

Penal Reform International

Death Penalty Information Pack



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Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ADPAN	Anti-Death Penalty Asia Network
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FHRI	Foundation for Human Rights Initiative
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
MENA	Middle East and North Africa
NCADP	National Coalition to Abolish the Death Penalty
NGO	Non-governmental organisation
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PRI	Penal Reform International
Safeguard	Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
WCADP	World Coalition Against the Death Penalty

International trends toward abolition

There has been a global trend moving toward the universal abolition of the death penalty and a restriction in the scope and use of capital punishment over the last fifty years.

Two thirds of states have abolished in law or in practice

According to the United Nations Secretary-General's eighth quinquennial report on the death penalty (published in 2009), of 198 states and territories in the world, only 47 retain the death penalty. 95 are abolitionist for all crimes, 8 are abolitionist for ordinary crimes (retaining the death penalty for exceptional circumstances, such as crimes in wartime) and 46 are abolitionist in practice (retaining the death penalty, but having not executed anyone during the past 10 years).¹ This means that 149 states and territories have abolished the death penalty in law or in practice.

81 states are permanently committed to abolition

Many states have ratified international and regional instruments that provide for restrictions on the use of the death penalty and its ultimate abolition. According to the UN Secretary-General, 81 states² have already committed themselves to prohibition of the death penalty through ratification or accession to international and/or regional treaties and covenants which prohibit the death penalty in law.

Support for a moratorium is growing

In December 2007, the UN General Assembly (GA) adopted a landmark resolution which called for a moratorium on the use of the death penalty and reaffirmed the UN's commitment towards abolition.³ The resolution was adopted with 104 states in favour, 54 states against and 29 abstentions.

In 2008⁴ and 2010⁵ the UN GA adopted second and third resolutions reaffirming the call for a moratorium. In both years, those voting in favour increased and those voting against decreased, resulting in no less than 13 countries changing their position from voting against to voting in favour or abstaining over a three year period.⁶

It is significant that in 2010 one country in the Arab League voted in favour of the UN moratorium resolution (Algeria, who also co-sponsored the resolution). Eleven abstained or were absent and only nine voted against the resolution. This was a noticeably better result than in 2007, when one Arab League country voted in favour, five abstained or were absent, and 15 voted against. No less than six countries in the League have changed their position from voting against in 2007 to abstaining in 2010.

Of the African Union, no less than four countries changed their position from voting against to abstaining in the 2010 resolution.⁷

¹ *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the Secretary-General to the UN ECOSOC, (18 December 2009) UN document E/2010/10, Table 1. ² *Ibid*, para. 55. ³ UN GA resolution 62/149 (18 December 2007). ⁴ UN GA resolution 63/168 (18 December 2008). ⁵ UN GA resolution 65/206 (21 December 2010). ⁶ In 2008, 106 countries voted in favour, 46 against and 34 abstained. In 2010, 109 countries voted in favour, 41 against and 35 abstained. ⁷ In 2007, 17 African Union states voted in favour, 12 against and 23 abstained or were absent. Notably, in 2010, only 8 African Union states voted against, and 26 abstained or were absent.

Fewer countries execute

The countries where executions continue to be carried out are fewer still. Executions are known to have taken place in 23 countries in 2010, with China, Iran, North Korea, Yemen and the US being the world's most prolific executioners.⁸

The US is the only country in the Americas to carry out executions, with the exception of St Kitts and Nevis which executed one person in 2008.⁹ Even the US presents a varied picture on the death penalty. Of the 34 US states which still retain the death penalty (Illinois being the 16th state to abolish the death penalty on 9 March 2011), only 12 states¹⁰ carried out executions in 2010. Of those 12 states, Texas, Ohio and Alabama carried out 65 percent of those executions.¹¹

Africa is largely free of executions. In 2010, only two countries in sub-Saharan Africa carried out executions: Botswana (1) and Sudan (at least 6).¹²

The Caribbean, as a sub-region, remained free of executions in 2010; only 4 of the 53 member states of the Commonwealth of Nations carried out executions in 2010; and 3 of the 10 member states of the Association of Southeast Asian Nations executed in 2010.¹³

Europe as an execution-free zone

Notably, aside from Belarus¹⁴, Europe is now an execution-free zone. While executions continue to be carried out in Belarus, steps are being taken at the national level to implement a moratorium. A working group on the death penalty was established in February 2010 by the chair of the Belarusian Parliament, and the Belarusian Supreme Court ruled in March 2004 that the death penalty, under the Belarusian Constitution, is merely a temporary measure and that a moratorium on executions could be declared at any time by the President or parliament.¹⁵

Europe acts as a global leader in efforts to abolish the death penalty, and acts both in its bilateral relations with third countries and in multilateral fora to work towards universal abolition and where the death penalty still exists, to call for its use to be progressively restricted.¹⁶

There is a growing recognition in the case law of the European Court of Human Rights (ECtHR) that the death penalty is a violation of human rights. In the 2010 ruling of *Al-Saadoon and Mufdhi v. the United Kingdom*, the ECtHR based its judgement on article 2 of the European Convention on Human Rights (right to life), to justify the duty not to expel or extradite a person who runs a serious risk of being subjected to the death penalty by the receiving country.

