding the prohibition against the execution of juvenile offenders

27. The prohibition against executing juvenile offenders (those who were under the age of 18 at the time of committing the relevant crime) is one of the clearest and most important of international human rights standards. It is unequivocal and admits of no exception. There is not a single Member State of the United Nations that is not a party to one of the two international treaties enshrining this norm: the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. Yet juvenile offenders continue to be sentenced to death, as evidenced by many such reports I have brought to the attention of the Governments concerned in recent years.

28. In its resolution 10/2, the Council urged States to ensure that capital punishment is not imposed for offences committed by persons under 18 years of age, and called on relevant special procedures of the Council to give special attention to such questions and to provide, wherever appropriate, specific recommendations in that regard.

29. I therefore wish to draw the Council's attention to the situation in relation to the juvenile death penalty, especially as reflected in the communications sent to Governments in the last two years.[138] During that period, I have addressed 33 communications to five Governments[139] regarding allegations that the death penalty has been imposed for a crime committed by a minor, or that the execution of a juvenile offender was imminent or had been carried out. The communications

138 See Report of the Special Rapporteur, Philip Alston, Cases transmitted to Governments and replies received, A/HRC/8/3/Add.1, 30 May 2008 and Report of the Special Rapporteur, Philip Alston, Cases transmitted to Governments and replies received A/HRC/11/2/Add.1, 29 May 2009.

139 Those of the Islamic Republic of Iran, Pakistan, Papua New Guinea, Saudi Arabia and the Sudan. A recent Human Rights Watch report on the theme includes Yemen but not Papua New Guinea, see "The last holdouts: ending the juvenile death penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen", 10 September 2008, available at: http://www.hrw.org/en/reports/2008/09/10/last-holdouts.

concerned 46 juvenile offenders, four of them female, the remainder male.[140] In six cases, it was alleged that the juvenile offender had been executed.[141] In the remaining cases, urgent appeals were sent in situations where reports indicated the risk of the execution of a juvenile offender taking place. In two cases, I was subsequently informed by the Government that the death penalty had been quashed on appeal (A/HRC/8/3/Add.1); in another case, I was subsequently informed by a source that the juvenile offender had been released (the Government did not respond to my urgent appeals in these cases). Finally, in two cases, I called the Government's attention to reports that such executions had already taken place. In neither of those cases did the Government confirm or deny the reports.

30. Unfortunately, the level of government responses to communications is particularly low in cases concerning the imposition of the death penalty against juvenile offenders. Thus, 33 communications over a two-year period have drawn only four responses, amounting to a response rate of about 12 per cent. Moreover, since February 2008, no responses to communications regarding the use of the death penalty against juvenile offenders have been received.

31. It might be asked why the Council should be especially concerned with this particular issue, when a relatively small number of juveniles have actually been executed. The answer is threefold. First, matters concerning the right to life are of fundamental importance, a fact which has consistently been recognised by the Council and its predecessor. Second, the juvenile death penalty is a negation of the essential principles of juvenile justice endorsed by a wide range of United Nations bodies and accepted by all States. Third, the credibility of the Council is called into question if it fails to respond in any way to a situation involving repeated violations of an international standard that is entirely unambiguous and universally proclaimed.

32. Based on the correspondence that I have engaged in with Governments and on the replies received, there would appear to be four possible obstacles in the way of eliminating the juvenile death penalty, not just on paper, but in practice.

33. The first obstacle seems to be a misunderstanding of the precise age at which an individual ceases to be a juvenile. Thus, for example, the Government of Saudi Arabia reported that it applies "regulations ... stipulat[ing] that a person can be held criminally responsible for acts that he commits after reaching the age of majority, which differs from one individual to another" (A/HRC/8/3/Add.1, p. 343). Similarly, article 7 (1) of the Arab Charter on Human Rights, which entered into force on 15 March 2008, provides that "Sentences of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime." While the Convention on the Rights of the Child leaves room in article 1 for the setting of an age below 18 years for specific purposes, this is not in fact the case in relation to the death penalty. To the contrary, the Convention is absolutely clear in article 37 (a) in establishing 18 years as the minimum age attained at the time of the relevant crime in order for an individual to be potentially subject to the death penalty in those jurisdictions that have retained it. Unlike other provisions of the Convention, this prohibition is not flexible when account is taken of the individual development and maturity of the offender. The Committee on the Rights of the Child has emphasised these points in relation to Saudi Arabia.[142] The International Covenant on Civil and Political Rights similarly admits no flexibility in terms of the minimum age. Thus, for States that are parties to the Arab Charter and to either or both of the other two international human rights treaties, the higher standard must prevail. In practice, this applies to all relevant States.

140 The breakdown by country is Iran (Islamic Republic of): 24 communications concerning 30 juvenile offenders; the Sudan: 4 communications concerning 10 offenders; Saudi Arabia: 3 communications concerning 4 offenders; Papua New Guinea and Pakistan: each one communication concerning one offender.

141 See A/HRC/11/2/Add.1, *supra* note 138.

142 CRC/C/SAU/CO/2, para. 32.

34. A second obstacle concerns disputes over the age of the individual. Contrary to previous reporting periods (for example, see A/HRC/4/20/Add.1, p. 154), none of the communications received from Governments during the reporting period disputed that the offenders sentenced to death were younger than 18 years at the time of the offence. In cases where a genuine dispute does exist, the Government is obligated to give the benefit of any doubt to the individual concerned. In other words, the inadequacy of birth registration arrangements cannot be invoked to the detriment of an individual who can reasonably contest an official claim that the age of majority had been attained at the time of the relevant offence.

35. A third obstacle, invoked especially by the State that is responsible for the great majority of the executions of juveniles, concerns the requirements of Islamic law. Thus, the main argument advanced by the Islamic Republic of Iran is that, where the death penalty is provided as retribution (*Qesas*) for murder, the "enforcement of *Qesas* depends upon the request to be made by guardians of the murder victim; and the Government is solely delegated to carry out the verdict, on behalf of the former" (A/HRC/8/3/Add.1, p. 223). The Government asserted that, as a consequence of this principle, it could not enforce the prohibition of the death penalty for juvenile offenders in cases where it is imposed as *Qesas*. On the same grounds, the Government argued that its authorities had no power to grant pardon or commutation of the death sentence in a *Qesas* case. It added that it strived "to apply mechanisms, such as the provision of financial assistance to the guardians, which might result in receiving the required consent [to the juvenile offender being pardoned] from them". It is beyond the scope of my mandate to examine the validity of this argument in terms of Islamic law, but it is noteworthy that none of the other States in which Islamic law is applicable has seen the need to invoke this exception.

36. In terms of international law, however, it is clear, as I have indicated in response to the specific cases,[143] that the obligation to eliminate capital punishment for offences committed by persons below 18 years of age cannot be confined to the role played by the judicial authorities, thus permitting the parallel existence of a whole separate regime designed to satisfy additional retribution claims asserted by the victim's family. No such additional considerations are contemplated in either article 37 (a) of the Convention on the Rights of the Child or article 6 (5) of the International Covenant on Civil and Political Rights. To permit such a separate regime, and for the State to be able to assert that it has no power over that regime, would be to comprehensively undermine the system of international human rights law. This also helps to explain why such an exemption has not been invoked by other States in an effort to facilitate the continuation of the juvenile death penalty.

37. In some States, the juvenile death penalty can be abolished by judicial decision (as in the United States of America in March 2005)[144] alone. In others, the actions required will be more diverse. Whatever the means employed, the result must be that all laws that permit the execution of juvenile offenders are repealed, the judiciary must end the practice of sentencing juvenile offenders to death, and a moratorium must be placed on the execution of any individuals already sentenced under pre-existing laws.

[...]

42. The execution of juvenile offenders is an affront to the fundamental principles of humane treatment and a blatant violation of international law. The insistence by one State in particular on continuing to impose and carry out such sentences thus represents a major challenge to the willingness of the Council to carry out the mandate entrusted to it.

143 See for example the communications to the Islamic Republic of Iran and to Sudan, A/HRC/11/2/Add.1, *supra* note 138.

144 *Roper v. Simmons*, 543 U.S. 551 (2005).

The Expert Declaration submitted by Special Rapporteur Heyns to the High Court of Malawi, excerpted above, also discussed the prohibition against executing juvenile offenders. He and his fellow-authors also noted the provision of General Comment No.10 of the Committee on the Rights of the Child affording the benefit of the doubt to the defendant if there is doubt as to their age.

> ***Expert Declaration of Christof Heyns (with Sandra Babcock and William Schabas) in the High Court Of Malawi in the matter of The Sentence Re-Hearings Conducted In Accordance With Kafantayeni v. Attorney General, Twoboy Jacob v. Attorney General, and Yasini Mclemonce v. Attorney General (February 2015, ¶¶11-12)***
>
> ***B. Youth***
>
> 11. The international norm prohibiting the application of the death penalty to individuals who were under the age of 18 at the time of the crime is so firmly established that many commentators believe it has attained the status of *jus cogens*. The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, treaties that have been ratified by the vast majority of the world's nations, including Malawi, prohibit the application of the death penalty to juvenile offenders. Article 5 of the African Charter on the Rights and Welfare of the Child similarly provides that capital punishment shall not be imposed on children (and Article 2 defines a "child" as every human being below the age of 18). In short, there is no dispute that nations that retain the death penalty may not impose capital punishment on children.
>
> 12. Problems often arise, however, in countries that do not have a national birth registry. In this situation, juvenile offenders may unintentionally be prosecuted and sentenced to death. We have been informed that there are several cases in Malawi where very young offenders have been sentenced to death, some of whom may have been under the age of 18. Wherever this possibility is raised, it is clear that the accused is always entitled to the benefit of the doubt where there is conflicting evidence regarding his age at the time of the offence. See U.N. Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, ¶ 72, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) ("The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt.").

ii. Persons with mental or intellectual disabilities

International law prohibits imposing the death penalty on persons with any form of mental illness or intellectual disability, sometimes also referred to as psychosocial disabilities.

Special Rapporteur Alston sent several communications to governments on this matter:

> ***Urgent appeal sent to the Government of Vietnam (11 May 2007) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)***
>
> We are writing concerning Le Manh Luong, Tran Van Hoi, Nguyen Minh Tuan and Nguyen Van Can who, we understand, are at imminent risk of execution.
>
> According to the information we received:
>
> > They were arrested in 2004 (along with three others), tried and convicted of trafficking in heroin, illegally buying and selling a pistol and bullets and forgery of identity documents. They were sentenced to death by the People's Court, Quang Binh Province on 25 November 2006. Mr Luong, Mr Tuan and Mr Can appealed to the People's Supreme Court of Vietnam in hearings

that took place on 5 and 6 April 2007, and the Court upheld the sentences. It is understood that applications for clemency were submitted to President Nguyen Minh Triet.

It is furthermore our understanding that Mr Luong currently suffers from a mental disorder. On 29 August 1967 when Mr Luong was six years of age a B-52 bomber dropped a bomb on his family's house killing two of his brothers and causing him serious brain injury. Mr Luong's defence lawyer submitted medical evidence to the Court which states that Mr Luong had received a significant trauma to the head and that he was diagnosed as having "unstable emotional disorder" or asthenia. Dr Kennedy, a British consultant psychiatrist who has analysed the findings of the Vietnamese Doctors wrote that there "is evidence from the doctors who examined him in Vietnam that in March 2006 the defendant was suffering from psychiatric problems related to a structural problem in his brain". Dr Kennedy has concluded that Luong's brain damage would be seen as a mitigating factor for sentencing in Britain.

[...]

Prohibition on executing the mentally ill: To execute an individual who is mentally incapacitated violates the right not to be subjected to torture, inhuman or to cruel, inhuman or degrading treatment or punishment (article 7 ICCPR), and to impose a death sentence on a mentally incapacitated individual is also prohibited (article 6(2) ICCPR). The great importance attached to this norm by the international community is further indicated by its inclusion in the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (principle 3: "nor shall the death sentence be carried out... on persons who have become insane") and resolutions of the Commission on Human Rights (see CHR resolution 2000/65, paragraph 3 (e), urging States "not to impose [the death penalty] on a person suffering from any form of mental disorder"). In light of the medical evidence submitted regarding Le Manh Luong's mental health condition, it would appear that the imposition of the death sentence and execution would be in violation of the provisions of ICCPR.

Urgent appeal sent to the Government of the United States of America (21 May 2008)

In this connection, I would like to draw the attention of your Government to information I have received regarding Mr. Earl Wesley Berry, who is reportedly scheduled to be executed in Mississippi at 6pm on 21 May 2008. He was sentenced to death for the murder of Mary Bounds in 1987. To the extent that he can be classified, on the basis of the facts described below, as mentally retarded, his execution would be in violation of the international legal norms which I have been mandated to bring to the attention of Governments. It is reported that he has exhibited signs of mental retardation for most of his life.

According to the information I have received Mary Bounds was reported missing on 29 November 1987. Her car was found on 1 December near the First Baptist Church she attended in Houston, Mississippi. Her body was found the next day in nearby woods. She had died of head injuries as a result of blows to the head. On 6 December, 28-year-old Earl Berry was arrested at his grandmother's house, and confessed to the crime. He rejected an offer from the prosecution of a life sentence in return for a guilty plea. After a jury trial, he was sentenced to death on 28 October 1988. The death sentence was overturned by the state Supreme Court which found fault with the instructions given to the jury, and a resentencing was held in June 1992. At this hearing, the defense presented mitigating evidence, including testimony from a neuropsychologist about Earl Berry's low intellectual functioning and possible brain damage. A psychologist also testified that, in his opinion, Berry suffered from paranoid schizophrenia. He was nonetheless sentenced once again to death.

[...]

> It has been brought to my attention, that on 24 April 2008, a psychologist with expertise in mental retardation signed an affidavit stating that his review of the materials relating to Earl Berry had led him to the conclusion that Berry had an IQ of 75 or lower and/or "significantly sub-average intellectual functioning, and "to a reasonable degree of psychological certainty that further testing will demonstrate that Mr Berry meets the criteria established by the American Psychiatric Association and the American Association on Mental Retardation to be classified as mentally retarded".[145] Among other things, he noted that during Berry's school years his IQ was assessed as low as 72, and when the 25-year-old Berry was discharged from a Mississippi Department of Corrections prison hospital on 24 April 1985 following an apparent suicide attempt, the final diagnosis was "suicidal gestures / mentally retarded". Other affidavits – from Earl Berry's mother, other relatives, and people who knew Berry – describe Berry's slow development as a child, childhood head injuries he sustained as a boy, and the fact that even as an adult he never lived independently. His mother said that he attempted suicide six or seven times.
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> [...]
>
> In this connection, I would like to refer Your Excellency's Government to the fundamental principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Articles 3 and 6 of these instruments, respectively, provide that every individual has the right to life and security of the person, that this right shall be protected by law and that no one shall be arbitrarily deprived of his or her life. It is generally accepted that the execution of an individual who is mentally insane is incompatible with the prohibition of arbitrariness under these provisions.
>
> I would also like to refer Your Excellency's Government to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council resolution 1984/50 of 25 May 1984. Of particular relevance is paragraph 3 which provides that the death penalty shall not be carried out on persons who have become insane. In addition resolution 1989/64 of the Economic and Social Council resolution of 24 May 1989 on the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, recommends in paragraph 1(d) that States further strengthen the protection of the rights of those facing the death penalty, eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution. Legal authorities have concluded that it has become a norm of customary law that the insane may not be executed.

Special Rapporteur Heyns also engaged with the United States Government concerning the execution of individuals appearing to live with psychosocial disabilities. In one instance, he also wrote a newspaper article about a case in the state of Georgia:

> ***'Georgia will violate both justice and the constitution if it executes Warren Hill' (Guardian, 13 February 2013)***
>
> The US Supreme Court says it is a violation of the constitution to execute an offender with intellectual disabilities, but the state of Georgia is poised to do just that.
>
> Just over a year ago, the world learned that Georgia was about to execute Troy Davis, someone about whose guilt there were serious questions. Many expressed their misgivings, but he was,

145 *Editors' note:* The term "intellectual disability" has now replaced "mental retardation," because of the negative connotations of the latter term and the stigma and offense associated with its use. The change has been formalised in various settings. For example, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* fifth edition uses "intellectual disability." The "American Association on Mental Retardation" referenced in this letter has since been renamed the "American Association on Intellectual and Developmental Disabilities."

nevertheless, executed. It has now become clear that Georgia has finally cleared the last legal hurdles and is intent on executing Warren Hill, whose IQ is within the range of what is considered to constitute intellectual disability, or "mental retardation" (in US parlance). A state court has twice found that Hill meets the criteria for mental retardation by a preponderance of the evidence.

Hill has been on death row since 1991. His execution was stayed twice in the middle of 2012, to resolve questions relating to the lethal injection process. On 23 July, he was asked to choose his last meal (he took the usual prison food). He had already had his pre-execution physical and was waiting in the holding cell by the lethal injection room when he was told he would be executed another day. His execution was halted at the last minute to resolve a technical question about the method that was going to be used to kill him.

This has now been resolved, and state attorney general has confirmed his execution date. On 18 February, he will again be given the opportunity to choose a last meal. On 19 February, he is scheduled to be executed.

While there are many indications that the world community is moving away from the death penalty in general, international law as it currently stands does not prohibit capital punishment. A minority of governments continue to impose the death penalty. It is allowed in a small number of closely defined – and shrinking – circumstances, but international law prohibits the execution of juveniles, people who are insane, and those with intellectual disabilities.

The rationale is that these people are not considered to be as morally blameworthy for their actions as those who are not members of these classes of offenders. They are unlikely to be deterred by the threat of such punishment, and retribution against people who do not properly understand the consequences of their actions is irrational and imprudent. Where they harm others, they should be removed from society, but not pay the ultimate price.

The United States supreme court also follows this approach, and has ruled in *Roper v Simmons* in 2005 that those who are below the age of 18 when they committed their crimes cannot be executed. Before that, in Atkins v Virginia in 2002, the court held that it is a violation of the eighth amendment to execute those suffering from intellectual disability.

Fourteen years before the US supreme court ruled such executions as unconstitutional, Georgia had already passed a law prohibiting the death penalty for those suffering from intellectual disability. It was the first state to take this bold stance. However, in Atkins, the supreme court left it to the states to determine how to apply the court's prohibition on the execution of the intellectually disabled.

Whereas almost all other US states (including states that are active implementers of the death penalty, such as Texas and Alabama) and the federal government require proof of intellectual disability by a preponderance of evidence, the Georgia legislature has imposed a uniquely high burden on the accused to prove beyond a reasonable doubt that he is "mentally retarded" and thus should not be executed. Georgia is the only jurisdiction that imposes this heaviest burden of proof in the law on persons who must prove the existence of a mental disability.

Georgia's own law coincides with those of the country as a whole and the international community – namely, that people with intellectual disabilities should not be executed. The state should not allow itself, through the burden of proof it imposes, to end rendering that law meaningless and ineffective in practice.

The world community is again watching Georgia with great concern as it prepares to carry out another grotesque and unjust execution. There is no sense and no honour in executing children, the insane and those who suffer from intellectual disability. Georgia should not execute Warren Hill.

Special Rapporteur Heyns took the opportunity to draw attention to international standards concerning mental illness and the death penalty in his 2015 Expert Declaration to the High Court of Malawi, as well as in a communication to the government of Pakistan.

Expert Declaration of Christof Heyns (with Sandra Babcock and William Schabas) in the High Court Of Malawi in the matter of The Sentence Re-Hearings Conducted In Accordance With Kafantayeni v. Attorney General, Twoboy Jacob v. Attorney General, and Yasini Mclemonce v. Attorney General (February 2015, ¶¶6-10)

A. Individuals with Significant Mental Illnesses or Intellectual Disabilities

6. Although a categorical prohibition against the death penalty for individuals with severe mental illnesses or intellectual disabilities has not been formally recognised in any human rights treaty, the norm is so widely accepted that it likely constitutes customary international law. Over the last thirty years, UN bodies, international tribunals, and national courts have emphasised that states should never carry out the death penalty on individuals who, because of a mental disorder beyond their control, have particular difficulties in processing information, making good decisions, controlling their impulses, understanding the consequences of their actions, or appreciating the nature and reasons for their punishment. The 1984 U.N. Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty, drafted by the Economic and Social Council and later adopted by the General Assembly, state that the death penalty should not be imposed on people who are insane. See 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). In 1989, the U.N. Economic and Social Council adopted a resolution calling for the elimination of the death penalty for "persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." U.N. ECOSOC, Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty, p. 51, para. 1(d), U.N. Doc. E/1989/91 (May 24, 1989).

