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## **Human Rights Council**

### **Forty-second session**

9–27 September 2019

Agenda items 2 and 3

### **Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General**

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty**

### **Yearly supplement of the Secretary-General to his quinquennial report on capital punishment\***

#### *Summary*

The present report is submitted pursuant to resolution 36/17 of the Human Rights Council. The report examines the consequences arising at various stages of the imposition and application of the death penalty on the enjoyment of the human rights of persons facing the death penalty and other affected persons. It pays specific attention to the impact of the resumption of the use of the death penalty on human rights.

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\* The present report was submitted late to conference services as a result of administrative constraints.

## I. Introduction

1. In its resolution 36/17, the Human Rights Council requested the Secretary-General to dedicate the 2019 supplement to his quinquennial report on capital punishment to the consequences arising at various stages of the imposition and application of the death penalty on the enjoyment of the human rights of persons facing the death penalty and other affected persons, paying specific attention to the impact of the resumption of the use of the death penalty on human rights, and to present it to the Council at its forty-second session.
2. In January 2019, the Office of the United Nations High Commissioner for Human Rights, on behalf of the Secretary-General, sent notes verbales to States, international, regional and intergovernmental bodies, national human rights institutions and non-governmental organizations, requesting information to inform the Secretary-General's report.<sup>1</sup>
3. The international trend towards abolition of the death penalty continues. Since the previous yearly supplement (A/HRC/39/19), published in September 2018, a record 121 States voted in favour of General Assembly resolution 73/175 on a moratorium on the use of the death penalty. The Gambia and the State of Palestine respectively ratified and acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Benin and Burkina Faso removed the death penalty from their Penal Codes, and the Central African Republic and Equatorial Guinea announced the drafting of legislation to take that step.<sup>2</sup> Malaysia declared a moratorium on the use of the death penalty.<sup>3</sup> In the United States of America, the State of California declared a moratorium on the use of the death penalty,<sup>4</sup> and in the State of Washington the death penalty statute was declared unconstitutional as a matter of state law.<sup>5</sup> The Islamic Republic of Iran removed the death penalty for a number of drug offences, which led to a significant decrease in executions.<sup>6</sup> Amnesty International reported that 19 of the 193 Member States of the United Nations carried out executions in 2018, a

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<sup>1</sup> Submissions were received from Australia, Azerbaijan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Brunei Darussalam, Colombia, Egypt, Greece, Guatemala, Honduras, Ireland, Kuwait, Kyrgyzstan, Lebanon, Montenegro, Slovakia, South Africa, Switzerland, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the State of Palestine, the European Union, the World Health Organization, the Council of Europe, the Commission on Human Rights of the Philippines, the National Human Rights Commission of Nigeria and the Ombudsman of Portugal, Advocates for Human Rights and World Coalition against the Death Penalty (joint submission), the American Civil Liberties Union, Americans for Democracy and Human Rights in Bahrain and the Bahrain Institute for Rights and Democracy (joint submission), Americans for Democracy and Human Rights in Bahrain and the European-Saudi Organisation for Human Rights (joint submission), Association nationale de promotion et de protection des droits de l'homme, Children Education Society, Egyptian Commission for Rights and Freedoms and Reprieve (joint submission), Ensemble contre la peine de mort, Foundation for Fundamental Rights and Reprieve (joint submission), Friends World Committee for Consultation, Harm Reduction International, International Federation of ACAT (Action by Christians for the Abolition of Torture), Justice Project Pakistan, Lembaga Bantuan Hukum Masyarakat (Community Legal Aid Institute) and Reprieve (joint submission), Project 39A of National Law University, Delhi, Reprieve and The Rights Practice. Andrew Novak, George Mason University, and Dr. Daniel Pascoe, City University of Hong Kong, also provided a joint submission. All submissions are on file with the Secretariat and are available for consultation.

<sup>2</sup> Benin, Law No. 2018-15 on the Penal Code; Burkina Faso, Penal Code of 21 June 2018; A/HRC/40/12 and Corr.1, para. 20; and [www.amnesty.org/en/latest/news/2019/04/equatorial-guinea-presidential-announcement-welcome-step-towards-abolishing-the-death-penalty/](http://www.amnesty.org/en/latest/news/2019/04/equatorial-guinea-presidential-announcement-welcome-step-towards-abolishing-the-death-penalty/).

<sup>3</sup> See [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24215&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24215&LangID=E).

<sup>4</sup> See [www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/](http://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/).

<sup>5</sup> Supreme Court of Washington, *State v. Gregory*, No. 88086-7, judgment of 11 October 2018.

<sup>6</sup> *Amnesty International Global Report: Death Sentences and Executions 2018*, p. 8. See also A/HRC/39/19, para. 8.

decrease from 2017, when 23 nations carried out executions.<sup>7</sup> In some States, however, there have been moves towards resumption of the use of the death penalty, and the present report will focus on those situations.

## II. International law regarding resumption of the use of the death penalty

4. The right to life is recognized in article 3 of the Universal Declaration of Human Rights. Article 6 of the International Covenant on Civil and Political Rights prohibits arbitrary deprivation of life and provides for specific conditions for the imposition of the death penalty with respect to countries that have not yet abolished it. The Second Optional Protocol to the International Covenant on Civil and Political Rights provides in its article 1 (1) that no one within the jurisdiction of a State party to that Protocol may be executed. The Human Rights Committee recently clarified its view of the scope of State obligations under article 6 of the Covenant, including as regards the death penalty. In its general comment No. 36 (2018) on the right to life, the Committee stated that when States parties to the Covenant had abolished the death penalty, by amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant or adopting another international instrument obligating them to abolish the death penalty, such abolition was “legally irrevocable” and States were barred from reintroducing it (para. 34).