⁸ *Death sentences and executions in 2010*, Amnesty International (28 March 2011), AI Index ACT 50/001/2011, p. 5. ⁹ *Ibid*, p. 14. ¹⁰ Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, Ohio, Oklahoma, Texas, Utah, Virginia and Washington. ¹¹ *Execution Database*, Death Penalty Information Centre, <<http://www.deathpenaltyinfo.org/executions>> (accessed 11 January 2011). ¹² *Death sentences and executions in 2010*, supra at note 8, p. 34. ¹³ *Ibid*, p. 6. ¹⁴ All high-level contacts with Belarusian officials have been suspended by the Parliamentary Assembly of the Council of Europe (PACE) in response to Belarus' use of the death penalty. PACE adopted resolutions 1671 (2009) and 1727 (2010) which strongly condemned continued executions in Belarus, and has made any reactivation of Belarus' special guest status for the parliament of Belarus conditional upon the introduction of a moratorium on executions (resolution 1971, para. 19.1 and 22). ¹⁵ See *Capital Punishment in Belarus and Changes of Belarus Criminal Legislation related thereto*, Embassy of the Republic of Belarus in the UK. ¹⁶ EU Guidelines on the Death Penalty, adopted by the European Council in 1998 and reviewed in 2008.

Status of death penalty in other regions

16 of 53 member states of the African Union are abolitionists in law. Gabon was the most recent country to abolish the death penalty in February 2010. A further 20 states are abolitionists in practice.¹⁷

Of the 53 member states of the Commonwealth of Nations, 31 are abolitionists in law or in practice.¹⁸

Civil society and inter-governmental organisations in retentionist states

In those regions where the death penalty still has a firm hold, coalitions and local civil society groups are emerging and raising their profile. This includes the Anti-Death Penalty Asia Network (ADPAN) in Asia and the Pacific region, the National Coalition to Abolish the Death Penalty (NCADP) in the US, the Arab Coalition Against the Death Penalty in the MENA region, and the World Coalition Against the Death Penalty (WCADP) at the international level.

Inter-governmental bodies such as the European Union (EU), the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the African Commission on Human and Peoples' Rights (ACHPR) are also finding active support in their efforts to educate the public and politicians towards change.

For example, the EU Guidelines on the Death Penalty (adopted by the European Council in 1998) have been instrumental in the EU's work in the fight against the death

penalty, and sets out minimum standards on the use of the death penalty.

In 1999, the ACHPR established a Working Group on the Death Penalty in Africa. The Working Group submits regular progress reports to the African Commission on the status of the death penalty in Africa, and has in recent years taken a lead in developing a strategic plan on the abolition of the death penalty in the region.

At the Commonwealth level, the Commonwealth Lawyers Association is opposed to the death penalty, and has a defined policy which commits them to advocate for the abolition of the death penalty in Commonwealth jurisdictions wherever it remains as an available sentence.

The momentum is growing

This momentum towards abolition has significantly grown in the last fifty years. When the Universal Declaration of Human Rights was adopted in 1948, only eight states had abolished the death penalty, and when the International Covenant on Civil and Political Rights (ICCPR) was approved by the UN GA in 1966, only 26 states were abolitionist.¹⁹ In less than fifty years abolition has gone from a minority to an overwhelming majority. States who still practise capital punishment do so in increasing isolation.

¹⁷ *Death sentences and executions 2010*, supra at note 8, p. 6. ¹⁸ Purna Sen, *Human Rights in the Commonwealth*, (London: Commonwealth Secretariat), 2008, p. 78. ¹⁹ Roger Hood, *Towards Global Abolition of the Death Penalty: Progress and Prospects*, a lecture delivered on 21 January 2010, p. 2, <http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (accessed 6 December 2010).

The trend is supported by international human rights standards and norms

This momentum toward abolition can in many ways be seen as influenced by the growing body of international human rights law and the implementation of international and regional covenants and treaties. Other factors have also influenced this trend, such as a better understanding of the arbitrary and discriminatory nature of the death penalty, and evidence-based studies indicating that the death penalty does not have a deterrent effect. However, one of the most profound influences on the abolition movement has been the acceptance by states, international bodies and the public that the death penalty is cruel and unusual punishment, and has no place in civilised society.