7. The UN Human Rights Commission repeatedly called upon states that continue to impose the death penalty "[n]ot to impose the death penalty on a person suffering from any form of mental disorder." U.N. Commission on Human Rights Resolution, Question of the Death Penalty, E/CN.4/RES/1999/61 (Apr. 28, 1999); U.N. Commission on Human Rights Resolution, Question of the Death Penalty, E/CN.4/RES/2000/65 (Apr. 27, 2000) (emphasis added). The U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has likewise emphasised that nations should eliminate the death penalty for mentally retarded persons and has called upon all governments that still permit such executions to bring their domestic laws in line with international law. See U.N. Commission on Human Rights, Extrajudicial, Summary, or Arbitrary Executions: Report of the Special Rapporteur, E/CN.4/2000/3, para. 97 (2000); U.N. Commission on Human Rights, Extrajudicial, Summary, or Arbitrary Executions: Report by the Special Rapporteur, E/CN.4/1998/68/Add.3, para. 145 (1998). And in December 2014, the U.N. General Assembly adopted a resolution calling for a universal moratorium on the death penalty in which it specifically urged states not to impose capital punishment on individuals suffering from "mental or intellectual disabilities." UNGA Res. 69/186 (Dec. 18, 2014).

8. These UN documents reflect what has become a strong international consensus against the execution of individuals with significant mental disorders. Taking note of international norms and the practices of foreign jurisdictions, the Supreme Court of India recently cited both international and foreign law in holding that a person who had become insane while on death row should be exempted from the death penalty. See *Shatrughan Chauhan & Another v. Union of India & Others*, (2014) 3 SCC 1, para. 79 (India, Jan. 21, 2014). In *Ford v. Wainwright*, the U.S. Supreme

Court explained the ancient provenance of this principle and explained why it has met with such universal acceptance:

> It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England ... For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. [citation omitted]. Similarly, the natural abhorrence civilised societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.

Ford v. Wainwright, 477 U.S. 399, 409–10, 417 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 979–80 (2007). Put differently, the execution of individuals with mental retardation or severe mental illness does not serve the punitive purposes of retribution, deterrence, or incapacitation. See *Panetti*, 551 U.S. at 958–59.

9. It is worth emphasizing that mental illnesses are distinct from intellectual disabilities, yet either condition acts as a bar to the application of the death penalty. Mental illness involves a medical condition that disrupts a person's thinking, feeling, mood, judgment, perceptions, ability to relate to others, and functioning. Common mental illnesses include paranoid schizophrenia, post-traumatic stress disorder, bipolar mood disorder, and many others. Mental retardation, also known as intellectual disability, is characterised by deficiencies in intellectual functioning and limitations in an individual's ability to cope with the requirements of everyday life. In some communities, these individuals might be identified as "slow learners." As explained by the U.S. Supreme Court in the seminal case of *Atkins v. Virginia*:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.
> *Atkins*, 536 U.S. 304 (2002) (citations omitted).

10. Reliable mental health evaluations are necessary for the courts to determine whether an offender suffers from any kind of mental disorder. For that reason, the Judicial Committee of the Privy Council has required that courts obtain psychiatric evaluations prior to imposing sentence. *Pipersburgh v. The Queen*, [2008] UKPC 11. Similarly, in *Moise v. The Queen*, the Eastern Caribbean Court of Appeal held that the trial court had erred during the offender's sentencing hearing by failing to take into account the offender's psychological assessment, which discussed the offender's probability of reform and social-readaptation. *Moise v. The Queen*, [2005] Crim. App. No. 8 of 2003 (St. Lucia, Nov. 12, 2003). Certainly, in all cases in which the imposition of a death sentence is a possibility, the courts should require competent mental health evaluations by properly trained professionals. Where such evaluations are not feasible due to a lack of qualified personnel or resources, the death penalty should be excluded from the range of possible sentences.

Urgent appeal sent to the Government of Pakistan (28 July 2015, Ref.UA PAK 6/2015) (with the Special Rapporteur on the rights of persons with disabilities, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

We express our grave concern at the potential imminent execution and torture and ill-treatment of [KH], as well as at his deteriorating psychosocial condition, *inter alia*, due to lack of appropriate treatment and reasonable accommodation in detention. The above seems to be in contravention of international human rights law, especially the right to everybody facing the death penalty to clemency and commutation of sentences, the prohibition of torture and ill treatment, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the right of persons with disabilities to reasonable accommodation and non-discrimination.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw your Excellency's Government's attention to the fact that any judgments imposing the death sentence to persons with disabilities are incompatible with the international legal obligations undertaken by your Excellency's Government under various instruments.

Article 6 (4) of the International Covenant on Civil and Political Rights (ICCPR), ratified by Pakistan on 12 November 1990, provides that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Persons with intellectual or psychosocial disabilities face the risk of being sentenced to death and executed in breach of international standards, including the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by Economic and Social Council resolution 1984/50 of 25 May 1984, and the Economic and Social Council resolution 1989/54 of 24 May 1989 for their implementation. States must do their utmost to address this risk, including by granting protection to persons with disabilities not covered by existing proscriptions.

Moreover, we would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Pakistan ratified on 23 June 2010.

We would also like to bring to the attention of your Excellency's Government that articles 10 and 15 of the Convention on the Rights of Persons with Disabilities ratified by Pakistan on 5 July 2011 expressly calls upon the States parties to take all necessary measures to ensure the effective enjoyment of the right to life by persons with disabilities on an equal basis with others, and not to be subjected to torture and cruel, inhuman or degrading treatment or punishment. Furthermore, the Committee on the rights of persons with disabilities has stated that the denial of reasonable accommodation in detention can be considered a form of discrimination, and in some instances also as a form of torture and ill treatment.

In addition, we would like to refer your Excellency's Government article 12 of the International Covenant on Economic, Social and Cultural Rights, ratified by Pakistan on 17 April 2008, which underlines the obligation of States to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, to preventive, curative and palliative health services (See CESC General Comment 14, para.34). Moreover, the Basic Principles for the Treatment of Prisoners, adopted by General Assembly resolution 45/111, underline that prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation (Principle 9).

4. Transparency

Transparency is among the fundamental safeguards aimed at preventing the arbitrary deprivation of life.

In 2006, Special Rapporteur Alston devoted his thematic report to the Commission on Human Rights to the issue of transparency and the imposition of the death penalty. In that report, he set out two overarching state obligations: (1) to publicise information on the use of the death penalty; and (2) to provide a transparent process to those facing the death penalty.

Report to the Commission on Human Rights (E/CN.4/2006/53/Add.3, 24 March 2006, ¶¶7-48)

II. THE OBLIGATION TO MAKE PUBLIC INFORMATION ON THE USE OF THE DEATH PENALTY

A. Legal framework of public transparency obligations

7. Transparency is fundamental to the administration of justice; indeed, in the succinct statement of the right to due process included in the Universal Declaration of Human Rights, the requirement of a public hearing follows only that of a fair hearing.[146] The prominence of the requirement is no accident: transparency is the surest safeguard of fairness. Why? Over time punishment imposed by Governments has come to replace private acts of retribution. This has rationalised the disposition of justice, yet it has also introduced the possibility of more systematic arbitrariness. The extraordinary power conferred on the State—to take a person's life using a firing squad, hanging, lethal injection, or some other means of killing—poses a dangerous risk of abuse. This power may be safely held in check only by public oversight of public punishment. It is a commonplace that due process serves to protect defendants. However, due process is also the mechanism through which society ensures that the punishments inflicted in its name are just and fair. As the Human Rights Committee has observed with respect to the International Covenant on Civil and Political Rights, transparency "is a duty upon the State that is not dependent on any request, by the interested party".[147]

8. The transparency safeguard for the due process of law is guaranteed by article 14, paragraph 1 of the International Covenant on Civil and Political Rights.[148] That provision lays down the general rule that everyone shall be entitled to a public hearing. It then clarifies this general rule with a limitation clause in two parts. The first part of the limitation clause provides that the public may be excluded for one of several reasons: the general interest of a democratic society in morals, public order, and national security, the privacy interests of the parties, and the interests of justice. These are thresholds not triggers: that a trial implicates a national security interest does not automatically justify a wholly secret trial; instead, the courts may exclude the public "from all or part of a trial"

146 The Universal Declaration of Human Rights, art. 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

147 Human Rights Committee, *Van Meurs v. the Netherlands* No. 215/1986 (1990), CCPR/C/39/D/215/1986, para. 6.1.

148 International Covenant on Civil and Political Rights, art. 14, para. 1: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

as required by the particular rationale by which publicity would imperil national security in the case at hand.

9. The second part of the limitation clause of article 14, paragraph 1, sharply limits the scope of the first part, specifying that secrecy may never extend beyond the hearing itself: "any judgement rendered in a criminal case or in a suit at law shall be made public". To this requirement there is only the narrowest of exceptions (for a few family law matters). No limitation whatsoever is permitted for interests of public order, national security, or justice. The reason for this nearly absolute transparency obligation is not, of course, that the drafters and States parties lost sight of these legitimate interests between the penultimate and last clauses of article 14, paragraph 1; rather, the rule is absolute because it is never the case that a democratic society has an interest in concealing from the public even this final trace of the judicial process.

10. In its resolution 1989/64 intended to ensure the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, the Economic and Social Council urged Member States "to publish, for each category of offence for which the death penalty is authorised, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law".[149] It is impossible to oversee compliance with the human rights law on capital punishment without this information.

11. Even during a state of emergency, derogation from transparency rights is never permitted in death penalty cases. It might be noted that the permissible scope of derogation from due process rights is always tightly circumscribed. While article 14, paragraph 1 is not listed among the so-called "non-derogable rights" (art. 4, para. 2), measures taken in derogation must always be limited "to the extent strictly required by the exigencies of the situation" (art. 4, para. 1). Moreover, derogations from due process may never go so far as to eviscerate the rule of law, because to permit such derogation would be to defeat the very purpose of the article 4 derogation regime: to prohibit states of exception subject solely to executive discretion by accommodating states of emergency subject to the rule of law.[150] It is not necessary, however, to speculate here on whether any species of emergency might strictly require derogation from the transparency requirements of article 14, paragraph 1. With respect to transparency and the death penalty, it is sufficient to quote the Human Rights Committee's cogent analysis: "The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights … . Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15."[151]

12. The purpose underpinning article 14, paragraph 1 explains why publicity must be more than formal. In order for every organ of government and every member of the public to have at least the opportunity to consider whether punishment is being imposed in a fair and non-discriminatory manner, the administration of justice must be transparent. It defeats the purpose of the publicity element of due process for judgements to be "made public" by filing them away in courthouses where they can, in theory, be paged through by citizens. Obscurity can be as harmful to due

149 UN Safeguards, *supra* note 16.

150 HRCtte, General comment No. 29 (2001) on derogations during a state of emergency, para. 16; see also Inter-American Court of Human Rights, Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency (arts. 27 (2), 25 and 8 American Convention on Human Rights)* (6 October 1987).

151 General comment No. 29, *supra* note 150, para. 15.

process as secrecy. Indeed, some of the questions that must be asked – that citizens must be able to ask – about the application of the death penalty cannot be answered without a comprehensive view of the decisions and the sentences that have been made throughout the country. The kind of informed public debate about capital punishment that is contemplated by human rights law is undermined if Governments choose not to inform the public. It is for this reason that a full and accurate reporting of all executions should be published, and a consolidated version prepared on at least an annual basis.

13. Neither is the general public alone in having a legitimate interest in comprehensive and reliable information on the use of the death penalty. At the national level, it might be noted that the human rights law obligation not to impose capital punishment in an arbitrary or discriminatory manner does not reside solely in the national executive. Organs in every branch of government – including the executive, the judicial and the legislative – and at every level, from the national to the local, will incur international legal responsibility on the State insofar as its acts lead to arbitrary or discriminatory executions.[152] Without aggregate information on capital punishment, it is, for example, impossible for any court to evaluate questions of discrimination. At the international level, States "have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms … ".[153] In recognition of this duty, the Economic and Social Council has, for example, requested that the Secretary-General survey Member States at five-year intervals on their use of capital punishment, including on the offences for which the death penalty may be imposed and on the total number of executions.

B. Case studies on secrecy and its impact on public oversight and debate

14. Capital punishment policies and practices are often justified with reference to the state of public opinion. Thus, the Government of China observed in a reply to the Special Rapporteur in 2003 that "each country should decide whether to retain or abolish the death sentence on the basis of its own actual circumstances and the aspirations of its people" and the role of public opinion was also emphasised in a reply to the Special Rapporteur in 2005.[154] The Government of Japan responded to a survey by the Secretary-General that "the majority of people in Japan recognise the death penalty as a necessary punishment for grievous crimes. Considering the number of serious crimes … it is inevitable to impose the death penalty on offenders who commit such crimes".[155] In many countries, however, non-compliance with transparency obligations means that the public lacks the information necessary to make these determinations.

15. The public is unable to determine the necessary scope of capital punishment without key pieces of information. In particular, public opinion must be informed by annual information on: (a) the number of persons sentenced to death; (b) the number of executions actually carried out; (c) the

152 HRCtte, General comment No. 31 (2004), para. 4, on the nature of the general legal obligation imposed on States parties to the Covenant.

153 The Universal Declaration of Human Rights, preamble; see also Charter of the United Nations, Article 1.

154 See Report of the Special Rapporteur, Philip Alston, E/CN.4/2005/7, 22 December 2004 para. 58. In a *note verbale* to the Special Rapporteur, dated 11 October 2005, the Government of China explained that the death penalty is applicable only to "extremely serious crimes" and that one of the factors leading to its use in that context is public opinion. "[E]ven though attitudes towards capital punishment and understanding of the issue have undergone considerable evolution in recent years in the judicial and theoretical fields, as well as in society in general, surveys show that retaining the death penalty for the crimes described above still garners widespread approval. Some 90 per cent of the population demand application of the death penalty in very serious cases of economic and other non-violent crime … We have also taken note of the fact that the questions of whether and when to abolish capital punishment in China are under discussion in academic circles and among the general public. The mainstream viewpoint, however, is that the practical conditions for abolition of the death penalty do not yet exist in China."

155 E/2005/3 *supra* note 103.

number of death sentences reversed or commuted on appeal; (d) the number of instances in which clemency has been granted; (e) the number of persons remaining under sentence of death; and (f) each of the above broken down by the offence for which the person was convicted. Many States, however, choose secrecy over transparency, leaving the public without the requisite information.

16. The decision of many States not to respond to the Secretary-General's survey on capital punishment is indicative. The Economic and Social Council has requested that the Secretary-General conduct this survey of Member States at five-year intervals since 1973.[156] The response rate has been very low, leading the Council to ask the Secretary-General to "draw on all available data" in future reports, rather than relying solely on Government responses.[157] The Secretary-General's most recent report shows that retentionist countries are especially unlikely to respond. Of the 62 countries that were retentionist at the time of the survey, 87 per cent did not respond at all, and only 4—Bahrain, Japan, Trinidad and Tobago, and the United States of America—reported on the offences for which the death penalty may be imposed and on the total number of executions.[158]

17. In some instances, no reason is given for the lack of transparency. Belarus does not publish annual statistics relevant to the death penalty, nor does it provide the names or case details of individuals who have already been executed. There has been great inconsistency in the information on the death penalty that has been provided by the Government. For example, on 5 October 2004, chief of the Belarusian Ministry of the Interior's Department of Corrections Vladimir Kovchur reportedly told Interfax that "there have been no executions this year, and nobody is even on death row".[159] However, on 19 November 2004, the Belarusian newspaper *Sovetskaya Belorussiya* reported that the Interior Minister, Uladzimir Navumaw, had stated that there were then 104 people on death row and that in 2004, 5 people had been sentenced to death and executed.[160]

18. In a *note verbale* to the Special Rapporteur, the Government stated that two persons were sentenced to death in 2004; the *note verbale* did not comment on the size of death row or on the number of persons executed.[161]

19. Singapore does not normally publish statistics on death sentences passed or executions carried out, and executions are not announced ahead of time and are rarely reported. However, the Government occasionally makes information available in response to questions from journalists or Parliament. A significant level of information on death sentences and executions was also released in response to Amnesty International's January 2004 report on the death penalty in Singapore (Singapore, the death penalty: a hidden toll of executions). In response to the claim by Amnesty International that the Government kept death penalty statistics secret, the Government issued a response stating that all trials and appeals are conducted in public, that Amnesty International

156 ECOSOC Res. 1754 (LIV) (16 May 1973).

157 ECOSOC Res. 1995/57 (28 July 1995), para. 4.

158 Calculated on the basis of information contained in E/2005/3, *supra* note 101, para. 6; annex I, table 1; : Report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, E/2005/3/Add.1, 21 June 2005, addendum, paras. 3(d), 8.

159 Interfax News Service, *Belarus Says Nobody On Death Row Now* (5 October 2004).

160 BBC Monitoring Ukraine And Baltics, *Belarusian Interior Minister Says Five People Executed In 2004*, 20 November 2004 (Citing *Sovetskaya Belorussiya, Minsk*, In Russian, 19 November 2004).

161 According to a note verbale sent by the Government of Belarus to the Special Rapporteur on 15 November 2005, 47 persons were sentenced to death in 1998 (6 of whose sentences were commuted to deprivation of liberty), 13 persons were sentenced to death in 1999, 4 persons were sentenced to death in 2000 (2 of whose sentences were commuted to life imprisonment), 7 persons were sentenced to death in 2001, 4 persons were sentenced to death in 2002, 4 persons were sentenced to death in 2003 (1 of whose sentences was commuted to life imprisonment), 2 persons were sentenced to death in 2004. All these persons were convicted of murder in aggravating circumstances (1960 Criminal Code, art. 100; 1999 Criminal Code, art. 139, para. 2). In the first six months of 2005, the courts did not hand down any death sentences.

itself has monitored certain trials and that the more newsworthy trials are reported in the media.[162] The Government response also revealed that "as you have requested for the figures, 19 Singaporeans and foreigners were executed in 2003. Between January and September 2004, six persons were executed".[163] In connection with Amnesty International's estimate that 400 people had been executed in Singapore since 1991, the Government did not provide a precise figure, but the Prisons Department said that this was a "fair estimation".[164]

20. A lack of transparency undermines public discourse on death penalty policy, and sometimes this may be its purpose. Measures taken by the Government of Singapore suggest an attempt to suppress public debate about the death penalty in the country. For example, in April 2005, the Government denied a permit to an Amnesty International official to speak at a conference on the death penalty organised by political opposition leaders and human rights activists. The reason for the restriction, as stated by the Government, was that a high degree of control over public debate and the media was necessary in order to maintain law and order. In another recent example, the Government banned the use of photographs of Shanmugam Murugesu, who was executed on 13 May 2005, in all publicity and information relating to a concert organised to protest the death penalty. Posters advertising the concert had included photographs of Shanmugam Murugesu's face. The reason stated for the ban was a concern that the concert organisers were "glorifying" an ex-convict and executed person.

21. Informed public debate about capital punishment is possible only with transparency regarding its administration. There is an obvious inconsistency when a State invokes public opinion on the one hand, while on the other hand deliberately withholding relevant information on the use of the death penalty from the public. How can the public be said to favour a practice about which it knows next to nothing? If public opinion really is an important consideration for a country, then it would seem that the Government should facilitate access to the relevant information so as to make this opinion as informed as possible. It is unacceptable for a Government to insist on a principled defence of the death penalty but to refuse to divulge to its own population the extent to which, and the reasons for which, it is being applied.

C. Case studies on the use of "national security" as a basis for withholding statistics on death sentences and executions

22. The most frequently cited rationale for not disclosing information on the death penalty is that such information is a "State secret" that would imperil national security were it made public. Thus, for example, in January 2004 the Government of Vietnam declared reports and statistics on the use of the death penalty to be "State secrets".[165] Article 1, paragraph 1, of the decision states: "The list of State top secrets of the People's Court includes: Documents related to the trial on

162 Response of Singapore Home Ministry to Reuters responding to Reuters News, *Amnesty challenges Singapore on executions*, 19 October 2004 (on file with the author).

163 Ibid.

164 Reuters News, *Singapore Says Amnesty Execution Report "Absurd"* (16 January 2004). The response of the government also indicated that, although the government does not as a rule disclose execution statistics, it nonetheless possesses detailed statistical information on the death penalty. For example, the government replied to amnesty international's claim that most of those executed were foreigners by stating that 64 per cent of those executed between 1993 and 2003 were Singaporeans and in the previous five years, 101 Singaporeans and 37 foreigners had been executed. Responding to amnesty international's claim that the death penalty was imposed disproportionately on the "poorest, least educated and most vulnerable", the government stated that, "of those executed between 1993 and last year, 44 per cent had primary education, 34 per cent had secondary education and 2 per cent had vocational or tertiary education. Only 20 per cent were unemployed". 'Govt Points Out 12 'Grave Errors' In Amnesty Report' *Straits Times* (31 January 2004).

165 Decision of the Prime Minister of Viet Nam on the list of State top secrets of the People's Court, No. 01/2004/QD-TTg (5 January 2004) (on file with the author).

national security crimes, reports and statistics on death penalty, clandestine trials that should not be published under the law." In the past, the Government has issued annual statistics on death sentences and executions, but this practice has been discontinued.[166] Today, the courts do not publish their proceedings, and the Government refuses to disclose any statistical information on capital punishment.