5. The Human Rights Committee also took the position that when a State party to the Covenant had not yet abolished the death penalty, it could not introduce or reintroduce the death penalty for a crime which, at the time of ratification of the Covenant or at any time thereafter, had not entailed the death penalty. Neither could States remove legal conditions from existing offences that would permit imposition of the death penalty in circumstances in which it had not previously been imposable.<sup>8</sup>

6. Should a State nonetheless reintroduce the death penalty for a particular offence, it cannot be applied retroactively. The principle of legality enshrined in article 11 (2) of the Universal Declaration of Human Rights and article 15 of the Covenant provides that there can be no penalty without law. As a result, the death penalty can never be imposed if it was not provided by law for the offence at the time of its commission.<sup>9</sup>

7. The Human Rights Committee further expressed the view that it was contrary to the object and purpose of article 6 of the Covenant for States parties to take steps to increase de facto the rate and extent to which they resorted to the death penalty.<sup>10</sup> In the Committee’s view, article 6 (6), reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future.<sup>11</sup> In accordance with that view, it would appear that resumption of the use of the death penalty after a long de facto moratorium on its use would necessarily increase the rate of executions, and would therefore potentially be in conflict with the object and purpose of article 6.<sup>12</sup>

<sup>7</sup> *Amnesty International Global Report 2018*, p. 10; and *Amnesty International Global Report: Death Sentences and Executions 2017*, p. 38.

<sup>8</sup> General comment No. 36, para. 34.

<sup>9</sup> See also International Covenant on Civil and Political Rights, art. 6 (2); Human Rights Committee, general comment No. 36, para. 38; and safeguards guaranteeing protection of the rights of those facing the death penalty, para. 2.

<sup>10</sup> General comment No. 36, para. 50.

<sup>11</sup> *Ibid.*

<sup>12</sup> See also Vienna Convention on the Law of Treaties, article 18 of which provides that States that have signed a treaty shall refrain from acts which would defeat the object and purpose of the treaty.

### III. Restriction of the use of the death penalty to the most serious crimes

8. Article 6 (2) of the Covenant provides that, in countries that have not abolished the death penalty, it may be imposed only for the most serious crimes. The Human Rights Committee has taken the view that the term “most serious crimes” must be interpreted restrictively and appertain only to crimes of extreme gravity, involving intentional killing. According to the Committee, crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, and drug and sexual offences, can never serve, within the framework of article 6, as the basis for the imposition of the death penalty.<sup>13</sup> Several submissions for the present report note that expansion of the death penalty to offences that do not meet the definition of “most serious crimes” leads to fundamental uncertainty and erodes the rule of law.<sup>14</sup>

9. The Government of the Philippines has proposed reintroducing the death penalty for drug offences.<sup>15</sup> The Philippines is a State party to the Second Optional Protocol, and so any such reintroduction would be inconsistent with that Protocol. The President of Sri Lanka has indicated his intention to resume executions of drug traffickers, which, if carried out, would bring to an end a moratorium on the death penalty in place since 1976.<sup>16</sup> In January 2019, the parliament of Egypt approved a law that would expand the application of the death penalty to include the import and export of synthetic narcotics.<sup>17</sup> The Human Rights Committee has stated that drug-related offences can never serve as the basis for the imposition of the death penalty.<sup>18</sup>

10. Introduction or reintroduction of the death penalty for drug offences is disproportionate to the aim of deterring drug-related crime, as there is no evidence that the death penalty in fact deters drug-related or other crime more than other methods of punishment.<sup>19</sup> Calls for resumption of the use of the death penalty for drug offences may be counterproductive, as punitive approaches could reduce the capacity of drug users to access treatment for addiction and other health services.<sup>20</sup> In contrast, public health approaches have led to significant successes in a range of national contexts.<sup>21</sup> In Pakistan, the Ministry of Human Rights has proposed a review of the imposition of the death penalty for drug-related crimes.<sup>22</sup>

11. In recent years, several States have widened their application of the death penalty to include terrorist offences not resulting directly and intentionally in death, which may not reach the high bar of “most serious crimes”. In 2014, the United Arab Emirates adopted a law permitting application of the death penalty to non-violent offences, including membership of a terrorist organization.<sup>23</sup> In 2015, Chad adopted a law permitting

<sup>13</sup> General comment No. 36, paras. 35–36.

<sup>14</sup> Submissions of Harm Reduction International and Reprieve and joint submission of Advocates for Human Rights and World Coalition against the Death Penalty.

<sup>15</sup> House Bill No. 4727 of 11 January 2017, available at [http://congress.gov.ph/legisdocs/first\\_17/CR00047.pdf](http://congress.gov.ph/legisdocs/first_17/CR00047.pdf).

<sup>16</sup> The Supreme Court of Sri Lanka granted interim relief pending appeal of the President’s decision. See [www.reuters.com/article/us-sri-lanka-drugs/sri-lankas-top-court-delays-first-executions-in-43-years-idUSKCN1U00WC](http://www.reuters.com/article/us-sri-lanka-drugs/sri-lankas-top-court-delays-first-executions-in-43-years-idUSKCN1U00WC).

<sup>17</sup> Joint submission of the Egyptian Commission for Rights and Freedoms and Reprieve.

<sup>18</sup> General comment No. 36, para. 35.