Overview of countries covered by PRI's death penalty programme²⁰

Country	Status	Date of abolition	Date of last execution	Voting 2007 UN GA moratorium resolution	Voting 2008 UN GA moratorium resolution	Voting 2010 UN GA moratorium resolution	Co-sponsor of UN GA moratorium resolutions	Status of ratification / accession to the Second Optional Protocol to ICCPR
CENTRAL ASIA								
Kazakhstan	Abolitionist in law for ordinary crimes	2007	N/A	Yes	Yes	Yes	No	-
Kyrgyzstan	Abolitionist in law for all crimes	2007	N/A	Yes	Yes	Yes	Yes – 2008 and 2010 resolutions	6 December 2010 (accession)
Tajikistan	Abolitionist in practice*	N/A	2003	Yes	Yes	Yes	No	-
Uzbekistan	Abolitionist in law for all crimes	2008	N/A	Yes	Yes	Yes	No	23 December 2008 (accession)
EAST AFRICA								
Kenya	Abolitionist in practice**	N/A	1987	Abstain	Abstain	Abstain	No	-
Uganda	Retentionist	N/A	2006	No	No	No	No	-
EASTERN EUROPE								
Belarus	Retentionist	N/A	2010	Abstain	Abstain	Abstain	No	-
Russia	Abolitionist in practice*	N/A	1996	Yes	Yes	Yes	Yes – only 2010 resolution	-
Ukraine	Abolitionist in law for all crimes	1999	N/A	Yes	Yes	Yes	Yes – all three resolutions	25 July 2007 (accession)
MIDDLE EAST AND NORTH AFRICA								
Algeria	Abolitionist in practice**	N/A	1993	Yes	Yes	Yes	Yes – all three resolutions. Only Arab state to co-sponsor.	-
Bahrain	Retentionist	N/A	2010	No	Abstain	Abstain	No	-
Egypt	Retentionist	N/A	2010	No	No	No	No	-
Jordan	Retentionist	N/A	2006	No	Abstain	Abstain	No	-
Lebanon	Retentionist	N/A	2004	Abstain	Abstain	Abstain	No	-
Morocco	Abolitionist in practice**	N/A	1993	Abstain	Abstain	Abstain	No	-
Tunisia	Abolitionist in practice**	N/A	1991	Absent	Absent	Absent	No	-
Yemen	Retentionist	N/A	2010	No	No	No	No	-
SOUTH CAUCASUS								
Armenia	Abolitionist in law for all crimes	2003	N/A	Yes	Yes	Yes	Yes – all three resolutions	-
Azerbaijan	Abolitionist in law for all crimes	1998	N/A	Yes	Yes	Yes	No	22 January 1999 (accession)
Georgia	Abolitionist in law for all crimes	1997	N/A	Yes	Yes	Yes	Yes – all three resolutions	22 March 1999 (accession)

* Russia and Tajikistan declared official moratoriums on death sentences in 1999 and 2004 respectively. Russia's State Duma extended the moratorium in November 2006 until 2010, and at the end of 2009, the Russian Constitutional Court further extended it "until the ratification of Protocol No. 6 to the ECHR".

** Algeria, Kenya, Morocco and Tunisia are deemed abolitionist in practice because they have not carried out an execution for more than ten years.

²⁰ PRI's EU project focuses on supporting governments and other stakeholders in progressing towards the abolition of the death penalty and implementation of human rights standards in criminal justice systems, particularly concerning the treatment of death row, life and long-term prisoners. The programme of work is being carried out in five regions: the Middle East and North Africa, Eastern Europe, South Caucasus, Central Asia and East Africa. The programme, funded under the European Union's Instrument for Democracy and Human Rights (EIDHR), commenced in February 2010 and will run for two years.

International standards and the death penalty

International law does not expressly prohibit the death penalty. However, it does provide for its abolition and sets out restrictions and prohibitions for certain categories and situations.

International and regional principles of abolition

The main international standard in relation to the death penalty can be found in the UN International Covenant on Civil and Political Rights (ICCPR), a legally-binding treaty, which explicitly recognises each person's right to life:

“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.” (article 6(2))

The ICCPR also states that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” (article 7)

These articles mirror principles established in the Universal Declaration of Human Rights (UDHR).

The Second Optional Protocol²¹ to the ICCPR, a legally binding document, commits state parties not to execute and to take all necessary measures within their jurisdiction to abolish the death penalty. It is the main international treaty which prohibits the death penalty.