23. It is also on "State secret" grounds that the Government of China refuses to disclose statistics on death sentences and executions.[167] (Likewise, the Government does not consistently publicise death sentences in individual cases.) This official opacity has opened for debate even the basic facts regarding the death penalty in China. In March 2004, Chen Zhonglin, director of the law academy at Southwestern University of Politics and Law and a senior national legislative delegate, stated that China executes "nearly 10,000" people every year. When this was reported in the media, Chen Zhonglin clarified that this number was not an official figure, but merely an estimate based upon the work of scholars and other senior legislators. The Ministry for Foreign Affairs has declined to explain why China did not release statistics on the number of people executed each year,[168] and China did not respond to the survey carried out in connection with the report of the Secretary-General to the Economic and Social Council on capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty.[169]

24. India has moved towards greater transparency, but significant gaps in information on past and present death sentences and executions remain. With respect to the present, since 1995 the National Crime Records Bureau has published tables listing the total number, but not the names or details, of persons executed each year. The situation with respect to pre-1995 executions is more complex. The Home Ministry had claimed that the 2004 execution of Dhananjoy Chatterjee was the fifty-fifth execution in India since independence. However, the Indian non-governmental organization (NGO) People's Union for Democratic Rights (PUDR) subsequently discovered information indicating that in the 10-year period between 1953 and 1963, 1,422 people had been executed in India. This information was found in an appendix to the thirty-fifth Report of the Law Commission of India (1965), which listed the number of executions carried out in this period in 16 Indian states. To follow up on this information, PUDR filed requests under local government right to information acts, seeking details of all persons who had been executed since 1947 in both Delhi and Maharashtra. The Maharashtra state authorities disclosed the data. In contrast, the Delhi authorities refused. In his response, the Deputy Inspector General (Prisons) stated that "the information sought would not serve any public interest" and that "some of the persons who have been executed had been convicted for various offences having prejudicial effect on the sovereignty and integrity of India and security of NCT (National Capital Territory) of Delhi and international relations and could lead to incitement of an offence".[170]

166 In a *note verbale* to the Special Rapporteur dated 26 September 2005, the Government of Viet Nam noted that, "In accordance with Article 18 of the Criminal Procedure Law, verdicts must be made publicly. Article 229 of the Criminal Procedure Law states that within 15 days after the verdict is made, first-trial court shall have to provide the defendant, defender, procuracy of the same level with the verdict. Viet Nam has so far publicised some of the verdicts by the Council of Judges of the People's Supreme Court." The Government did not address the classification of death penalty statistics as "State secrets" in its *note verbale*.

167 In a *note verbale* to the Special Rapporteur, dated 11 October 2005, the Government of China stated that, "On the statistical tables kept by the People's Courts, executions and death sentenceswith-reprieve are counted among all sentences that exceed five years of imprisonment. These figures are forwarded in March every year to the President of the Supreme People's Court, who reports them to the National People's Congress and arranges for their publication in the People's Daily and the Supreme Court journal."

168 Agence France-Presse, *China defends keeping execution statistics secret*, 5 February 2004. ("The question you raised is not up to me to answer", Foreign Ministry spokeswoman Zhang Qiyue said. "But I think with China's improvement and reform and opening, China has made great improvements in information transparency".)

169 E/2005/3 *supra* note 103.

170 Letter from the Deputy Inspector General (Prisons) Delhi Prisons to Deepika Tandon, PUDR (12 May 2005) (on

25. The national security and public order concerns that underpin State secret classifications of death penalty information lack legal justification. As discussed above, article 14, paragraph 1, of the Covenant permits secrecy on these grounds only at the trial stage, and no derogation from this rule whatsoever is permitted in death penalty cases. This "black-letter" legal conclusion is not hard to understand. Even restrictions on transparency at the trial stage must be justified by "reasons of morals, public order (ordre public) or national security in a democratic society".[171] Basic information on the administration of justice should never be considered a threat to public order or national security.

III. THE OBLIGATION TO PROVIDE POST-CONVICTION TRANSPARENCY FOR CONVICTS AND THEIR FAMILIES

A. Legal framework

26. A lack of transparency regarding the post-conviction process and timetable for execution implicates two sets of rights. The first is that the failure to provide notice to the accused of the timing of his own execution may undermine due process rights. Due process rights and other safeguards on the right to life remain even after a person has been convicted of a crime and sentenced to death. Most notably, the death row prisoner has "the right to his conviction and sentence being reviewed by a higher tribunal" (article 14, paragraph 5, of the Covenant) and "the right to seek pardon or commutation of the sentence" (article 6, paragraph 4, of the Covenant). The uncertainty and seclusion inflicted by opaque processes place due process rights at risk, and there have, unfortunately, been cases in which secrecy in the post-conviction process has led to a miscarriage of justice. In addition, and regardless of the actual due process consequences, to conceal from someone the facts of their preordained fate will constitute inhuman or degrading treatment or punishment. There are, of course, legitimate interests in security and privacy that necessarily limit access to death row and the publicity accorded to some information. However, these interests can and must be accommodated without violating rights.

27. For the prisoner and for his or her family, the other issue is that a lack of transparency in what is already a harrowing experience – waiting for one's execution – can result in "inhuman or degrading treatment or punishment" within the meaning of article 7 of the International Covenant on Civil and Political Rights. The views of the Human Rights Committee in two cases illustrate the scope of this right. In a recent decision that responded to an individual complaint of the mother of an executed Belarusian prisoner, the Committee found that "The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress." This amounted to inhuman treatment in violation of article 7 of the Covenant.[172] In *Pratt and Morgan v. Jamaica*, the Committee found that a delay of approximately 20 hours before communicating a reprieve to the accused just 45 minutes prior to his scheduled execution constituted a violation of Article 7.[173] States do not have any interest that justifies keeping persons on death row and their families in the dark regarding their fate.

file with the author).

171 The International Covenant on Civil and Political Rights article 14 (1) (emphasis added).

172 HRCtte, *Natalia Schedko v. Belarus*, CCPR/C/77/D/886/1999, para. 10.2. The same conclusion was reached in a similar case, also decided in 2003, HRCtte, *Mariya Staselovich v. Belarus, CCPR/C/77/D/887/1999,* para. 9.2, Article 7 of the Covenant states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

173 HRCtte, *Pratt and Morgan v. Jamaica*, CCPR/C/35/D/210/1986, para. 13.7.

B. Case studies on how secret executions undermine due process safeguards and lead to the inhuman or degrading treatment or punishment of prisoners and their families

28. While convicted persons remain on death row, a number of States withhold from them and their family members basic information concerning the post-conviction process.

29. In an example from the Islamic Republic of Iran, Afshen Razvany and Meryme Sotodeh were reportedly arrested on 9 July 2003, sentenced to death shortly afterwards and executed on 23 January 2004 without a court order and without prior notice being given to their families.[174] (In response to these allegations, the Government asserted that it had no record of these individuals being detained in July 2003.[175])

30. The case of Dong Wei illustrates the risks that post-conviction opacity poses to respect for human rights. Dong Wei was a farmer who was sentenced to death on 21 December 2001 for killing a man during a fight outside a dance hall in Yan'an City, Shaanxi Province, China. His lawyer appealed against the sentence, claiming that Dong had killed the man in self-defence. Shaanxi Province High People's Court reviewed its own decision, rejected the appeal in a closed session, and, on 22 April 2002, issued an order for Dong to be executed seven days later. Dong's lawyer was not informed of the decision, and only found out on 27 April – just two days before the execution was scheduled – because he happened to visit the high court to ask about the progress of the appeal. The lawyer then travelled to Beijing at his own expense to appeal the case at the Supreme People's Court, but he was refused entry and turned away. On the morning of the execution, the lawyer managed to gain access to the Supreme People's Court under false pretences and convinced a judge to review the case. The judge agreed with the lawyer that Dong's case needed further review, and the execution was only stopped when the judge contacted the execution ground with a borrowed mobile phone, reportedly just four minutes before the execution was scheduled. (After a further review of the case by Shaanxi Province High People's Court on the orders of the Supreme People's Court, Dong was executed on 5 September 2002.) Transparency would have prevented this near violation of the right to life.

31. In many cases, the due process consequences of opacity in the post-conviction process will remain unknown; however, the consequences of the dignity of the individual and his or her family are clear.

32. Refusing to provide convicted persons and family members advance notice of the date and time of execution is a clear human rights violation. In the most extreme instances, prisoners have learned of their impending executions only moments before dying, and families have been informed only later, sometimes by coincidence rather than design. These practices are inhuman and degrading and undermine the procedural safeguards surrounding the right to life.

33. In Saudi Arabia, there have been cases in which foreign prisoners were unaware that they were under sentence of death. This has been due, at least in part, to the failure of the Government to provide translators for defendants who did not speak Arabic. In one instance, it has been credibly alleged that six Somali nationals spent six years in prison before learning that they were under sentence of death.[176] When they spoke to their families by telephone on the morning of 4 April 2005, they remained unaware that they were to be executed. Later that day they were beheaded.

174 E/CN.4/2005/7/Add.1, *supra* note 68, para. 227.

175 Ibid., para. 329.

176 *Note verbale* of the Government of Saudi Arabia to the Special Rapporteur (dated 30 December 2005): "With regard to the Special Rapporteur's reference to Somali nationals, according to a letter received from the Director-General of Prisons in the Ministry of the Interior there are no Somali prisoners who have been executed or who are facing the death penalty. Instead of generalizing and making unfounded and inaccurate accusations, it would have been more appropriate for the Special Rapporteur to provide full information on this case in order to enable the

34. Incidents in which the family has not been informed have occurred in China. In one case, the families of two Nepalese citizens sentenced to death in Tibet had not heard from the defendants for four months and read about their death sentences in a Kathmandu newspaper.[177] (The Government of China has informed me that their death sentences were subsequently commuted and that regular contact had been maintained with the Nepalese consulate during the trial proceedings.[178]) More generally, the ability of family and lawyers to visit death-row prisoners is sometimes very limited, and there are many reports of relatives being denied access to condemned prisoners, or of executions being carried out without relatives being informed of the failure of final appeals. However, there are encouraging signs of reform. For example, the Beijing Municipality High People's Court announced in September 2003 that it was urging all intermediate-level courts in the municipality to set aside rooms for condemned prisoners to meet for a final time with their family.[179]

35. It is more often information about the date and time of execution that is withheld than information about the death sentence itself. In some cases notice is provided, but only belatedly. Thus, in Singapore prisoners and their families are typically given one week's notice, in Egypt they are typically provided two to three days' notice, and in Japan it appears that they are provided even less time. In other cases, no advance notice has been provided at all. The execution of Sasan Al-e Kena'n provides an example. He was executed at 4 in the morning on 19 February 2003 in Kordestan province, Islamic Republic of Iran. Later that day, his mother arrived at the prison to visit her son and was told to go the judiciary's local offices. Only then was she informed that Sasan Al-e Kena'n had been executed earlier that morning. She was told not to make a "fuss" and to bury him quickly.

36. As noted above, the unlawful character of such practices has been previously established in the case of Belarus. There it has been found that the Government does not provide full information to the relatives of executed prisoners about the dates and places of execution and burial; does not ensure that relatives of a prisoner under sentence of death are informed of the prisoner's place of imprisonment; does not permit regular and private meetings with the prisoner, not even to say goodbye if the petition for clemency is rejected; and, does not allow family members to collect the executed prisoner's remains or personal effects.[180] In a 2003 decision, the Human Rights Committee

competent authority to reply to his allegations."

177 E/CN.4/2005/7/Add.1, *supra* note 68, para. 82.

178 In a *note verbale* to the Special Rapporteur, dated 11 October 2005, the Government of China clarified that: "With respect to the case mentioned in the Report of two Nepalese citizens sentenced to death in Tibet, in the absence of concrete details of the case, China is unable to determine which specific case is at issue. According to case information at hand, however, China's judicial organs did try a case in 2004 involving the Nepalese citizens Ananda, Jiansan and others accused of smuggling arms and munitions, and a case involving the Nepalese citizen Rebi and others, accused of smuggling narcotics. In all cases, the proceedings of second instance saw the defendants' death sentences reduced to death penalties with a two-year reprieve, or to life or fixed-term imprisonment. During trial proceedings, the People's High Court of the Tibetan Autonomous Region made regular reports to the Nepalese Consulate in Lhassa, and Nepalese officials were permitted to meet with the Nepalese defendants."

179 See also the note verbale from the Government of China to the Special Rapporteur, dated 11 October 2005: "In China, a condemned prisoner may meet with his or her family prior to execution, no matter how grave the offence committed. The rights of the condemned to settle personal affairs and to make family farewells are respected and fully protected. In Beijing for example, in 2004, two Intermediate People's Courts approved all applications by condemned prisoners for final family visits and made the due arrangements on their behalf. In addition, the Courts also specially arranged for the presence of a physician at these meetings so as to ensure that no harm befall the prisoners or their family members due to an excess of emotion. These actions clearly demonstrate the humanitarian concern of these authorities."

180 The Government addressed some of these issues in a *note verbale* to the Special Rapporteur dated 15 November 2005. The Government did not address the publicity of hearings and judgements; it did, however, state that decisions to grant clemency to a convicted person under sentence of death, to turn down such appeals or to commute the

found that these practices had put the mother of a condemned prisoner in a state of anguish and mental stress amounting to inhuman treatment in violation of article 7 of the International Covenant on Civil and Political Rights.[181]

37. There is no justification for post-conviction secrecy, and these case studies have illustrated how a lack of transparency both undermines due process rights and constitutes inhuman and degrading treatment or punishment. Persons sentenced to death, their families, and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency petitions, and executions.

C. Evaluating the privacy rationale for secret executions

38. Policies and practices of secret execution are often concealed and denied. However, the secrecy that Japan maintains around its death row and executions is a matter of official policy that is openly held and the legality of which is expressly defended. Thus, for example, in 2004 two people were executed in Japan without advance notice being given to their families or lawyers. The prisoners themselves were informed only a few hours before the executions. And the Government has refused to confirm or deny the execution of any particular person.

39. The Government of Japan has defended these practices by arguing that executions must be kept secret in order to protect the privacy of the prisoner as well as that of his or her family. The refusal to disclose the names of executed individuals is justified by the stigma of the death penalty: their names had already been made public during their trials; the further public announcement of their names on the day of execution would be cruel.[182]

40. There is, of course, a point at which individual rights to dignity and privacy do outweigh transparency obligations.[183] This point has, for example, already been passed when a person is executed before the general public. As the Human Rights Committee has observed, carrying out executions before the public is a practice that is "incompatible with human dignity". The experience of some countries with public executions clearly illustrates the fundamental difference between revealing the information needed for the public to make informed decisions about the death penalty and the use of death as a public spectacle. Indeed, exhibitions of bloodletting are not necessarily informative, and information need not be accompanied by violent displays.

41. In China, the Supreme Court has stated that public parading and other actions that humiliate the person being executed are forbidden. This has not, however, stopped all such practices. Especially in connection with trials involving drugs, gangs and corruption, condemned prisoners

death penalty to life imprisonment, deprivation of liberty or another more lenient sentence, shall take the form of a presidential decree. The activities of the Pardons Board and presidential decisions on clemency are regularly reported in the mass media.

With respect to post-conviction transparency, the *note verbale* stated that article 369 of the Code of Criminal Procedure provides that, after the verdict has been handed down, the presiding officer at the trial or the president of the court shall permit the accused's family and close relatives to visit him in custody, at their request. Where such permission is granted, the prison administration shall not obstruct meetings between accused persons and their families or close relatives. Persons under sentence of death have the same obligations and rights as persons detained in a remand prison on the basis of a pretrial restraining order. Once their sentence has become enforceable, convicted prisoners under sentence of death shall have, *inter alia*, the following rights: to meet with lawyers and other persons entitled to provide legal assistance, for as often and as long as necessary; to receive and send letters without restriction; to one short meeting with close relatives every month; to receive one parcel or hand-delivered package every three months under the procedure established by the prison administration; and, the right to be visited by ministers of religion.

181 *Natalia Schedko v. Belarus*, *supra* note 172, para. 10.2.

182 E/2005/3, *supra* note 103, p. 43.

183 The International Covenant on Civil and Political Rights, articles 7 and 17.

have been lined up in front of the court's public gallery to hear their sentence, sometimes with photographers and television cameras focused on their faces to capture their expression as sentence is passed. Following sentencing, prisoners may be paraded in an open truck through the streets to the execution ground, with a placard around their neck bearing their name crossed out in red. However, the Government has informed the Special Rapporteur that, "on 24 July 1986 and again on 1 June 1988, the ministries responsible for law, the People's Procuratorates, public security and justice jointly issued a circular strictly forbidding the public display of condemned persons, and the pertinent authorities have since then treated this issue with the utmost gravity. In recent years, the phenomenon has thus been effectively prohibited".[184] It had also been credibly alleged that executions are carried out in public stadiums or squares in front of large crowds, but this allegation was denied by the Government.

42. Public executions are also carried out in a number of other countries. In the Democratic People's Republic of Korea, there have been many reports of public executions in front of large crowds drawn from schools, businesses, and farms that were notified in advance. Some prisoners have reportedly even been executed in front of their families.[185] In Viet Nam, also, many executions are carried out publicly and the general public is encouraged to attend these events. And in Saudi Arabia, executions are generally carried out outside crowded mosques after Friday prayer services.

43. It is, thus, only superficially difficult to reconcile the prohibition on secret executions with the prohibition on public executions. On the one hand, it is inhuman treatment to give a prisoner only moments to prepare for his fate, and it is inhuman treatment to surprise a mother with news of her child's execution. But these practices can be avoided with advance notification of the date, time and place of execution, permitting final visits and final personal preparation. And the due process rights of persons sentenced to death can be protected so long as such notifications are made public. There is no legitimate interest served, however, by making executions public spectacles, and this is itself a most inhuman form of punishment.

44. The limitations on transparency imposed by, for example, Japan go beyond what is necessary to protect individual rights to privacy and human dignity and undermine the safeguards publicity provides. Some outside access to death row is essential to ensuring the rights of death-row prisoners. It is problematic, for instance, that in 2002 the international NGO International Federation for Human Rights (FIDH) visited Japan in order to investigate detention conditions of death-row inmates and was refused access to inmates, death-row cells, the execution chamber or any of the secure area of the detention house grounds. It becomes impossible to justify such

184 In a *note verbale* to the Special Rapporteur, dated 11 October 2005, the Government of China stated that:

> "With respect to the method of execution, China's 1979 Law of Criminal Procedure stipulated execution by shooting; this was amended in 1996 to include execution by lethal injection. The implementation and promotion of this latter method has served to make executions more civilised and humanitarian. Meanwhile, Chinese law strictly prohibits public executions, and in actual practice, no case of a public execution has ever occurred.
>
> "China's Law of Criminal Procedure stipulates that, 'Executions of death sentences shall be announced but shall not be held in public'. In the past, individual cases of condemned persons being paraded in public have occurred in certain regions of the country. On 24 July 1986 and again on 1 June 1988, the ministries responsible for law, the People's Procuratorates, public security and justice jointly issued a circular strictly forbidding the public display of condemned persons, and the pertinent authorities have since then treated this issue with the utmost gravity. In recent years, the phenomenon has thus been effectively prohibited."

185 In its *note verbale* to the Special Rapporteur dated 19 September 2005, the Government of the Democratic People's Republic of Korea did not address the particular issues raised by the Special Rapporteur but stated in general terms that "such phenomena as mentioned in your letter do not exist in reality in the Democratic People's Republic of Korea. In spite of this, the hostile forces have been ceaselessly fabricating and spreading the plot information as part of their pursuit of ill-minded aim to disintegrate and overthrow the state system of the Democratic People's Republic of Korea."

practices inasmuch as information on death-row prisoners is withheld regardless of the prisoner's own appreciation of his or her privacy interests. When members of the Human Rights Commission of the Council of Europe visited Japan in early 2001, they were not permitted to contact a convict on death row even though the convict had, with the help of his wife, given his consent. When death-row inmate Masakatsu Nishikawa requested that a photographer be permitted to take a photograph of him that could be displayed at his funeral, his request was denied. An Osaka Regional Correction Headquarters official said that in considering whether to allow such a photo to be taken, they had to consider "the manner in which it would be distributed as well as the effect of the photograph on the defendant, his family and the bereaved family members of the victims".[186]

45. This lack of transparency has grave consequences for the adequacy of public oversight. The survey carried out in connection with the Secretary-General's 2005 report on capital punishment (E/2005/3) requested that Japan explain why it had not abolished the death penalty for ordinary crimes. The response of the Government was that "the majority of people in Japan recognise the death penalty as a necessary punishment for grievous crimes. Considering the number of serious crimes … it is inevitable to impose death penalty to the offenders who commit such crimes".[187] However, report of the Secretary-General also takes note of the view of the Japanese Federation of Bar Associations (JFBA) that one of the main reasons why capital punishment has not been abolished in Japan is the extraordinary secrecy surrounding the death penalty system and the consequent lack of proper information to discuss abolition.[188] Thus far, even parliamentary oversight has been limited. In 2003, two Diet members were allowed to tour an execution chamber but this was the first time they had been allowed to do so since 1973. JFBA has recently proposed a bill that would: (a) set up parliamentary study panels on the death penalty; (b) suspend executions while the study is underway; and (c) require the Government to disclose information about the death penalty so the panels can conduct full research.

