

THE DEATH PENALTY

This Chapter of the Handbook collects the observations and recommendations of the UN Special Rapporteur with respect to a State's imposition of the death penalty in a criminal proceeding in a civilian or military court. This Chapter focuses on the systemic inadequacies within a State's laws or judicial procedures that can lead to a death sentence being a de facto arbitrary deprivation of life.

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A. DUE PROCESS AND JUDICIAL INDEPENDENCE

Report on Mission the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 5-22, 24-27, 74):

5. In the United States, 35 states, the federal Government and the U.S. military provide for the death penalty.¹ 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.²

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.³ 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.⁴ 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 analyze 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

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

² 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.

³ *Ex Parte Michael Nawee Blair*, Court of Criminal Appeals of Texas, 25 June 2008.

⁴ 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 post-conviction claim channels, which have strict procedural and time requirements.

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 characterized 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 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.⁵

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 recognized 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 authorized 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.

Judicial independence

10. Alabama and Texas both have partisan elections for judges.⁶ 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 jeopardize 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

⁵ 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/state_reports/alabama.html. Alabama’s death penalty policies are thus an appropriate subject for dialogue with the international community.

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

tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience.⁷

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.⁸ The significant impact of judicial electoral systems on capital punishment cases was recognized 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.⁹

12. In Alabama, the problem of politicizing death sentences is heightened because state law permits judges to “override” the jury’s opinion in sentencing.¹⁰ 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.¹¹ According to one study, judicial overrides are twice as common in the year before a judge seeks re-election than in other years.¹² 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.

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.¹³ 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

⁷ Brace and Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges”, 52 *American Journal of Political Science* (2008) 360; Baum, “Judicial Elections and Judicial Independence: The Voter’s Perspective”, 64 *Ohio State Law Journal* (2003) 13; and Hall, “Justices as Representatives: Elections and Judicial Politics in the American States”, 23 *American Politics Quarterly* (1995) 485.

⁸ De Muniz, “Politicizing State Judicial Elections: A Threat to Judicial Independence”, 38 *Willamette Law Review* (2002) 367, 387-388.

⁹ 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.

¹⁰ 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), (hereinafter “ABA Alabama Report”), pp. 226-228.

¹¹ Equal Justice Initiative, “Judicial Override in Alabama” (March 2008).

¹² See Burnside, “Dying to Get Elected: A Challenge to the Jury Override”, [1999] *Wisconsin Law Review* 1017, 1039-44.

¹³ Article 14, International Covenant on Civil and Political Rights.

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.¹⁴ 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.¹⁵ Such structural problems are compounded by inadequate compensation for counsel.¹⁶ Until 1998, court-appointed counsel in Alabama could only be compensated up to \$1,000 per phase of the case.¹⁷ A significant proportion of current death row inmates were convicted during 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.¹⁸ 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.¹⁹

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

¹⁴ 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).

¹⁵ 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.

¹⁶ ABA Alabama Report, n. 9 above, pp. 107-108.

¹⁷ The \$1,000 cap no longer applies. Presently, trial counsel can receive \$60 per hour of work in court, and \$40 per 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).

¹⁸ One study found nearly one in four Texas death row inmates had been represented by court-appointed 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).

¹⁹ Liebman and Marshall, “Less is Better”, 74 *Fordham Law Review* (2005-06) 1607, pp 1664-65.

perceive to be money-saving, instead of the necessary establishment of state-wide, well-funded, independent public defender services.

Racial disparities

17. Studies from across the country show racial disparities in the application of the death penalty.²⁰ 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.

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.²¹ 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 anti-death 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.

Systematic evaluation of the criminal justice system

²⁰ See, e.g., American Bar Association, “State Death Penalty Assessments: Key Findings” (29 October 2007) (reporting 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” (2003) 39 *Criminal Law Bulletin* 194 (reviewing studies published between 1990 and 2003 and finding race of victim disparity); Scott Phillips, “Racial Disparities in the Capital of Capital Punishment” (2008) 45 *Houston Law Review* 807 (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” (2006) 17(5) *Psychological Science* 383 (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).

²¹ 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 findings 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.

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,²² 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).²³ 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 in-depth 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.

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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ The regulations that came into effect on 12

²² See, e.g., Texas Senate Bill 263, *A bill to be entitled an act realting to the creation of a commission to investigate and prevent wrongful convictions* (23 April 2007).

²³ ABA Alabama Report, n. 9 above.

²⁴ 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.

²⁵ As amended, these provisions are at 28 U.S.C. § 2261.

²⁶ Public Law 104-132 (enacted 24 April 1996).

²⁷ Public Law 109-177 (enacted 9 March 2006).

January 2009 are grossly inadequate.²⁸ 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.

[...]

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 1969.²⁹ In 2008, Texas executed two Mexican nationals who had not been notified of their consular rights.³⁰ Of the remaining 25 foreign nationals on Texas's death row, 14 (twelve Mexicans, one Honduran and one Argentinean) were not informed of their consular rights at the appropriate time.³¹

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

²⁸ AG Order 3024–2008, 73 FR 75338, (11 December 2008).

²⁹ 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.”

³⁰ Jose Ernesto Medellin Rojas was executed on 5 August 2008. Heliberto Chi Aceituno was executed on 7 August 2008.

³¹ 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>.

notified of their consular rights.³² 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 authorize state courts to provide this review, and the U.S. Congress has similarly failed to authorize federal courts to do so.³³ 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*,³⁴ 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 organized as a federal system.³⁵ 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.

[...]

IV. RECOMMENDATIONS

A. Domestic issues

74. Due process in death penalty cases

- The system of partisan elections for judges should be reformed to ensure that capital defendants receive a fair trial and appeals process.

³² *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexcian Nationals (Mexico v United States of America) (Mexico v United States of America)* Judgment of 19 January 2009, ICJ Reports 2009, para 55

³³ 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).

³⁴ 128 S. Ct. 1346 (2008).

³⁵ 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.

- Alabama and Texas should establish well-funded, state-wide public defender services. Oversight of these should be independent of the executive and judicial branches.
- Texas should establish a commission to review cases in which convicted people have been subsequently exonerated, analyze the reasons, and make recommendations to enable the criminal justice system to prevent future mistakes.
- Alabama should evaluate and respond in detail to the findings and recommendations of the American Bar Association report on the implementation of its death penalty.
- Federal and state governments should systematically review and respond to concerns about continuing racial disparities in the criminal justice system generally, and in the imposition of the death penalty specifically.
- In light of uncorrected flaws in state criminal justice systems, and given the finality of executions, Congress should enact legislation permitting federal courts to review on the merits all issues in death penalty post-conviction cases.
- Regulations permitting the Department of Justice to certify the adequacy of state indigent defense systems based on factors left to states' discretion should be amended or repealed.
- Federal and state governments should ensure that capital punishment is imposed only for the most serious crimes, requiring an intent to kill resulting in a loss of life.
- Foreign nationals who were denied the right to consular notification should have their executions stayed and their cases fully reviewed and reconsidered.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 65, 89):

65. Shortly before my visit, the Supreme Court submitted some 100 existing death sentences covering the preceding six years to President Karzai, whose approval is required for the carrying out of the sentences. There are strong reasons for the imposition of a moratorium on executions, quite apart from the larger debate over whether Afghanistan should abolish the death penalty. Even the police, prosecutors, and judges acknowledge that corruption and incompetence are widespread and that the criminal justice system is incapable of ensuring respect for due process rights. Thus, convictions often follow trials that are inherently unfair and unreliable. Those sentenced to death often had no access to lawyers, and were convicted following trials in which no evidence was produced or no defence witnesses called. And, while some well-informed interlocutors did not think that any genuinely innocent person has yet been sentenced to death, others felt certain that there are innocents on death row. Proceeding with executions in these circumstances would clearly be unjust and violate international legal standards.

[...]

89. It is widely agreed that the criminal justice system is not currently capable of reliably respecting fair trial standards. To avoid the execution of innocent persons, the Government should impose a moratorium on the application of the death penalty.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 83-84, 115):

83. Kenya has had a moratorium on carrying out the death penalty since 1987. However, the death sentence continues to be handed down on a regular basis, and in a manner that violates international law. International law prohibits the mandatory death penalty, and requires individualized sentencing to prevent the arbitrary deprivation of life.³⁶ International law also strictly limits the crimes for which the death penalty can be applied to cases where it can be shown that there was an intention to kill which resulted in the loss of life.³⁷ Further, the death penalty is unlawful where it follows a trial that violates basic due process guarantees.³⁸

84. However, Kenya has the mandatory death penalty for treason, murder, robbery with violence, and attempted robbery with violence.³⁹ The provision of the death penalty for robbery with violence is particularly concerning: the elements of the crime create a low threshold for conviction, robbery is very common, and there are many thousands convicted each year. In the period 2004-2007, 15,265 people were convicted of robbery with violence. There is no legal aid for those charged with robbery with violence, and only limited legal aid is provided for those charged with murder. In practice, this means that individuals face a death sentence often without the assistance of legal counsel. The high levels of corruption in the judiciary further call into serious question the fairness of trials.

Follow-up to Country Recommendations—Sri Lanka and Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 73-75, Annex II):

Procedural irregularities in capital trials and poor death row conditions

73. The Special Rapporteur found during his 2005 visit that torture was routinely used by the police to obtain confessions, and that these forced confessions played an important role in securing convictions. Many defendants on trial for capital offences did not have legal representation. In fact, many of the death row inmates who the Special Rapporteur met were tried when during Nigeria's military era when some constitutional rights were suspended. Some cases were heard by military tribunals, and due process was not observed. He found that the average period spent on death row was 20 years, and that prison conditions were horrendous. Because of the due process concerns, and the cruel and inhuman treatment caused by leaving inmates on death row for so long, the Special Rapporteur recommended that Nigeria commute to life the sentences of those prisoners currently on death row.

74. There has been some progress on the implementation of this recommendation. On 1 October 2006, Nigeria announced that 107 death row inmates would have their sentences commuted to life imprisonment. In February 2007, the Presidential Commission on

³⁶ See A/HRC/420, paras. 54-62.

³⁷ See A/HRC/420, paras. 39-53.

³⁸ ICCPR, Arts 6, 14.

³⁹ See ss 40, 203-204, 295-297, Penal Code of Kenya. "Robbery with violence" is defined as: robbery of a person, with one of the following elements: the crime was committed with another person, or the criminal was armed with a weapon, or physical violence to any person was caused (ss 295-296).

Reform of the Administration of Justice recommended that inmates who have served between ten and fifteen years on death row should have their sentences commuted to life. The Commission further recommended that inmates who have spent over fifteen years on death be released from prison. Nigeria's Minister of Information in May 2007 said that Nigeria had granted amnesty to all prisoners who have been on death row for ten or more years.

75. These announcements are positive developments. However, I have received credible reports from human rights organizations which visited prisons in Nigeria after the announcements, that many of those to whom amnesty or commutation was promised are still on death row. Nigeria should clarify how many prisoners have in fact had their sentences commuted or who have been released from prison. The Government should release the names of the prisoners who have had their sentences commuted or who were granted amnesty so that the Government announcements can be verified.

Annex II

Nigeria - Summary of follow-up to each recommendation

[...]

(b) The sentence of every prisoner who has served more than five years on death row should be commuted immediately and consideration given to commuting all such sentences.

There has been partial progress on this recommendation.

(c) All persons sentenced to death or life imprisonment under martial law should have their convictions reviewed in recognition of the highly unsatisfactory due process protections applied at the time. Since judicial review is probably beyond the capacity of an inefficient and overstretched court system, an administrative procedure should undertake an initial vetting of all such convictions and make recommendations to the Government.

This recommendation has not been implemented.

Follow-up to Country Reports (Sudan) (E/CN.4/2006/53/Add.2)(28 February 2006, ¶¶ 120-121, 151):

Concerns relating to respect for fair trial guarantees in proceedings in which the death penalty is imposed

151. Reports indicate that fair trial guarantees are not respected in criminal proceedings resulting in death sentences being imposed, in particular with regard to the right not to be coerced to admit guilt, the right to legal representation, and the effectiveness of the right to appeal. These concerns are particularly acute in the case of trials before the specialised

criminal courts created specifically for Darfur and Kordofan.⁴⁰ The reason for their establishment may be described as ‘fast tracking’, particularly in light of the fact that, according to reports, the hearing of a charge punishable by death may take no more than one hour.⁴¹ One flaw inherent in the 2003 Decree which established the Specialised Courts is its failure to ensure that confessions extracted under torture or other forms of duress are excluded from the evidence.⁴² According to the decree establishing the Specialised Courts, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. There is no possibility of further judicial review.⁴³

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 27-29; 93-94, 96, 98, 104):

27. During the military era the death penalty was liberally prescribed for a range of offences including economic crimes such as setting fire to public buildings, ships or aircraft, tampering with oil pipelines or electric and telephone cables, and the selling of cocaine. Today Nigerian Federal law prescribes the death penalty only for treason, homicide and armed robbery.

28. In 2004 there were 530 condemned convicts on death row in Nigeria. In the course of the Special Rapporteur’s visit to several prisons he spoke on an individual basis with more than 20 per cent of this number. It became clear from individual testimony, supported by convincing civil society studies, that torture is consistently used by the Nigeria Police to extract confessions and that these confessions have often been critical to the conviction of persons charged with capital offences. Moreover many defendants in capital trials have effectively had no legal representation and legal aid is not available for appeals.