“No one within the jurisdiction of a State Party to the present Protocol shall be executed. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.” (article 1)

The Second Optional Protocol does however allow state parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.²²

Protocol No. 6²³ to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides for the abolition of the death penalty in Europe: state parties may retain the death penalty for crimes "in time of war or of imminent threat of war".²⁴

Protocol No. 13²⁵ to ECHR provides for the abolition of the death penalty in all circumstances, including time of war or of imminent threat of war.²⁶

Article 2 of the Charter of Fundamental Rights of the European Union also provides that no one shall be condemned to death or executed, and abolition is now a prerequisite for accession to the EU.²⁷

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty²⁸ provides for the total abolition of the death penalty but allows state parties to retain the death penalty in wartime if they make a declaration to that effect at the time of ratifying or acceding to the Protocol.

²¹ Adopted by the UN GA in 1989. ²² At the time of writing, 73 of the 192 UN member states have either acceded to or ratified the Second Optional Protocol to the ICCPR, with 8 states declaring reservations. Kyrgyzstan is the newest state party, having acceded to the Protocol on 6 December 2010 without reservation. An additional 3 states are signatories. ²³ Adopted by the Council of Europe in 1982. ²⁴ At the time of writing 46 of the 47 states of the Council of Europe have either acceded to or ratified Protocol No. 6. The 47th state (Russia) is a signatory. Belarus is not a member of the Council of Europe. ²⁵ Adopted by the Council of Europe in 2002. ²⁶ At the time of writing, 42 of the 47 states of the Council of Europe have either acceded to or ratified Protocol No. 13. An additional three states are signatories. Only Azerbaijan and Russia have neither ratified nor signed the Protocol. ²⁷ All 27 EU member states have abolished the death penalty in law. Only Latvia retains the death penalty, for aggravated murder committed in wartime. ²⁸ Adopted by the General Assembly of the Organization of American States in 1990.

Article 4 of the Convention forbids states from reinstating the death penalty once it has been abolished.²⁹

*committed by **persons below eighteen years of age***. [emphasis added]

The Rome Statute of the International Criminal Court also excludes the death penalty from the list of punishments which the Court is authorised to impose. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have also excluded the death penalty.

Article 4(5) of the American Convention on Human Rights provides that:

*“Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were **under 18 years of age or over 70 years of age**; nor shall it be applied to **pregnant women**.”* [emphasis added]

While the African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights do not provide outright prohibitions on the death penalty, they do make provisions for the right to life and provide restrictions on its use.³⁰

Article 5(3) of the African Charter on the Rights and Welfare of the Child provides that:

*“The death sentence shall not be pronounced for crimes committed by **children**”.* [emphasis added]

Prohibited categories

While international law does not expressly prohibit the death penalty, it does specify categories of people who must not be executed.

Article 2 of this treaty specifies that the term “*child*” refers to anyone under the age of 18.

Article 6(5) of the ICCPR provides that:

*“Sentence of death shall not be imposed for crimes committed by **persons below eighteen years of age and shall not be carried out on pregnant women**.”* [emphasis added]

Article 30(1)(e) of the African Charter on the Rights and Welfare of the Child also provides that a death sentence shall not be imposed on

*“**expectant mothers and mothers of infants and young children**”.* [emphasis added]

Article 37(a) of the UN Convention on the Rights of the Child (CRC) provides that:

Article 4(2)(g) of the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides that states that retain the death penalty shall not:

“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences

*“carry out death sentences on **pregnant or nursing women**”* [emphasis added]

²⁹At the time of writing, 11 of the 34 states of the Organization of American States have either acceded to or ratified the Protocol. ³⁰Article 4 of the African Charter on Human and Peoples’ Rights protects the right to life, and article 5 prohibits torture, cruel, inhuman or degrading punishment and treatment. Article 5 of the Arab Charter on Human Rights protects the right to life, and article 8 prohibits torture, cruel, inhuman or degrading treatment.

Article 7 of the Arab Charter on Human Rights provides that:

*“(1) Sentence 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.*

*(2) The death penalty shall not be inflicted on a **pregnant woman** prior to her delivery or on a **nursing mother within two years from the date of her delivery**; in all cases, the best interests of the infant shall be the primary consideration.” [emphasis added]*

The ECOSOC has recommended that the death penalty be eliminated

*“for persons suffering from **mental retardation or extremely limited mental competence**, whether at the stage of sentence or execution”³¹ [emphasis added]*

The ECOSOC also recommended that member states establish *“a **maximum age** beyond which a person may not be sentenced to death or executed”³² [emphasis added]*

Limitations and restrictions

As well as refraining from executing certain categories of people, states that retain the death penalty are required under international law to observe a number of restrictions and limitations on its use. International law sets out the circumstances under which capital punishment may be imposed or carried out. These restrictions

and limitations have been set out in a number of international treaties and documents, most notably in the ICCPR, the CRC and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by UN ECOSOC resolution 1984/50 of 1984.