<sup>19</sup> A/73/260, para. 60. See also A/HRC/33/20, para. 62; General Assembly resolution 71/187, seventh preambular paragraph; and Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control”.

<sup>20</sup> See, for example, Giada Girelli, *The Death Penalty for Drug Offences: Global Overview 2018*, Harm Reduction International (February 2019), pp. 9, 17, 20 and 25.

<sup>21</sup> See, for example, United Nations Office on Drugs and Crime, *World Drug Report*, vol. 1 (2019), p. 24; and Joint United Nations Programme on HIV/AIDS, “A public health and rights approach to drugs”, 2015, p. 1.

<sup>22</sup> Submission of Justice Project Pakistan.

<sup>23</sup> Federal Law No. 7 of 2014 on Combating Terrorism Acts; and submission of Reprieve.

application of the death penalty for complicity in terrorism.<sup>24</sup> A revision of the law was announced in 2018.<sup>25</sup> The Human Rights Committee, in its general comment No. 36, stated that a limited degree of involvement or of complicity in even the most serious crimes could not justify imposition of the death penalty (para. 35). Crimes of terrorism are often vaguely phrased in national laws, and successive Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism have raised concerns that such laws might result in unjustifiable and arbitrary restrictions of human rights, including notably the rights to freedom of opinion and expression, and to freedom of association.<sup>26</sup> The Council of Europe further noted that applying the death penalty in cases of terrorism could be counterproductive, creating focal points whose memory could be used to rally others to commit further acts of terrorism.<sup>27</sup>

12. Some States have reintroduced the death penalty for other crimes which, while serious, do not involve intentional killing and therefore, in the view of the Human Rights Committee, would not qualify as “most serious crimes”. In 2018, India expanded the list of crimes punishable by death to include sexual assault of a child.<sup>28</sup> While such crimes rightly result in calls for stronger preventive measures and better protection of children, both the Committee’s view that the death penalty should be restricted to crimes involving intentional killing and a victim-centred approach indicate that the death penalty should not be reintroduced in such cases. For example, the submission of Project 39A of the National Law University in Delhi noted that, as perpetrators of child sex abuse were in the majority of cases from the child’s family or social circle, introducing the death penalty for that offence could cause immense psychological conflict for and pressure on child victims and could even create a perverse motivation on the part of perpetrators to extinguish evidence by killing the child victim.<sup>29</sup>

13. A number of States have expanded the application of the death penalty to conduct the criminalization of which may already be in breach of the International Covenant on Civil and Political Rights, such as adultery, consensual same-sex relations, blasphemy and apostasy. Implementation of the death penalty for such cases could thus constitute arbitrary deprivation of life.<sup>30</sup> Mauritania reintroduced the mandatory death penalty for blasphemy in 2018.<sup>31</sup> In 2019, Brunei Darussalam introduced the death penalty for offences including adultery, sodomy and insult or defamation of the Prophet Muhammad.<sup>32</sup> Even if the Government of Brunei Darussalam has announced that a moratorium will remain in place, such laws can have a significant chilling effect on the legitimate exercise of human rights, in particular by religious or sexual minorities.<sup>33</sup>

14. The Human Rights Committee has stated that conduct whose very criminalization violates the Covenant, such as establishing opposition groups or offending a head of State, should never be subject to the death penalty.<sup>34</sup> Any move towards reintroduction of the

<sup>24</sup> Law No. 034/PR/2015 on the punishment of acts of terrorism; and the submission of International Federation of ACAT (Action by Christians for the Abolition of Torture).

<sup>25</sup> Alwihda Info, “Le Tchad va réviser la loi sur le terrorisme”, 15 November 2018 (in French).

<sup>26</sup> See, for example, A/HRC/40/52, paras. 34–37.

<sup>27</sup> Submission of the Council of Europe.

<sup>28</sup> Protection of Children from Sexual Offences Act, 2012, as amended; and Indian Criminal Law (Amendment) Act, 2018.

<sup>29</sup> See also Centre for Child and the Law, National Law School of India University, *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (Bangalore, India, 2018), particularly chapter 11 as regards pressure on children.

<sup>30</sup> Human Rights Committee, general comment No. 36, para. 36.

<sup>31</sup> Criminal Code of Mauritania, as amended, art. 306.

<sup>32</sup> See [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24432&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24432&LangID=E).

<sup>33</sup> Communication OL BRN 1/2019 to Brunei Darussalam from the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on freedom of religion or belief, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice.

<sup>34</sup> General comment No. 36, para. 36.

death penalty on such grounds would be inconsistent both with the Human Rights Committee's interpretation of article 6 (2) of the Covenant<sup>35</sup> and with the legal principle of no penalty without law, if the offences charged did not carry the death penalty at the time of their commission.

#### IV. Methods of execution

15. Particularly following a long *de jure* or *de facto* moratorium, resumption of executions may entail the use of methods of execution that could amount to torture or cruel, inhuman or degrading treatment or punishment, especially when applied by inexperienced personnel. Execution involving the use of chemicals or gases, or untested drug combinations or protocols, may raise further concerns under article 7 of the Covenant, which prohibits torture and cruel, inhuman or degrading treatment or punishment and medical or scientific experimentation without free consent.<sup>36</sup>

16. In the view of the Human Rights Committee, certain methods of execution are in all cases prohibited, as they constitute torture or cruel, inhuman or degrading punishment. In addition to injection of untested lethal drugs, these include execution in gas chambers, stoning, burning and burying alive, public executions and other painful and humiliating methods of execution.<sup>37</sup> A number of special procedure mandate holders expressed concern at amendments to the Criminal Code of Brunei Darussalam in 2019, which, *inter alia*, introduced stoning as a method of execution.<sup>38</sup> The prohibition of torture is a norm of general international law that is binding on all States, regardless of whether they have ratified or acceded to the Covenant. All States are therefore bound not to resort to methods of execution that amount to torture.