29. In addition, many of the individuals with whom he met on death row were tried when Nigeria was governed by a military regime, when various constitutional rights were suspended and capital trials were sometimes conducted by military tribunals. The procedural probity of such trials was almost certainly deeply flawed. Another problem is the imposition of the death penalty for crimes committed as a minor.

⁴⁰ Initially established as Special Courts by decrees under the State of Emergency in Darfur in 2001, the courts were in 2003 transformed into Specialised Courts. A decree issued by the Chief Justice on 28 March 2003 first established the Specialised Court in West Darfur, and later did the same in North and South Darfur. Specialised Courts have been established also for the Kordofan states.

⁴¹ Commission of Inquiry report, para. 444.

⁴² Commission of Inquiry report, para. 445.

⁴³ Commission of Inquiry report, para. 447.

III. A CYCLE OF BLAME: THE MAIN PATHOLOGIES AFFECTING THE NIGERIAN CRIMINAL JUSTICE SYSTEM

D. The holding charge

93. If the system worked, suspects would be brought before a court, charged and remanded. Instead the police consistently resort to a short cut by taking suspects before a magistrate who remands them indefinitely without formal charges while the police conduct their investigation. The result of this “holding charge” is that individuals can be jailed more or less indefinitely in a legal limbo based on little more than a suspicion of criminal activity, unsupported by any evidence. This practice continues despite a declaration of its unconstitutionality by the Court of Appeal.⁴⁴ It has contributed significantly to the extremely high rates of individuals in Nigerian prisons who have not been formally charged, a situation which can endure for a decade and beyond. It is an insidious but pervasive practice which shields police inefficiency and severely punishes many innocent persons.

94. Proposals in Lagos State would limit the remand period to 100 days.⁴⁵ This would constitute a vast improvement, although 100 days is still far too long.⁴⁶

[...]

F. Legal aid

96. There is a “severe lack of competent and adequately compensated counsel for indigent defendants and death row inmates seeking appeals.”⁴⁷ Although the Legal Aid Act guarantees free legal assistance in capital cases to those who cannot afford a lawyer, in practice the Legal Aid Council, the body responsible for providing such assistance, is under-funded and unable to fulfill its duties. While practitioners are keen to point to the pro bono work done by some barristers, this makes little dent in the overall shortfall of legal aid.

[...]

H. The judicial system

⁴⁴ Bayo Johnson v. Olufadeju (2002) 8NWLR Part 768, 192-222 (cited in Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004)).

⁴⁵ Thereafter the suspect would be entitled to release unless good cause is shown for a further 30 day remand. Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004) pp. 52-57.

⁴⁶ For a similar criticism see Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004) p. 55.

⁴⁷ *The Report of the National Study Group on Death Penalty*, Abuja, August 2004 p. 82.

98. The judiciary cannot absolve itself of responsibility for the unconscionable amount of time taken to resolve serious criminal charges, the adjournments handed out with reckless abandon (the Special Rapporteur met accused persons who had endured more than 50 adjournments), and the subsequent long-term rotting in prison of thousands charged with capital offences. There seem to have been remarkably few efforts to develop alternative dispute resolution mechanisms or more efficient methods of resolving criminal charges.

(Recommendations:)

104. *The death penalty*

[...]

(b) The sentence of every prisoner who has served more than five years on death row should be commuted immediately and consideration given to commuting all such sentences;

(c) All persons sentenced to death or life imprisonment under martial law should have their convictions reviewed in recognition of the highly unsatisfactory due process protections applied at the time. Since judicial review is probably beyond the capacity of an inefficient and overstretched court system, an administrative procedure should undertake an initial vetting of all such convictions and make recommendations to the Government;

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 60-62, 88):

60. Experience shows that even in the most sophisticated legal systems, mistakes occur which result in wrongful executions. This is a constant risk and no country's legal system can comprehensively and reliably ensure that such errors do not occur. In relation to lesser punishments, the penalty is neither so severe nor so final, and mistakes can always be rectified. Capital punishment, however, is in a class all of its own and the appropriate legal regime governing it cannot be compared to that relating to other sentences.

61. It is therefore incumbent upon those countries that retain the death penalty to undertake regular periodic reviews, staffed by persons independent of the criminal justice apparatus, to evaluate the extent to which international standards have been complied with and to consider any evidence (such as DNA) that might be available which casts doubt upon the guilt of an executed person.

62. The Commission should call upon all retentionist countries to undertake such reviews and to report to it on the outcome thereof.

[...]

88. Because it is impossible to ensure that wrongful executions do not occur, countries applying the death penalty should undertake regular, independent, periodic reviews of them extent to which international standards have been complied with and to consider any evidence of wrongful execution. The Commission should ask those States to report to it on the outcome of their reviews.

B. TRANSPARENCY

Report of the Special Rapporteur to the Human Rights Council (A/HRC/14/24, 20 May 2010, ¶¶ 50-52):

50. International law does not prohibit the application of the death penalty. However, given the fundamental nature of the right to life, the circumstances in which the death penalty may lawfully be applied are strictly circumscribed. Executions carried out in violation of those limits are unlawful killings.

51. Various reports examining the legal limits on the application of the death penalty show that:

(a) The death penalty is only lawful if imposed after a trial conducted in accordance with fair trial guarantees, including judicial independence, the right to counsel, an effective right to appeal, and the right not to be coerced or tortured to give evidence (A/HRC/11/2/Add.5). When a State's judicial system cannot ensure respect for fair trials, the Government should impose a moratorium on executions (A/HRC/11/2/Add.4, paras. 65 and 89);

(b) States that impose the death penalty must provide transparency in relation to the specifics of the processes and procedures under which it is imposed.⁴⁸ This obligation is firmly grounded in existing law (E/CN.4/2006/53/Add.3). States retaining the death penalty should undertake periodic reviews to determine whether international standards have been complied with, and report to the Council on their findings (E/CN.4/2005/7, paras. 60-62, 88);

(c) International law prohibits the application of the death penalty to juveniles;⁴⁹

(d) International law prohibits the mandatory imposition of the death penalty;⁵⁰

(e) International law only permits the death penalty for "the most serious crimes". The scope and implications of this important phrase have been explored in detail;⁵¹

(f) A person sentenced to death has the right to seek pardon or commutation of the sentence (A/HRC/8/3, paras. 59-67).

52. In the death penalty context it has also been necessary to address the relationship between international legal obligations and sharia law or Islamic criminal law as applied in some countries. Specifically, reports have discussed stoning, the illegality of the death penalty for homosexuality or adultery, and the challenges of diyah (compensation in lieu of criminal punishment).⁵²

Follow-up to Country Recommendations—Sri Lanka and Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 78-81, Annex II):

⁴⁸ E/CN.4/2005/7; E/CN.4/2006/53, para. 28; and A/HRC/8/3/Add.3, para. 81.

⁴⁹ A/HRC/11/2, paras. 29-42 and A/HRC/4/20, paras. 16-17 and 63.

⁵⁰ E/CN.4/2005/7, paras. 63-64 and 80; A/HRC/4/20, paras. 54-62 and 66; and A/HRC/11/2/Add.6, paras. 83-84 and 115.

⁵¹ A/HRC/4/20, paras. 39-53 and 65; A/HRC/11/2/Add.6, para. 84; and A/HRC/11/2/Add.5, para. 23.

⁵² A/HRC/8/3/Add.3, paras. 76-78; E/CN.4/2006/53/Add.4, paras. 21-24 and 32-38; and A/61/311, paras. 55-64.

79. It was understood by the international community at the time of the Special Rapporteur's visit to Nigeria that the country had, since 2002, an unofficial moratorium on the application of the death penalty. The existence of this moratorium was restated by Nigeria in its comments to the Human Rights Council in September 2006 to justify its argument that the issue of the death penalty for private sexual acts should not have been addressed in the report of the Special Rapporteur.⁵³ It was reiterated on 15 November 2007, when Nigeria stated to the UN General Assembly Third Committee during debates on a world-wide moratorium for the death penalty, that it "is thus on record that we have not carried out any capital punishment in recent years in Nigeria".

80. However, there have been reliable reports by international and Nigerian rights organizations that at least seven executions by hanging took place in Nigeria in 2006. On 30 May 2006, Kenneth Ekhone and Auwalu Musa were executed in Kaduna Central Prison, following trials in which they did not have lawyers, or an opportunity to appeal the trial judgments. On 15 June 2006, Salisu Babuga was executed in Jos prison, and at least four men were executed in Enugu prison in the same year. It is feared that other secret executions may have taken place since 2002.

81. As the Special Rapporteur has previously made clear, "countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty."⁵⁴ Secrecy on the use of the death penalty is not compatible with international human rights standards. Without transparency, it is very likely that fundamental due process safeguards for death row inmates will not be observed. Furthermore, misleading the international community and the Nigerian people about the application of the death penalty prevents informed debate within Nigeria about whether or not a true moratorium on the death penalty should be imposed.

82. Nigeria must publicly release the number of executions carried out since the purported moratorium began in 2002. The families of those executed should be officially informed. And the names and details of those executed, and the prisons in which they were executed, should be publicly released.

[...]

Nigeria - Summary of follow-up to each recommendation

(a) The Federal Government should reiterate that the imposition of the death penalty for offences such as adultery and sodomy is unconstitutional. It should commit to undertaking a constitutional challenge at the earliest opportunity.

⁵³ Nigeria's response to the Report on extrajudicial, summary, or arbitrary executions, submitted by Philip Alston, delivered by H.E. Mr. Joseph U Ayalogu, Ambassador/Permanent Representative of Nigeria. Geneva, 19 September 2006.

⁵⁴ E/CN.4/2005/7, [59]; E/CN.4/2006/53, para. 28.

This recommendation has not been implemented.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, 8 March 2006, ¶¶ 28-32, 56-57):

28. In his 2005 report to the Commission on Human Rights (E/CN.4/2005/7) the Special Rapporteur drew attention to the problem of a lack of transparency in relation to the death penalty. In particular, he observed that in a “considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little if any information is provided to those who are to be executed or to their families”.⁵⁵ He observed that such secrecy is incompatible with human rights standards in various respects, and concluded that “countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty”.⁵⁶ In an addendum to the present report the Special Rapporteur analyses in detail the legal basis of the obligation to be transparent in such matters. Consideration is also given to a range of case studies that illustrate the major problems that exist in this area.

29. Transparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life. As the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) state, everyone has the right for criminal charges against him or her to be adjudicated in view of the public. The report looks in detail at article 14, paragraph 1, of the ICCPR, which narrowly limits the scope for secrecy at trial, and provides a powerful transparency requirement thereafter. Secrecy throughout the post-conviction process is also limited by State obligations to ensure due process rights and to respect the right to freedom from cruel, inhuman or degrading treatment or punishment.

30. Two key conclusions result from this analysis. First, the public is unable to make an informed evaluation as to the death penalty in the absence of key pieces of information. In particular, any meaningful public debate must take place in the light of detailed disclosure by the State of information relating to: the number of persons sentenced to death; the number of executions actually carried out; the number of death sentences reversed or commuted on appeal; the number of instances in which clemency has been granted; and each of the above broken down according to the offence for which the condemned person was convicted. Notwithstanding the critical role of this information in any informed decision-making process, many States choose secrecy over transparency, but still claim that capital punishment is retained in part because it attracts widespread public support.

31. Second, condemned persons, their families, and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency

⁵⁵ E/CN.4/2005/7, paragraph 57.

⁵⁶ E/CN.4/2005/7, paragraph 59.

petitions, and executions. Experience demonstrates that to do otherwise is highly likely to lead to violations of due process rights and to inhuman and degrading treatment.

32. The case studies demonstrate that non-compliance with these transparency obligations is of considerable practical relevance. Although the death penalty is not prohibited by international law, its use is potentially inconsistent with respect for the right to life when its administration is cloaked in secrecy.

RECOMMENDATIONS

[...]

56. Transparency is essential wherever the death penalty is applied. The public is unable to make an informed evaluation as to the death penalty in the absence of the relevant facts. The oversight required to safeguard the right to life depends on the detailed disclosure by the State, on at least an annual basis, of information relating to: the number of persons sentenced to death; the number of executions actually carried out; the number of death sentences reversed or commuted on appeal; the number of instances in which clemency has been granted; and each of the above broken down according to the offence for which the condemned person was convicted.

57. 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. Experience demonstrates that to do otherwise is highly likely to lead to violations of due process rights and to inhuman and degrading treatment.

Report on transparency and the imposition of the death penalty (E/CN.4/2006/53/Add.3, 24 March 2006):

I. INTRODUCTION

1. In the previous report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Commission on Human Rights at its sixty-first session, the Special Rapporteur noted that there is a widespread lack of compliance with the obligation to administer the death penalty in a transparent manner:

“secrecy prevents any informed public debate about capital punishment within the relevant society ... Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty. 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 is unacceptable. The Commission should, as a matter of priority, insist that every country that uses capital punishment undertake full and accurate reporting

of all instances thereof, and should publish a consolidated report prepared on at least an annual basis”.⁵⁷

2. The present follow-up report explores that problem in greater detail, discussing the legal framework underpinning transparency obligations and providing case studies that may clarify the issues. Information on actual practices undermining transparency is required to assess both the dimensions of the problem and the range of reform options. A preliminary observation is that countries do not fall neatly into “transparent” and “opaque” categories. While there are countries in which the entire process of capital punishment from trial to execution is cloaked in secrecy, more often some aspects are secret while others are public. For example, in Japan the public is provided no information regarding individual executions, but detailed aggregate statistics are provided. In contrast, in China, at least some executions are widely publicized, but all aggregate information is held in secrecy. This diversity of legal and institutional obstacles to transparency demonstrates that there is no single path to transparency.