International Safeguards include:	
The death penalty may be imposed only for the most serious crimes proscribed by law at the time of its commission.	Article 6(2) ICCPR and Safeguard 1 and 2
Sentence of death may only be carried out pursuant to a final judgement rendered by a competent court.	Article 6(2) ICCPR and Safeguard 5
Fair trial guarantees must be observed, including the presumption of innocence, the minimum guarantees for the defence and the right to adequate legal assistance at all stages of the proceedings.	Article 14 ICCPR and Safeguard 5
Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.	Safeguard 4
There is a right to review or appeal by a court of higher jurisdiction.	Article 14(5) ICCPR and Safeguard 6
There is a right to seek pardon or commutation of the sentence.	Article 6(4) ICCPR and Safeguard 7
Capital punishment shall not be carried out pending any appeal, pardon or commutation procedure.	Safeguard 8
Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.	Safeguard 9

³¹ UN ECOSOC resolution 1989/64, adopted on 24 May 1989. ³² *Ibid.*

Implementation at the national level

Although international law expressly prohibits the death penalty for specific categories of person, it is not always reflected at the national level.

While almost all states have now abolished the death penalty for juveniles, Iran was known to have executed one juvenile offender in 2010, and four other states imposed death sentences on juveniles (Saudi Arabia, Sudan, United Arab Emirates and Yemen).³³ In Iran, judges can impose the death penalty if the defendant has attained “Majority”, defined in Iranian law as nine years for girls and 15 for boys.³⁴ In Saudi Arabia the death penalty can be imposed on children from either puberty or 15 – whichever comes first.³⁵

In Yemen, while the Penal Code sets out a maximum ten-year sentence for capital crimes committed by persons under the age of 18, in a country where only 22 percent of births are registered and there is minimal capacity for forensic age determinations, children can find it impossible to prove their age at the time of the crime.³⁶

In 2005 the US Supreme Court in *Roper v. Simmons*³⁷ outlawed the death penalty for juveniles who were under the age of 18 at the time of the crime, calling the execution of children unconstitutionally cruel, and in 2002 the US Supreme Court in *Atkins v. Virginia*³⁸ prohibited the execution of the “mentally retarded”.

However, the execution of the mentally ill still occurs in many countries.

Consideration of the mental state of a prisoner after sentence is a fairly new concept in Uganda. In 2009, a local human rights NGO, *Foundation for Human Rights Initiative* (FHRI), undertook an assessment exercise and found that 15 percent of the death row population suffered from mental illness.³⁹ In Kenya, people who have become insane while on death row are also not exempted from the death penalty.⁴⁰

³³ *Death sentences and executions 2010*, supra at note 8, p. 13. ³⁴ *The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, and Yemen*, Human Rights Watch (10 September 2008), <<http://www.hrw.org/en/reports/2008/09/10/last-holdouts>> (accessed 9 December 2010), p. 5. ³⁵ *Ibid.*, p. 7. ³⁶ *The Last Holdouts*, supra at note 34, p. 16. ³⁷ *Roper v. Simmons*, 543 U.S. 551 (2005). ³⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002). ³⁹ Information regarding Uganda has been provided by FHRI (Kampala, Uganda) following research into the application of the death penalty (2010). ⁴⁰ Information regarding Kenya has been provided by FHRI (Kampala, Uganda) following research into the application of the death penalty (2010).

Moratorium

A moratorium is a temporary suspension of executions and/or the issuing of death sentences. It is often seen as a necessary step toward narrowing the scope of the death penalty, indicating a change of policy or a growing reluctance towards capital punishment.

Why moratorium?

The hope is that the moratorium ultimately leads to abolition in law. It provides states with the 'breathing room' to undertake necessary reforms, such as:

- Implementing legislative restrictions and undertaking constitutional reforms.
- Strengthening and reforming law enforcement agencies and criminal justice systems.
- Establishing alternative sanctions to the death penalty which respect international human rights standards.
- Commutation of sentences of those already sentenced to death.
- Education of the public and officials.
- The adoption of relevant international human rights treaties.

Although a moratorium is not a required step on the path to abolition, it allows states the time to consider the issues listed above, and to implement them. It ensures that abolition of the death penalty is implemented irreversibly and in a way which reassures the public that justice is upheld and communities are safe. Active involvement of criminal justice professionals, the media, NGOs, religious leaders, politicians etc. is essential for this process to be successful.

Inter-governmental support for moratoria

Inter-governmental organisations have called for states to observe a moratorium as a step towards abolition. In 1999, the African Commission on Human and Peoples' Rights (ACHPR) called upon all state parties to the African Charter on Human and Peoples' Rights to observe a moratorium on the death penalty, in resolution 42. This was later reaffirmed by the ACHPR in 2008 with resolution 136.