46. Two logical limits to the privacy argument against transparency are apparent. The first such logical limit is that ensuring the right to privacy does not justify the denial of information to the very person whose privacy rights are being invoked. Thus, the argument that secrecy protects the privacy of death-row prisoners cannot explain or justify a refusal to reveal the timing and other details of executions to death-row prisoners themselves or to their families. Indeed, privacy protections would, if anything, support the claim that a death-row prisoner and his or her family should be fully informed of the prisoner's fate. It undermines rather than promotes privacy to forbid families and prisoners the most basic information about the prisoner's own death.

47. The second such logical limit is that respect for privacy cannot offset transparency obligations when the prisoner does not desire his experience on death row or the fact of his execution to be private. "Privacy", in this context, is merely a by-product of enforced secrecy. Because prisoners are not aware of when they will die, they have no opportunity to make this fact public (or alternatively maintain their privacy). Moreover, while on death row they are prohibited from contacting the media or politicians and any contact they do have with permitted visitors is strictly controlled and monitored. By stripping death-row inmates of control over their communications and knowledge of the most crucial aspect of their lives, i.e. the timing of their own death, the Japanese system undermines rather than protects the privacy of death-row prisoners.

IV. CONCLUSION

48. The widespread pattern of non-compliance with transparency obligations that the present report has documented is disappointing. It is reassuring, however, that with the will to reform the

186 "Only arrest photos available", *International Herald Tribune*, 8 June 2005.
187 E/2005/3, *supra* note 103, pp. 8-9.
188 Ibid., p. 36.

administration of capital punishment, the problems in most countries could be resolved with little technical difficulty. It is hoped that this report will lead to continued constructive dialogue on the measures required to ensure full transparency in the administration of the death penalty.

In 2012, Special Rapporteur Heyns took the issue of transparency and the death penalty further in his thematic report to the General Assembly.

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶98-99, 103-107, 109-115)

98. Transparency, or the public availability of information, is an underappreciated, yet crucial, aspect of ensuring compliance of the use of the death penalty with the protection of the right to life under international law. The requirements of transparency are likely to become increasingly significant as the world becomes more interconnected and international human rights law, in general, and scrutiny of the supreme right that is the right to life, in particular, develop further. The coherence and integrity of the international supervisory system is challenged when there are black holes in respect of which no information is available on the taking of lives, whether through judicial or extrajudicial killings.

99. The United Nations has over many years emphasised the importance of the public availability of information on the death penalty. Recently, the Secretary General stated that the obligations of those States that continued to use the death penalty included the obligation not to practise the death penalty in secrecy (A/65/280, para. 72). This summarises a long line of authoritative statements to the same effect within the United Nations system.

[...]

103. Three dimensions of the need for transparency in the context of the death penalty can be distinguished. First, sufficient and relevant information must be provided to those individuals who are directly concerned: the person who is to be executed and his or her immediate relatives, in addition to the defence lawyers to ensure effective representation at all stages. Second, the general public in the State in question requires transparency for informed public debate and democratic accountability. Lastly, the international community as a whole has an interest in supervising the observance of the right to life everywhere.

104. Various legal bases have been put forward as the source of these obligations, often linked to the rights of or obligations due to these three groups. In respect of prisoners, their families and the public, the realization of specific rights imposes a duty of transparency on States: the right to life, considerations of fair trial and the right of the public to information. At the domestic level, the right to information informs the broader set of rights to political participation. The obligation to be transparent to the international community also stems on a general level from the nature of international human rights supervision, which is impossible without reliable information. In many cases, information on the death penalty cannot be obtained from any source other than the State itself.

105. The starting point for transparency in all cases in which the lawfulness of killings is in question is the State's duty to investigate violations of the right to life. Since the right to life is recognised as a rule of customary international law, the obligation to uphold it extends to all States, irrespective of treaty ratification. The obligation to uphold this right has been recognised to include not only protection from violations but also investigation into violations. As a former mandate holder has pointed out, transparency and accountability are part and parcel of the right to life under both article 6 of the International Covenant on Civil and Political Rights and customary law.[189] A lack of

189 Philip Alston, "The CIA and Targeted Killings Beyond Borders", *Harvard National Security Journal*, vol. 2, No. 2

accountability for a violation of the right to life is itself a violation of that right, and transparency is an integral part of accountability. The Human Rights Committee has further concluded that failing to be transparent about the fate of an individual, including by withholding information from families about imminent executions, could itself constitute a human rights violation (see CCPR/C/77/D/886/1999 and CCPR/C/77/D/887/1999).

106. While transparency obligations in respect of extrajudicial executions must rely on provisions guaranteeing the right to life and the duty of States to investigate violations, transparency in judicial executions is also required by provisions concerning fair trial standards and, in particular, the general rule that hearings should not take place behind closed doors. Article 14 of the International Covenant on Civil and Political Rights and various parallel regional treaty provisions dealing with fair trial standards explicitly recognise the right to a public hearing and provide that any judgement rendered in a criminal case or in a suit at law is to be made public. A violation of fair trial rights during capital cases, including the openness of the trial to the public, can also constitute a violation of the right to life itself (CCPR/C/86/D/915/2000, paras. 7.5-7.6, and CCPR/C/39/D/250/1987, paras. 11.5 and 12.2). Accordingly, a State that fails to be transparent in its death sentences in line with article 14 risks also violating article 6.

107. Article 14 contemplates not only the prisoner's rights but also the public interest in information. States have a duty to make information on the death penalty publicly available in the aggregate and not simply buried in files in courts throughout the country (E/CN.4/2006/53/Add.3, para. 12). As a previous mandate holder has noted, for every organ of government and every member of the public to have at least the opportunity to consider whether punishment is being imposed in a fair and non-discriminatory manner, the administration of justice must be transparent, and the kind of informed public debate about capital punishment that is contemplated by human rights law is undermined if Governments choose not to inform the public (ibid.). The provision on fair and public trials also enables the public to scrutinise the work of a country's courts. Keeping any part of the administration of justice secret, including the imposition and carrying out of death sentences, risks undermining public trust in judicial institutions and in the legal process as such. 108. Article 19 of the Covenant also generates transparency requirements in recognizing not only freedom of expression but also public access to information. In *Toktakunov v. Kyrgyzstan*, the Human Rights Committee found that information about a State's use of the death penalty was of public interest (CCPR/C/101/D/ 1470/2006). The Committee consequently recognised a general right to gain access to that information deriving from article 19.

[...]

109. The idea of a public right to information finds further support in the emergence of a right to truth. In the context of the death penalty, this would create the public's right to the information needed to establish whether deprivation of life is arbitrary or lawful.

110. In contexts other than the death penalty where transparency issues are raised, States often claim that secrecy is necessary to protect national security. The link between information on executions and national security appears tenuous at best, however. In cases of extrajudicial executions, States often answer calls for information with the claim that they lack the required information, whether because non-State actors are involved or because they lack the capacity to provide disaggregated data. Irrespective of its validity in other contexts, this is not a valid argument in death penalty cases because these executions are by definition performed by the State itself and the information required is straightforward. It is difficult to imagine a persuasive rationale by which States might withhold this information other than as an attempt to avoid international scrutiny.

(2011), p. 314.

111. Official information on the use of the death penalty was not available for a number of States in 2011. Figures were classified as a State secret in Belarus, China, Mongolia and Viet Nam. Information on the practices of the Democratic People's Republic of Korea, Egypt, Eritrea, Libya and Malaysia is reportedly difficult to find. In 2011, in Belarus and Viet Nam neither prisoners nor their families and lawyers were informed of forthcoming executions; in 2010, the same held true for Botswana, Egypt and Japan.[190] These States have been called to account for these failures during, among others, sessions of the Working Group on the Universal Periodic Review (A/HRC/WG.6/4/MYS/1/Rev.1, para. 89; A/HRC/WG.6/5/VNM/3, para. 10; A/HRC/WG.6/8/BLR/3, para. 20; A/HRC/WG.6/9/MNG/3, para. 22; A/HRC/WG.6/ 9/MNG/2, para. 22; and A/HRC/WG.6/11/SGP/3, para. 18).

112. One result of secrecy is that the positive developments that are increasingly taking place may not be given the credit that is due if their details are not public. For example, although China is typically given as an example as a result of its troubling practices, during the past few years there have been indications that its total executions have decreased dramatically.[191] Because these figures are State secrets, however, this assertion can neither be confirmed nor potentially commended.

113. Without reliable information, the international human rights system cannot function. In some cases, the international community has no advance knowledge of an imminent execution, rendering it ineffective in examining questions of lawfulness before execution. In others, the information is provided too late to take meaningful action. Over the years, mandate holders have had the disquieting experience of sending urgent appeals to Governments in great haste when they heard about an impending execution potentially in violation of international standards, only to learn a day or two later that the person had already been executed.

114. International practice over recent years has shown less tolerance for the unavailability of evidence in respect of alleged human rights violations. For example, the United Nations and regional treaty bodies increasingly accept allegations made in communications to be true when the State in question does not counter them. Likewise, where States do not submit State reports that are due, treaty bodies no longer pass them over. Instead, they may consider the situation in the States in question even in the absence of such reports and issue concluding observations on the basis of information that is otherwise available.

115. The concern raised in section D above [on international collaboration and complicity] is also of importance in this context. Access to information about other States' death penalty practices is necessary for States to decide how they wish to engage in inter-State cooperation and foreign relations and to avoid running afoul of their own international legal commitments or being complicit in another State's violations of the right to life.

5. Collaboration and assistance in respect of the death penalty

As the majority of states have now abolished the death penalty in law, and a further significant proportion no longer apply it in practice, the relationship between these states and the minority that still implement capital punishment is an important area of the international law around the death penalty. When is it prohibited under international law for an abolitionist state to assist another state to impose the death penalty?

Special Rapporteur Heyns addressed the question of foreign direct assistance in respect of the death penalty as a distinct topic within his broader report on the death penalty in 2012:

190 Amnesty International, *Death Sentences and Executions in 2010* (London, 2011)
191 See http://humanrightsdoctorate.blogspot.com/2011/12/china-and-death-penalty-signs-of.html.

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶68, 71-79, 81, 87, 93-97)

68. The actual execution of a prisoner sentenced to death may depend on the collaboration of a web of actors beyond the executing State. Where the death penalty is imposed in violation of international standards, this assistance may amount to complicity and should lead to indirect legal or other responsibility on the part of the assisting party.

[...]

1. Assistance by States

(a) Transfer of persons

71. One form of State assistance with regard to the death penalty occurs through the transfer of persons to the jurisdiction of the executing State, such as through extradition, deportation, surrender, handover or any other form of enforced removal.

72. International human rights law entails an obligation on States not to transfer people when State authorities know, or ought to know, that the individuals concerned would face a genuine risk of serious human rights violations, including arbitrary executions.[192] The international law principle of non-refoulement prohibits such a transfer in these situations and holds States, irrespective of all other considerations, responsible for all and any foreseeable consequences suffered by them.[193] This prohibition takes precedence over specific bilateral extradition treaties or other agreements, such as on mutual assistance in criminal matters, that may be in place (CCPR/C/48/D/470/1991, para. 13.1).

73. In the context of the death penalty, the application of the non-refoulement principle differs between abolitionist States and States that retain the death penalty in law.

74. States that have abolished the death penalty are absolutely prohibited from transferring a person when they know or ought to know that there is a real risk of the imposition of the death penalty (A/HRC/18/20, para. 45).

75. For States parties to the International Covenant on Civil and Political Rights in this category – that is, the majority – this prohibition applies irrespective of whether the requesting State complies with international standards in its use of the death penalty. It is also not dependent on whether the sending State has ratified the Second Optional Protocol, although it applies a fortiori to those that have ratified a treaty that specifically provides for the abolition of the death penalty.[194] The question of the State's intent is also immaterial; it matters only that the risk is foreseeable (CCPR/C/78/D/829/1998, para. 10.6, and CCPR/C/21/Rev.1/Add.13, para. 12). Transfer in violation of this prohibition amounts to an indirect violation of article 6 (1) of the Covenant by the abolitionist State, even though the requesting State, if it complies with all international standards, may not itself act unlawfully.

76. This absolute prohibition stems from the fact that States, once they have abolished the death penalty, are foreclosed from reinstating it (see CCPR/C/70/D/869/1999) and that only retentionist

192 See principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set out in the annex to Economic and Social Council resolution 1989/65, and the jurisprudence of the Human Rights Committee in *Judge v. Canada, supra* note 134, para. 10.5, and *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.9.

193 See several decisions of the ECtHR in this regard: *Soering v. United Kingdom*, paras. 85 and 86, 7 July 1989; *Hirsi Jaama and Others v. Italy*, para. 115, 23 February 2012 (judgement of the Grand Chamber); and *Saadi v. Italy*, para. 126, 28 February 2008 (judgement of the Grand Chamber).

194 See the concurring opinion of Judge Cabral Barreto in ECtHR, *Bader and Others v. Sweden*, , 8 November 2005.

States can claim the exceptions provided under article 6 (2) (CCPR/C/78/D/829/1998, paras. 10.2-10.6). Assisting a retentionist State in its imposition of the death penalty therefore raises problems of inconsistency with the abolitionist State's obligation to protect the right to life. The Human Rights Committee concluded in *Judge v. Canada* that an abolitionist State would violate article 6 (1) not only if it were to reinstate the death penalty, but also if it were to transfer a person to a country where he or she would risk imposition of the death penalty, stating that, "for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application" (ibid., para. 10.4). Regional and domestic courts have reached similar conclusions.[195] In line with this approach, the Constitutional Court of South Africa affirmed in July 2012 that deporting individuals to a State in which they might face execution would violate the right to life of the persons concerned.[196]

77. For their part, States that retain the death penalty in law may transfer persons where there is a risk of the death penalty, but the transfer is lawful only where the requesting State adheres to all requirements imposed by international law, specifically but not exclusively those enshrined in articles 6 and 14 of the Covenant and in the safeguards guaranteeing protection of the rights of those facing the death penalty.[197]

78. If adequate and reliable, diplomatic assurances may render a transfer lawful in the context of the death penalty (E/2010/10, para. 9). For transferring States that have abolished the death penalty, assurances must be obtained that remove completely the possibility that the person would face the death penalty in the receiving State. Retentionist States must obtain assurances that the receiving State will impose the death penalty only in compliance with international law. In all cases, to render the transfer lawful, the assurances must comply with various standards, including making public the existence and terms of the assurance in line with the principle of transparency.

(b) Mutual assistance: provision of information and logistical support

79. States often assist one another in criminal and other matters by means other than the transfer of persons. Such assistance may include the provision of intelligence information, incriminating evidence or police assistance and investigation aid sufficient to capture the suspect; lethal drugs or materials for the execution; funds for projects such as drug control; and other forms of financial and technical support, for example to strengthen the legal system. These forms of inter-State cooperation may also raise questions of complicity where they contribute to the imposition of the death penalty in violation of international standards or issues of non-compliance with the assisting State's international legal commitments. 80. Human rights advocates have raised concerns that such assistance may facilitate capital sentences and/or executions[198] and identified specific cases in which such assistance appears to have directly or indirectly led to the capture of suspects later sentenced to death.[199]

[...]

81. The same legal principles apply here as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition.

195 See *Soering v. United Kingdom, supra* note 193, paras. 85 and 86.

196 See *Minister of Home Affairs and Others v. Tsebe and Others, Minister of Justice and Constitutional Development and Another v. Tsebe and Others*, para. 73, Constitutional Court of South Africa, 27 July 2012.

197 See the dissenting opinion by Human Rights Committee members Eckart Klein and David Kretzmer in *G.T. v. Australia* (CCPR/C/61/D/706/1996, appendix)

198 See Amnesty International, Addicted to Death: Executions for Drug Offences in Iran (London, 2011).

199 See International Harm Reduction Association, Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights (London, 2012).

[...]

2. Intergovernmental level

87. The intergovernmental level involves many of the same considerations. With regard to the transfer of persons, the United Nations – bound by the principle of non-refoulement as a matter of customary law – and contributing States in multinational operations commonly follow the practice not to transfer persons if there is a risk of the death penalty.[200] Furthermore, the United Nations and other international organizations often assist in the crime prevention programmes of specific States and may likewise be implicated by involvement in unlawful executions.

[...]

3. Non-State actors

93. While States are the primary duty bearers under international human rights law, there is an increasing awareness of the impact of non-State actors on human rights. In the context of the death penalty, they are part of the web that in some cases makes unlawful executions possible.

(a) Corporations

94. Corporations assist in the imposition of the death penalty by providing equipment and materials that States use to carry out executions. Where such executions are unlawful, this assistance raises questions of legal or other responsibility. International standards for the conduct of business and human rights have been established and are developing further. These include the Guiding Principles on Business and Human Rights, the Global Compact and the Guidelines for Multinational Enterprises. Domestically, the law of the State of incorporation may establish corporate or individual (civil or criminal) liability for complicity, including extraterritorially, and harm to reputation has come to play a significant role in influencing corporate behaviour.

(b) Medical personnel

95. Around the world, medical associations have had to question to what extent their members, whose professional ethics require them to be healers and not executioners, may be involved in the implementation of the death penalty. This issue arises most regularly, but not exclusively, in the case of lethal injections, where medical personnel are often required by States to participate in the administration of lethal drugs and monitoring of the onset of death.

96. In a recent global study, it was said that: "Virtually all codes of professional ethics which consider the death penalty oppose medical or nursing participation. Despite this, many death penalty States have regulations specifying that health professionals be present at executions."[201]

97. It is clearly established under international law and codes of medical ethics that physicians and other medical personnel should not participate in torture or other cruel, inhuman or degrading treatment or punishment.[202] From the perspective of ethics, if medical personnel should not help

200 Cordula Droege, "Transfer of detainees: legal framework, non-refoulement and contemporary challenges", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), pp. 669, 686 and 688.

201 Amnesty International, "Execution by lethal injection", 4 October 2007. Available from www.amnesty.org/en/library/info/ACT50/007/2007.

202 See, for example, General Assembly resolution 37/194, by which the Assembly adopted the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment; and the World Medical Association Council resolution on prohibition of physician participation in torture, adopted by the Council at its 182nd session, held in Tel Aviv, Israel, in May 2009.

to torture, there is good reason to imagine that they should not help to execute, at least not where such executions may violate international law. States should be cognizant of these considerations when they call for the presence or assistance of medical personnel when administering the death penalty.

In 2015, Special Rapporteur Heyns, in a report to the General Assembly, examined the responsibilities of states regarding the execution of their nationals in other jurisdictions, or their complicity in such executions by other means:

Report to the General Assembly (A/70/304, 7 August 2015, ¶¶95-111)

95. In his prior report to the General Assembly on the death penalty, the Special Rapporteur noted with respect to the responsibility of States a distinction between the responsibilities of those States which have already abolished the death penalty and of those which have not yet done so (A/67/275, paras. 68-97). Abolitionist States can have responsibilities with respect to the continued application of the death penalty elsewhere in a number of ways, many of which have an impact on foreign nationals. First, they can be directly responsible for the transfer of a person to a retentionist jurisdiction (whether that person is their national or not); second, they can bilaterally or multilaterally assist in the legal process leading to a death sentence; and third, they can have responsibilities arising from the defendant being their own national.

96. Article 16 of the International Law Commission's Articles on State Responsibility prohibits complicity in internationally wrongful acts. It is internationally wrongful for any State to impose the death penalty in violation of international law and, hence, all States must refrain from providing assistance in situations where the death penalty might be imposed in such a manner, for example, where it might be imposed for drug-related offences or for other crimes that do not meet the threshold of "most serious".

97. In addition to this, once a State party to the International Covenant on Civil and Political Rights has abolished the death penalty, it may not reinstate it and it must not be complicit in the use of the death penalty anywhere, in any circumstances (see A/67/275, para. 76; CCPR/C/70/D/869/1999).

98. In this instance, "abolitionist" means States that have abolished the death penalty de jure. However, it could be argued that these obligations could also apply to States that are abolitionist in practice, for example, where an official moratorium on executions exists or if a State has signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, but not yet fully abolished the death penalty in law.[203]

1. Refoulement and extradition

99. The extradition or deportation of an individual to a State where they are likely to face the death penalty is a clear example of a State facilitating the use of the death penalty elsewhere, since the death penalty can be imposed only with the assistance of the extraditing State. States that have abolished the death penalty are absolutely prohibited from transferring a person when they know or ought to know that there is a real risk of the imposition of the death penalty. States that retain the death penalty in law may transfer persons where there is a risk of the death penalty, but the transfer is lawful only where the requesting State adheres to all requirements imposed by international law (see A/67/275, paras. 74 and 77).

203 See Yuval Ginbar, Jan Erik Wetzel and Livio Zilli, "Non-refoulement obligations under international law in the context of the death penalty", in Peter Hodgkinson (ed.) *Capital Punishment: New Perspectives*, (Westminster, United Kingdom, Ashgate, 2013).

100. It has been well established that abolitionist States must seek effective and credible assurances that the death penalty will not be imposed before extraditing or deporting an individual to a State when there is a real risk that they will face the death penalty.[204] Most States that have not yet abolished the death penalty willingly offer assurances when seeking extradition from abolitionist States (including now certain States within the United States that were initially reluctant).[205] In all cases, to render the transfer lawful, the assurances must comply with various standards, including making public the existence and terms of the assurance.