3. It should be noted that one consequence of the lack of transparency in the administration of capital punishment is that reports like this draw on a poor factual base. Today, it would be impossible to survey current practices in a comprehensive manner; for that reason, the Special Rapporteur chose to focus on representative incidents and practices. The Special Rapporteur drew on information he had received from various sources. Notes verbales were sent on 24 August 2005 to those States which seemed to be most pertinent to the inquiry with a request for their views. Of those, Belarus, China, Democratic People’s Republic of Korea, Egypt, India, Saudi Arabia, Singapore, and Viet Nam responded. The Special Rapporteur appreciates the cooperation these Governments have extended and the cases studies in the present report build on information received by the Special Rapporteur, combined with responses by the Governments concerned to a preliminary statement of the current situation. The Special Rapporteur regrets that the Governments of Afghanistan, the Islamic Republic of Iran, Japan, and the Syrian Arab Republic did not respond. The Special Rapporteur is very grateful to the secretariat of the Office of the United Nations High Commissioner for Human Rights for its assistance in obtaining material for this report and to Katrina Gustafson and William Abresch for superb research and analysis.

4. The case studies that follow will analyse some of the reasons given for non-disclosure of information on the death penalty, but it is worthwhile to first highlight one key point: the failure to comply with transparency obligations lacks any basis related to crime control or the traditional purposes of punishment.⁵⁸ It is, for example, widely believed that the death penalty is a necessary deterrent. Putting aside the empirical debate on whether capital punishment serves as a deterrent, is it plausible that secrecy could enhance such a deterrent effect? It could be argued that prospective criminals would, lacking information, assume the worst. However, even if we were to impute this species of fear of uncertainty to criminals, the facts are that secrecy is not actually utilized by

⁵⁷ E/CN.4/2005/7, paras. 58-59.

⁵⁸ For instance, in a note verbale to the Special Rapporteur, dated 11 October 2005, the Government of China stated that “the application of the death penalty for crimes of this order has salutary deterrent and preventative effects”.

Governments in a way that would exaggerate the use of the death penalty. Instead, secrecy seems to be universally relied on so as to downplay the actual numbers of death sentences and executions that take place; thus, secrecy would tend to undermine any deterrence effect of capital punishment.

5. Secrecy is also incompatible with a retributive rationale for the death penalty. The general public and the families of victims alike are provided with a sense of retribution by punishments that are known not by punishments that are secret. Indeed, any retributive effect that might result from the knowledge that the criminal has been put to death will be reduced as secrecy reduces knowledge of the death sentence and execution.

6. That secret executions and confidential statistics in no way advance crime control and the traditional purposes of punishment should itself raise serious questions about these practices.

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

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.⁵⁹ 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 rationalized 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".⁶⁰

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.⁶¹ That provision

⁵⁹ 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."

⁶⁰ *Van Meurs v. the Netherlands*, Human Rights Committee (HRC), communication No. 215/1986 (1990), CCPR/C/39/D/215/1986, para. 6.1.

⁶¹ 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;

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” 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 authorized, 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”.⁶² 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

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.”

⁶² ECOSOC resolution 1989/64.

emergency subject to the rule of law.⁶³ 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."⁶⁴

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 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.⁶⁵ 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 ...".⁶⁶ In recognition of this duty, the Economic and Social Council has, for example, requested that the Secretary-General survey Member States at

⁶³ HRC, 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).

⁶⁴ HRC, general comment No. 29 (2001), para. 15.

⁶⁵ HRC, general comment No. 31 (2004), para. 4, on the nature of the general legal obligation imposed on States parties to the Covenant.

⁶⁶ The Universal Declaration of Human Rights, preamble; see also Charter of the United Nations, Article 1.

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.

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 emphasized in a reply to the Special Rapporteur in 2005.⁶⁷ The Government of Japan responded to a survey by the Secretary-General that “the majority of people in Japan recognize 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”.⁶⁸ 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 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 1973.⁶⁹ 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

⁶⁷ See E/CN.4/2005/7, 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.”

⁶⁸ See Capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty, Report of the Secretary-General to the Economic and Social Council, at pp. 8-9, U.N. Doc. E/2005/3 (9 March 2005).

⁶⁹ ECOSOC resolution 1754 (LIV) (16 May 1973).

Government responses.⁷⁰ 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.⁷¹

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".⁷² 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.⁷³

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.⁷⁴

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 itself has monitored certain trials and that the more newsworthy trials are reported in the media.⁷⁵ The Government response also revealed that "as you have

⁷⁰ ECOSOC resolution 1995/57 (28 July 1995), para. 4.

⁷¹ Calculated on the basis of information contained in E/2005/3 (9 March 2005), para. 6; annex I, table 1; E/2005/3/Add.1 (21 June 2005), paras. 3 (d), 8.

⁷² Interfax News Service, Belarus says nobody on death row now (5 October 2004).

⁷³ 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).

⁷⁴ 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.

⁷⁵ Response of Singapore Home Ministry to Reuters responding to Reuters News, Amnesty challenges Singapore on executions, 19 October 2004 (on file with the author).

requested for the figures, 19 Singaporeans and foreigners were executed in 2003. Between January and September 2004, six persons were executed".⁷⁶ 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".⁷⁷

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 organized 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 organized 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 organizers 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.

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

⁷⁶ Response of Singapore Home Ministry to Reuters responding to Reuters News, Amnesty challenges Singapore on executions, 19 October 2004 (on file with the author).

⁷⁷ 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". Straits Times, Govt points out 12 'grave errors' in Amnesty Report (31 January 2004).

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”.⁷⁸ 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 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.⁷⁹ 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.⁸⁰ (Likewise, the Government does not consistently publicize 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,⁸¹ 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.⁸²

⁷⁸ 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).

⁷⁹ 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 publicized 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.

⁸⁰ 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 sentences-with-remission 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.”

⁸¹ 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”.)

⁸² Capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty, Report of the Secretary-General to the Economic and Social Council, E/2005/3 (9 March 2005).

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 Dhananjay 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".⁸³

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".⁸⁴ 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

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

⁸³ Letter from the Deputy Inspector General (Prisons) Delhi Prisons to Deepika Tandon, PUDR (12 May 2005) (on file with the author).

⁸⁴ The International Covenant on Civil and Political Rights article 14 (1) (emphasis added).

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.⁸⁵ 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 7.⁸⁶ States do not have any interest that justifies keeping persons on death row and their families in the dark regarding their fate.

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

⁸⁵ Human Rights Committee, Communication No. 886/1999: Belarus, para. 10.2, seventy-seventh session, 28 April 2003, CCPR/C/77/D/886/1999. The same conclusion was reached in a similar case. HRC, Communication No. 887/1999: Belarus, para. 9.2, seventy-seventh session, 24 April 2003. 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."

⁸⁶ *Pratt and Morgan v. Jamaica*, Human Rights Committee, thirty-fifth session, para. 13.7, CCPR/C/35/D/210/1986, 7 April 1989.

given to their families.⁸⁷ (In response to these allegations, the Government asserted that it had no record of these individuals being detained in July 2003.⁸⁸)

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.⁸⁹ When they spoke to their

⁸⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum - Summary of cases transmitted to Governments and replies received, to the Commission on Human Rights at its sixty-first session, E/CN.4/2005/7/Add.1, para. 227.

⁸⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum - Summary of cases transmitted to Governments and replies received, to the Commission on Human Rights at its sixty-first session, E/CN.4/2005/7/Add.1, para. 329.

⁸⁹ 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

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.

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.⁹⁰ (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.⁹¹) 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.⁹²

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

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 competent authority to reply to his allegations."

⁹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum - Summary of cases transmitted to Governments and replies received, to the Commission on Human Rights at its sixty-first session, E/CN.4/2005/7/Add.1, para. 82.

⁹¹ 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 Lhasa, and Nepalese officials were permitted to meet with the Nepalese defendants."

⁹² 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."

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.⁹³ In a 2003 decision, the Human Rights Committee 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.⁹⁴

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.

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

⁹³ 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 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.

⁹⁴ HRC, Communication No. 886/1999: Belarus, para. 10.2, seventy-seventh session, 28 April 2003, CCPR/C/77/D/886/1999.

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.⁹⁵

40. There is, of course, a point at which individual rights to dignity and privacy do outweigh transparency obligations.⁹⁶ 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 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”.⁹⁷ 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.

⁹⁵ Capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty, Report of the Secretary-General to the Economic and Social Council, (E/2005/3), p. 43.

⁹⁶ The International Covenant on Civil and Political Rights, articles 7 and 17.

⁹⁷ 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 civilized 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.”

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.⁹⁸ 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 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".⁹⁹

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

⁹⁸ 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."

⁹⁹ International Herald Tribune, "Only arrest photos available", 8 June 2005.

the death penalty for ordinary crimes. The response of the Government was that “the majority of people in Japan recognize 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”.¹⁰⁰ 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.¹⁰¹ 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 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

¹⁰⁰ Capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty, Report of the Secretary-General to the Economic and Social Council, E/2005/3, pp. 8-9.

¹⁰¹ Capital punishment and implementation of the safeguards guaranteeing protection of those facing the death penalty, Report of the Secretary-General to the Economic and Social Council, E/2005/3, p. 36.

continued constructive dialogue on the measures required to ensure full transparency in the administration of the death penalty.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 57-59, 87):

57. In a considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little if any information is provided to those who are to be executed or to their families. Such secrecy is incompatible with human rights standards in various respects. It undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages. It denies the human dignity of those sentenced, many of whom are still eligible to appeal, and it denies the rights of family members to know the fate of their closest relatives.

58. Moreover, secrecy prevents any informed public debate about capital punishment within the relevant society. In a reply to the Special Rapporteur in 2003 the Government of China observed that the “ultimate worldwide abolition [of the death penalty] will be the inevitable consequence of historical development”, and that “[e]ach 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”.¹⁰² It is clear, however, that such decisions and aspirations cannot be formed in a state of ignorance about the facts.

59. Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty. 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 is unacceptable. The Commission should, as a matter of priority, insist that every country that uses capital punishment undertake full and accurate reporting of all instances thereof, and should publish a consolidated report prepared on at least an annual basis.

[...]

87. Transparency is essential wherever the death penalty is applied. Secrecy as to those executed violates human rights standards. Full and accurate reporting of all executions should be published, and a consolidated version prepared on at least an annual basis.

¹⁰² Reply to a communication dated 9 December 2002.

C. THE DEATH PENALTY FOR JUVENILES

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/11/2, 27 May 2009, ¶¶ 29-42):

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.¹⁰³ During that period, I have addressed 33 communications to five Governments¹⁰⁴ 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 concerned 46 juvenile offenders, four of them female, the remainder male.¹⁰⁵

In six cases, it was alleged that the juvenile offender had been executed.¹⁰⁶ 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 recognized 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

¹⁰³ See A/HRC/8/3/Add.1 and A/HRC/11/2/Add.1.

¹⁰⁴ 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 "The last holdouts: ending the juvenile death penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen" (<http://www.hrw.org/en/reports/2008/09/10/last-holdouts>) includes Yemen but not Papua New Guinea.

¹⁰⁵ 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.

¹⁰⁶ See in A/HRC/11/2/Add.1.

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”. 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 emphasized these points in relation to Saudi Arabia.¹⁰⁷ 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.

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.

¹⁰⁷ CRC/C/SAU/CO/2, para. 32.

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,¹⁰⁸ 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)¹⁰⁹ alone. In others, the actions required will be more. See for example the communications to the Islamic Republic of Iran and to Sudan in 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. A review of current developments in the relevant jurisdictions in this regard is instructive.

38. In January 2005, the Government of the Islamic Republic of Iran informed the Committee on the Rights of the Child that all executions of persons who had committed crimes under the age of 18 had been halted. This was reiterated in a note verbale of 8 March 2005 to OHCHR, in which it explained that the ban had been incorporated into the draft bill on juvenile courts, which was before Parliament for ratification.¹¹⁰ I have sought confirmation of the current status of the bill in eight communications, but no reply addressing this issue has been received.¹¹¹

¹⁰⁸ See for example the communications to the Islamic Republic of Iran and to Sudan in A/HRC/11/2/Add.1.

¹⁰⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹¹⁰ A/HRC/4/20/Add.1, p. 152.

¹¹¹ See communications to the Islamic Republic of Iran dated 5 January 2007, 31 January 2007, 29 February 2008, 27 March 2008, 2 May 2008, 13 August 2008, 30 January 2009 and 6 March 2009.