In 1996, resolution 1097 of the Parliamentary Assembly of the Council (PACE) of Europe stated that "the willingness... to introduce a moratorium [on executions] upon accession [to the Council of Europe] has become a prerequisite for membership of the Council of Europe on the part of the Assembly."⁴¹

In 2005, the UN Commission on Human Rights also called upon states that still maintain the death penalty "to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions".⁴²

The UN GA moratorium resolutions of 2007, 2008 and 2010 established international support for a moratorium on the death penalty. These resolutions mirrored the trend at the national and regional level, and were seen as a significant step in the international fight towards abolition.

The Parliamentary Assembly of the Organization for Security and Cooperation in Europe (OSCE) adopted a resolution in 2009 which called on all state parties

⁴¹ This position has lead PACE to suspend Belarus' special guest status to the Council of Europe following continued executions. ⁴² UN Commission on Human Rights resolution 2005/59 (April 2005).

who retain the death penalty to declare an immediate moratorium on executions.⁴³

Arab support for a moratorium

In May 2008, representatives of Arab civil society and the Arab coalitions challenging the death penalty issued the Alexandria Declaration. The Declaration called on all Arab states to implement a moratorium on executions. The Alexandria Declaration was recalled and upheld in the subsequent Algiers Declaration (January 2009), Madrid Declaration (July 2009) and at the second Alexandria Conference (September 2010).

Moratoria at the national level

At the national level, certain states who could be described as abolitionist in practice have also implemented an official moratorium, this includes Mongolia in 2010; Democratic Republic of Congo in 2009; Tajikistan in 2004; the Russian Federation in 1999; and Algeria in 1993.

Risks associated with moratoria

While a moratorium is intended to provide a state with a stepping stone toward abolition in law, some states, notably Algeria, Russia and Tajikistan, have continued this status quo for an extended period of time. While PRI commends those states that have put a halt to executions, there is always a risk that if a state does not move from a moratorium to abolishing the death penalty in law, executions may resume.

In 2009 Thailand resumed executions after a six year de facto moratorium, and Taiwan

resumed executions in April 2009 after a five year suspension.⁴⁴

Debates on the reinstatement of the death penalty occasionally resurface in Russia. The issue of retaining the death penalty for those convicted of committing terrorist acts received significant public coverage following the Moscow Metro bombings in March 2010. Immediately after the bombings, the Committee on Judicial and Legal Affairs of the Federation Council (the upper house of the Russian parliament) reportedly began work on a draft law to introduce the death sentence for organisers of terrorist attacks resulting in multiple deaths.⁴⁵ Russian President Dimitry Medvedev demonstrated political leadership by stating that Russia will stick to its international obligations and not reintroduce the death penalty. However, until Russia fully abolishes it in law, there will always be a risk that this sentence could be reintroduced.

Tajikistan is using its moratorium to work toward abolition; in 2010 they established a Working Group on the Study of Social-Legal Aspects of the Abolition of the Death Penalty.⁴⁶

States that have imposed a moratorium on executions often continue to sentence people to death, and subsequently such individuals join those languishing on death row - often for an indeterminate period in day-to-day uncertainty of their fate, and frequently in inhumane conditions - while a state decides how to progress from a moratorium to abolition.

⁴³ Vilnius Declaration of the OSCE Parliamentary Assembly (18th Annual Session, 3 July 2009). ⁴⁴ Report of the Secretary General to the UN GA, *Moratoriums on the Use of the Death Penalty*, UN document A/65/280, 11 August 2010, para. 20. ⁴⁵ Kester Kenn Klomegah, *Death Penalty Lingers in Former Soviet Republics*, IPS News, 5 April 2010, <<http://ipsnews.net/news.asp?idnews=50912>>. ⁴⁶ *Death sentences and executions 2010*, supra at note 8, p. 25.

Although Algeria has not carried out any executions since 1993, death sentences still continue to be passed.⁴⁷ At least 130 death sentences were pronounced in 2010 in Algeria.⁴⁸

The UN Human Rights Committee has called for the sentences of those people currently on death row during moratoria to be commuted,⁴⁹ and to commute the death sentences of all prisoners whose final appeals have been exhausted in any country where no executions have been carried out for more than 10 years.⁵⁰

Russia commuted 697 death sentences to life imprisonment following the extension of the moratorium by the Constitutional Court in 1999.⁵¹

Officials must use the space that a moratorium provides to actively engage and educate the public on the death penalty in order to facilitate full abolition in law. While it is often difficult to engage a public who may appear firmly opposed to abolition, politicians should not shy away from taking the difficult action to protect fundamental human rights.