17. The Human Rights Committee, special procedure mandate holders and the Inter-American Commission on Human Rights have also held that certain personal characteristics and the health status of an individual might render use of a particular method of execution contrary to the prohibition on torture and cruel, inhuman or degrading treatment or punishment.<sup>39</sup>

#### V. Due process guarantees affected by resumption

18. Capital punishment trials must provide all possible safeguards to ensure a fair trial and respect for due process guarantees, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.<sup>40</sup> The full provision of these rights distinguishes capital punishment from arbitrary deprivation of life,<sup>41</sup> so death penalty cases must in all cases respect the highest of evidentiary standards. Sentenced persons must have an opportunity to resort to all judicial appeal procedures, to appeal through all other available non-judicial avenues, including supervisory review by prosecutors or courts, and to have their requests for official or private pardon considered.<sup>42</sup>

<sup>35</sup> *Ibid.*, para. 38.

<sup>36</sup> *Ibid.*, para. 40.

<sup>37</sup> *Ibid.*

<sup>38</sup> Joint communication OL BRN 1/2019.

<sup>39</sup> General comment No. 36, para. 49; [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22671&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22671&LangID=E); and Inter-American Commission on Human Rights, Report No. 71/18, Case 12.958, Merits, Russell Bucklew, United States, 10 May 2018, paras. 73–83.

<sup>40</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 5.

<sup>41</sup> Human Rights Committee, general comment No. 36, para. 41.

<sup>42</sup> *Ibid.*, para. 46.

## A. Presumption of innocence

19. The right to be presumed innocent until proved guilty according to law is enshrined in article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the International Covenant on Civil and Political Rights. This right is particularly fundamental in death penalty cases, where errors are irreversible if not detected and remedied prior to implementation of the sentence. The Human Rights Committee recently reiterated the well-established principle that failure to respect the presumption of innocence in proceedings resulting in the imposition of the death penalty rendered the sentence arbitrary, and therefore in violation of article 6 of the Covenant.<sup>43</sup> The safeguards guaranteeing protection of the rights of those facing the death penalty (para. 4) provide that capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

20. Particularly where the death penalty is introduced for crimes that were not previously capital offences, or where a State resumes executions, legislation and courts must ensure that appropriate evidentiary standards are scrupulously applied. Inversions of the burden of proof may be especially problematic. In India, article 29 of the Protection of Children from Sexual Offences Act, 2012, reverses the burden of proof for some offences, requiring the court to presume that the accused is guilty unless the contrary is proven. Following recent amendments to the Act, some of those offences now carry the death penalty (see para. 12 above). Similarly, in Pakistan, which ended a seven-year moratorium on capital punishment in late 2014, the Control of Narcotic Substances Act, 2007, which includes the death penalty as a potential punishment for non-violent drug-related crimes (see para. 10 above), provides in its section 29 that a defendant found in possession of narcotics is presumed to have committed an offence unless the contrary is proven.

## B. Individual circumstances

21. In capital cases, sentencing judges must take into account the particular circumstances of the offence, including any attenuating elements and any relevant personal circumstances.<sup>44</sup> In Egypt, an increasing number of trials have taken place in recent years under a law dating from the colonial period that applies concepts of joint enterprise, allowing large numbers of defendants to be held jointly liable for criminal acts committed by one co-defendant.<sup>45</sup> The organizations Egyptian Commission for Rights and Freedoms and Reprieve report that between 3 July 2013 and 23 September 2018, mass trials led to 1,884 preliminary death sentences, of which 860 were later confirmed.<sup>46</sup> Special procedure mandate holders have expressed grave concern at mass trials of protestors in Egypt, leading to death sentences of 75 people or more at a time, and have raised concerns over respect for the fair trial guarantees enjoyed by each individual.<sup>47</sup>

22. The mandatory application of the death penalty does not allow for consideration of individual circumstances or for judicial discretion. In the view of the Human Rights Committee, that could render an execution arbitrary.<sup>48</sup> In Thailand, a moratorium in place

<sup>43</sup> Ibid., para. 41.

<sup>44</sup> Ibid., para. 37.

<sup>45</sup> Law 10/1914, commonly known as the Assembly Law. Joint submission of Egyptian Commission for Rights and Freedoms and Reprieve; and Cairo Institute for Human Rights Studies, *Toward the Emancipation of Egypt: A Study on Assembly Law 10/1914* (2017).

<sup>46</sup> Joint submission of the Egyptian Commission for Rights and Freedoms and Reprieve.

<sup>47</sup> See the press release, "Egypt: United Nations experts call for Human Rights Council response to 'appalling' verdicts against protesters", issued jointly on 17 September 2018 by the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Chair-Rapporteur of the Working Group on Arbitrary Detention.