39. In the meantime, the death penalty continues to be imposed upon juveniles and to be carried out in relation to them. Reliable reports suggest that there are at least 130 juvenile offenders currently on death row in Iran. I have sent 24 communications relating to 30 different cases of juvenile offenders sentenced to death or executed, but there has been no real movement of any kind towards bringing the Islamic Republic of Iran into compliance with its obligations under international law. Since 2004, I have been requesting a visit to the country, which has issued a standing invitation to all special procedures to visit. Despite several high-level meetings in Geneva, no dates have ever been set.

40. Recent cases continue to be deeply troubling. B.Z. was found guilty of killing a man in 2005, when he was aged 16. On 14 February 2008, the Government informed me that the judicial system, on the basis of human considerations, had entered the case into conciliation process and was seriously following it with the hope for final settlement. Therefore, carrying out the penalty was not in its programme of work (A/HRC/8/3/Add.1, p. 223). B.Z. was executed in Shiraz six months later, on 26 August 2008.¹¹² Another case is that of Delara Darabi, who was convicted of murdering a relative when she was 17, in 2003. She is alleged to have confessed in an attempt to save her boyfriend who was the responsible party, but she then withdrew her confession. On 19 April 2009, she was reportedly granted a two-month stay of execution by the Head of the Judiciary, but this order was ignored and she was executed less than two weeks later, on 1 May 2009.

41. In Papua New Guinea, the legislature is reported to be considering a draft juvenile justice act that would exclude the imposition of the death penalty for juvenile offenders.¹¹³ Southern Sudan abolished the death penalty for juveniles when it adopted its Interim Constitution in 2006, but there remained at least six offenders on death row sentenced for crimes committed as minors.¹¹⁴ The Interim National Constitution of the Sudan adopted in 2005, however, maintains an exception for “cases of retribution or *hudud*” in the prohibition of the imposition of the death penalty on a person under age 18 (art. 36 (2)). In August 2008, a counter-terrorism court in Khartoum sentenced a 17 year-old found guilty of having taken part in the Justice and Equality Movement attack against an omdurman in May 2008 to death on charges of *hiraba* (brigandage), a *hudud* offence.¹¹⁵

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.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 16-17, 63):

¹¹² See the communication of 24 October 2008 to the Islamic Republic of Iran in A/HRC/11/2/Add.1.

¹¹³ See the communication of 29 December 2008 to Papua New Guinea in A/HRC/11/2/Add.1.

¹¹⁴ See the communication of 10 October 2008 to the Sudan in A/HRC/11/2/Add.1.

¹¹⁵ See the communication of 23 September 2008 to the Sudan in A/HRC/11/2/Add.1.

The situation in the Islamic Republic of Iran

16. Between August 2004 and March 2006 I sent 12 communications, involving nine boys and six girls who had been sentenced to death in Iran for crimes committed when they were under 18. Three girls were sentenced for murder and three others for “acts contrary to chastity”. Four boys were sentenced for murder, one for drug trafficking, three for abduction and rape, and one for attempted hijacking. According to the available information four juvenile offenders have been executed and two acquitted. Five other death sentences are “on hold” and one is under review. The status of the remaining three cases is unclear.

17. The information received is clearly credible and there is every reason to believe that the Iranian judiciary is freely ignoring the prohibition on the juvenile death penalty. This constitutes a clear violation of Iran’s obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. There is no other country in the world in relation to which I regularly receive allegations of this type. This is not surprising, since the juvenile death penalty has been specifically abolished in virtually every other country. If the Council is to take seriously its responsibilities in relation to extrajudicial executions, it will respond appropriately to this wholly unacceptable situation.

[...]

63. The prohibition of the execution of those who were under 18 at the time of committing a crime is of fundamental importance to international human rights law. The Islamic Republic of Iran is the only country in the world in relation to which I continue to receive significant numbers of credible reports of such sentences being imposed and, in some cases, carried out on juveniles. Iran is a party to two treaties which explicitly outlaw this practice. My repeated requests over several years to visit Iran in order to ascertain the accuracy of these reports and to explore through dialogue ways in which to remedy any shortcomings have yielded no response. This is despite the fact that a “standing invitation” has been issued. This is now a matter in relation to which the Council will need to respond appropriately.

Follow-up to Country Recommendations (Sudan) (E/CN.4/2006/53/Add.2)(28 February 2006, ¶ 149):

C. Recommendations related to the death penalty (Sudan)

[...]

149. On 6 July 2005, a new Interim National Constitution was ratified. It makes the ICCRP, as well as the Convention on the Rights of the Child (CRC), which both prohibit sentencing someone to death if he or she was less than 18 years old at the time of the offence, an integral part of the constitutional bill of rights. Article 32(5) of the Interim

National Constitution affirms that the state shall “protect the rights of the child as provided in the international and regional conventions ratified by Sudan.” But the Constitution itself and criminal laws provide for exceptions to this principle which are incompatible with international law.¹¹⁶ On 31 August 2005, two persons were executed in Khartoum who were reported by their relatives to have been less than 18 years old when they committed the capital offences.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 29, 104):

29. In addition, many of the individuals with whom he met on death row were tried when Nigeria was governed by a military regime, when various constitutional rights were suspended and capital trials were sometimes conducted by military tribunals. The procedural probity of such trials was almost certainly deeply flawed. Another problem is the imposition of the death penalty for crimes committed as a minor.

[...]

(d) UNICEF should commission a consultant to review the files of all prisoners on death row for crimes committed before they were 18. Judicial review should then be sought to ensure compliance with the Convention on the Rights of the Child.

¹¹⁶ High Commissioner’s Second Periodic Report, pp.26-27.

D. ISLAMIC LAW AND THE DEATH PENALTY

1. Sharia law – sodomy & adultery

Follow-up to Country Recommendations—Sri Lanka and Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 76-78):

76. In response to the Special Rapporteur's recommendation, on 19 September 2006, Nigeria stated to the Human Rights Council that it disagreed with the Special Rapporteur's position on the "death penalty by stoning under Shari'a law for unnatural sexual acts".¹¹⁷ Nigeria argued that the issue should not have featured in the Special Rapporteur's report because there was a "long-standing moratorium on executions" in Nigeria, that no executions have taken place after the passing of death sentences by Shari'a courts, and that the practice of stoning is not pervasive. These arguments, seeking to silence criticism of the death penalty for private sexual acts by contending that it is not applied in practice, are unconvincing. First, as elaborated below in Part III(C)(3), Nigeria has not in fact had a general moratorium on executions. Second, as the Special Rapporteur explained in his 2006 report, the fact that the death penalty may not actually be carried out does not justify its existence as a penalty available on the books. As he stated, the "mere possibility" that it can be applied threatens the accused for years, and is a form of cruel, inhuman or degrading treatment or punishment. Its status as law justifies persecution by vigilante groups, and invites abuse. Third, the argument that stoning is not pervasive does not address concerns about the legality of its application in individual cases.

77. Nigeria also argued that "the notion that executions for offences such as homosexuality and lesbianism are excessive is judgemental rather than objective. What may be seen by some as disproportional penalty in such serious offences and odious conduct such may be seen by others as appropriate and just punishment".¹¹⁸ This argument is also unconvincing. The provision by twelve Nigerian States of the death penalty for sodomy contradicts not just settled international law,¹¹⁹ but the federal law of Nigeria itself. The Special Rapporteur's recommendation was simply that Nigeria take action to ensure the conformity of the law of its States with the Nigerian federal Constitution.

78. No action has been taken on that front. In fact, Nigeria continues to hand down death sentences for sodomy and adultery. In October 2006, the Special Rapporteur wrote an

¹¹⁷ Nigeria's response to the Report on extrajudicial, summary, or arbitrary executions, submitted by Philip Alston, delivered by H.E. Mr Joseph U Ayalogu, Ambassador/Permanent Representative of Nigeria. Geneva, 19 September 2006.

¹¹⁸ Nigeria's response to the Report on extrajudicial, summary, or arbitrary executions, submitted by Philip Alston, delivered by H.E. Mr Joseph U Ayalogu, Ambassador/Permanent Representative of Nigeria. Geneva, 19 September 2006.

¹¹⁹ Article 6 (2) of the ICCPR, which Nigeria acceded to without reservation in 1993, provides that the death penalty may only be imposed "for the most serious crimes". It is clear that "most serious crimes" only includes crimes where there was an intention to kill which resulted in the loss of life: A/HRC/4/20, para. 53.

allegation letter to Nigeria concerning two individuals who were sentenced to death by stoning for sodomy in June 2006. Nigeria did not respond.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 21-24, 32-38):

Case study 4: the sharia courts and stoning to death for homosexuality

In 2000 the jurisdiction of the Shari'a courts,¹²⁰ which exist in twelve states, was extended from civil and personal matters to criminal cases. Concerns have long been expressed that the Shari'a judges lacked the training necessary to deal with criminal matters, that a confession alone was sufficient to convict, that defendants were unrepresented or poorly represented, and that some penalties violated human rights standards.¹²¹ After considerable publicity and lengthy legal proceedings, the widely-publicized convictions of several women sentenced to death by stoning for adultery were overturned. In a lengthy discussion of these issues, several judges of the Appeals Court of the Grand Khadi of Kano sought to allay my concerns by recalling the injunction attributed to the Prophet to '[p]ut off the hudud (prescribed) penalties in cases of uncertainty'.

The day after meeting the judges I asked to meet with all death row prisoners in Kano prison. One of them was a 50 year old man awaiting death by stoning after being convicted of sodomy. A neighbour had reported him to the local Hisbah Committee¹²² which carried out a citizen arrest and handed him to the police. He claimed to have been comprehensively beaten by both groups. The official court records show that he admitted to the offence, but sought the court's forgiveness. He had no legal representation and failed to appeal within the time provided. I subsequently took steps so that a late appeal could be lodged and the case is now under review.

In December 2005 the Katsina Shari'a court acquitted two other men charged with the capital offence of sodomy, because there were no witnesses. They had nevertheless spent six months in prison on remand which the judge reportedly said should remind them 'to be of firm character and desist from any form of immorality'.¹²³

¹²⁰ Jurisdiction applies to '[e]very person who is a Muslim and/or every other person who voluntarily consents to the exercise of the jurisdiction of the Shari'ah Courts ...'. See e.g. Kaduna State, *The Shari'ah Penal and Criminal Procedures Codes, 2002*, Section. 3(1).

¹²¹ See Human Rights Watch, *Political Shari'a? Human Rights and Islamic Law in Northern Nigeria* (September, 2004).

¹²² Hisbah Committees are groups of mostly young men who patrol neighbourhoods with the aim of preventing crime and arresting individuals suspected of committing crimes against the Shari'a. The committees are largely unregulated and untrained, although they are often provided with vehicles, uniforms and an office by the local or state government. Although they are not authorized to carry out punishments, there have been numerous reports of Hisbah Committees flogging and beating suspected criminals. The role of the Hisbah Committees is discussed below under the heading 'Vigilantes'.

¹²³ Reported in Online Nigeria, 9 Dec 2005, available at <http://nm.onlinenigeria.com/templates/?a=6318&z=12>

Regardless of the circumstances of the individual case, however, the incident serves to highlight several major problems. They are the use of stoning to death as a punishment, and the prescription of the death penalty for private sexual conduct.

Sharia law in Nigeria

Under the Shari'a Penal Codes in force in twelve northern states, capital offences include sodomy, 'adultery (zina), apostasy (rida), rebellion (bag'yi), and Hiraba, translated as highway robbery ...'.¹²⁴ The issue of punishment for zina (adultery) has attracted extensive media attention because of cases in which the Shari'a courts prescribed death by stoning for women found guilty of zina. In my discussions with them, judges of the Appeals Court of the Grand Khadi of Kano emphasized the extent to which the version of the Shari'a which they applied (following the Maliki School)¹²⁵ contains provisions which ensure that only very few cases will ever satisfy the requirements for the imposition of the death penalty.¹²⁶

In March 2002 a Shari'a Court in Katsina State sentenced Ms. Amina Lawal to death by stoning for *zina*. A higher court upheld the judgment in August 2002.¹²⁷ On appeal in September 2003 the Katsina State Shari'a Court of Appeal (by a 4-1 majority) overturned the conviction. Several grounds were cited: (i) the evidence against her should have been presented not just by the police but by four witnesses as required by the Qur'an; (ii) her initial conviction should have been rendered by a three judge panel, rather than only a

¹²⁴ Ibid., para 3.4.1.1.

¹²⁵ It is noteworthy that some Nigerian Islamic legal scholars have been strongly critical of the official entrenchment of the approach of one particular school of interpretation. According to one commentator it has the effect of 'unduly restricting the scope and regenerative mechanism of Islamic law'. Abdulmumini Adebayo Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction', 52 *American Journal of Comparative Law* 859, at 879 (2004).

¹²⁶ These were recited in a 2004 report of a National Study Group which observed, in relation to charges of adultery, the accused will not be stoned to death:

- Where there are not up to 4 male witnesses.
- Where the witnesses are not eligible witnesses.
- Where the witnesses contradict themselves.
- Where even one witness (out of four) is not certain as to the act committed.
- Where the suspect(s) did the act because of some mistake as to the identity of the partner or under the supposition that the partner was lawful to him/her.
- Where the woman was given "consideration" for the act because, as some jurists argue, that represents a type of "marriage".
- Where the suspect is unable to defend his case by advancing a justification/excuse for his act because he is dumb.
- Where the judge does not cross-examine the witnesses thoroughly as to details of the act committed.
- Where the suspect is not given the opportunity to defend his case.