⁴⁷ Mona Chamass, *Fighting against the death penalty in the Arab World*, World Coalition Against the Death Penalty (February 2010), p. 10.

⁴⁸ *Death sentences and executions 2010*, supra at note 8, p. 5. ⁴⁹ UN document CCPR/CO/69/KGZ, 24 July 2000, para. 8. ⁵⁰ UN document CCPR/CO/83/KEN, 29 April 2005, para. 13. ⁵¹ *Death sentences and executions 2010*, supra at note 8, p. 25.

The death penalty only for the “most serious crimes”

States that retain the death penalty are required under international law to observe a number of restrictions and limitations on its use. One of the most fundamental restrictions deals with the categories of offences for which a person may be sentenced to death. Article 6(2) of the ICCPR provides that:

*“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. ...”* [emphasis added]

Definition of the “most serious crimes”

Interpretation of the phrase, the “most serious crimes” has led to restrictions on the number and types of offences for which death sentences can be imposed under international law.

The UN Human Rights Committee, the UN body tasked with monitoring the implementation and interpretation of the ICCPR has stated:

*“the expression ‘the most serious crimes’ must be read restrictively to mean that the death penalty should be quite an **exceptional measure**”⁵².* [emphasis added]

In fact, the UN Human Rights Committee has interpreted “most serious crimes” as not including: economic offences⁵³, embezzlement by officials⁵⁴, political offences⁵⁵, robbery⁵⁶, abduction not resulting in death⁵⁷, apostasy⁵⁸, and drug-related crimes.⁵⁹

The UN Commission on Human Rights, a subsidiary body of the UN Economic and Social Council (ECOSOC), replaced by the Human Rights Council in 2006, has interpreted “most serious crimes” as not including non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults.⁶⁰

Safeguard 1 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁶¹ also provides that:

*“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.**”* [emphasis added]

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has interpreted Safeguard 1 as excluding the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or

⁵² General Comment No 6 on article 6 of the ICCPR, adopted on 27 July 1982, para. 7. ⁵³ UN document C/PR/CO/79/Add.101, 6 November 1998, para. 8. ⁵⁴ UN document C/PR/CO/79/Add.85, 19 November 1997, para. 8. ⁵⁵ UN document C/PR/CO/79/Add.101, 6 November 1998, para. 8. In relation to political offences the Committee has, in particular, expressed concern about “very vague categories of offences relating to internal and external security” (UN document C/PR/CO/69/KWT, 27 July 2000, para. 13); about vaguely worded offences of opposition to order and national security violations (UN document C/PR/CO/75/VNM, 26 July 2002, para. 7); and about “political offences... couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria” (UN document C/PR/CO/72/PRK, 27 August 2001, para. 13). ⁵⁶ UN document C/PR/CO/83/KEN, 29 April 2005, para. 13. ⁵⁷ UN document C/PR/CO/72/GTM, 27 August 2001, para. 17. ⁵⁸ UN document C/PR/CO/79/Add.85, 19 November 1997, para. 8. ⁵⁹ UN document C/PR/CO/69/KWT, 27 July 2000, para. 13. ⁶⁰ Resolution 2005/59 adopted by UN Human Rights Committee on 20 April 2005. ⁶¹ Approved by UN ECOSOC resolution 1984/50 of 25 May 1984.

political nature - including acts of treason, espionage and other vaguely defined acts usually described as crimes against the state or disloyalty. His interpretation would exclude the possibility of a death sentence for actions primarily related to prevailing moral values, such as adultery and prostitution, as well as matters of sexual orientation.⁶²

The Special Rapporteur has also gone on to say that “the death penalty should be eliminated for crimes such as economic crimes and drug-related offences”⁶³.

Failure of some states to restrict the death penalty in law

Unfortunately, a number of retentionist states go beyond the “most serious crimes” restriction.

There are 32 jurisdictions in the world with laws allowing for the death penalty to be applied for drug offences.⁶⁴

In 2008, proposed amendments to the 1976 Bahrain Penal Code to repeal the death penalty for drug trafficking were defeated by the Shura Council (the Upper Chamber of Parliament).

Morocco has 361 crimes for which the death penalty is applicable⁶⁵, and in Yemen, capital punishment is mentioned in 315 articles, in four laws.⁶⁶ Many of these laws are not only in contravention of international law, but go way beyond what is provided in Sharia law.