<sup>48</sup> General comment No. 36, para. 37.

since 2009 was ended with the execution of a prisoner convicted of aggravated murder in 2018, an offence that carries the mandatory death penalty.<sup>49</sup> Reintroduction of the mandatory death penalty, as has occurred in Mauritania in 2018 and Brunei Darussalam in 2019, would be contrary to the provisions of the Covenant, on the Human Rights Committee's interpretation.<sup>50</sup>

23. A number of States have sought to justify resumption of the use of the death penalty as a response to rising crime levels. The Special Rapporteur on extrajudicial, summary or arbitrary executions stated that outside factors, including crime rates, could not be attributed to a particular prisoner on death row, so execution of that individual as a demonstration of strength of the criminal justice system would be arbitrary.<sup>51</sup> In the Philippines and Sri Lanka, government officials have called for reintroduction of the death penalty in response to drug-related crimes, and in Malawi, government officials have called for resumption of the use of the death penalty for crimes against persons with albinism.<sup>52</sup> As there is no evidence that the death penalty in fact has any impact on levels of crime,<sup>53</sup> resumption of the use of the death penalty on such grounds would be disproportionate to the stated aim of crime reduction, and accordingly unreasonable.

### C. Special courts or processes

24. Resumption of or increase in the use of the death penalty for crimes of terrorism in particular can involve violations of the right to a fair trial, such as the trial of civilians by military or special courts, or other violations related to due process and fair trial guarantees. The Human Rights Committee has stated that, as a rule, civilians should not be tried for capital crimes before military tribunals.<sup>54</sup> Justice Project Pakistan reports that in Pakistan at least 80 prisoners executed after the lifting of the moratorium had been convicted by special antiterrorist courts.<sup>55</sup> In Cameroon, it is reported that military courts are primarily responsible for a significant increase in the number of death sentences. Several special procedure mandate holders have called upon the United States to dismantle the military commissions at Guantanamo Bay and transfer the detainees charged with a criminal offence to United States federal facilities on the mainland so that they can be prosecuted before ordinary courts, in compliance with international due process and fair trial standards, including those related to the independence of judges and lawyers.<sup>56</sup>

25. In an effort to reduce the burden on the criminal justice system, some States have introduced expedited procedures for certain offences. The stricter due process guarantees that should apply to death penalty cases mean that such cases may be incompatible with requisite standards if expedited procedures do not permit adequate time and facilities for the preparation of the defence.<sup>57</sup> In China, revisions to the Criminal Procedure Law in 2018

<sup>49</sup> See [www.amnesty.org/en/latest/news/2018/06/thailand-countrys-first-execution-since-2009-a-deplorable-move/](http://www.amnesty.org/en/latest/news/2018/06/thailand-countrys-first-execution-since-2009-a-deplorable-move/).

<sup>50</sup> General comment No. 36, para. 37.

<sup>51</sup> A/69/265, paras. 103–104.

<sup>52</sup> Submissions of Harm Reduction International and Reprieve and joint submission of Advocates for Human Rights and the World Coalition against the Death Penalty.

<sup>53</sup> See, for example, Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed. (Oxford, Oxford University Press, 2008), pp. 325–330 and 345.

<sup>54</sup> Human Rights Committee, general comment No. 36, para. 45; and general comment No. 35 (2014) on liberty and security of person, para. 45.

<sup>55</sup> Submission of Justice Project Pakistan.

<sup>56</sup> “Open letter to the Government of the United States of America on the occasion of the 14th anniversary of the opening of the Guantánamo Bay detention facility” issued on 11 January 2016 by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the independence of judges and lawyers, the Chair-Rapporteur of the Working Group on Arbitrary Detention and the Director of the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights; and submission of the American Civil Liberties Union.

<sup>57</sup> Human Rights Committee, general comment No. 36, para. 41.

introduced expedited procedures, primarily targeted at cases where the defendant is considered to have confessed. The law provides that these procedures may apply to crimes carrying the death penalty.<sup>58</sup> In Pakistan, the Anti-Terrorism Act of 1997 also provides for expedited trials.<sup>59</sup> Such provisions notably reduce the time available to those accused to prepare their defence and, given the associated risks, should not be applied in cases that might entail the death penalty.

#### **D. Rights to effective legal representation, to information and to appeal**

26. Where use of the death penalty is resumed after a long moratorium, there may be a lack of lawyers experienced in representing clients facing capital charges, making the risk of inadequate legal representation particularly high. Persons suspected of or charged with a crime for which capital punishment may be imposed have a right to adequate and effective legal assistance at all stages of the proceedings.<sup>60</sup> Death penalty cases are generally longer and more complex than other criminal trials. Full rights of appeal must be guaranteed in law, and all rights of appeal exercised must be strictly and scrupulously conducted. The Human Rights Committee has taken the view that States must take all feasible measures to avoid wrongful convictions in death penalty cases, including measures to allow for reconsideration of convictions and re-examination of past convictions on the basis of new evidence, including DNA evidence.<sup>61</sup>

27. Where resumption occurs without sufficient notice, it may also result in violations of due process rights. The Human Rights Committee has held that failure to provide individuals with timely notification about the date of their execution constitutes a form of ill-treatment, which renders the subsequent execution contrary to the prohibition of torture and cruel, inhuman or degrading treatment or punishment.<sup>62</sup> In Bahrain, a seven-year moratorium on executions was lifted in 2017, less than a week after the Court of Cassation had upheld the death sentences of three individuals who were subsequently executed.<sup>63</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions noted with concern that when executions were resumed in India in 2012, it was reported that the authorities did not make a prior announcement specifically in order to avoid intervention from human rights activists.<sup>64</sup>

28. According to the Human Rights Committee, following a final judgment, convicted persons who are sentenced to death must have a meaningful right to seek pardon or commutation.<sup>65</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions has pointed out that, during moratoriums, prosecutors might be more inclined to demand and judges to impose death sentences, assuming that they would not, in fact, be implemented.<sup>66</sup> The interests of justice demand that any request for pardon or commutation made in such circumstances be examined particularly seriously. The Special Rapporteur expressed concern in July 2017 that a threatened revival of the death penalty in Maldives after a 60-year moratorium did not allow for the executive to grant pardon or

<sup>58</sup> Submission of The Rights Practice.