101. Ensuring that all States were able to cooperate with international criminal justice was one reason for the exclusion of the death penalty from the Rome Statute of the International Criminal Court and its abolition in Rwanda. More recently, the founding document of a special criminal court established in the Central African Republic can impose a maximum sentence of life imprisonment.

2. Cooperation and collaboration

102. A dilemma emerges when abolitionist States provide assistance to retentionist States in criminal matters and that assistance leads to the use of the death penalty. Even though the individual facing the death penalty in such cases may never have been in the jurisdiction of the abolitionist State, such assistance could amount to complicity in the death penalty. The same legal principles apply here as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition (see A/67/275, para. 81).

103. At the most basic level, a State may share information or intelligence with another State concerning a criminal act, which may at some later stage be used as evidence in a judicial proceeding that results in a death sentence. Investigations by non-governmental organizations have highlighted how assistance from abolitionist States has contributed to death sentences for drug-related offences in the Islamic Republic of Iran and Pakistan.46 Because such intelligence-sharing often occurs at an agency-to-agency level, it is important that States develop guidance for their officials in this regard.

104. Following recent executions in Indonesia, a proposed private member's bill in Australia would create an offence for public officials and former public officials "who disclose information resulting in a person being tried, investigated, prosecuted or punished for an offence that carries the death penalty in a foreign country".[206] An official found guilty of such a disclosure could face a jail term of up to 15 years, with a mandatory minimum sentence of 1 year. However, the bill contains an unfortunate exception that allows the Attorney-General to authorise assistance without such assurances in terrorism cases or any other case that involves an act of violence that causes a person's death or that endangers a person's life (section 7(2)). This proposed text appears incompatible with Australia's commitment, as an abolitionist State, not to impose the death penalty for any offences or be complicit in the death penalty in any circumstances.

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204 See communication No. 829/1998, *Judge v. Canada*, views adopted on 5 August 2002; ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom* (Application No. 61498/08), 2 March 2010); and Moratorium on the use of the death penalty, A/69/288, 8 August 2014.

205 Patrick Gallahue, Roxanne Saucier and Damon Barret, *Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights* (London, Harm Reduction International, 2012); Reprieve, "European Aid for Executions: how European counternarcotics aid enables death sentences and executions in Iran and Pakistan", November 2014, available at: www.reprieve.org.uk/wp-content/uploads/2014/12/European-Aid-for-Executions-A-Report-byReprieve.pdf.

206 Australia, Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015, available at: www.austlii.edu.au/au/legis/cth/bill/fdpoidb2015640/; Human Rights Watch, "Australian Government and the death penalty: a way forward", 20 May 2015, available at: www.hrw.org/news/2015/05/20/australian-government-and-death-penalty-way-forward.

105. Aside from providing information concerning a specific case, two States may have a bilateral development agreement in place, again often at the agency-to-agency level, that can provide material assistance to the criminal justice system. As a question of policy rather than ad hoc cooperation, it ought to be more straightforward for States to ensure that they are not providing assistance to a legal system that is potentially collaborating in the imposition of death sentences. Prohibitions of trade in products that might be used in executions, such as the decision of the European Union in December 2011 to block the export of specific drugs to the United States, offer an example of how such non-cooperation can function.[207]

106. If abolitionist States require more guidance on what sort of assistance might constitute unlawful complicity in the death penalty, a non-exhaustive list should be drawn up by OHCHR detailing what assistance might be proximate enough to engage responsibility under the International Law Commission's Articles on State Responsibility. The United Nations Office on Drugs and Crime (UNODC) has already suggested that, for example, even training border guards who are responsible for the arrest of drug-traffickers ultimately sentenced to death "may be considered sufficiently proximate to the violation to engage international responsibility".[208]

107. In addition to bilateral assistance, States may contribute to multilateral assistance programmes (where the nature of the crime regarding which assistance is provided or the likelihood of the death penalty being imposed as a result are less directly obvious to the funding State). In his 2012 report, the Special Rapporteur called for guidelines to help States to engage in cooperative drug control efforts without departing from the human rights framework, including international standards on the death penalty, and that these guidelines should also assist in making operational the standards on State responsibility in this context (see A/67/275, para. 84). UNODC has itself recognised this tension, noting that where "a country actively continues to apply the death penalty for drug offences, UNODC places itself in a very vulnerable position vis-à-vis its responsibility to respect human rights".

3. Particular responsibility for a State's own nationals: consular assistance

108. Several States have established specific programmes to support their nationals who are sentenced to the death penalty in other jurisdictions. For example, the Office of the Undersecretary for Migrant Workers' Affairs of the Department of Foreign Affairs of the Philippines provides legal assistance to Filipino migrant workers facing death sentences abroad. The Ministry of Foreign Affairs of Mexico also established a legal support programme, known as the Mexican Capital Legal Assistance Programme, for Mexicans facing the death penalty in the United States. Between its inception in 2000 and February 2014, the programme intervened in 1,001 cases of first-degree murder and the interventions led to the prevention or reversal of the death penalty in 878 cases.[209] Several non-governmental organizations, including those working on migrant issues, also provide legal and other support to persons facing the death penalty abroad and to their families.

109. If it can empirically be shown that the provision of consular assistance can materially diminish the likelihood of the imposition of a death sentence (and the statistics made available by Governments with specialist programmes suggests that this is the case), then a Government that, when notified, does not take all reasonable steps to provide adequate consular assistance can arguably be said to have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life.

207 Commission Implementing Regulation (EU) No. 1352/2011 of 20 December 2011.

208 United Nations Office on Drugs and Crime (UNODC), "UNODC and the promotion and protection of human rights", position paper, 2012, available at: www.unodc.org/documents/ justice-and-prison-reform/UNODC_HR_position_paper.pdf, p. 10.

209 Statement of the Ministry of Foreign Affairs of Mexico, 11 March 2014, Geneva.

110. If States of origin are to be understood to have a duty of due diligence with respect to the provision of assistance to their nationals when facing the death penalty abroad, then it is important that guidance be developed as to how that assistance can best be provided. As a first step, OHCHR should draw together a set of best practices with respect to the provision of consular assistance in capital cases.

111. It is important to note that none of the above descriptions of additional responsibilities on the part of the State of origin in any way diminish the responsibilities of the receiving State to take all possible steps to ensure a fair trial, whatever the status of the defendant.

C. The Death Penalty In Practice

1. Fair trial safeguards

The Special Rapporteurs have highlighted weaknesses within the fair trial guarantees of jurisdictions still imposing the death penalty, casting doubts over the non-arbitrariness of sentences that had been imposed and underlining the importance for systemic reforms.

When sending communications to governments concerning death penalty cases, the Special Rapporteurs would often interrogate details of the proceedings that led to the passing of the death sentence. For example, in this urgent appeal to Afghanistan, Special Rapporteur Alston highlighted a number of specific concerns that brought into question the fairness of the trial in question:

Urgent appeal sent to the Government of Afghanistan (20 April 2006) (with the Special Rapporteur on the independence of judges and lawyers)

We would like to bring to the attention of your Excellency's Government reports we have received regarding the trial of Mr. Asadullah Sarwari and the imposition of the death penalty against him. We understand that Mr. Sarwari, who is now aged 65, was the head of Afghanistan's intelligence service (AGSA) under the regime of Hafizullah Amin (1978-79), which carried out mass arrests and summarily executed many of those detained. According to the information received:

> Mr. Sarwari was arrested in 1992 by a Mojahedin force following the withdrawal from Afghanistan of the Soviet Union's armed forces. In 2003 he was handed over to the intelligence service of your Excellency's Government, the National Security Directorate. In autumn 2005, Mr. Sarwari requested President Karzai 'for justice'. Criminal proceedings against him were initiated and he was charged with several crimes against the internal security of the state, including inviting armed forces to an uprising, using force to overthrow the presidency, and homicide.
>
> The trial consisted of 3 hearings, the first on 26 December 2005, the last on 25 February 2006. Because of the highly charged atmosphere surrounding the trial and of the precarious security situation, Mr. Sarwari was unable to find a suitable lawyer to represent him. Most of the evidence adduced at trial related to the arrest and subsequent disappearance of up to 70 members of a family, the Mujeddadi, in June 1979. At the final trial hearing on 25 February 2006, at Kabul National Security Primary Court, sixteen witnesses gave testimony. Some of them were called by the prosecutor, others 'gave evidence' spontaneously from the public gallery. Members of the Mujeddadi family and household stated that the accused was present at, and was in charge of, the arrests. One witness came forward and gave evidence supportive of Mr. Sarwari, stating that 120 detainees were released by him in 1979. This produced an angry reaction from the public gallery. The presiding judge called the audience to order and stated that it was important that the court listened to both sides. Mr. Sarwari was not given the opportunity to cross examine any of the witnesses.

Mr. Sarwari read out his defence statement denying all allegations against him. He complained about his illegal arrest and detention for more than 13 years without trial. He admitted to having issued arrest warrants, but asked the prosecutor to produce any testimony or documentary proof that could prove his involvement in the killing of detainees. During this exchange, the Prosecutor conceded the absence of any article in the Penal Code of Afghanistan under which Mr. Sarwari could be convicted as a war criminal, but argued that Mr. Sarwari's official position as the head of AGSA was sufficient to hold him responsible for the murder and disappearance of innocent countrymen under Article 130 of the Constitution.

At 1.30 p.m. the judicial panel retired to consider its verdict. Fifteen minutes later the judges returned and pronounced the judgment and sentence. Mr. Sarwari was found guilty of the 'killing of countless Afghans' on the basis of his involvement in the arrest of members of the Mujeddadi family and on the basis of his senior official position in the Amin Regime. He was not found guilty on any specific count contained in the indictment but rather, according to the judge, in accordance with article 130 of the Constitution which states that 'if there is no provision in the Constitution or other laws about a case, the courts shall in pursuance of Hanafi jurisprudence and within the limits set by the Constitution, rule in a way that attains justice in the best manner'. On the basis of this guilty finding, he was sentenced to death.

It would appear that the Attorney General has filed an appeal against the judgment (or the sentence), while Mr. Sarwari has not appealed against the judgment and sentence within the 20-day deadline provided by the Interim Criminal procedure Code.

[...]

[...] With specific regard to the case of Mr. Sarwari, we would like to draw your attention to the requirement that "in capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the [ICCPR] admits of no exception" *(Little v. Jamaica*, communication no. 283/1988, Views of the Human Rights Committee of 19 November 1991, para. 10). The reports concerning the trial of Mr. Sarwari raise a number of very serious concerns with regard to the right to a fair trial:

i) Regarding the requirement of independence and impartiality of the tribunal (article 14(1) ICCPR), reports indicate that before the decisive hearing of 25 February 2006 representatives of the Mujeddadi family (i.e. victims and prosecution witnesses) and the Head of the Department of Judicial Inspections of the Supreme Court, Mr. Halimi, were sitting in the judges' chambers at the court house and meeting with the judge presiding over the trial. Mr. Halimi sat in the front row of the court throughout the hearing, next to prosecution witnesses and close to the prosecutor. At one point he intervened during the trial. When the judges retired to consider their verdict, he also left the court. Moreover, the judicial panel took only fifteen minutes of deliberation to find the applicant guilty and sentence him to death. We acknowledge that the presiding judge reportedly gave Mr. Sarwari the opportunity to speak unhindered in his defence and reminded the public that both sides must be given a full hearing. The circumstances referred to above, however, engender the impression of possibly undue influence over the trial judges by the Department of Judicial Inspections of the Supreme Court and the victims' family and cast a grave shadow over the appearance of independence and impartiality of the tribunal.

ii) Regarding the accused's right to be informed of the charges, to be given adequate time and facilities for the preparation of his defence, and to be enabled to examine the witnesses against him and obtain the attendance of witnesses on his behalf (article 14(3), letters (a), (b) and (e) ICCPR), nothing in the reports I have received indicates that the accused had prior notice of who would give evidence against him and what exactly the witnesses would give evidence on. Under articles 51 and 53 of the Interim Criminal Procedure Code the prosecution was obliged to submit to the court a list of witnesses it intends to call, which it failed to do. Mr. Sarwari therefore had no opportunity to call evidence in rebuttal, to effectively challenge the prosecution evidence

or to properly prepare his defence. The accused was not given the opportunity to crossexamine the witnesses against him, and did not call any witnesses on his behalf. Finally, the accused was convicted on the basis of a provision, Article 130 of the Constitution, that was not contained in the criminal code in force at the time of the trial, was not mentioned in the indictment and reportedly was not discussed in the course of the trial, which would appear to have seriously undermined his chances of effectively preparing his defence. Articles 57 and 42 of the Interim Criminal Procedure Code as well require prior notice to be given to the defence of changes in the definition of offences alleged.

iii) Regarding the accused's right "to defend himself in person or through legal assistance of his own choosing … and to have legal assistance assigned to him, in any case where the interests of justice so require" (article 14(3), letter (d) ICCPR), Mr. Sarwari did not enjoy any legal assistance. The reports we have received indicate that this was not his free choice, but due to the circumstance that no lawyer was willing to take up his defence. We am also concerned that in the indictment, Mr. Sarwari's request for an attorney was viewed as disruptive of the prosecution's investigation and as another basis for his guilt.

iv) Regarding the right to obtain review of conviction and sentence by a higher court (article 14(5) ICCPR), the effective exercise of this right requires that the defendant be provided with legal counsel and time to adequately prepare his appeal.

Special Rapporteur Alston also addressed more structural concerns about the fairness of trials in capital cases, for example in a report following his visit to the United States in 2008:

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶10-16, 19-22)

1. Judicial independence

10. Alabama and Texas both have partisan elections for judges.[210] My mandate does not extend to an evaluation of how a system of multi-million dollar campaigns for judicial office comports with judicial independence requirements. But if – as research and practice show – the outcome of such a system is to jeopardise the right of capital defendants to a fair trial and appeal, there is clearly a need to consider changes. Studies reveal that in states where judges are elected there is a direct correlation between the level of public support for the death penalty and judges' willingness to impose or uphold death sentences. There is no such correlation in non-elective states. In particular, research shows that, in order to attract votes or campaign funds, judges are more likely to impose or refuse to reverse death sentences when: elections are nearing; elections are tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience.[211]

11. The goal of an independent judiciary is to ensure that justice is done in individual cases according to law. Too often, though, under judicial electoral systems, the death penalty is treated as a political rather than a legal matter.[212] The significant impact of judicial electoral systems on

210 Judges in both states are elected for 6-year terms. See Article 5, Constitution of the State of Texas; Amendment 328, Constitution of Alabama.

211 Brace and Boyea, "State Public Opinion, the Death Penalty, and the Practice of Electing Judges", *American Journal of Political Science* 52 (2008); Baum, "Judicial Elections and Judicial Independence: The Voter's Perspective", Ohio State Law Journal 64 (2003); and Hall, "Justices as Representatives: Elections and Judicial Politics in the American States", *American Politics Quarterly* 23 (1995).

212 De Muniz, "Politicizing State Judicial Elections: A Threat to Judicial Independence", *Willamette Law Review* 38 (2002), pp. 387-388.

capital punishment cases was recognised by many with whom I spoke. They strongly suggested that judges in both Texas and Alabama consider themselves to be under popular pressure to impose and uphold death sentences and that decisions to the contrary would lead to electoral defeat. Numerous government officials in both states openly stated that it was not possible to speak out against the death penalty and hope to get re-elected.[213]

12. In Alabama, the problem of politicizing death sentences is heightened because state law permits judges to "override" the jury's opinion in sentencing.[214] Thus, even if a jury unanimously decides to sentence a defendant to life in prison, the judge can instead impose a death sentence. When judges override jury decisions, it is nearly always to increase the sentence to death rather than to decrease it to life – 90% of overrides imposed the death penalty. And a significant proportion of those on death row would not be there if jury verdicts had been respected. Over 20% of those currently on death row were given the death sentence by a judge overruling a jury decision for life without parole.[215] According to one study, judicial overrides are twice as common in the year before a judge seeks re-election than in other years.[216] In light of concerns about possible innocence and the irreversible nature of the death penalty, Alabama should relieve judges of the invidious influence of politics by repealing the law permitting judicial override.

2. Right to counsel

13. One of the most fundamental rights Governments must provide criminal defendants is the right to counsel, which helps ensure defendants receive fair trials.[217] But the right is empty, and reliable and just trial outcomes are threatened, if the quality of counsel is poor. In both Alabama and Texas, a surprisingly broad range of people in and out of government acknowledged that existing programs for providing criminal defense counsel to indigent defendants are inadequate.

14. Neither state has a statewide public defender system. Instead, individual counties in each state determine how counsel for the indigent will be appointed, with most opting for court-appointed counsel.[218] One effect of such a system is that defense counsel are less likely to be independent. Counsel must appear before the same judges for their appointed death penalty cases as for the rest of their legal practice. Not surprisingly, this can create structural disincentives for vigorous capital defense.[219] Such structural problems are compounded by inadequate compensation for counsel.[220] Until 1998, court-appointed counsel in Alabama could only be compensated up to $1,000 per phase of the case.[221] A significant proportion of current death row inmates were convicted during

213 Indeed, I viewed a number of election advertisements by prospective judges in which the underlying message was the judge's commitment to handing down death sentences.

214 Alabama Code § 13A-5-47. For a detailed review of the politicization of the death penalty in Alabama see, American Bar Association, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report" (June 2006), ("ABA Alabama Report"), pp. 226-228.

215 Equal Justice Initiative, "Judicial Override in Alabama" (March 2008).

216 See Burnside, "Dying to Get Elected: A Challenge to the Jury Override", *Wisconsin Law Review* 1017 (1991), pp. 1039-44.

217 Article 14, International Covenant on Civil and Political Rights.

218 In Alabama, just four of 41 judicial circuits have a public defender (and only one represents capital defendants). Most of the circuits appoint attorneys for an hourly fee. The options for the counties are set out in state legislation: Alabama Code, § 15-12-4(e) (2006).

219 A further structural problem with court-appointed defense counsel systems is that judges are likely to appoint defense counsel based on factors that could compromise counsel's independence, including: the advice of state prosecutors; the defense counsel's ability to move cases 'regardless of the quality defense they provide'; on the basis of campaign contributions; and based on personal friendships. Texas Defender Service, *A State of Denial: Texas and the Death Penalty* (2000), p. 79.

220 ABA Alabama Report, *supra* note 214, pp. 107-108.

221 The $1,000 cap no longer applies. Presently, trial counsel can receive $60 per hour of work in court, and $40 per

the time that cap was in place. Although hourly caps were subsequently enacted, they bear similarly little relation to the true costs of effectively defending a death penalty case.

15. Failure to provide an adequately-funded state-wide public defender has the predictable result of poor legal representation for defendants in capital cases.[222] In Texas, one well-informed Government official referred to the overall quality of appointed defense counsel as "abysmal." In Alabama, I read appellate legal briefs, submitted on behalf of defendants on death row, that barely reached ten pages, did not request oral argument, or were largely a bare restatement of the facts. Cost concerns also limit the extent to which qualified experts can or will be retained for the defense.[223]

16. For there to be a meaningful right to counsel, major reforms are required. A positive first step is the system recently established in West Texas – a pilot multi-county public defender to provide capital defense in 85 counties. This project is an exception, however, and in both Texas and Alabama, state officials are considering half-measures they perceive to be money-saving, instead of the necessary establishment of state-wide, well-funded, independent public defender services.

[...]

4. Systematic evaluation of the criminal justice system

19. There is a clear onus on states to systematically evaluate the workings of their criminal justice systems to ensure that the death penalty is not imposed unjustly. In Texas, the Court of Criminal Appeals recently set up a Criminal Justice Integrity Unit to examine wrongful conviction issues. This is a positive development, but much more is needed. An appropriate approach would be for the Texas legislature to establish, as some have proposed,[224] an Innocence Commission designed to assess systematically why people have been wrongly convicted and then to apply those lessons with recommendations for criminal justice system reform.

20. Alabama could draw on the in-depth analysis of its system produced by the American Bar Association (ABA).[225] While various state officials dismissed the ABA as biased, they generally acknowledged that those who conducted the study were serious lawyers. In any event, none of the officials with whom I spoke had undertaken a thorough analysis of the report. Given the seriousness of the problems identified, and officials' reluctance to undertake any alternative indepth study, it is incumbent upon the authorities to formally respond to the ABA's findings and recommendations. Alabama officials could indicate the seriousness of their concern about alleged injustices if they gave reasons for accepting or rejecting the ABA's specific recommendations.

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hour of work out of court: Alabama Code, § 15-12-21(d) (2006). Appellate counsel on a direct appeal can receive $60 per hour, capped at $2,000 per appeal: Alabama Code, § 15-12-22(d)(3) (2006). There is no right to post-conviction counsel, but if such counsel is appointed, the fee is capped at $1,000: Alabama Code, § 15-12-23(d) (2006).