In all such cases, a lesser penalty (ta'zir) is to be prescribed at the discretion of the court. See *The Report of the National Study Group on Death Penalty*, Abuja, August 2004, p. 69.

¹²⁷ For a lengthy analysis see Vanessa von Struensee, 'Stoning, Sharia and Human Rights'.

single judge; (iii) under Islamic law she should have been permitted to withdraw her confession at any point prior to execution; and (iv) the child of a divorced woman is presumed to have been fathered by her ex-husband, a presumption which only he could refute.¹²⁸ The alleged father of the baby denied paternity and had been discharged at an early stage on the grounds that the required four witnesses could not be found to testify against him.

In late 2004 two women, Hajara Ibrahim and Daso Adamu, were sentenced to death for *zina* by Shari'a Courts in Bauchi State. Both convictions were later overturned by Upper Shari'a Courts. Ms. Ibrahim was acquitted on the basis that her marriage had never been consummated so she could not be guilty of adultery and Ms. Adamu was acquitted on the basis of the principle that a pregnancy can reasonably be attributed to the ex-husband up to five years after a divorce.¹²⁹

Fortunately, the accused in all of these cases were ultimately acquitted. But reason for continuing concern remains. Firstly, characterizing adultery and sodomy as capital offences leading to death by stoning is contrary to applicable Nigerian and international law. Neither can be considered to be one of the most serious crimes for which the death penalty may be prescribed.¹³⁰ Secondly, even if the sentence is never carried out, the mere possibility that it can threaten the accused for years until overturned or commuted constitutes a form of cruel, inhuman or degrading treatment or punishment. Assurances that an offence which continues to be recognized by the law will never be applied in practice are neither justified nor convincing. The very existence of such laws invites abuse by individuals. This is all the more so in a context in which Shari'a vigilante groups have been formed with strong Government support. The maintenance of such laws on the books is an invitation to arbitrariness and in the case of *zina* to a campaign of persecution of women.

The operation of the *zina* laws is also discriminatory in terms of Nigerian and international law. The theory is that both the man and the woman in such allegedly adulterous situations are protected by the requirement of four witnesses, which will in almost all circumstances be impossible to obtain. But the woman alone remains very vulnerable because her pregnancy alone can be considered sufficient evidence to warrant conviction.¹³¹ In terms of gender equality this outcome is entirely unbalanced because the rules of evidence operate so as to exculpate almost every male and inculpate almost

¹²⁸ This approach is based on the Maliki

¹²⁹ This Day, *Shari'a Convict Gets Reprieve* (November 11, 2004) (reporting the acquittal of Ms. Ibrahim); Vanguard, *Sharia Court Nullifies Death Penalty on Woman* (December 11, 2004) (reporting the acquittal of Ms. Adamu).

¹³⁰ See Article 6(2) of the International Covenant on Civil and Political Rights, the relevant jurisprudence of the Human Rights Committee, and the 1984 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. The latter provide 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'.

¹³¹ One of the curious aspects of both the Lawal and Ibrahim cases was the fact that the alleged father was released on the basis of his own denial (and the absence of four witnesses) while the mother was initially found guilty primarily on the grounds of pregnancy.

every female in such situations. Similarly, DNA testing seems never to have been considered, most likely because it would lead to a more gender neutral outcome in which the child could be linked to a specific father as well as mother.

In relation to sodomy, the imposition of the death sentence for a private sexual practice is clearly incompatible with Nigeria's international obligations. Moral sanction is a matter for the consciences of individuals and the beliefs of religious groups. Criminal sanctions are an entirely different matter and when the threat of execution is involved the State cannot stand idly by and permit the two types of sanctions to be conflated in a way that violates international law.

The constitutionality of Shari'a criminal law has been widely challenged for violating the principle of non-discrimination, the federal-state division of powers, freedom of religion and the prohibitions against a state religion. Indeed the Federal Government has itself asserted that the northern states are acting unconstitutionally. Yet it has so far failed to take legal action to uphold the Constitution.¹³²

[...]

[Recommendations]:

104(a). The Federal Government should reiterate that the imposition of the death penalty for offences such as adultery and sodomy is unconstitutional. It should commit to undertaking a constitutional challenge at the earliest opportunity.

2. Victim empowerment (diyah)

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/61/311, 5 September 2006, ¶¶ 55-64):

Balancing State responsibilities against legal doctrines seeking to empower victims

55. An important number of recent communications I have received have called into question the compatibility of some tenets of Islamic criminal law, as practiced in some jurisdictions, with the applicable requirements of international law. Such questions are inevitably sensitive but, like all other laws and practices relevant to the extrajudicial executions mandate, must be examined objectively in accordance with the relevant standards.

56. To varying degrees different schools of Islamic law determine punishment on the basis of a theory of equivalent retaliation in the case of intentional crimes committed against the bodily integrity of a human being (*qisas* crimes). This calls for the infliction

¹³² See Vincent O. Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or not to Implement, the Constitutionality is the Question', 26 *Human Rights Quarterly* 730 (2004) at 754-57.

on the guilty party of the same treatment suffered by the victim.¹³³ Similarly, Islamic law gives victims and their families the ability to pardon the offender and accept financial compensation (*diyah*) for the crime.¹³⁴ Finally, in some jurisdictions the law has been interpreted to authorize the victim's family to carry out the death sentence.

57. Each of these practices can give rise to serious concern in human rights terms. Where the principle in relation to *qisas* is applied without the possibility of appeal to a court in relation to both the verdict and the sentence, the resulting principle of absolute, equivalent retaliation amounts to a mandatory death penalty and is thus incompatible with customary international law and with article 6 of ICCPR.

58. The practice of *diyah* could perhaps be seen as a form of empowerment of the victims of violations of the right to life (or rather of their families) and thus as a measure consistent with the obligation under article 2 (3)(a) of ICCPR to "ensure that any person whose rights ... are violated shall have an effective remedy". It is true that the payment of *diyah* saves lives to the extent that it avoids executions, and it is thus appropriate for Governments to engage in proactive mediation with a view to encouraging victims' families to accept *diyah* rather than the death penalty.

59. However, there are circumstances in which the choice of accepting *diyah* can operate inconsistently with international human rights law, and in particular with the guarantees of non-discrimination and procedural objectivity (due process) in the imposition of the death penalty.

60. First, non-discrimination concerns arise in relation to the implementation of *diyah*. Discrimination on the basis of wealth, social origin or property is a problem in the sense that a wealthy offender can effectively buy freedom in a way which is not open to poor offenders. *Diyah* is also potentially discriminatory based on the status of the victim. Thus it has been shown that the amount of *diyah* can be less for female victims than for male victims, and less for non-Muslim victims than for Muslim victims, with further discrimination between recognized religious minorities (*dhimmah*) and non-recognized minorities.¹³⁵

61. Second, where the private *diyah* pardon stands alone and when it relates to the death penalty, it is almost certain to lead to significant violations of the right to due process in situations where a pardon is not granted. To the extent that the procedure does not provide for a final judgement by a court of law, or for the right to seek pardon or commutation of the sentence from the State authorities, the requirements of international law will be violated. Where the *diyah* pardon is available it must be supplemented by a separate, public system for seeking an official pardon or commutation.

¹³³ This may also apply to involuntary killings, although Islamic schools of jurisprudence differ on the scope of intentional murder and on whether quasi-intentional murder should also receive the same punishment.

¹³⁴ See e.g. E/CN.4/2006/53/Add.1, pp. 108 and 219.

¹³⁵ See the progress report on discrimination in the criminal justice system by Leïla Zerrougui, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2005/7), para. 45.

62. Finally, contexts in which the victim's relatives are entrusted with the responsibility of carrying out the death sentence are incompatible with international law. The criminal law functions of imposing and carrying out the death penalty are quintessentially public functions and cannot be "outsourced" to private individuals, any more than the process of trial and sentencing can be privatized. In addition, entrusting the conduct of an execution to inexperienced hands and, even more problematically, to those who have reason to bear a grudge against the convicted person, greatly enhances the likelihood of torture or cruel, inhuman or degrading treatment being applied to the convict.

63. These observations are made in the knowledge that the legal systems in very few countries are based exclusively on Islamic law. Rather, in the vast majority of countries with significant Islamic populations, the legal systems are based on a mixture of Islamic law and other law, such as a civil code. In such countries, the criminal justice system may have modified the equivalent retaliation principle of *qisas* or provided for means of commutation additional to or in lieu of *diyah*. In this regard, the Special Rapporteur notes the case of Tunisia, where "[e]ven after the death sentence has been passed, the President of the Republic ... [has] not in practice authorize[d] execution of the death penalty".¹³⁶67 This example helps to illustrate that a system of commutation by a public official may not in practice be incompatible with Islamic law, and may exist alongside or in place of the private *diyah* pardon.

64. I would also note that difficulties balancing State responsibilities with practices seeking to empower victims are not unique to Islamic law. Thus it could be argued that the victim's rights movements in some Western countries, involving increased victim impact evidence in capital trials, might also raise concerns in relation to ensuring due process and the functioning of an independent and impartial justice system in capital cases.

¹³⁶ Roger Hood, *The Death Penalty: A Worldwide Perspective* (3rd ed.) (Clarendon Press, 2002), p. 35 (citing Tunisia's response to a request for information related to the preparation of the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty (E/1995/78 and Add.1 and Add.1/Corr.1).

E. MANDATORY DEATH PENALTY

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 83-84, 115):

83. Kenya has had a moratorium on carrying out the death penalty since 1987. However, the death sentence continues to be handed down on a regular basis, and in a manner that violates international law. International law prohibits the mandatory death penalty, and requires individualized sentencing to prevent the arbitrary deprivation of life.¹³⁷ International law also strictly limits the crimes for which the death penalty can be applied to cases where it can be shown that there was an intention to kill which resulted in the loss of life.¹³⁸ Further, the death penalty is unlawful where it follows a trial that violates basic due process guarantees.¹³⁹

84. However, Kenya has the mandatory death penalty for treason, murder, robbery with violence, and attempted robbery with violence.¹⁴⁰ The provision of the death penalty for robbery with violence is particularly concerning: the elements of the crime create a low threshold for conviction, robbery is very common, and there are many thousands convicted each year. In the period 2004-2007, 15,265 people were convicted of robbery with violence. There is no legal aid for those charged with robbery with violence, and only limited legal aid is provided for those charged with murder. In practice, this means that individuals face a death sentence often without the assistance of legal counsel. The high levels of corruption in the judiciary further call into serious question the fairness of trials.

[...]

115. Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 54-62, 66):

54. The Special Rapporteur has addressed communications to a number of Governments noting that legislation dictating the mandatory imposition of the death penalty is prohibited under international human rights law. This section more fully elaborates the law underpinning that prohibition.¹⁴¹ The view of the Special Rapporteur has been

¹³⁷ See A/HRC/420, paras. 54-62.

¹³⁸ See A/HRC/420, paras. 39-53.

¹³⁹ ICCPR, Arts 6, 14.

¹⁴⁰ See ss 40, 203-204, 295-297, Penal Code of Kenya. "Robbery with violence" is defined as: robbery of a person, with one of the following elements: the crime was committed with another person, or the criminal was armed with a weapon, or physical violence to any person was caused (ss 295-296).

¹⁴¹ Previous reports on the Special Rapporteur have also discussed the prohibition of mandatory death sentences briefly. A/61/311, para. 57; E/CN.4/2005/7, paras. 63-64; E/CN.4/2002/74, paras. 114, 120; E/CN.4/2001/9, para. 83; A/55/288, paras. 34, 36; E/CN.4/2000/3, paras. 70, 73, 98; E/CN.4/1999/39, paras. 63, 82.

informed by, and is generally consistent with, the approach adopted by almost every judicial or quasi-judicial human rights body in the world. This includes, in particular, the Commission on Human Rights¹⁴² and the Human Rights Committee. In addition, the same approach has been adopted by a wide range of national courts and other judicial bodies such as the Privy Council.¹⁴³ The legal reasoning underpinning these views is thus highly persuasive when it comes to interpreting international human rights norms, whether they be based on treaty or customary law.¹⁴⁴

55. The intuitive argument against the mandatory death penalty is strong - surely, a human facing death merits a chance to present reasons why he or she should be allowed to live – but some still contend that this opportunity may be denied. The principal argument that has been advanced in favour of the compatibility of mandatory death

¹⁴² CHR Res. 2005/59, para. 7 (f).

¹⁴³ The first national court to strike down the mandatory death penalty as a violation of rights was that of the United States Supreme Court in 1976. *Woodson et al. v. North Carolina*, 428 U.S. 280 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987) (clarifying that the holding in *Woodson* did not have exceptions). The Supreme Court of India invalidated that country's last remaining mandatory death penalty law in 1983, and the Constitutional Court of Uganda followed suit in 2005. *Mithu v. State of Punjab*, 2 S.C.R. 690 (1983); *Susan Kigula and 416 others v. Attorney General*, Constitutional Petition No. 6 of 2003, Judgement of 10 June 2005.