<sup>59</sup> Submission of Justice Project Pakistan.

<sup>60</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 5; International Covenant on Civil and Political Rights, art. 14 (3) (d); and Human Rights Committee, general comments No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 38, and No. 36, para. 41.

<sup>61</sup> General comment No. 36, para. 43.

<sup>62</sup> *Ibid.*, para. 40; and CCPR/C/JPN/CO/6, para. 13.

<sup>63</sup> Joint submission of Americans for Democracy and Human Rights in Bahrain and the Bahrain Institute for Rights and Democracy.

<sup>64</sup> A/69/265, para. 105, citing Amnesty International, *Death Sentences and Executions 2012* (April 2013), p. 20.

<sup>65</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 7; and International Covenant on Civil and Political Rights, art. 6 (4).

<sup>66</sup> A/69/265, para. 106.

commutation.<sup>67</sup> The Committee has stated that the right is individual to the person, and therefore automatic denials or exclusions of clemency based on categories of offence are incompatible with the State's international human rights obligations to give consideration to the individual circumstances of each case.<sup>68</sup> Purported blanket denials, such as those announced in Indonesia in 2014 for drug offences or in India in 2013 in rape cases, raise concern as, according to the criteria defined by the Human Rights Committee, cases should be reviewed to ensure that each application receives individual consideration according to objective, transparent criteria.<sup>69</sup>

29. Following a final sentence, persons facing the death penalty must have the right to challenge a proposed method of execution that could be considered as cruel, inhuman or degrading treatment or punishment.<sup>70</sup> Accordingly, the State has a corresponding duty to inform the person sentenced to death, in a detailed and timely manner, about the applicable method of execution.

## VI. The argument of public support

30. Public support is frequently cited as a justification for either the retention or the resumption of use of the death penalty. However, few statistics are cited in this regard, and claims of public support without reference to evidence should be treated with caution.<sup>71</sup> In response to government claims of public support for reintroduction of the death penalty, the Commission on Human Rights of the Philippines conducted a detailed national survey in which respondents chose among a range of options. The survey determined that, given a choice, 7 out of 10 people would choose not to reintroduce the death penalty.<sup>72</sup> In Malawi, some politicians have called for a public debate about ending a moratorium on the death penalty for convicted killers of persons with albinism, in spite of a survey showing that 94 per cent of traditional leaders oppose the death penalty as a punishment for murder.<sup>73</sup>

31. Evidence suggests that where public support exists, it is based on a misconception that the death penalty acts as a deterrent to serious crime.<sup>74</sup> The lack of transparency regarding the death penalty in most countries that apply it allows erroneous assumptions to continue unchecked.<sup>75</sup> In its submission, the Council of Europe notes that the more people know about the facts surrounding the execution process, the reasons for abolition and alternatives to capital punishment, the less resistant they are to abolition.

32. When information about discrimination in application of the death penalty is available, public support tends to fall. In the United States, where there is greater transparency surrounding capital punishment than in most other States that still apply it, less than half of the population reportedly believe that the death penalty is fairly applied.<sup>76</sup> An increasing number of states in the United States, most recently California and

<sup>67</sup> Communication UA MDV 3/2017 of the Special Rapporteur on extrajudicial, summary or arbitrary executions.

<sup>68</sup> General comment No. 36, para. 47.

<sup>69</sup> Ibid.

<sup>70</sup> International Covenant on Civil and Political Rights, art. 2 (3) read in conjunction with art. 7; and Inter-American Commission on Human Rights, Report No. 53/13, Case 12.864, Merits, Ivan Teleguz, United States, 15 July 2013, para. 123. See also Human Rights Committee, general comment No. 36, paras. 40 and 49.

<sup>71</sup> See generally [www.deathpenaltyworldwide.org/public-opinion.cfm](http://www.deathpenaltyworldwide.org/public-opinion.cfm).

<sup>72</sup> Submission of Commission on Human Rights of the Philippines; and Social Weather Stations, "March 2018 National Survey on Public Perceptions on the Death Penalty: 33% or less demand the death penalty for 6 of 7 crimes related to illegal drugs", 10 October 2018.

<sup>73</sup> Paralegal Advisory Service Institute (Malawi) and Cornell Center on the Death Penalty Worldwide, "Malawian traditional leaders' perspectives on capital punishment: A targeted survey of traditional leaders affected by the Malawi Capital Resentencing Project" (2017).

<sup>74</sup> See, for example, Girelli, *The Death Penalty for Drug Offences*, pp. 17–19.

<sup>75</sup> A/HRC/39/19, para. 16.

<sup>76</sup> Death Penalty Information Center, "The death penalty in 2018: year end report", p. 3; and submission of the American Civil Liberties Union.