222 One study found nearly one in four Texas death row inmates had been represented by courtappointed attorneys who had been disciplined for professional misconduct. "Quality of Justice", *Dallas Morning News*, (10 September 2000). Another study suggested court-appointed counsel in Texas were often "crippled by substance abuse, conflicts of interest and disciplinary problems". Texas Defender Service, *A State of Denial: Texas and the Death Penalty* (2000), p. 83. Another study concluded that Texas death row inmates "face a one-in-three chance of being executed without having the case properly investigated by a competent attorney". Texas Defender Service, *Lethal Indifference* (2002).

223 Liebman and Marshall, "Less is Better", *Fordham Law Review* 74 (2005-06) pp. 1664-65.

224 See, e.g., Texas Senate Bill 263, *A bill to be entitled an act relating to the creation of a commission to investigate and prevent wrongful convictions* (23 April 2007).

225 ABA Alabama Report, *supra* note 214.

5. Federal habeas corpus review

21. A capital defendant convicted by a state court can (after exhausting state habeas corpus review) bring a habeas corpus suit in federal court to challenge the conviction.[226] But federal courts' role in reviewing state-imposed death sentences has been curtailed by legislation designed to "expedite" such cases. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prevents federal habeas review of many issues, imposes a six-month statute of limitation for inmates seeking to file federal habeas claims, and restricts access to an evidentiary hearing at the federal level.[227] As initially enacted, AEDPA permitted states to opt in to expedited federal review of death penalty cases if the state provided counsel for indigent death row inmates in post-conviction cases.[228] But federal courts, which were originally responsible for determining whether states qualified for expedited review, found that few states met statutory requirements for proper provision of counsel. (Texas was among those states denied qualification.) The appropriate response to the federal courts' findings would have been to improve state indigent defense systems. Instead, Congress amended the law to permit the Department of Justice (DOJ) to issue regulations under which DOJ, rather than the courts, would certify state indigent defense systems.[229] The regulations that came into effect on 12 January 2009 are grossly inadequate.[230] They do not specify: the level of competency that must be exhibited by state appointed counsel; the amount of litigation expenses that counsel must be provided with; or that counsel must receive reasonable or adequate compensation. Such matters are left to the discretion of the states, thus effectively eviscerating both the federal oversight function and incentives for states to improve indigent defense. These regulations should be amended or repealed.

22. When I asked one official with responsibility for handling federal habeas cases about the impact of AEDPA, I was told that although the restrictive legislation may prevent some meritorious claims from being raised, rules were necessary to enforce finality. I agree that finality is important in criminal cases, and that it serves important purposes both for victims and the system as a whole. But presently, too much weight is given to finality and too little to the due process rights of the accused and to the Government's obligation to ensure that innocent people are not executed. Given the serious concerns about the fairness of state-level trials and appeals, the federal writ of habeas corpus plays a critical role in capital cases. Congress should investigate whether state criminal justice systems fail to protect constitutional rights in capital cases, and also enact legislation permitting federal courts to review *de novo* all merits issues in death penalty cases, with appropriate exceptions, such as where a defendant attempts deliberately to bypass state court procedures.

One specific problem that is often highlighted regarding the death penalty and fair trial guarantees in the United States is the apparent racial bias in its application.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶17-18)

17. Studies from across the country show racial disparities in the application of the death penalty.[231] The weight of the scholarship suggests that the death penalty is more likely to be imposed when the victim is white, and/or the defendant is African American.

226 In California, for example, "70 per cent of the habeas petitions in death cases have achieved relief in the federal courts, even though relief was denied when the same claims were asserted in state courts". See *Report and Recommendations on the Administration of the Death Penalty in California* (30 June 2008), p. 57.

227 As amended, these provisions are at 28 U.S.C. § 2261.

228 Public Law 104-132 (enacted 24 April 1996).

229 Public Law 109-177 (enacted 9 March 2006).

230 AG Order 3024-2008, 73 FR 75338, (11 December 2008).

231 See, e.g., American Bar Association, "State Death Penalty Assessments: Key Findings" (29 October 2007) (reporting

> 18. When I raised racial disparity concerns with federal and state Government officials, I was met with indifference or flat denial. Some officials had not read any specific reports or studies on race disparity and showed little concern for the issue. Others conceded racial disparity exists, but invoked a handful of studies suggesting the cause was not racial bias.[232] Thus, I was told that the overrepresentation of African Americans among those sentenced to death as opposed to life without parole was related to racial disparities in criminality, or to the overrepresentation of African Americans in the prison population generally. Many officials dismissed the results of studies showing racial disparity as biased, claiming they were written by researchers with antideath penalty views. Some dismissed the results of studies but then admitted that they had not carefully looked at them. These responses are highly disappointing. They suggest a damaging unwillingness to confront the role that race can play in the criminal justice system generally, and in the imposition of the death penalty specifically. Given the stakes, both state and federal Governments need to systematically review and respond to concerns about continuing racial disparities.

Special Rapporteur Heyns highlighted this issue again as part of his follow-up report on the United States:

> ***Follow-up Country Report to the United States of America (A/HRC/20/22/Add.3, 30 March 2012 ¶¶17-19)***
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> 17. The mission report outlined studies from across the country showing racial disparities in the imposition of the death penalty.[233] Reports released since then corroborate the persistence of this problem.[234] The Government has expressly acknowledged that racial and ethnic disparities exist in the criminal justice system. This new approach by the Government constitutes a significant departure from federal officials' vehement denial of such problems during the 2008 country visit,[235] and is to be commended. The Government also supported the recommendation of the universal periodic review to undertake studies to determine the factors of racial disparity in the application

race of victim disparity in all eight states studied). See also United States General Accounting Office, "Death Penalty Sentencing: Resource Indicates Pattern of Racial Disparities" (1990) (reviewing studies published between 1972 and 1990 and finding race of victim disparity); Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, "Final Report" (2003) (finding race of defendant disparity); David C Baldus and George Woodworth, "Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research" *Criminal Law Bulletin* 39 (2003) (reviewing studies published between 1990 and 2003 and finding race of victim disparity); Scott Phillips, "Racial Disparities in the Capital of Capital Punishment" *Houston Law Review* 45 (2008) (finding both race of defendant and race of victim disparity); Jennifer L. Eberhardt, Paul G. Davies, Valerie Purdie-Vaughns, and Sheri Lynn Johnson, "Looking Deathworthy" *Psychological Science* 17(5) (2006) (the likelihood of a black defendant being sentenced to death is influenced by the degree to which he or she is perceived to have a "stereotypical" black appearance).

232 Federal Justice Department officials relied heavily upon a 2006 Rand Corporation study that identified the heinousness of the crime rather than race as the principal determinant in seeking the death penalty. But the study itself warned that its finding were not definitive given the difficulty of determining causation based on statistical modeling. See Klein, Berk, and Hickman, *Race and the Decision to Seek the Death Penalty in Federal Case*. The study's methodology has been criticised for using selective data, framing the issue very narrowly, and limiting its investigation to Janet Reno's term as Attorney-General. See: ACLU, *The Persistent Problem of Racial Disparities in the Federal Death Penalty* (25 June 2007). See also Death Penalty Information Center, "Racial and Geographical Disparities in the Federal Death Penalty" available at: www.capitalpunishmentincontext.org/issues/disparitiesfdp.

233 A/HRC/11/2/Add.5, *supra* note 5, para. 17.

234 American Civil Liberties Union (ACLU) of Georgia, *The Persistence of Racial Profiling in Gwinnett – Time for Accountability, Transparency, and an End to 287(g)*, March 2010; ACLU of Georgia, *Terror and Isolation in Cobb – How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*, October 2009; Inter-American Court of Human Rights, Report No. 77/09, Petition 1349-09, *Orlando Cordia Hall v. United States*, 5 August 2009; DPIC, Research Shows that Race of the Victim Matters in North Carolina Death Penalty, available at: http://www.deathpenaltyinfo.org/studies-research-shows-race-victim-matters-north-carolina-death-penalty; Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, August 2010.

235 A/HRC/11/2/Add.5, *supra* note 3, para. 18.

of the death penalty and to prepare effective strategies aimed at ending possible discriminatory practices.[236] The materialization of the DoJ's stated intentions to conduct further statistical analysis and studies on sentencing disparities is highly anticipated.

18. The Special Rapporteur notes the Government's intention to revise the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which prohibits racial profiling in federal law enforcement activities. Bearing in mind that its review was initiated in 2009,[237] he encourages the Government to finalise the revised document in consultation with the civil society. For such an instrument to have practical relevance, it should be enforceable and law enforcement officials should be held accountable for any violations.[238] Likewise, it should be binding on all law enforcement officers, including intelligence agencies.

19. Federal and state governments should systematically review and respond to concerns about persistent racial disparities in the criminal justice system, in general, and more specifically, in the imposition of the death penalty. The Special Rapporteur urges the Government to effectively address these issues by supporting the recommendation made by the Committee on the Elimination of Racial Discrimination to adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias.[239]

2. Imposition for crimes that are not the "most serious"

One of the most common reasons the mandate takes up death penalty cases is where it is provided for crimes other than intentional killing. The most high-profile cases are often for drug-related crimes, but the imposition for other offences (including some which should not even be crimes) is also a concern.

Urgent appeal sent to the Government of Indonesia (2 October 2009) (with the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on violence against women, its causes and consequences)

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the adoption of the new Islamic Criminal Code (Qanun Jinayah) in Aceh.

According to the information received,

> On 14 September 2009, the Aceh Legislative Council adopted a new Islamic Criminal Code which imposes severe sentences for consensual extra-marital sexual relations, rape, homosexuality, alcohol consumption and gambling. Among other sanctions, the Code imposes the punishment of stoning to death for adultery; 100 cane lashes for sexual intercourse outside marriage; between 100 and 300 cane lashes or imprisonment for rape; and 100 lashes for homosexuality.
>
> In addition, the new Code legalises marital rape and provides that a woman alleging that she is a victim of rape will be found guilty of sex outside marriage unless she can provide four male witnesses testifying to the lack of consent on her part; impunity will be given to those who commit rape at the command of superiors.

236 Report of the Working Group of the Universal Periodic Review: United State of America, A/HRC/16/11, 4 January 2011, para. 92.95.

237 National report submitted for Universal Periodic Review: United States of America, A/HRC/WG.6/9/USA/1, 23 August 2010, para. 52.

238 Submission by the ACLU for the present report.

239 Committee on the Elimination of Racial Discrimination, Concluding Observations: United States of America, CERD/C/USA/CO/6, 8 May 2008, para. 23; OHCHR Compilation of comments for Universal Periodic Review: United States of America, A/HRC/WG.6/9/USA/2, 12 August 2010, para. 25.

> The National Commission against Violence on Women has called for a judicial review of Law No. 11/2006 of the Government of Aceh concerning the sources the Aceh Legislative Council has used to adopt the Aceh Islamic Criminal Code. Moreover, this Code applies to both Muslims and non-Muslims.
>
> It is furthermore alleged that although the Code is applicable to the population as a whole in practice women are far more likely to become victims of stoning due to patriarchal and discriminatory practices and policies, as well as biological differences such as pregnancy.
>
> [...]
>
> With regard to the provision allegedly dictating that the death penalty by stoning shall be imposed on those found guilty of adultery, we recall that Article 6(2) of the Covenant provides that "in countries which have not abolished the death penalty", the "sentence of death may be imposed only for the most serious crimes". A thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting the most serious crimes provision shows that a death sentence can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life (A/HRC/4/20, para. 53). The Human Rights Committee has expressly stated that the imposition of the death penalty for adultery is incompatible with the Covenant (see, e.g., CCPR/C/79/Add.25).
>
> Furthermore, we would like to draw the attention of your Excellency's Government to General Assembly resolution 63/181 in which the Assembly urges States "to ensure that no one within their jurisdiction is deprived of the right to life, liberty or security of person because of religion or belief and that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment, or arbitrary arrest or detention on that account and to bring to justice all perpetrators of violations of these rights" (para. 9 b). We would also like to recall that the General Assembly in the same resolution urges States "to step up their efforts to eliminate intolerance and discrimination based on religion or belief, [...] devoting particular attention to practices that violate the human rights of women and discriminate against women" (para. 12 a). Furthermore, the General Assembly invites all actors to address "situations of violence and discrimination that affect many women as well as other individuals on the grounds or in the name of religion or belief or in accordance with cultural and traditional practices" (para. 16 b).
>
> Moreover, we would like to refer to para. 10 of General Comment No. 22 on freedom of thought, conscience and religion, in which the Human Rights Committee emphasised that "[i]f a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognised under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it".

Recognising that in practice probably the most common imposition of the death penalty for a crime that does not meet the threshold of "most serious" is for drug-related offences, Special Rapporteur Heyns addressed a dedicated section of his 2012 thematic report to that subject:

> ***Report to the General Assembly (A/67/275, 9 August 2012, ¶¶51-60, 84-85, 89-92)***
>
> 51. Currently, 32 States have laws providing for the death penalty for drug-related offences. This total has been decreasing over the past decade.[240] As suggested earlier, few States impose death sentences for these crimes and even fewer actually carry out executions for them. Nevertheless, it is alarming that the States that do resort to the death penalty for these offences sometimes do so with

240 International Harm Reduction Association, *The Death Penalty for Drug Offences: Global Overview 2011* (London, 2011).

high frequency. A small group of States is responsible for the vast majority of death sentences and executions for drug-related offences worldwide: China, the Islamic Republic of Iran, Saudi Arabia and Viet Nam, followed by, to a lesser extent, Malaysia and Singapore. Some States reportedly carry out more executions for drug-related offences than for any other type of offence. For example, executions for drug-related offences in the Islamic Republic of Iran reportedly increased six-fold from 2008 to 2010 and currently comprise between 85 and 90 per cent of the State's total executions.

52. The number of executions for drug-related offences in China is a State secret but is believed to be high.[241] Viet Nam likewise claims execution numbers as secret, but it is reported that most death sentences from 2007 to 2010 were imposed for drug-related offences.[242] In Malaysia, actual execution numbers are not publicly available. In 2011, however, it was reported that 479 of 696 prisoners on death row had been sentenced to death for drug-related crimes.[243]

53. In addition to these six high-application States, seven low-application States have resorted to death sentences and sometimes executions for drug-related offences in a number of cases in the past five years: Egypt, Indonesia, Kuwait, Pakistan, the Syrian Arab Republic, Thailand and Yemen.[244]

54. While the above 13 States impose death sentences and, in some cases, carry out executions, 14 others have legislation prescribing the death penalty for drug-related offences but have never or have not for many years resorted to it. Lastly, while the Democratic People's Republic of Korea, Iraq, Libya and the Sudan retain the death penalty in law for drug-related offences, insufficient data are available regarding actual use to place them among these other groups of States.[245]

55. Insofar as figures for actual executions can be established, only between 8 and 15 States appear to put drug offenders to death. Since 2007, known executions have taken place in China, Indonesia, the Islamic Republic of Iran, Kuwait, Pakistan, Saudi Arabia, Singapore and Thailand. It is probable that executions for drug-related offences have also taken place in the Democratic People's Republic of Korea, Malaysia and Viet Nam. It is unknown, but possible, that executions for drug-related offences have occurred in Egypt, Iraq, the Syrian Arab Republic and Yemen.

56. These statistics support a conclusion similar to that reached for "most serious crimes" more generally. Only a minority of States Members of the United Nations (32 worldwide) retains the death penalty for drug-related offences in law, of which only between 8 and 15 actually carry out executions for them. These numbers indicate a broad consensus that States that maintain the death penalty as part of their law should not carry out executions for drug-related offences.

57. The special rapporteurs on health and torture have confirmed the view of the current mandate holder and the Human Rights Committee that the weight of opinion indicates that drug offences do not meet the threshold of "most serious crimes" to which the death penalty might lawfully be applied (E/2010/10, para. 67).

58. The nature of drug-related offences is conceptually unique and makes this category particularly vulnerable to arbitrary practices. Unlike murder, for example, drug crimes effectively criminalise action not for the grave consequences that it has had but for those believed to be likely. The causal connection is thus many stages removed and often even pre-empted by the drug-related arrest.

241 Ibid.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.

59. In domestic legislation, the range of related activities contemplated in this category is typically over-expansive and involves very different degrees of connection to drug trafficking. In some cases, it may also involve a presumption that possession of a threshold quantity of drugs is proof of trafficking, which is a capital offence and which the defendant must then disprove. As early as 1995, the Secretary-General noted that the threshold for a capital drug offence among retentionist States varied from the possession of 2 to 25,000 grams of heroin (E/1995/78, para. 55). In some States, many or even most death sentences and executions are for dealers in less dangerous drugs, such as marijuana traffickers.[246] Such discrepancies present additional concerns of arbitrariness.

60. There is no persuasive record that the death penalty contributes more than any other punishment to eradicating drug trafficking. In November 2011, the Secretary General of the Iranian High Council for Human Rights stated that: More than 74 per cent of executions in Iran are stemming from drug trafficking related crimes. Whether it is correct or not, there is a big question: "Did this harsh punishment bring the crimes down or not?" In fact, [it] did not bring it down.[247]

[...]

84. Clear guidelines are needed to help States to engage in cooperative drug control efforts without departing from the human rights framework, including international standards on the death penalty. These guidelines should also assist in making operational the standards on State responsibility in this context.

85. Such guidelines are being explicitly sought by regional organizations that are major donors with regard to drug control efforts. For example, in a December 2010 resolution on the European Union's annual report on human rights and democracy in the world, the European Parliament called upon the European Commission to develop guidelines governing international funding for country-level and regional drug enforcement activities. Some individual States, such as Australia and the United Kingdom of Great Britain and Northern Ireland, are already developing domestic safeguards and guidance

[...]

89. While mixed messages were previously sent, the international drug control system now fully recognises the need to ensure that drug control is pursued in a manner consistent with international human rights law, explicitly stating that the death penalty for drug-related crimes violates recognised norms. This has been made clear by the United Nations Office on Drugs and Crime (UNODC) on multiple occasions, including in 2010, when it called upon member States to follow international standards concerning prohibition of the death penalty for offences of a drug-related or purely economic nature (see E/CN.7/2010/CRP.6-E/CN.15/2010/ CRP.1).

90. In 2012, UNODC introduced guidance in which it stated that in cooperative counter-narcotics projects it would seek assurances that international safeguards would be respected: "If, following requests for guarantees and high-level political intervention, executions for drug-related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support."[248]

91. In its 2003 report, the International Narcotics Control Board referred to efforts by the United Nations to limit the scope of the death penalty to the most serious crimes (E/INCB/2003/1, para. 213). A number of scholars have, however, since criticised the Board for failing to clarify the

246 Ibid.
247 Amnesty International, *Death Sentences and Executions in 2011* (London, 2012).
248 Available from www.unodc.org/documents/justice-and-prison-reform/HR_paper_UNODC.pdf.

balance of international responsibilities between drug control and human rights in the context of the death penalty.[249]

92. While the elaboration of guidelines points in the right direction, actual practice has not been sufficiently modified accordingly and remains a matter of concern. For example, UNODC and some States are actively involved in the Islamic Republic of Iran, where more than 1,400 people have reportedly been executed since the beginning of 2010, most of them on drug-related charges.

The salience of the challenge posed to the protection of the right to life by the imposition of the death penalty for drug-related offences was further highlighted by the decision to make drug offences the focus of the 2015 World Day Against the Death Penalty. Special Rapporteur Heyns issued a press release to raise awareness of the World Day:

Press Release of the Special Rapporteur on the occasion of the World Day Against the Death Penalty in 2015 (7 October 2015) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

Using the death penalty to fight drug crimes violates international law, UN rights experts warn

GENEVA (7 October 2015) – "Executions for drug crimes amount to a violation of international law and are unlawful killings," the United Nations Special Rapporteurs on summary executions, Christof Heyns, and on torture, Juan E. Méndez, today reminded Governments. It is estimated that drug-related sentences could account for around 1,000 executions a year worldwide.

"The imposition of death sentences and executions for drug offences significantly increases the number of persons around the world caught in a system of punishment that is incompatible with fundamental tenets of human rights," the experts said, speaking ahead of the 13th World Day Against the Death Penalty, observed on 10 October.

They noted that more than 30 States have legal provisions providing the death penalty for drug-related crimes, and in certain countries, including Indonesia, China, Iran and Saudi Arabia, such cases make up a significant proportion of the total number of executions.

"Of particular concern is that these arbitrary sentencing regimes exist in several of the very small minority of countries around the world which most frequently resort to capital punishment," Special Rapporteur Heyns said. "Moreover, in many States where the death penalty is used for drug-related offences, there is not a system of fair trial."

"The World Day Against the Death Penalty provides an opportunity to reflect on another year in which the number of States that have completely moved away from capital punishment has increased," Mr. Heyns said. "However, it also prompts scrutiny of the extent to which a small minority of States violate international law by imposing the death penalty for drug offences."

The International Covenant on Civil and Political Rights* prohibits the imposition of the death penalty for any but the 'most serious' crimes. The Human Rights Committee, the body responsible for the authoritative interpretation of the Covenant, has repeatedly made clear that drug offences do not meet this threshold, and that only crimes involving intentional killing can be 'most serious'.

"Certain States that persistently and openly flout this international standard are also acting contrary to an emerging customary norm that the imposition and enforcement of the death penalty, in breach of those standards, is a violation *per se* of the prohibition of torture or cruel, inhuman or degrading treatment," said Special Rapporteur Méndez.