Influenced by the reasoning of the US and Indian decisions, international treaty bodies began contributing to the jurisprudence in the mid-1990s. The HRC first found a mandatory death penalty law incompatible with the ICCPR in 1995 and did so in more general terms in 2000. *Lubuto v. Zambia*, Human Rights Committee, No. 390/1990 (1995); *Thompson v. Saint Vincent*, Human Rights Committee, No. 806/1998 (2000). The Inter-American Commission on Human Rights reached the same conclusion in 1999. *Rudolph Baptiste v. Grenada*, Inter-American Commission on Human Rights, Case 11.743, Report No. 38/00 (1999). The Inter-American Court of Human rights confirmed this jurisprudence in 2002. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 (21 June 2002). The most influential recent judgements have been those of the Judicial Committee of the Privy Council. The Privy Council first considered the constitutionality of a mandatory death penalty law in *Ong Ah Chuan v. Public Prosecutor* (1980) and found that law constitutional. *Ong Ah Chuan v. Public Prosecutor* (1980) 3 WLR 855 (Privy Council; appeals from the Court of Criminal Appeals of Singapore). However, in subsequent cases the Privy Council has rejected this line of reasoning and established that the mandatory death penalty is incompatible with human rights. The question of whether the mandatory death penalty violated individual human rights was settled by 2002. *Reyes v. The Queen* [2002] 2 App. Cas. 235 (P.C.), judgement of 11 March 2002 (Belize); *Queen v. Hughes* [2002] 2 App. Cas. 259 (P.C.), judgement of March 2002; *Fox v. The Queen* [2002] 2 App. Cas. 284 (P.C.), judgement of March 2002. See also Eastern Caribbean Court of Appeal, *Spence and Hughes v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997, judgement of 2 April 2001. Later cases have primarily concerned questions of whether those rights were enforceable under particular constitutional schemes. See Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, *American Journal of International Law*, Vol. 98, No. 1 (January 2004), pp. 126-140. In a 2006 case, the Privy Council noted that the evolution of its jurisprudence was due not to the changing content of the law but to the gradual process by which judges came to understand that law: "It is ... clear that it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence on human rights and constitutional adjudication was unfamiliar and, by some courts, resisted." *Bowe v. The Queen*, Privy Council Appeal No. 44 of 2005 (8 March 2006) (appeal from the Court of Appeal of the Bahamas), para. 42.

¹⁴⁴ The Special Rapporteur has, for example, engaged in dialogue with several Governments on the universal significance of the jurisprudence of the Judicial Committee of the Privy Council. E/CN.4/2006/53/Add.1, pp. 34-36, 199-206, 247-249.

sentences with international human rights law has been that, insofar as an offence carrying such a penalty covers only the “most serious crimes”, all of the facts legally relevant to the permissibility of such a sentence will be considered in the course of obtaining a conviction. To this it has been added that other factors relevant to a sense of justice will be considered should the convict exercise his or her “right to seek pardon or commutation of the sentence”.¹⁴⁵ However, the key insight that has emerged from the approach adopted by the world’s human rights bodies has been that the proper application of human rights law - especially of its provisions that “[n]o one shall be arbitrarily deprived of his life”¹⁴⁶ and that “[n]o one shall be subjected to ... cruel, inhuman or degrading ... punishment”¹⁴⁷ - requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty of committing a “most serious crime”.¹⁴⁸ As a result, these factors can only be taken into account in the context of individualized sentencing by the judiciary in death penalty cases.¹⁴⁹

56. The understanding that mandatory death sentences are per se violations of human rights law originates in the efforts of a number of judicial and quasi-judicial bodies to distinguish between mandatory death penalty laws that respected human rights and those that did not. Each began by attempting to discern whether a particular offence for which the death penalty was mandatory was sufficiently narrowly drawn that anyone convicted of that offence could justly receive the death penalty. The process of pursuing this case-by-case approach led to the conclusion that even if the offence had been drafted to cover only the “most serious crimes”, there would invariably be other factors regarding each individual case that would be relevant to the legal determination of whether a death sentence would be consistent with also upholding the defendant’s human rights.¹⁵⁰ The conclusion, in theory as well as in practice, was that respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualized sentencing that accounts for all of the relevant factors.¹⁵¹

57. The Human Rights Committee’s first consideration of the mandatory death penalty turned on the requirement of ICCPR that a “sentence of death may be imposed only for

¹⁴⁵ ICCPR, art. 6(4).

¹⁴⁶ ICCPR, art. 6(1).

¹⁴⁷ ICCPR, art. 7. Note that insofar as a violation of Article 7 results in the deprivation of life it also constitutes a violation of Article 6. *See* ICCPR, art. 6(2): “sentence of death may be imposed only ... not contrary to the provisions of the present Covenant”.

¹⁴⁸ *See also* E/CN.4/2006/53/Add.1, 232-242.

¹⁴⁹ ICCPR, art. 14(5): “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

¹⁵⁰ The relevance of a range of factors has been noted by judicial and quasi-judicial bodies. *See, e.g., Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8 (“defendant’s personal circumstances” and the “circumstances of the particular offence”); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 (21 June 2002), para. 87 (“prior criminal record of the offender”, “the subjective factors that could have motivated his conduct”, “the degree of his participation in the criminal act”, “the probability that the offender could be reformed and socially readapted”, “whether the death penalty is the appropriate punishment or not for the specific case in light of the circumstances of the offender’s conduct”).

¹⁵¹ While this explanation of the reasoning behind these cases is somewhat stylized, it clarifies far more than it obscures.

the most serious crimes”.¹⁵² In *Lubuto v. Zambia* the applicant had been sentenced to death pursuant to a law that made the death sentence mandatory for the offence of aggravated robbery in which firearms were used. The Committee concluded that the offence was defined in an overinclusive manner because it included crimes that “did not produce the death or wounding of any person”.¹⁵³ Because some of the crimes covered by the offence were not among the most serious, a mandatory death sentence was inappropriate. This was not a finding that mandatory death sentences inherently violate international law. Although the mandatory death penalty in question was unacceptable, the Committee’s tacit view was that its defects could be remedied by a legislative amendment that would draw an additional distinction in its codification of the offence.

58. Subsequent cases persuaded the Committee that no such solution was viable in practice. In other words, legislative classifications are inherently overinclusive and that reliable proportionality is achievable only through individualized sentencing.¹⁵⁴ *Thompson v. Saint Vincent* concerned a mandatory death sentence for murder, which was defined to include only “intentional acts of violence resulting in the death of a person”.¹⁵⁵ The Committee found that the mandatory death sentence was “arbitrary”, even in these circumstances, because it would be arbitrary for the court not to consider the “defendant’s personal circumstances” and the “circumstances of the particular offence” in order to ascertain “whether this exceptional form of punishment is appropriate ...”.¹⁵⁶ In *Kennedy v. Trinidad and Tobago*, the Committee went even further when it found a mandatory death sentence for murder, defined to include “situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the victim”, to violate the prohibition on arbitrary deprivation of life.¹⁵⁷ The problem identified by the Committee in this and subsequent cases was not that an individual was being sentenced to death for a crime that was not among the most serious. Rather, it was that conviction for a most serious crime was not per se sufficient to satisfy other requirements of human rights law.¹⁵⁸

¹⁵² ICCPR, art. 6(2).

¹⁵³ *Lubuto v. Zambia*, Communication No. 390/1990 (1995), para. 7.2.

¹⁵⁴ The distinction between evaluating general legislation and individual sentences under human rights law can also be understood as an example of the difference between “macro-policy at the central level” and the “micro-policy of specific law enforcement bodies”. See Liu Renwen, “Strict Restriction on Death Penalty and its Paths in China” in *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).

¹⁵⁵ *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002), para. 7.3.

¹⁵⁸ The HRC has affirmed its holding in *Thompson* in a number of its other final views. *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002); *Carpo et al. v. The Philippines*, No. 1077/2002 (2002); *Pagdayawon Rolando v. Philippines*, Communication No. 1110/2002 (2004); *Ramil Rayos v. Philippines*, Communication No. 1167/2003 (2004); *Hussain et al. v. Guyana*, Communication No. 862/1999 (2005); *Mr. Webby Chisanga v. Zambia*, Communication No. 1132/2002 (2005); *Lawrence Chan v. Guyana*, Communication No. 913/2000 (2006); *Larrañaga v. the Philippines*, Communication No. 1421/2005 (2006); *Raymond Persaud and Rampersaud v. Guyana*, Communication No. 812/1998 (2006).

59. The same logical path - from testing offences carrying a mandatory death sentence for overinclusiveness to requiring individualized sentencing - has been followed by a number of other judicial organs, including the Judicial Committee of the Privy Council¹⁵⁹ and the Supreme Court of India. The latter found in *Mithu* that the sheer range of scenarios in which idiosyncratic circumstances would make the death penalty permissible for one, but impermissible for another in superficially similar circumstances demonstrated the impossibility of a just mandatory death penalty, concluding that: “It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example ‘Theft’, ‘Breach of Trust’ or ‘Murder’. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. ... A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. The infinite variety of cases and facets to each would make general standards either meaningless ‘boiler plate’ or a statement of the obvious. ... The task performed by the legislature while enacting [mandatory death penalty legislation] is beyond even the present human ability”¹⁶⁰

60. The approach uniformly shared by international human rights bodies is entirely consistent with the Court’s conclusion that “law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead”.¹⁶¹

61. Such a conclusion could only be rejected were one to reject the long-standing jurisprudence of the Human Rights Committee that the right to life is the “supreme right” and that “the deprivation of life by the authorities of the State is a matter of the utmost gravity”. Accordingly, “the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities”.¹⁶² It has thus been consistently

¹⁵⁹ The logical structure of the conclusion reached by these various judicial and quasi-judicial bodies was clearly stated by the Privy Council in *Bowe* in the following syllogism: (1) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted;

(2) The criminal culpability of those convicted of murder varies very widely;

(3) Not all those convicted of murder deserve to die.

Bowe v. The Queen, Privy Council Appeal No. 44 of 2005 (8 March 2006) (appeal from the Court of Appeal of the Bahamas), para. 29.

¹⁶⁰ *Mithu v. State of Punjab*, 2 S.C.R. 690, 704, 707-708 (1983) (internal citations and quotation marks omitted).

¹⁶¹ *Mithu v. State of Punjab*, 2 S.C.R. 690, 704 (1983).

¹⁶² HRC, *General Comment 6* (1982) (emphasis added); see also *Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983 (1985), para. 14.

found in practice that permitting mandatory death sentences makes it inevitable that some persons will be sentenced to death even though that sentence is disproportionate to the facts of their crimes. Whatever inexactitude might be tolerated in determining the size of a fine or the length of a sentence in years, uncertainty in the decision between life and death is incompatible with the strict control with which the law must protect the right to life. As the Supreme Court of the United States held when ending that country's use of the mandatory death penalty: "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case".¹⁶³

62. It is clear, therefore, that in death penalty cases, individualized sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life.

[...]

[CONCLUSIONS AND RECOMMENDATIONS]

66. Making the death penalty mandatory for certain crimes, in such a way that a judge is prohibited from taking the circumstances of an individual accused person into account in sentencing, is illegal under international human rights law. This is not to say that countries which retain the death penalty are unable to apply that penalty in the majority of cases involving a most serious crime, but they are obligated to at least provide for the possibility that a judge might find a death sentence impermissible in a particular individual's case because of extenuating circumstances of one kind or another.

Follow-up to Country Recommendations (Jamaica) (E/CN.4/2006/53/Add.2, 28 February 2006, ¶¶ 73-75):

73. An important development did, however, take place with regard to capital punishment. Jamaican criminal law provided for the mandatory death penalty for murder under certain aggravating circumstances, such as murder of a member of the security forces, or murders carried out in the furtherance of a robbery, house -breaking, or sexual abuse. The mandatory death sentence for those categories of murder was abolished by a decision of the Privy Council on 7 July 2004, in the case *Lambert Watson v. the Queen*.¹⁶⁴ Mr. Watson successfully argued that there were mitigating factors in his case which (because of the mandatory death sentence for murder) could not be taken into

¹⁶³ *Woodson et al. v. North Carolina*, 428 U.S. 280, 304-305 (1976) (internal citations omitted).

¹⁶⁴ *Lambert Watson v. the Queen* (Privy Council Appeal No. 36 of 2003), Judgment delivered 7 July 2004, (available at < <http://www.privacy-council.org.uk/files/other/lambert%20watson.jud.rtf>>), particularly paras. 33-34. The Judicial Committee of the United Kingdom Privy Council is the court of final appeal for those Commonwealth countries, including Jamaica, that have retained the appeal to it.

account by the judges, who had no choice but to impose the death penalty once he was convicted of murder.

74. The decision affects the cases of 45 or more prisoners on death row in Jamaica. Their cases have to be re-evaluated by the Court of Appeal. As of 1 September 2005, the Court of Appeal had re-assessed 22 cases, confirming the death penalty in four cases,¹⁶⁵ commuting it to prison sentences between 15 and 45 years in 11 cases, and confirming the decision of the Governor General to commute the death sentence to life imprisonment in seven cases. In at least 23 other cases, including the case of Lambert Watson, the re-assessment was still pending.

Conclusion

75. I welcome the amendments to the Coroner's Act adopted by the Jamaican legislature, and hope that the practice of the Coroners Courts over the coming years will dispel the doubts observers have expressed over the effectiveness of the amendments. The general picture, however, remains that very little was done to implement the recommendations of the Special Rapporteur. ...