Washington, have recognized the risk of discrimination in death penalty cases, and have abolished or established a moratorium on the death penalty, at least in part as a result. The Human Rights Committee has noted that data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns regarding the right to non-discrimination in application of the right to life, and the right to equality before the law.<sup>77</sup> People with psychosocial and intellectual disabilities are also disproportionately subject to the death penalty where it is still applied.<sup>78</sup>

## VII. Impact of calls for resumption

33. Where a State has abolished the death penalty in law, calls for its formal reintroduction may undermine the framework of existing international legal obligations concerning its progressive abolishment. Such calls are particularly grave in States parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which precludes such a step.<sup>79</sup> Liberia remains the only State party to the Protocol to have reintroduced the death penalty in law, although no executions have been carried out.<sup>80</sup> The Human Rights Committee has recommended that, in order to comply with its obligations under the Protocol, Liberia should remove the death penalty from its legislation, commute all existing death sentences and refrain from carrying out any executions.<sup>81</sup>

34. A resurgence of public calls to resume use of the death penalty often accompanies a prominence of populist, autocratic and/or authoritarian voices in public discourse. Politicians may threaten to resume use of the death penalty in order to enhance a reputation as being tough on crime, or to target people whose religious beliefs or political opinions do not align with theirs.<sup>82</sup> Even where such threats are not in fact carried out, they may have a chilling effect on political participation and freedoms of religion, expression, association and assembly, and constrict civic space.<sup>83</sup>

35. When politicians or other high-profile individuals make public calls for the resumption of the death penalty for conduct such as blasphemy or consensual same-sex relations, this carries a risk of increasing the rate of hate crimes, in particular against religious or sexual minorities.<sup>84</sup> The re-emergence of the death penalty as an actual or threatened punishment for conduct that should not be criminalized not only impairs the right to life but could also affect the enjoyment of the freedoms of religion, expression and association, as well as the right to privacy.<sup>85</sup>

36. Calls for the resumption of executions can have a significant impact on the families and communities of persons on death row, and on persons sentenced to death. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has highlighted the right of death row inmates and their family members to prepare for death.<sup>86</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions noted that, as a consequence, following a change in positions on executions, the reinforced anxiety of both prisoners and their family members had to be mitigated by giving them sufficient time to

<sup>77</sup> General comment No. 36, para. 44.

<sup>78</sup> Submission of the World Health Organization.

<sup>79</sup> Submissions of Australia, Harm Reduction International and Reprieve and joint submission of Advocates for Human Rights and the World Coalition against the Death Penalty.

<sup>80</sup> See

[www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBR\\_national\\_legislation.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBR_national_legislation.pdf).

<sup>81</sup> CCPR/C/LBR/CO/1, paras. 28–29.

<sup>82</sup> See, for example, joint submission of Advocates for Human Rights and the World Coalition against the Death Penalty and submission of Reprieve.

<sup>83</sup> See [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20435&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20435&LangID=E).

<sup>84</sup> See, for example, Amnesty International, *“As Good As Dead”: The Impact of the Blasphemy Laws in Pakistan* (London, 2016).

<sup>85</sup> Joint submission of Advocates for Human Rights and the World Coalition against the Death Penalty.

<sup>86</sup> A/67/279, para. 40.

adapt.<sup>87</sup> Particularly following a long moratorium, prisoners and their families may have developed a legitimate expectation that execution will not in fact be carried out.

37. The Convention on the Rights of the Child is the first human rights treaty to achieve near-universal ratification. Article 3 of the Convention requires that, in all actions concerning children, the best interests of the child must be a primary consideration. The Special Representative of the Secretary-General on Violence against Children has pointed out that, where a parent has been sentenced to death, it can be particularly confusing and frightening for a child, who may experience deep trauma, anger, uncertainty, loneliness and helplessness.<sup>88</sup> Such feelings may be exacerbated where the death penalty is actually, or is even threatened to be, resumed after a long moratorium. The Committee on the Rights of the Child has stated that whenever a decision is to be made that will affect a specific child or children, all decision-making processes must include an evaluation of possible impacts of the decision on any children affected by it.<sup>89</sup> Before reaching any decision on resumption of executions, either as a general policy or in a specific case, States should therefore conduct a detailed assessment of the potential impact on children of parents who are sentenced to death.<sup>90</sup>

38. Life on death row can have a devastating impact on a person's mental health. Conditions of detention on death row are frequently worse than for the general prison population and often violate the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). In some countries, persons on death row are subject to special regimes, which may include lower levels of family contact, excessive time spent in seclusion and ineligibility for training or work.<sup>91</sup> Such regimes may violate the Nelson Mandela Rules and also exacerbate feelings of helplessness, a lack of hope and a lack of control over one's life, which are common in death row prisoners.<sup>92</sup> Conditions of detention on death row may themselves amount to torture or cruel, inhuman or degrading treatment or punishment.<sup>93</sup> To protect prisoners' mental health, States should take special measures to provide support to death row inmates in circumstances in which they propose to resume use of the death penalty.

39. During long moratoriums, when death sentences continue to be handed down in the belief that they will not be implemented, such sentences can effectively begin to function as a way for a judge to underline the particular seriousness of an offence, with no intention or expectation on the part of the judge or other participants in the justice system that they will be carried out. Prison personnel may experience significant psychological pressure if suddenly confronted with the task of preparing a prisoner for, or even carrying out, execution.<sup>94</sup>

40. Implementation of the death penalty, particularly where it is disproportionately applied to a particular group, can represent a trauma for the community and wider society. In its submission, the Government of South Africa drew attention to its efforts not only to abolish the death penalty, which had been historically applied in a particularly racist, brutal and political manner, but also to recognize and commemorate the victims. A capital punishment memorial museum is currently under construction and efforts have been made to recover the remains of political prisoners who were judicially executed in the period from 1960 to 1989 and to return them to their families. These efforts are commendable and

<sup>87</sup> A/69/265, para. 105.