249 See www.hrw.org/news/2012/03/12/letter-international-narcotics-control-board-capitalpunishment-drug-offences.

> The experts welcomed the fact that international agencies and bodies charged with guiding programmes to counter the illicit drug trade have publicly called for the abolition of the death penalty for this category of crime. However, they remained concerned that "international cooperation to combat drug crime could, in certain circumstances, inadvertently be contributing to unlawful executions."
>
> "Abolitionist States must ensure that they are not complicit in the use of the death penalty in other States under any circumstances, but all States—whatever their stance on the death penalty—must refrain from acts that could contribute to an arbitrary execution, including any execution for drug offenses," Mr Heyns said.
>
> "International agencies, as well as States providing bilateral technical assistance to combat drug crime, must ensure that the programmes to which they contribute do not ultimately result in violations of the right to life," the Special Rapporteurs stressed.
>
> The two Special Rapporteurs reaffirmed that the death penalty has no role to play in the 21st century, and even less so in the case of drug-related offences. "We are looking forward to the time when it will no longer be necessary to have a special day on the death penalty; a time when all states have left this form of punishment behind them."

In 2016, ahead of the UN General Assembly Special Session on Drugs held in New York, Special Rapporteur Heyns co-authored an open letter about the inappropriateness and illegality of the death penalty for drugs crimes.

> ***Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nation General Assembly Special Session on Drugs New York, 19-21 April 2016 (15 April 2016)***
>
> [...]
>
> ***The death penalty for drug offenses, the use of lethal force, and arbitrary executions***
>
> Recalling the consistent findings of the UN Human Rights Committee, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Torture, and other mandate holders, we would like to reiterate that the death penalty for drug offences does not meet the threshold of 'most serious crimes' for the purposes of the International Covenant on Civil and Political Rights.
>
> We again add our voices to calls by the UN Secretary General, the International Narcotics Control Board, and many Member States for the abolition of the death penalty for drug offences. We express our collective disappointment that many States have failed to bring their national policies into accordance with this standard. Despite the political silence in reference to the death penalty in the outcome document, the application of capital punishment for drug-related offenses directly contravenes international human rights law and we urge States to make immediate commitments towards its full abolition.

3. The problem of error

The problem of error is a significant argument against the death penalty. Most of the data on error originates from the United States, as result of significant civil society mobilisation to demonstrate innocence. The number of innocent people executed in other jurisdictions remains a matter of conjecture.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶5-9)

A. The death penalty: the risk of executing the innocent

5. In the United States, 35 states, the federal Government and the U.S. military provide for the death penalty.[250] Some 3,300 people are on death row across the country, and, since 1976, 1,145 people have been executed. My mission focused on the federal death penalty and the application of the death penalty in Alabama and Texas. Alabama has the highest per capita rate of executions in the United States, while Texas has the largest total number of executions and one of the largest death row populations.[251]

6. Since 1973, 130 death row inmates have been exonerated across the United States. This number continues to grow. While I was in Texas, the conviction of yet another person on death row was overturned by the Court of Criminal Appeals.[252] Although in that case DNA testing ultimately prevented the execution of an innocent man, other possible innocents have been less fortunate. In many cases, either because of inadequate laws or practices governing the preservation of evidence or because of the passage of time, there is no longer any physical evidence that can be DNA tested and potentially exonerate the inmate. In some states, legal barriers – such as a lack of a post-conviction DNA access laws – make DNA testing difficult for death row inmates to obtain.[253] In yet other cases, biological evidence is immaterial and other evidentiary or procedural issues preclude a just or reliable basis for imposing the death penalty.

7. I met a range of officials and others who acknowledged that innocent people might have been executed. Serious flaws in the system are of obvious significance to the innocent convicted person, but also of serious concern for victims' families and the wider community, because wrongful convictions mean that true criminals remain at large.

8. At present, a great deal of time and energy is spent trying to expedite executions. A better priority would be to analyse where the criminal justice system is failing in capital cases and why innocent people are being sentenced to death. In Texas, there is at least official recognition that reforms are needed and that innocent people may have been executed. In Alabama, the situation remains highly problematic. Government officials seem strikingly indifferent to the risk of executing innocent people and have a range of standard responses to due process concerns (which are sometimes seen as "technicalities"), most of which are characterised by a refusal to engage with the facts. When I confronted them with cases in which death row inmates have been retried and acquitted, officials explained that a "not guilty" verdict does not mean the defendant was actually innocent and that

250 The number of states does not include New Mexico; legislation repealing the death penalty in New Mexico will take effect on July 1, 2009.

251 Since 1976, Texas has executed 429 people. The state with the next highest number of total executions is Virginia, which executed 102 people over the same period.

252 *Ex Parte Michael Nawee Blair*, Court of Criminal Appeals of Texas, 25 June 2008.

253 In Texas, by statute, a convicted person may apply for post-conviction DNA testing if certain requirements are met. Texas Code of Criminal Procedure, Article 64. The requirements are set at a high threshold and, as a result, some convicted persons are denied access to DNA testing. The situation is worse in Alabama. Alabama is one of seven states that does not have a specific post-conviction DNA access law at all. Inmates must seek DNA testing through the regular postconviction claim channels, which have strict procedural and time requirements.

most defendants "played the system" and probably were guilty. But the truth is that Alabama's capital system is simply not designed to uncover cases of innocence, however compelling they might be. Alabama may already have executed innocent people, but its officials would rather deny than confront criminal justice system flaws.[254]

9. Given the rising number of innocent people being exonerated nationwide, both state and federal Governments need to investigate and fix the problems in their criminal justice systems. As a start, I recommend that: (1) problems already recognised as such, including lack of judicial independence and the absence of an adequate right to counsel, should be addressed immediately; (2) systematic review of criminal justice system flaws, including racial disparities in capital cases, should be undertaken to identify needed reforms; and (3) federal courts should be authorised to review all substantive claims of injustice in capital cases. In light of the United States' international law obligations with respect to the death penalty, I also recommend that: (4) state and federal legislatures ensure that the death penalty only be applied for the "most serious crimes"; and (5) review and reconsideration be provided to foreign nationals on death row who were denied the right to consular notification.

Special Rapporteur Heyns likewise raised the challenge posed by even very occasional errors in his 2012 thematic report on the death penalty:

Report to the General Assembly (A/67/275, 9 August 2012, ¶¶27-29)

1. Problem of error

27. Increasingly, evidence is emerging that innocent people are sentenced and even put to death. When such evidence results in exonerations, these developments should be heralded. Such failures of justice, however, point to the reality that the levels of stringency with which fair trial standards are applied are often inadequate to protect the innocent.

28. A compelling example can be seen in the United States, where sophisticated methods of evidence-gathering, such as DNA analysis, are available. Since 1973, 140 people have been exonerated from death row in 26 states.[255] From 1973 to 1999, there were on average 3.03 exonerations for capital crimes each year. With the advent of more advanced technology, on average five people sentenced to death have been exonerated each year since 2000. 2 Since the first exoneration through DNA testing in 1993, 17 people in the United States have been exonerated by this technology specifically.[256]

29. While the availability of technology in the United States may enable exonerations in some cases before it is too late, very few countries that resort to the death penalty on a large scale have access to such resources. This raises the question of how many innocent people around the world have been executed or may currently be among the estimated 18,750 people on death row.[257]

254 Alabama's systematic rejection of concerns that basic international standards are being violated sits oddly alongside the Government's determined and successful bid to attract foreign investment from the European Union in particular. Indeed, Alabama's largest export market is Germany. See U.S. Department of Commerce, "Alabama: Exports, Jobs, and Foreign Investment" (September 2008), available at: http://www.trade.gov/td/industry/otea/statereports/alabama.html. Alabama's death penalty policies are thus an appropriate subject for dialogue with the international community.

255 See www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

256 See www.deathpenaltyinfo.org/innocence-and-death-penalty.

257 *Death Sentences and Executions in 2011 supra* note 247.

4. Excessive delays and the "death row" phenomenon

The drawn-out nature of death penalty proceedings (where the full process of law and appeals are respected), or the adoption of *de facto* moratoria on the imposition of executions without corresponding changes to sentencing structures, can lead to large numbers of detainees sentenced to death spending a long period of time on death row. Clearly, from a right to life perspective, this is partially a positive development in that they have not been executed, however it has also been a focus of attention for the Special Rapporteur on torture that the mental suffering inflicted by death row may amount to cruel inhuman or degrading treatment.

Expert Declaration of Christof Heyns (with Sandra Babcock and William Schabas) in the High Court Of Malawi in the matter of The Sentence Re-Hearings Conducted In Accordance With Kafantayeni v. Attorney General, Twoboy Jacob v. Attorney General, and Yasini Mclemonce v. Attorney General (February 2015, ¶¶43-47)

43. The concerns that animate the jurisprudence discussed above are closely related to those discussed in judicial opinions condemning lengthy incarceration on death row as cruel, inhuman or degrading treatment or punishment. "Death row phenomenon" refers to the psychological consequences of extended periods spent on death row, often in harsh conditions, compounded with the uniquely stressful experience of living with a death sentence. Many studies have documented that the stress associated with living for a prolonged period of time under a sentence of death results in significant mental trauma: "The observable result of mental suffering inflicted on the condemned prisoner is destruction of spirit, undermining of sanity, and mental trauma." *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 Iowa L. Rev. 814, 829 (1972). Other factors potentially contributing to this mental trauma include cramped environments, extreme deprivation, arbitrary or severe rules, harassment, and isolation from others. *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behavioral Sciences and the Law 19 (2002). Manifestations of death row syndrome vary, but may involve overwhelming senses of fear and helplessness, fluctuating moods, recurrent depression, and deterioration of mental capabilities, similar to senility. Additionally, death row syndrome appears to exacerbate existing psychological or mental disorders. *See id.*

44. There is now a significant body of jurisprudence from international tribunals and national courts recognizing the dehumanizing nature of prolonged incarceration on death row. *See generally* Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 St. Louis U. L.J. 699 (1996). In the 1989 case of *Soering v. United Kingdom*, the European Court of Human Rights recognised the legitimacy of death row phenomenon, declining to extradite a person facing the death penalty to the United States. *See Soering v. United Kingdom*, 11 Eur. H. R. Rep. 439 (1989). In doing so, the Court distinguished between the death penalty itself (which was—and is—a legitimate punishment under U.S. law) from the impermissible delay between the imposition of sentence and the prisoner's execution, causing the prisoner to suffer the "mental anguish of anticipating the violence he is to have inflicted on him." *Id.* Since then, both international tribunals and national courts have followed the European Court's reasoning. *See, e.g.,* U.N. Human Rights Committee *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, Aug. 3, 1995 (continued death row incarceration of a prisoner whose mental health had "seriously deteriorated" violated Article 7 of the International Covenant on Civil and Political Rights); U.N. Human Rights Committee, *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, CCPR/C/74/D/684/1996, Apr. 15, 2002 (finding that the issuance of a death warrant of a mentally ill prisoner also violated the Covenant); *Pratt & Morgan v. Attorney General of Jamaica*, 2 AC 1 (Privy Council 1993); *Shatrughan Chauhan & Anr. v. Union of India & Ors.*, (India 2014) 3 SCC 1 (Supreme Court of India determining that a prolonged delay in

execution of death sentence is relevant factor in deciding whether an execution should be carried out). The courts have reached varying conclusions regarding the length of time that a prisoner must spend on death row to render his death sentence cruel, inhuman or degrading treatment or punishment.

45. In *Pratt and Morgan v. The Attorney General of Jamaica*, for example, the Judicial Committee of the Privy Council recommended commuting the sentences of 105 death row inmates to life imprisonment after finding that a five-year delay between sentencing and execution would constitute "inhuman and degrading punishment or other treatment," in contravention of Section 17(1) of the Jamaican Constitution. *Pratt and Morgan v. The Attorney General of Jamaica*, 2 AC 1 (Privy Council 1993) (en banc). Similarly, in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others*, the Supreme Court of Zimbabwe set aside the death sentences of four men who had each served between four and six years on death row because carrying out the sentence after such prolonged delays and the appalling conditions on death row in Zimbabwe would constitute inhuman or degrading treatment, violating the Zimbabwean Constitution. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others*, Zimbabwe: Supreme Court, 24 June 1993, available at: http://www.refworld.org/docid/3ae6b6c0f.html [accessed 10 February 2015]. The Ugandan Supreme Court has found even shorter delays to be impermissible, holding a delay of more than three years between appellate confirmation of a prisoner's death sentence and his execution to be "cruel, inhuman or degrading treatment or punishment." *Kigula and Others v. The Attorney General*, 2006 S. Ct. Const. App. No. 03, at 56-57 (Uganda 2009). Finally, the European Court on Human Rights determined in *Al–Saadoon and Mufdhi v. United Kingdom*, that subjecting two prisoners to a "well-founded fear of being executed by the Iraqi authorities" for a period of two years and two months "must have given rise to a significant degree of mental suffering and that to subject them to such suffering constituted inhuman treatment." Significantly, in *Al-Saadoon*, the European Court on Human Rights for the first time extended its jurisprudence on death row phenomenon to *pretrial* delays, where the accused had not yet been subjected to a capital murder prosecution, but where the risk of such a prosecution was high.

46. The Eastern Caribbean Court of Appeal took a similar approach in *Moise v. The Queen*, where the court addressed the sentencing appeal of a man who had been re-sentenced to death following the demise of the mandatory death penalty in St. Lucia. The Court of Appeal took into account the delay that the offender had endured (1) prior to trial; (2) while on death row; and (3) waiting for his sentence rehearing. The court found it particularly relevant that "*the Appellant has laboured under a mandatory death sentence for 3 years and 10 months after this Court held in April 2001 that it was unconstitutional and unlawful.*" [2005] Crim. App. No. 8 of 2003, para. 52 (St. Lucia, Nov. 12, 2003). The court accordingly quashed his death sentence, even though he had only spent four years on death row.

47. It is our understanding that twenty-two of the prisoners who are entitled to be resentenced under the *Kafantayeni* judgment remain on death row. Most were sentenced to death in 2005, and have already spent a decade on death row—twice the amount of time found to be presumptively cruel, inhuman, or degrading by the Judicial Committee of the Privy Council in *Pratt.* We are informed that two or more prisoners may have been sentenced in 2007; they have spent nearly eight years on death row, which is twice as long as the prisoner whose death sentence was vacated in *Moise*. The fact of their lengthy incarceration is for the Malawi courts to consider in the course of the resentencing process, but we would note that the precedents cited above provide strong support for a finding that their sentences must, at a minimum, be commuted to life imprisonment (if not a term of years).

Follow-up to Country Recommendations – India (A/HRC/29/37/Add.3, 6 May 2015, ¶26)

26. The Special Rapporteur welcomes the recent decision of the Supreme Court in the matter of *Shatrughan Chauhan v. Union of India*,[258] by which the Court held that the death sentence of a condemned prisoner could be commuted to life imprisonment on the basis of a delay on the part of the Government in deciding a mercy plea. The Court held that the prolonged delay in implementing the death sentence had a dehumanizing effect, which in turn had the constitutional implication of depriving a person of his/her life in an unjust, unfair and unreasonable way so as to offend the fundamental right to life under article 21 of the Constitution. In so doing, the Court commuted the death penalty to life imprisonment for 15 death row inmates. The Court further held that mental illness was one of the supervening circumstances that warranted commutation of a death sentence to life imprisonment.

5. Application of the death penalty to foreign nationals

Hundreds of foreign nationals face the death penalty around the world after trials that may not meet the highest—or in some cases even the lowest—standards of fairness.

While foreign nationals should not be exempt from local law, they are often in a particularly vulnerable position due to their foreign citizen status and have little or no defence against law enforcement systems of the countries in which they are being tried. Migrant workers can be particularly at risk in this regard.

Urgent appeal sent to the Government of Saudi Arabia (14 August 2008) (with the Special Rapporteur on the question of torture, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the human rights situation of migrants)

In this connection, we would like to draw the attention of your Government to information we have received regarding the sentences imposed against seven Filipino men found guilty of a triple murder. Three of them were sentenced to death and four to eight years imprisonment and one thousand lashes each.

According to the information we have received:

> Edison Gonzales, Rolando Manaloto Gonzales, Eduardo Arcilla, Victoriano Alfonso, Efren Francisco Dimaun, Omar Basillo and Joel Sinamban, seven Filipino migrant workers, were arrested in April 2006 on charges of having murdered three other Filipino nationals. The seven men were tried by a General Court in Jeddah and sentenced in July 2007. Eduardo Arcilla, Edison Gonzales and Rolando Manaloto Gonzales were sentenced to death. Victoriano Alfonso, Efren Francisco Dimaun, Omar Basillo, and Joel Sinamban were sentenced to eight years imprisonment and one thousand lashes each.
>
> The seven men were held incommunicado and were not given access to lawyers until April 2008, i.e. eight months after their conviction and sentencing in first instance. Allegedly, they were also tortured during interrogation in order to force them to confess to the murders, including by being beaten on the soles of their feet.
>
> The seven men are currently held at Briman Prison in Jeddah. It would appear that their appeals are still pending before the second instance court.

[...]

We would also like to express our concern regarding the apparently disproportionate number of foreigners among those sentenced to death in the Kingdom of Saudi Arabia. As already noted in a previous communication to your Government, we have received reports according to which in

258 2014 3 SCC 1. See also *Union of India v V. Sriharan @ Murugun*, 2014 4 SCC 242.

> 2005 out of 86 executions known to have taken place in Saudi Arabia 39 concerned foreigners, in the year 2006 27 out of 39, and in 2007 (as of April of that year) 15 out of 34 executions concerned foreigners. Recent reports indicate that out of 66 persons executed so far in the Kingdom of Saudi Arabia in the course of the current year, almost half were foreign nationals. If these figures were correct, approximately 50 percent of those executed would be foreigners. Similarly, among the 18 individual cases of persons sentenced to death reported to us and brought to the attention of your Excellency's Government by the Special Rapporteur on extrajudicial, summary or arbitrary executions and other Special Procedures mandate holders since January 2007, ten concerned foreign nationals. While we are fully aware that the Kingdom hosts a significant number of migrant workers and other foreign nationals, these statistics raise certain questions in terms of possible discrimination in relation to both criminal enforcement and sentencing. It would be important to know if more than half of the capital offences are committed by foreigners, if the police use the same approach in investigating and charging both locals and foreigners, and if the sentences handed down are equally harsh in relation to both foreigners and locals. In addition, foreigners in conflict with the law are particularly vulnerable and require special measures to ensure the fairness of the proceedings against them, including interpretation and consular assistance. These needs are protected by international human rights law and the Vienna Convention on Consular Relations, to which Saudi Arabia is a party. In communications to your Excellency's Government of 24 January 2007, 5 April 2007 and 20 April 2007 we sought clarification of what percentage of those sentenced to death and executed are foreigners. Regrettably, we never received a reply to this question, which we would like to reiterate.

Following a dedicated consultation organised in conjunction with the Office of the High Commissioner for Human Rights (including with the Special Rapporteur on the human rights of migrants), Special Rapporteur Heyns dedicated half of his 2015 General Assembly report to the question of the imposition of the death penalty on foreign nationals:

> ***Report to the General Assembly (A/70/304, 7 August 2015, ¶¶73-90)***
>
> 73. Persons facing the death penalty abroad are often disadvantaged compared with nationals of the prosecuting State. They can be disproportionately and thus arbitrarily affected by the death penalty owing to unfamiliarity with the laws and procedures in the prosecuting State. They may also have limited access to legal aid and therefore inadequate or low-quality legal representation. They may be unable to understand the language in which proceedings are conducted. They are less likely to have a support network of family and friends.
>
> 74. Pursuant to article 2 of the International Covenant on Civil and Political Rights, each State party to the Covenant is required to respect and ensure respect for the provision on non-discrimination to all individuals within its territory and subject to its jurisdiction, including foreign nationals facing the death penalty. Further, the refusal of State authorities to allow foreigners the power to seek clemency or commutation could amount to a violation of article 6 (4) of the Covenant.
>
> 75. The imposition of the death penalty against foreign nationals often leads to a situation in which States that have abolished the death penalty for legal and ethical reasons and that comply with all international standards in this regard are confronted with their citizens being detained elsewhere, subjected to unlawful procedures and, in some cases, executed.
>
> 76. Data suggest that foreign nationals, including migrant workers, especially from Asia and Africa, remain disproportionately affected by the death penalty in several States.[259] In Malaysia, death sentences have recently been issued against at least 37 foreign nationals, mostly for drug offences,

259 Unless otherwise stated, the statistics cited here were collated by OHCHR before convening an expert meeting on the question of the death penalty and foreign nationals in June 2015.

and at least 250 Malaysians are under sentence of death abroad for drug offences. In Saudi Arabia, at least 33 foreign nationals were executed in the first half of 2015 alone.