76. Also with regard to the death penalty, I note with regret that it would appear that no steps were taken by the Government to bring the application of capital punishment in Jamaica into compliance with international law.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 63-64. 80):

63. The legislation of a significant number of States provides for the death penalty to be mandatory in certain circumstances. The result is that a judge is unable to take account of even the most compelling circumstances to sentence an offender to a lesser punishment, even including life imprisonment. Nor is it possible for the sentence to reflect dramatically differing degrees of moral reprehensibility of such capital crimes. Moreover, in some States even the exercise of clemency is automatically precluded in relation to certain crimes, including those that do not involve violence. It is appropriate, therefore, to note a recent judgement of the Privy Council in response to a ruling by the Court of Appeals of Barbados. The relevance of such a case in the present context is that it was decided on the basis of a careful review of international legal standards. The majority of the Court 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".¹⁶⁶

¹⁶⁵ The four cases are Delroy Stewart (found guilty of the rape and murder of a 12-year-old girl), Mark Watson, for the murder of a 68-year-old security guard to cover up a robbery, Michael Asserope, found guilty of the rape and murder of a 10-year-old girl, and Ian Gordon, convicted for a double murder.

¹⁶⁶ *Boyce and Joseph v. The Queen*, Privy Council Appeal No. 99 of 2002, Judgement of 7 July 2004, para. 6.

64. On that issue, the minority judgement reached the same conclusion, but went into greater detail:

“[T]he 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.”¹⁶⁷

[...]

80. The mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment.

¹⁶⁷ Ibid., para. 81 (3).

F. MOST SERIOUS CRIMES

Report on Mission the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶ 23):

23. States that retain the death penalty may only permit capital punishment for the “most serious crimes.”¹⁶⁸ Under international law, this means crimes requiring an intention to kill that results in the loss of life.¹⁶⁹ However, several U.S. jurisdictions allow the death penalty for lesser crimes. For example, the Federal Death Penalty Act of 1994 permits the death penalty for crimes such as the running of large-scale drug enterprises.¹⁷⁰ During my mission, there was an encouraging development when the U.S. Supreme Court decided in *Kennedy v Louisiana* that the death penalty could not be imposed for the crime of rape of a child where death did not result.¹⁷¹ The Court’s decision brings U.S. law further in line with international human rights law. Federal and state Governments should amend the remaining laws permitting capital punishment to conform to international law.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 83-84, 115):

83. Kenya has had a moratorium on carrying out the death penalty since 1987. However, the death sentence continues to be handed down on a regular basis, and in a manner that violates international law. International law prohibits the mandatory death penalty, and requires individualized sentencing to prevent the arbitrary deprivation of life.¹⁷² International law also strictly limits the crimes for which the death penalty can be applied to cases where it can be shown that there was an intention to kill which resulted in the loss of life.¹⁷³ Further, the death penalty is unlawful where it follows a trial that violates basic due process guarantees.¹⁷⁴

84. However, Kenya has the mandatory death penalty for treason, murder, robbery with violence, and attempted robbery with violence.¹⁷⁵ The provision of the death penalty for robbery with violence is particularly concerning: the elements of the crime create a low threshold for conviction, robbery is very common, and there are many thousands

¹⁶⁸ ICCPR, article 6(2).

¹⁶⁹ See A/HRC/4/20, para. 53.

¹⁷⁰ 18 U.S.C. 3591(b).

¹⁷¹ 128 S. Ct. 2641 (2008). Five states (Louisiana, Montana, Oklahoma, Texas, South Carolina) permitted the death penalty for sexual crimes, not resulting in death, against children. Other positive recent developments in the Supreme Court’s death penalty jurisprudence are *Roper v Simmons* 543 U.S. 551 (2005) (holding that juveniles or persons who committed crimes as juveniles could not be executed) and *Atkins v. Virginia* 536 U.S. 304 (2002) (striking down the death penalty for mentally retarded defendants).

¹⁷² See A/HRC/420, paras. 54-62.

¹⁷³ See A/HRC/420, paras. 39-53.

¹⁷⁴ ICCPR, Arts 6, 14.

¹⁷⁵ See ss 40, 203-204, 295-297, Penal Code of Kenya. “Robbery with violence” is defined as: robbery of a person, with one of the following elements: the crime was committed with another person, or the criminal was armed with a weapon, or physical violence to any person was caused (ss 295-296).

convicted each year. In the period 2004-2007, 15,265 people were convicted of robbery with violence. There is no legal aid for those charged with robbery with violence, and only limited legal aid is provided for those charged with murder. In practice, this means that individuals face a death sentence often without the assistance of legal counsel. The high levels of corruption in the judiciary further call into serious question the fairness of trials.

[...]

115. Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 39-53, 65):

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.¹⁷⁶ 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.¹⁷⁷ 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”,¹⁷⁸ and he began to consider particular situations implicating the most serious crimes limitation.¹⁷⁹ 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.¹⁸⁰ In communications with

¹⁷⁶ E/CN.4/1984/29, paras. 38-40.

¹⁷⁷ ECOSOC Res. 1985/50; see generally *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16 (25 January 1984).

¹⁷⁸ E/CN.4/1985/17, para. 24.

¹⁷⁹ E/CN.4/1985/17, paras. 31-38.

¹⁸⁰ See, e.g., E/CN.4/1997/60, para. 91: “[The *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

Governments, the Special Rapporteur has addressed death sentences for offences and conduct including¹⁸¹ adultery,¹⁸² apostasy,¹⁸³ blasphemy,¹⁸⁴ bribery,¹⁸⁵ acts incompatible with chastity,¹⁸⁶ corruption,¹⁸⁷ drug possession,¹⁸⁸ drug trafficking,¹⁸⁹ drug-related offences,¹⁹⁰ economic offences,¹⁹¹ expressing oneself,¹⁹² holding an opinion,¹⁹³ homosexual acts,¹⁹⁴ matters of sexual orientation,¹⁹⁵ manifesting one's religion or beliefs,¹⁹⁶ prostitution,¹⁹⁷ organization of prostitution,¹⁹⁸ participation in protests,¹⁹⁹ premarital sex,²⁰⁰ singing songs inciting men to go to war,²⁰¹ sodomy,²⁰² speculation,²⁰³ "acts of treason, espionage or other vaguely defined acts usually described as 'crimes against the State'",²⁰⁴ and writing slogans against a country's leader.²⁰⁵ 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.

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.

¹⁸¹ 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.

¹⁸² E/CN.4/2006/53/Add.4, para. 35 (Nigeria); E/CN.4/2006/53/Add.2, para. 150 (Sudan); E/CN.4/2003/3, para. 60 (Nigeria and Sudan); E/CN.4/2000/3, para. 70.

¹⁸³ E/CN.4/2006/53/Add.2, para. 150 (Sudan).

¹⁸⁴ E/CN.4/1994/7, para. 475 (Pakistan).

¹⁸⁵ E/CN.4/1994/7, para. 209 (China).

¹⁸⁶ E/CN.4/2006/53/Add.1, pp. 87-88 (Islamic Republic of Iran).

¹⁸⁷ E/CN.4/1994/7, para. 209 (China).

¹⁸⁸ E/CN.4/2005/7/Add.1, para. 721 (Thailand).

¹⁸⁹ E/CN.4/1999/39/Add.1, para. 236 (Thailand); E/CN.4/2004/7/Add.1, paras. 524-525 (Singapore; *see also* E/CN.4/2004/7, para. 51).

¹⁹⁰ A/51/457 (1996), para. 107.

¹⁹¹ E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83; A/51/457 (1996), para. 107.

¹⁹² E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen).

¹⁹³ E/CN.4/1998/68/Add.1, para. 227 (Iran); E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen).

¹⁹⁴ E/CN.4/2002/74/Add.2, para. 546 (Somalia; *see also* E/CN.4/2002/74, para. 65);

E/CN.4/2006/53/Add.2, para. 150 (Sudan); E/CN.4/2006/53/Add.1, pp. 108-110 (Islamic Republic of Iran).

¹⁹⁵ E/CN.4/2000/3, para. 70.

¹⁹⁶ E/CN.4/1998/68/Add.1, para. 227 (Iran); E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen);

E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83.

¹⁹⁷ E/CN.4/2000/3, para. 70.

¹⁹⁸ E/CN.4/2000/3/Add.1, para. 110 (China).

¹⁹⁹ E/CN.4/2000/3/Add.1, para. 111 (China).

²⁰⁰ E/CN.4/2002/74/Add.2, para. 456 (Nigeria; *see also* E/CN.4/2002/74, para. 115).

²⁰¹ E/CN.4/2005/7/Add.2, para. 56 (Sudan).

²⁰² E/CN.4/2006/53/Add.4, para. 35 (Nigeria).

²⁰³ E/CN.4/1994/7, para. 209 (China).

²⁰⁴ E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83; E/CN.4/2000/3, para. 70.

²⁰⁵ E/CN.4/2002/74/Add.2, paras. 338, 342 (Islamic Republic of Iran; *see also* E/CN.4/2002/74, para. 116).

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): “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.”²⁰⁶

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”.²⁰⁷ 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.²⁰⁸ Various substantive limits on the scope of death penalty laws were thus introduced, including a prohibition of arbitrary deprivations of life

²⁰⁶ 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 *Capital Punishment: Strategies for Abolition* (eds. Hodgkinson & Schabas 2004), p. 46.

²⁰⁷ See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), pp. 113-145.

²⁰⁸ See, e.g., E/CN.4/SR.152, 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.”); E/CN.4/SR.140, 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.”).

(with “arbitrarily” meaning either “illegally” or “unjustly”²⁰⁹), 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.²¹⁰ To determine 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”.²¹¹ This view was widely rejected as unrealistic in the context of a binding legal instrument.²¹² 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”,²¹³ and a

²⁰⁹ A/2929, p. 83, para. 3. *See also* Manfred Nowak, *CCPR Commentary* (2nd revised ed. 2005), pp. 127-128: “Although the term ‘arbitrarily’ was criticized as too vague, the HRCComm [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 HRCComm, 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 HRCComm that arbitrary deprivation of life contained elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness*.”

²¹⁰ A/2929, 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 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, pp. 307-317 (Yemen); E/CN.4/1998/68/Add.1, paras. 221-227 (Islamic Republic of Iran); Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd ed. 1999), p. 220.

²¹¹ A/2929, p. 82, para. 1.

²¹² A/2929, p. 82, para. 1.

²¹³ A/2929, 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 “criticized as lacking precision” and some suggested the explicit exclusion of particular categories of offences from the concept. A/2929, page 84,

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”.²¹⁴ 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.²¹⁵

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.²¹⁶ 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.²¹⁷

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.²¹⁸

para. 6. However, exhaustively enumerating examples proved as difficult in the abstract as it had under the broader rubric of arbitrary deprivation.

²¹⁴ A/2929, p. 82, para. 2; *see also* E/CN.4/SR.140, paras. 2, 13.

²¹⁵ A/2929, p. 82, para. 3.

²¹⁶ *See, e.g.*, E/CN.4/SR.140, 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.”).

²¹⁷ On the contemplated role of the HRC and of world public opinion, *see, e.g.*, E/CN.4/SR.139, 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.*, E/CN.4/SR.139, 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 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.”

²¹⁸ 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.

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.”²¹⁹

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.”²²⁰

50. The safeguards drafted by the Committee were adopted by the Economic and Social Council and subsequently by the General Assembly,²²¹ and the Secretary-General was requested by the Council to report on the implementation of the safeguards by States.²²² 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”.²²³

²¹⁹ *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16, paras. 40-43 (25 January 1984).

²²⁰ *Safeguards*, para. 1.

²²¹ ECOSOC Res. 1984/50 (25 May 1984); GA Res. 39/118 (14 December 1984).

²²² ECOSOC Res. 1990/51 (24 July 1990).

²²³ *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the 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 *Safeguards*, in its *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, 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 non-violent financial crimes or for non-violent religious practice or expression of conscience. (*Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1988), at <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm>.)

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.²²⁴ These include: abduction not resulting in death,²²⁵ abetting suicide,²²⁶ adultery,²²⁷ apostasy,²²⁸ corruption,²²⁹ drug-related offences,²³⁰ economic crimes,²³¹ the expression of conscience,²³² financial crimes,²³³ embezzlement by officials,²³⁴ evasion of military service,²³⁵ homosexual acts,²³⁶ illicit sex,²³⁷ sexual relations between consenting adults,²³⁸ theft or robbery by force,²³⁹ religious practice,²⁴⁰ and political offences.²⁴¹ 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”,²⁴² “imprecise”,²⁴³ “loosely defined”,²⁴⁴ “so broad [as to encompass] a wide range of acts of differing gravity”,²⁴⁵ or “couched in terms so broad that the imposition of the death penalty may be subject to

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.)

²²⁴ 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).

²²⁵ CCPR/CO/72/GTM, para. 17 (2001) (Guatemala).

²²⁶ A/50/40, para. 35 (1995) (Sri Lanka).

²²⁷ CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).

²²⁸ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).

²²⁹ CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).

²³⁰ A/50/40, para. 35 (1995) (Sri Lanka); A/55/40, para. 13 (2000) (Kuwait).

²³¹ CCPR/C/79/Add.1, para. 5 (1992) (Algeria); CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).

²³² 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).

²³³ 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).

²³⁴ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).