<sup>88</sup> Marta Santos Pais, "Introductory essay of the United Nations Special Representative of the Secretary-General on Violence against Children", in *The Death Penalty in the OSCE Area: Special Focus – Children of Parents Sentenced to Death or Executed* (Warsaw, OSCE Office for Democratic Institutions and Human Rights, 2017), p. 7.

<sup>89</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 6.

<sup>90</sup> Submissions of Children Education Society and Friends World Committee for Consultation.

<sup>91</sup> World Coalition against the Death Penalty, "Living conditions on death row", fact sheet, 2018. Available from [www.worldcoalition.org/media/resourcecenter/EN\\_FactSheet\\_WD2018/](http://www.worldcoalition.org/media/resourcecenter/EN_FactSheet_WD2018/).

<sup>92</sup> Submission of the World Health Organization.

<sup>93</sup> Human Rights Committee, general comment No. 36, para. 40.

<sup>94</sup> A/69/265, para. 106.

may serve as a powerful example for other States where use of the death penalty is shown to have been tinged by political considerations, bias and discrimination.

## VIII. Foreign nationals, deportation, extradition and transfer

41. The Human Rights Committee has recently stated that failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations in cases resulting in the imposition of the death penalty would be a violation of the right to life.<sup>95</sup> Failure to afford individuals about to be deported to a country in which their lives were claimed to be at real risk with the opportunity to avail themselves of judicial recourse would similarly violate article 6 of the International Covenant on Civil and Political Rights.<sup>96</sup> In Indonesia and the United Arab Emirates, which both resumed use of the death penalty after a brief hiatus, it is reported that a significant proportion of persons sentenced to death for drug offences are foreign nationals, who in some cases have lacked access to consular support.<sup>97</sup>

42. The Human Rights Committee has further stated that it would be contrary to article 6 of the Covenant to deport, extradite or otherwise transfer an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty, unless credible and effective assurances against the imposition of the death penalty had been obtained.<sup>98</sup> A number of States confirmed that they respected this approach in their submissions for the present report.<sup>99</sup> Actual or threatened resumption of the use of the death penalty in a State may therefore create an obligation on third States to seek specific guarantees of non-application regarding nationals already transferred, or to refrain from any form of deportation, extradition or transfer where credible guarantees cannot be obtained. Resumption of use of the death penalty in a State can have a detrimental impact on citizens of that State accused of a crime abroad, as it may lead to the State no longer seeking such guarantees for crimes that carry the death penalty in both States.<sup>100</sup>

## IX. Role of the international community

43. Resumption of the use of the death penalty is a matter of international concern not only as it relates to international human rights law but also as regards its potential impact on bilateral and multilateral relations among States. A number of States and regional bodies highlighted in their submissions for the present report the important role of advocacy against the death penalty in their foreign policy.<sup>101</sup> The European Union drew attention to the Alliance for Torture-Free Trade, co-sponsored by Argentina and Mongolia, through which States committed to enact and enforce legislation to restrict trade in goods used for torture and the death penalty. The Council of Europe noted that it had established a European Day against the Death Penalty, which had become the World Day against the Death Penalty, celebrated on 10 October every year. Such measures are important elements of the growing international consensus against the death penalty and contribute to the goal, supported by the Secretary-General, of universal abolition of the death penalty.

<sup>95</sup> General comment No. 36, para. 42.

<sup>96</sup> *Ibid.*

<sup>97</sup> A/HRC/36/26, para. 27, and submission of Reprieve.

<sup>98</sup> General comment No. 36, paras. 30 and 34.

<sup>99</sup> Submissions of Australia, Azerbaijan, Colombia, Ireland, Slovakia, South Africa, Switzerland and the United Kingdom.

<sup>100</sup> Submission of the Commission on Human Rights of the Philippines; and Commission on Human Rights of the Philippines, "Advisory on Overseas Filipino Workers on Death Row", 8 October 2018.

<sup>101</sup> Submissions of Australia, Ireland, Montenegro, Switzerland, the United Kingdom and the European Union.

## **X. Conclusions and recommendations**

44. The Secretary-General welcomes all measures taken by States towards limiting the application of, or abolishing, the death penalty. These measures constitute progress in the protection of the right to life and are important steps towards the universal abolition of the death penalty. He encourages States that continue to impose and implement death sentences to declare and implement a moratorium on executions with a view to abolishing the death penalty.

45. States parties to the International Covenant on Civil and Political Rights and to its Second Optional Protocol that have legally abolished the death penalty have an international legal obligation not to reintroduce it. Where a long *de jure* or *de facto* moratorium on use of the death penalty has been observed, resuming its use could be contrary to the object and purpose of article 6 of the Covenant. The Secretary-General calls upon all States to fully respect these obligations under international human rights law.

46. States parties to the Covenant that have not yet abolished the death penalty may only impose it for the “most serious crimes”. The Human Rights Committee has expressed the view that this means crimes of particular gravity involving intentional killing. States should remove from national laws any application of the death penalty to crimes not involving intentional killing, such as drug-related offences or terrorism-related crimes not involving intentional killing. The death penalty should especially not be imposed as a sanction for forms of non-violent conduct such as apostasy, blasphemy, adultery and consensual same-sex relations.

47. There is little evidence that the death penalty has an impact on reducing levels of crime, so resumption of use of the death penalty is inconsistent with the aim of crime reduction. Transparent and accurate information is vital to policymakers, civil society and the general public to enable informed debate on the death penalty and its impact. The Secretary-General urges all leaders to exercise caution in rhetoric around the death penalty, recalling that targeting certain categories of offence or individuals may also have a chilling effect on the peaceful exercise of human rights and fundamental freedoms.

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