77. In Indonesia, many foreign nationals are among the at least 149 persons convicted of drug-related offences who are reportedly on death row. Moreover, 247 Indonesians are on death row in other countries. In the United Arab Emirates, foreign nationals accounted for the largest number of people receiving death sentences in 2014, including nationals of Afghanistan, Bangladesh, Egypt, India, Kuwait, Pakistan and Saudi Arabia.32 In the Islamic Republic of Iran, a large number of foreign nationals are on death row for drug crimes, including at least 1,200 Afghans. In the United States of America, a total of 139 individuals, representing 36 nationalities, are under sentences of death. Some 125 Filipino migrant workers are also on death row abroad. Seventy-five British nationals are facing execution abroad for offences including murder, drugs, terrorism and blasphemy. Nearly 120 Nigerians are facing the death penalty in China, more than 170 in Indonesia, Thailand, Malaysia and Viet Nam and 5 in Qatar, the United Arab Emirates and Saudi Arabia.[260]

78. Recent reports of the Secretary-General identified discrimination against foreign nationals facing the death penalty abroad as an area of concern when considering the application of the death penalty.[261] Recognizing the significance of the issue, the General Assembly, in its 2014 resolution on a global moratorium also called upon States to comply with their obligations under the Vienna Convention on Consular Relations and to respect the right of foreign nationals to receive information on consular assistance when legal proceedings are initiated against them.[262]

A. Discriminatory application of the death penalty

79. In addition to direct forms of discrimination with respect to the application of the death penalty to foreign nationals, there are a number of indirect ways in which broader discriminatory structures of death penalty systems tend to impact on foreign nationals.

1. Migrant workers

80. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals (article 18 (1)).

81. In many jurisdictions, however, migrant workers appear to face discriminatory justice. For example, the number of foreign domestic workers on death row in Saudi Arabia made headlines around the world in 2013, drawing attention to the treatment of foreign domestic workers.[263] Failures to meet fair trial standards have led some Governments to establish special task forces to protect their citizens working abroad (see A/HRC/21/29, para. 38).

260 Information regarding Nigerians on death row was provided to OHCHR by the Legal Defence and Assistance Project, a non-governmental organization of lawyers and law professionals, engaged in the promotion and protection of human rights, the rule of law and good governance in Nigeria.

261 See Question of the Death Penalty; Report of the Secretary General, A/HRC/21/29, 2 July 2012; Question of the Death Penalty; Report of the Secretary General, A/HRC/24/18, 1 July 2013; and Question of the Death Penalty; Report of the Secretary General, A/HRC/27/23, 30 June 2014.

262 Resolution 69/186.

263 Gethin Chamberlain, "Saudi Arabia's treatment of foreign workers under fire after beheading of Sri Lankan maid", *Observer*, 12 January 2013, available at: www.theguardian.com/world/2013/jan/13/saudi-arabia-treatment-foreign-workers.

82. In certain legal systems, the imposition of an execution can be avoided through the payment of diya or "blood money". It is important, where such provision exists, that it be applied transparently and without discrimination.[264] However, it remains the case that such systems can have a disproportionate impact on migrant workers, who cannot afford to pay the necessary sums.[265]

2. Drugs offences

83. There is also a link between the application of the death penalty to drugs offences (most commonly drug trafficking) and foreign nationals. A significant proportion of the perpetrators of trafficking crimes are foreign nationals. The very high proportion of migrants on death row in countries in South-East Asia and the Middle East may well be related to the fact that in many of those States, drug offences carry sentences of death.

84. The Special Rapporteur emphasises that the death penalty for drug offences is in no circumstances permissible under international law. Both he and other actors, including the Human Rights Committee, have repeatedly underlined that drugs offences do not meet the threshold test of "most serious" crimes. The problem of migrants on death row for drugs offences is highlighted here not because it is normatively different, but because these cases make up a numerically significant proportion of cases. Moreover, as discussed below, this can have ramifications with respect to bilateral or multilateral assistance to programmes aimed at combating transnational drug trafficking.

3. Death penalty and poverty

85. The disproportionate impact of the death penalty on poorer communities has now been widely recognised. As equal justice campaigner Bryan Stevenson has frequently stated with respect to the United States, "It's better to be rich and guilty than poor and innocent when charged with a serious crime". Recent research in India has drawn attention to this connection.[266]

86. One study of the discriminatory impact of criminal justice against the poor in the United States highlighted that, with only rare exceptions, those facing capital charges cannot afford a lawyer and hence rely on a State-appointed attorney to provide their defence. However, "while capital cases are among the most complex, time-intensive and financially draining cases to try, indigent capital defendants often are appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent or inexperienced in trying death penalty cases".[267] The same considerations apply in many other countries.

87. Moreover, in some jurisdictions, legal aid systems commence only at the trial stage, which means that police and prosecutors can conduct their investigations of the poorest offenders completely free of oversight or intervention by a lawyer. By the time a case reaches a courtroom, it may already be too late to guarantee a fair trial.

264 Michael Mumisa, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty be Unfaithful to the Message of Islam?* (London, Penal Reform International, 2015).

265 The special task force established by the Indonesian Government has gone to the length of paying substantial sums in "blood money" to secure the release of Indonesians on death row. See, for example, Hands Off Cain, "Saudi Arabia: six Indonesians on death row released after Indonesia agreed to pay blood money", 3 June 2015, available at: www.handsoffcain.info/news/index.php?iddocumento=19303864.

266 Interview with Anup Surendranath, Assistant Professor at National Law University of Delhi, by Uttam Sengupta, available at: www.outlookindia.com/article/most-death-row-convicts-arepoor/292798.

267 American Civil Liberties Union, "Slamming the courthouse door: denial of access to justice and remedy in America" (New York, December 2010).

4. Fair trial guarantees

88. As noted above, the safeguards surrounding the imposition of the death penalty require that it be imposed only after a fair trial. What constitutes a fair trial should be determined with reference to other areas of international law, including article 14 of the International Covenant on Civil and Political Rights.

89. One of the most obvious forms of an unfair trial is the conduct of legal proceedings against a person in a language he or she does not comprehend without making provision for interpretation. Article 14 (3)(f) of the International Covenant on Civil and Political Rights guarantees a defendant "the free assistance of an interpreter if he cannot understand or speak the language used in court". The 1996 Economic and Social Council resolution regarding the safeguards guaranteeing protection of the rights of those facing the death penalty, provides that States should "ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court ".[268] This protection should extend beyond the courtroom: the provision of interpretation during police questioning is a vital safeguard and one of the most important contributions that early consular intervention can make.

90. Foreign nationals, including migrant workers, can find it difficult to access (and fund) a lawyer of appropriate experience to defend them throughout the different stages of an investigation ending in trial for a capital offence. This can be for a range of procedural, financial, linguistic or cultural reasons, but is a clear impediment to a fair trial.

The provision of consular assistance can be important in reducing human rights violations, and is closely linked with the role of states in protecting the right to life of their nationals from arbitrary executions overseas. If it can empirically be shown that the provision of consular assistance materially diminishes the likelihood of the imposition of a death penalty (and statistics made available by governments with specialist programmes suggests that this is the case), then a government that, when notified, does not take all reasonable steps to provide adequate consular assistance may have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶24-27)

7. Consular notification

24. Of particular importance in Texas are the cases in which foreign nationals have been sentenced to death without the opportunity to contact their national consulates for assistance as required by the Vienna Convention on Consular Relations (VCCR), to which the United States has been a party since 1969.[269] In 2008, Texas executed two Mexican nationals who had not been notified of their consular rights.[270] Of the remaining 25 foreign nationals on Texas's death row, 14 (twelve

268 Economic and Social Council resolution 1996/15 entitled "Safeguards guaranteeing protection of the rights of those facing the death penalty", para. 4.

269 Article 36(1)(b) of the VCCR provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

270 Jose Ernesto Medellin Rojas was executed on 5 August 2008. Heliberto Chi Aceituno was executed on 7 August 2008.

Mexicans, one Honduran and one Argentinean) were not informed of their consular rights at the appropriate time.[271]

25. The federal Government has acknowledged that it has a legal obligation to provide review and reconsideration of the cases of Mexican nationals on death row who were not notified of their consular rights.[272] Review is necessary to determine whether any of these individuals was prejudiced by the lack of consular notification. But the Texas Legislature has failed to authorise state courts to provide this review, and the U.S. Congress has similarly failed to authorise federal courts to do so.[273] The very simplicity of the available solutions makes it all the more disturbing that nothing has been done.

26. Texas officials told me their refusal to provide review was supported by the U.S. Supreme Court's decision, in *Medellin v. Texas*,[274] that the federal Government could not force Texas to abide by the United States' international legal obligations. As one senior Texas official noted, it is not a popular notion in Texas to be seen to be "submitting" to the International Court of Justice. But it is a bedrock principle of international law that when a country takes on international legal obligations, those obligations bind the entire state apparatus, whether or not it is organised as a federal system.[275] There are many federal systems around the world, and they have all devised means to ensure that treaties, whether dealing with trade, investment, diplomatic immunities, or human rights, bind the entire state, including its constituent parts. Nor is it "submission" to respect the treaty rights and obligations by which the United States voluntarily agreed to abide – and from which American citizens have benefitted for nearly 40 years. Consular rights protection not only affects foreign nationals currently on death row in Texas, it applies equally to any American who travels to another country.

27. Texas's refusal to provide review of the foreign nationals' cases undermines the United States' role in the international system, and threatens nation States' reciprocity with respect to the rights of each others' nationals. If Texas opts to put the United States in breach of its international legal obligations, Congress must act to ensure compliance at the federal level.

Follow-up Country Report to the United States of America (A/HRC/20/22/Add.3, 30 March 2012, ¶¶25-28)

25. Although the Government expressed its commitment to comply with article 36 of the Vienna Convention on Consular Relations (VCCR),[276] failure to notify foreign citizens of their right to consular assistance at the appropriate time persists.[277] The execution in Texas of Humberto Leal García, a Mexican national, has again brought to the fore the Government's failure to comply

271 There are 126 foreign nationals on death row across the United States as of 19 May 2009. Mark Warren and Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., available at: http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us.

272 Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (*Mexico v United States of America*) Judgment of 19 January 2009, ICJ Reports 2009, para 55.

273 Presently, the regular procedural default rules apply to VCCR claims, so that foreign nationals who did not raise the failure of consular notification issue at trial or on direct appeal are largely prohibited from having the merits of their claim heard when seeking federal habeas corpus review. See e.g., *Sanchez-Llamas v Oregon*, 126 S Ct 2669 (2006).

274 128 S. Ct. 1346 (2008).

275 On the application of the principle to the United States in particular, see *LaGrand Case (Germany v United States of America)*, ICJ Reports 1999, para. 28.

276 A/HRC/WG.6/9/USA/1, *supra* note 237, para. 54.

277 A/HRC/11/2/Add.5, *supra* note 5, para. 24. According to the DPIC, only seven cases of full compliance with art. 36 of the VCCR have been identified so far, see http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW.

with its obligations under the VCCR. In the *Avena and Other Mexican Nationals* judgment, the International Court of Justice (ICJ) concluded that the United States had breached its obligations under such provisions.[278] The United States was requested to review and reconsider the conviction and sentence of the Mexican nationals, including Mr. Leal García. In 2009, the ICJ specified that the Government's obligation not to execute Mr. Garcia pending a review of his case, and the reconsideration afforded to him was fully intact and accepted by the Government.[279] However, despite the request made by the Solicitor General, the Supreme Court denied a stay of execution. Furthermore, the Governor of Texas did not satisfy the appeals for clemency. The Special Rapporteur denounced the execution of Mr. Garcia, which was carried out on 7 July 2011, in breach of international law.[280]

26. Nevertheless, the Government has taken some steps to comply with its obligations under the VCCR. A Memorandum was issued by the President directing state courts to give effect to the decisions in the cases of 51 Mexican nationals, identified in the ICJ judgment.[281] The Department of State Bureau of Consular Affairs also issued a Consular Notification and Access Manual to guide federal, state and local law enforcement and other officials.[282] Most importantly, a bill has been introduced to facilitate compliance with article 36 of the VCCR.[283]

27. The Supreme Court, however, held that the President was not empowered to enforce the judgment in domestic courts by means of a Memorandum.[284] During the country visit, Texas officials contended that their refusal to provide review of the cases of Mexican nationals on death row was supported by this decision.[285]

28. The Special Rapporteur is also concerned about the situation of 133 foreign nationals currently on death row across the country,[286] and strongly recommends the adoption of the 2011 Consular Notification Compliance Act to ensure respect for their rights in accordance with the VCCR.

Report to the General Assembly (A/70/304, 7 August 2015, ¶¶91-94)

91. Access to consular assistance is an important aspect of the protection of those facing the death penalty abroad. The Vienna Convention on Consular Relations requires all States to take every possible action to ensure reciprocal compliance with this safeguard, in line with the relevant provision on the right to seek consular assistance.

92. Under article 36 of the Convention, local authorities must inform all detained foreigners "without delay" of their right to have their consulate notified of their detention and to communicate with their consular representatives. This applies to all detained foreigners but is of particular significance to those who face the death penalty because of the irreversibility of the punishment. At the request

278 *Avena and Other Mexican Nationals, supra* note 22, in particular p. 72.

279 *Request for Interpretation of the Judgment of 31 March 2004, supra* note 272, p. 3, see also para. 54.

280 Special Rapporteur's press release of 1 July 2011, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11198&LangID=E; also statement of the United Nations High Commissioner for Human Rights of 8 July 2011, available at: http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx; and the Inter-American Commission on Human Rights press release No. 67/11 of 8 July 2011, available at: http://www.oas.org/en/iachr/media_center/PReleases/2011/067.asp.

281 Case concerning *Avena and Other Mexican Nationals supra* note 22, p. 12.

282 See new edition of manual, published September 2010, available at: http://www.travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

283 Senate Bill 1194 (Consular Notification Compliance Act of 2011).

284 *Medellin v. Texas*, 552 U.S. 491 (2008).

285 *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

286 See DPIC, Foreign Nationals and the Death Penalty in the US, available at: http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW.

of the national, the authorities must then notify the consulate of the detention without delay; they must also facilitate consular communication and grant consular access to the detainee. Consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of humanitarian and other assistance, with the consent of the detainee. Local laws and regulations must give "full effect" to the rights enshrined in article 36. These protections for migrant workers are further elaborated in article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

93. In several States, however, foreign nationals, including migrant workers, have been deprived of protection under the Vienna Convention on Consular Relations and sentenced to death without respect for fair trial standards. Foreign nationals, many of whom do not speak the language of the court in which they are being tried, often do not have access to interpreters. The denial of the right to consular notification and access is a violation of due process and the execution of a foreign national deprived of such rights constitutes an arbitrary deprivation of life, in contravention of articles 6 and 14 of the International Covenant on Civil and Political Rights.

94. The requirement that foreign nationals must be informed without delay after their arrest of their rights under the Vienna Convention on Consular Relations has been confirmed by the International Court of Justice. In its *Avena* ruling, the Court found that advisement of consular rights "without delay" means "a duty upon the arresting authorities to give the information to an arrested person as soon as it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national". The Court also held that States should provide judicial "review and reconsideration" of convictions and sentences to examine the nature and consequences of consular rights violations in cases of foreign nationals facing severe penalties or prolonged incarceration.[287] The Inter-American Court of Human Rights also issued an advisory opinion on the right to information on consular assistance in the framework of the guarantees of the due process of law.[288]

6. Resumption of executions

To the extent that international law may now require the progressive abolition of the death penalty, resumptions of its use may constitute a violation of the right to life. Special Rapporteur Heyns addressed this topic as part of his 2014 General Assembly report:

Report to the General Assembly (A/69/265, 6 August 2014, ¶¶90-106)

90. In a previous report, I have brought to the attention of the General Assembly the trend in State practice, at the global level, towards the abolition of the death penalty (A/67/275, paras. 17-22). The trend is in line with the requirement under international law, identified in paragraphs 39 to 42 of that report, for the progressive abolition of the death penalty. The existence and continuation of this trend subsequently received further confirmation,[289] pointing towards the real possibility that the death penalty is nearing its end.

91. At the same time, this is not a linear process; in isolated cases there are resumptions and extensions of the death penalty that could constitute violations of the right to life. Moreover, recent developments have shown that announcements by States that they will stop executions cannot

287 *Avena and other Mexican Nationals, supra* note 22.

288 Inter-American Court of Human Rights, Advisory opinion OC-16/99 of October 1, 1999 requested by the United Mexican States: the rights to information on consular assistance in the framework of the guarantees of the due process of law.

289 Amnesty International, *Death Sentences and Executions 2013* (London, 2014).

always be accepted at face value and should therefore be followed by formal steps, including legal abolition.

92. At a subsequent stage of its current session, the General Assembly will again consider a resolution calling for a global moratorium on executions, with a view towards abolition. It is appropriate therefore to dedicate a section of the present report to the question of the resumption of executions.

A. Resumption of executions since 2012

93. Over the past two years, 10 countries have conducted executions after a period of two years or more during which there were none.[290]

94. In some cases, the practice of non-execution was firmly entrenched. For example, in the Gambia, after 27 years when there were no official executions, nine death row inmates were killed by firing squad in August 2012. This happened despite the fact that, during the universal periodic review of the Gambia in the Human Rights Council in 2010, its Government had reaffirmed the moratorium. In September 2012, a renewed conditional moratorium on executions was announced by the President.

95. In November 2012, a man convicted for his role in the 2008 terrorist attack in Mumbai, India, was executed with no prior announcement. It was the first execution to be conducted in India in more than eight years.

96. In Nigeria, four executions were conducted in June 2013 in Edo State, the first since 2006. No advance notice was given to the families, and the executions were carried out while legal proceedings and appeals were under way. In 2009, the Government had expressed its commitment to a moratorium during its universal periodic review. The Minister of Justice has since reaffirmed a moratorium at the federal level.

97. In several cases, the resumption took place with no public announcement, or even notification to relatives or lawyers.

B. Concerns from the international law perspective

98. At the very least, it is clear that resumptions of executions run counter to the international trend towards the reduction and eventual abolition of the death penalty. However, they also raise the question as to what extent resumption after a long period is compatible with human rights.

99. In its resolution 2005/59, the Commission on Human Rights called upon States that had recently lifted or announced the lifting de facto or de jure of moratoriums on executions once again to commit themselves to suspending such executions. The Human Rights Committee has expressed its deep concern "at the de facto reinstitution of death sentences and executions" in a State party to the International Covenant on Civil and Political Rights (CCPR/CO/84/SYR, para. 7). In general comment No. 6 (1982), it was concluded that all measures of abolition should be considered to be progress in the enjoyment of the right to life.[291] This means that, conversely, any resumption of executions, as does any other measure that increases the use of the death penalty, leads to less protection of the right to life.

290 In 2012, in the Gambia, India and Pakistan; in 2013, in Indonesia, Kuwait and Nigeria; and, to date in 2014, in Belarus, Egypt, Equatorial Guinea and Singapore.

291 General comment No. 6: Article 6 (Right to life), 1982 (HRI/GEN/1/Rev.9 (Vol. I)), para. 6.

100. At present, the United Nations considers States to be de facto abolitionist if they have carried out no executions for 10 years (E/2010/10 and Corr.1, para. 3 (c) (i)). If executions are resumed after being suspended for a decade or more, then the categorization of these States is undermined.

101. Working groups convened within the context of the universal periodic review – understandably – often comment positively on the existence of moratoriums. However, States that have not yet gone beyond a de facto moratorium may find themselves being asked to give increased assurances of a non-return to executions.

C. Potential arbitrariness of resumption

102. If executions were suspended for an extended period, it is unclear how authorities would be able to provide objective reasons for their resumption at a specific point in time, or for specific prisoners on death row, especially if no prior announcement is made. If the timing of an execution and the selection of prisoners are essentially decided upon at random, those executions are rendered arbitrary.

Extraneous causes

103. Executions may be considered arbitrary if they are resumed owing to extraneous developments, unrelated to the crime or criminal in question. A current deterioration in the law and order situation of a particular State is not attributable to a convict on death row, who may have committed his or her crime years, or even decades, before. The execution of that convict in order to demonstrate strength in the criminal justice system is arbitrary.

104. Even if one assumes that the convict on death row is guilty of a most serious crime, outside factors that may prompt a Government to resume executions have no relationship to his or her culpability, or therefore to the punishment applied.

Legitimate expectations

105. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that convicts and family members have a right to prepare for death (A/67/279, para. 40). This implies that, when a Government changes its position concerning executions, sufficient notice must be given. The newly reinforced anxiety for both prisoners and family members must be mitigated not only by giving time to adapt, but also by allowing lawyers to explore all available legal options. In the context of the resumption of executions in India in 2012, it was reported that the authorities explained the lack of prior announcement with the need to avoid intervention from human rights activists.[292]

106. Even if one rejects the idea that prisoners and their families may have developed something akin to legitimate expectations to avoid execution, it should be noted that other participants in the process may have. For example, prosecutors are arguably more inclined to demand and judges to impose death sentences if they assume the sentence will not be implemented. The psychological pressure on prison personnel is different if they assume that they will never have to carry out executions. Resumption of executions destroys a balance that many participants in the process will have taken for granted and could lead to executions that were not intended to become reality.

292 Amnesty International, *Death Sentences and Executions 2012* (London, 2013), p. 20.