²³⁵ CCPR/C/79/Add.84, para. 11 (1997) (Iraq).

²³⁶ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).

²³⁷ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).

²³⁸ CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).

²³⁹ CCPR/C/79/Add.85, para. 8 (1997) (Sudan); CCPR/CO/83/KEN, para. 13 (2005) (Kenya).

²⁴⁰ 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).

²⁴¹ CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).

²⁴² CCPR/CO/75/VNM, para. 7 (2002) (Viet Nam); CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).

²⁴³ CCPR/CO/71/SYR/Add.1, para. 9 (2001) (Syrian Arab Republic).

²⁴⁴ CCPR/C/79/Add.116, para. 14 (1999) (Cameroon).

²⁴⁵ CCPR/C/79/Add.23, para. 8 (1993) (Egypt).

essentially subjective criteria”²⁴⁶ have included legislation regarding “opposition to order and national security violations”,²⁴⁷ “attacks against the internal security of the State”,²⁴⁸ “categories of offences relating to internal and external security”,²⁴⁹ “secession, espionage or incitement to war”,²⁵⁰ a broadly written definition of terrorism,²⁵¹ and various other political offences.²⁵²

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.”²⁵³ 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.²⁵⁴ Second, it has consistently rejected the imposition of a death sentence for offences that do not result in the loss of life.²⁵⁵ Third, the Committee’s conclusion that the death penalty may not be

²⁴⁶ CCPR/CO/72/PRK, para. 13 (2001) (Democratic People’s Republic of Korea).

²⁴⁷ CCPR/CO/75/VNM, para. 7 (2002) (Viet Nam).

²⁴⁸ CCPR/CO/76/TGO, para. 10 (2002) (Togo).

²⁴⁹ A/55/40, para. 13 (2000) (Kuwait).

²⁵⁰ CCPR/C/79/Add.116, para. 14 (1999) (Cameroon).

²⁵¹ CCPR/C/79/Add.23, para. 8 (1993) (Egypt).

²⁵² CCPR/CO/71/SYR/Add.1, para. 9 (2001) (Syrian Arab Republic); CCPR/CO/72/PRK, para. 13 (2001) (Democratic People’s Republic of Korea); CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).

²⁵³ HRC, *General Comment 6* (1982) (emphasis added); see also *Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983 (1985), para. 14.

²⁵⁴ In a series of communications concerning the extradition of persons to a country in which they could face the death penalty, the HRC 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).

²⁵⁵ This has been stated explicitly in the concluding observations on some country reports. See CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran) (“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, para. 13 (2005) (Kenya) (“[T]he

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.²⁵⁶ Indeed, the 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.

[...]

65. The death penalty must, under international law, only be applied for the most serious crimes. This standard, like all others in international human rights law, cannot be interpreted subjectively by each individual country without making a mockery of the basic principle. Over the past two decades international jurisprudence from a wide range of sources has succeeded in bringing clarity to the question of which crimes can legitimately be classified as being the “most serious”. As a result, the death penalty 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.

Follow-up to Country Recommendations (Sudan) (E/CN.4/2006/53/Add.2, 28 February 2006, ¶¶ 150):

150. The death penalty appears to continue to be applicable for the offences of apostasy, homosexual acts and adultery²⁵⁷, which were all found by the Human Rights Committee not to fulfil the criteria of “most serious crimes” when it considered, in 1997, Sudan’s Second Periodic Report under the Covenant.²⁵⁸

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.”)

²⁵⁶ *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2-3. See also E/CN.4/1998/68/Add.3, para. 21: “The notion of most serious crimes was later developed in the 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.”

²⁵⁷ High Commissioner’s Second Periodic Report, p. 27.

²⁵⁸ Concluding Observations on Sudan, (1997) UN Doc. CCPR/C/79/Add. 85, para. 8.

G. RIGHT TO SEEK PARDON OR COMMUTATION OF A DEATH SENTENCE

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (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.²⁵⁹ 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.”²⁶⁰ 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.²⁶¹ The Government argued that clemency procedures ensured that every person sentenced to death received a reconsideration of his or her case prior to execution.

²⁵⁹ The Inter-American Court of Human Rights in the Case of *Fermín Ramírez v. Guatemala*, Judgment of 20 June 2005 (Merits, Reparations and Costs), at http://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.doc, para. 109 concluded that “the right to grace forms part of the international corpus juris”.

²⁶⁰ The same principle is reaffirmed in the Safeguards guaranteeing protection of the rights of those facing the death penalty adopted by the Economic and Social Council in its resolution 1984/50, para. 7.

²⁶¹ Case Concerning *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 12.

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.²⁶² The second part of the right has been jeopardized by developments in Guatemala, beginning with an initiative in 2000 which eliminated the law governing clemency,²⁶³ 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 characterized as lying at “the borderland of legality,”²⁶⁴ 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.²⁶⁵ 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.

²⁶² Nicholas Berg, “Turning a Blind Eye to Innocence: The Legacy of *Herrera v. Collins*”, 42 *Am. Crim. L. Rev.* (2005) 121, at 145-46.

²⁶³ In its observations on the situation in Guatemala the Human Rights Committee expressed its concern over the elimination of the right to pardon. Final Observations of the Human Rights Committee: Guatemala, 27 August 2001, CCPR/CO/72/GTM, 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), at http://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.doc. 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. *Ibid.*, para. 110.

²⁶⁴ Sarat and Hussein, “On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life”, 56 *Stanford Law Review* (2004) 1307, at 1312.

²⁶⁵ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002), para. 7.4.

64. In interpreting the relevant provision of the American Convention on Human Rights, the Inter-American Commission on Human Rights has recognized 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.²⁶⁶ 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.²⁶⁷ The Judicial Committee of the Privy Council reached largely 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.²⁶⁸

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.²⁶⁹ 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.²⁷⁰

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.²⁷¹ 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

²⁶⁶ *Rudolph Baptiste v. Grenada*, Case 11.743 (13 April 2000), para. 121.

²⁶⁷ *Ibid.*; the last of these is also affirmed in *Safeguards*, para. 8.

²⁶⁸ "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.

²⁶⁹ E/CN.4/1998/68/Add.3, para. 102; E/CN.4/1987/20, para. 45.

²⁷⁰ 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." E/CN.4/2006/53/Add.3, para. 26.

²⁷¹ *See, e.g.*, E/CN.4/2006/53/Add.1, pages 232-242.

mean that certain considerations central to matters of mercy are marginalized 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 recognized. 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 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.

H. MILITARY TRIBUNALS AND THE DEATH PENALTY

Report on Mission the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 38-41):

Death penalty under the Military Commissions Act

38. Five men detained at the U.S. Naval Station at Guantánamo Bay, Cuba, have been charged with capital offences under the Military Commissions Act (MCA) and a number of other Guantanamo detainees face charges that may carry the death penalty.²⁷² I welcome the President's decision to seek a stay of all commission proceedings and to order a review of whether, and in what forum, individual detainees may be prosecuted.²⁷³ Such steps send a strong signal that the United States is restoring its commitment to the rule of law in its treatment, detention and prosecution of Guantanamo detainees. However, the President's order appears to leave open the possibility that detainees may still be prosecuted - and subjected to the death penalty - under the MCA. Any such prosecution would be a violation of the United States' obligations under international human rights and humanitarian law because the MCA does not comport with fundamental fair trial principles.

39. The United States has an obligation under international law to provide detainees with fair trials that afford all essential judicial guarantees. No State may derogate from this obligation, regardless of whether persons are to be tried for crimes allegedly committed during peace or armed conflict.²⁷⁴ But the text of the MCA and the experiences of those involved in the military commission process with whom I met indicate that commission

²⁷² Five men were arraigned on 5 June 2008: Khalid Sheik Mohammed; Ramzi bin al-Shibh; Ali Abd al-Aziz Ali; Mustafa Ahmed al-Hawsawi; and Walid bin 'Attash. The five will be tried at a joint trial. They were charged with: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violence of the law of war; hijacking or hazarding a vessel or aircraft; terrorism; and providing material support for terrorism (see: *United States of America v Khalid Sheikh Mohammed et al*, Charge Sheet, 9 May 2008). Two other men faced charges for capital offenses, but the charges were either dismissed or have been withdrawn without prejudice and could be reinstated. On 11 February 2008, U.S. military officials announced charges against Mohammed al-Qahtani for his alleged role in the 11 September 2001 attack, but those charges were dismissed on 9 May 2008. According to the official responsible for approving military commission charges, the charges were dismissed because al-Qahtani had been subjected to torture by U.S. officials over a prolonged period, which had resulted in a negative impact on his health. Bob Woodward, *Detainee Tortured, Says U.S. Official*, Washington Post, Jan. 14, 2009. On 30 June 2008, prosecutors charged Abd al-Rahim Hussein Muhammed Abdu al-Nashiri, for his alleged role in the October 2000 USS Cole attack (see: *United States of America v Abd al-Rahim Hussein Muhammed Abdu al-Nashiri*, Charge sheet, 30 June 2008). Charges against him were withdrawn without prejudice on 5 February 2009. CIA Director Michael Hayden has publicly stated that al-Nashiri was one of three people subjected to waterboarding by the CIA.

²⁷³ Executive Order directing the Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4899 (22 Jan. 2009).

²⁷⁴ See, e.g., International Covenant on Civil and Political Rights, Article 14; UN Human Rights Committee, General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras 11, 16; Geneva Conventions, Common Article 3; International Committee of the Red Cross, *Customary International Humanitarian Law*, Volume 1: Rules, Rule 100.

proceedings utterly fail to meet basic due process standards. I highlight just a few of the more egregious evidentiary due process flaws.²⁷⁵

40. There is now no doubt that detainees at Guantanamo were subjected to torture and coercion; senior Government officials have publicly admitted as much, and non-governmental organizations and counsel for individual detainees have provided credible accounts of cruelty and mistreatment. Contrary to international law, the MCA permits the taint of such coercion to pollute the U.S. justice system because it explicitly allows statements coerced by means such as cruel, inhuman, or degrading treatment to be admitted into evidence.²⁷⁶ Also deeply problematic are the MCA provisions on classified information, which permit the Government to withhold from the defense the sources and methods by which evidence was acquired, and permits the accused to be convicted on the basis of evidence he has never seen.²⁷⁷ The MCA also presumptively permits second and third hand hearsay evidence.²⁷⁸ Together, the provisions on coerced evidence, classified evidence, and hearsay make it likely that evidence obtained through torture, although formally prohibited,²⁷⁹ may in practice be admitted.

41. The MCA's provisions constitute a gross infringement on the right to a fair trial and it would violate international law to execute someone under this statute.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 27-29, 104):

27. During the military era the death penalty was liberally prescribed for a range of offences including economic crimes such as setting fire to public buildings, ships or aircraft, tampering with oil pipelines or electric and telephone cables, and the selling of cocaine. Today Nigerian Federal law prescribes the death penalty only for treason, homicide and armed robbery.

²⁷⁵ The jurisdictional flaws are equally troubling. For example, the MCA's definition of an "alien unlawful enemy combatant" who may be subjected to military commission jurisdiction does not comport with international humanitarian law. The definition elides the fundamental distinctions humanitarian law makes between combatants and non-combatants and between types of armed conflict. MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948a(1) Thus, civilians who have never directly participated in hostilities against the United States and even those without any connection to armed conflict could be militarily prosecuted under the MCA. The MCA's subject matter jurisdiction provisions are also inconsistent with international humanitarian law because they include offenses that are not recognized as war crimes. See, e.g., MCA section 3, amending Subtitle A of Title 10 U.S.C. §950v(b)(25) (offense of "providing material support for terrorism") and §950v(b)(28)(conspiracy).

²⁷⁶ Statements obtained by cruel, inhuman or degrading treatment may be used, if they were obtained before December 2005 and the military judge finds that they are reliable, possess probative value and to do so would be in the interests of justice. See MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(c) and (d).

²⁷⁷ MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949d(f) and Title 10 U.S.C. §949d(b)(2)(B). Classified information can be privileged from disclosure. Also see §949j(c). Such secrecy impedes the defense's ability to answer accusations, and particularly inhibits the accused's ability to investigate whether specific evidence was acquired through torture or other coercion.

²⁷⁸ MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949a(b)(2)(e).

²⁷⁹ MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(b).

28. In 2004 there were 530 condemned convicts on death row in Nigeria. In the course of the Special Rapporteur's visit to several prisons he spoke on an individual basis with more than 20 per cent of this number. It became clear from individual testimony, supported by convincing civil society studies, that torture is consistently used by the Nigeria Police to extract confessions and that these confessions have often been critical to the conviction of persons charged with capital offences. Moreover many defendants in capital trials have effectively had no legal representation and legal aid is not available for appeals.

29. In addition, many of the individuals with whom he met on death row were tried when Nigeria was governed by a military regime, when various constitutional rights were suspended and capital trials were sometimes conducted by military tribunals. The procedural probity of such trials was almost certainly deeply flawed. Another problem is the imposition of the death penalty for crimes committed as a minor.

[...]

104(c). All persons sentenced to death or life imprisonment under martial law should have their convictions reviewed in recognition of the highly unsatisfactory due process protections applied at the time. Since judicial review is probably beyond the capacity of an inefficient and overstretched court system, an administrative procedure should undertake an initial vetting of all such convictions and make recommendations to the Government[.]