The list of death penalty crimes continues to grow in Egypt, and includes drug and terrorism related offences. In October 2002, the UN Human Rights Committee noted that some of Egypt’s capital offences did not conform with the provisions of article 6(2) of the ICCPR.⁶⁷

Crimes connected to terrorism became capital crimes under Algerian law in 2002.⁶⁸

In Saudi Arabia the death penalty may be imposed for a wide range of offences, including for example “sorcery”.⁶⁹

Uganda introduced an anti-homosexuality Bill in 2009 that includes the death penalty for some homosexual acts.⁷⁰ In both Uganda and Kenya robbery, treason, and treachery carry a death sentence.⁷¹

In Iran, the death penalty continues to be applied in political cases, in which individuals are commonly accused of “enmity against God”, and in the cases of sodomy and adultery.⁷²

Pakistan allows the death penalty for crimes of blasphemy.⁷³

⁶² UN document E/CN.4/1999/39, 6 January 1999, para. 63. ⁶³ UN document E/CN.4/1997/60, 24 December 1996, para. 91. ⁶⁴ Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association (2010), p. 7. ⁶⁵ Nadia Binhedo, *Death Penalty Between the Moroccan Legislation and the Demands of Human Rights Movement*, in *Studies on Death Penalty and the Right to Life in the Arab World*, Penal Reform International (2007), p. 11-19. ⁶⁶ Chamass, supra at note 47, p.26. ⁶⁷ UN document CCPR/CO/76/EGY, 28 November 2002, para. 12. ⁶⁸ Chamass, supra at note 47, p.9. ⁶⁹ *Death sentences and executions 2010*, supra at note 8, p. 33. ⁷⁰ *Uganda bill proposes death penalty for homosexuals*, BBC (19 May 2010), <<http://news.bbc.co.uk/1/hi/8693560.stm>> (accessed 10 December 2010). ⁷¹ *FHRI research into the application of the death penalty* (2010). ⁷² Gallahue and Lines, supra at note 64, p.20. ⁷³ *Death sentences and executions 2010*, supra at note 8, p. 11.

State progress is restricting crimes attracting the death penalty

Some states, however, have taken steps to reduce the number of death penalty applicable crimes on their law books.

In May 2010, Jordan amended the Penal Code to abolish the death penalty for two crimes: crimes against the constitutional authorities; and crimes of arson resulting in death.

On 25 February 2011, China amended their Criminal Law to remove 13 of their 68 death penalty applicable crimes. The 13 crimes were economic-related non-violent offences, including smuggling valuables and cultural relics; carrying out fraudulent financial activities; and tax crimes. This is the first time the People's Republic of China has reduced the number of crimes subject to the death penalty since the Criminal Law took effect in 1979.⁷⁴

On 4 April 2011, Gambia abolished the death penalty for drug-related offences, and replaced it with life imprisonment.⁷⁵

⁷⁴ 13 crimes removed from death penalty list, Xinhua News (25 February 2011), < http://www.china.org.cn/china/NPC_CPPCC_2011/2011-02/25/content_22006335.htm> (accessed 28 February 2011). ⁷⁵ Gambia abolishes death penalty for drug-related crimes, Hands Off Cain (4 April 2011).

Right to a fair trial and administrative safeguards in death penalty cases

The right to a fair trial is one of the cornerstones of democracy and the rule of law. It is designed to protect individuals from the unlawful and arbitrary curtailment of basic rights and freedoms, the most prominent of which are the right to life and liberty. It is designed to ensure that all individuals

are protected equally by law throughout the criminal process, from the moment of investigation or detention until the final disposition of their case. A fair trial is particularly important when the outcome could result in the state taking a citizen's life.

Key international standards for a fair trial include:	
All persons shall be equal before the courts.	Article 14(1) ICCPR
The right to a fair and public hearing by a competent, independent and impartial tribunal established by law.	Article 14(1) ICCPR and Safeguard 5
The right to be presumed innocent until proved guilty.	Article 14(2) ICCPR
The right to be informed promptly and in detail in a language which you understand of the nature and cause of the charges against you.	Article 13(3)(b) ICCPR
The right to be tried without undue delay.	Article 14(3)(c) ICCPR
The right to adequate legal assistance of the defendant's own choosing at every stage of the proceedings.	Article 14(3)(d) ICCPR, Safeguard 5 and UN ECOSOC resolution 1989/64 (24 May 1989)
The right to consular communication and assistance for foreign nationals.	Article 36 Vienna Convention on Consular Relations
The right to have adequate time and facilities for the preparation of a defence.	UN ECOSOC resolution 1989/64 (24 May 1989)
The right to communicate with counsel of the defendant's choosing.	Article 13(3)(b) ICCPR
The right to free legal assistance for defendants unable to pay for it.	Article 12(3)(d) ICCPR
The right to examine witnesses for the prosecution and to present witnesses for the defence.	Article 14(3)(e) ICCPR
The right to free assistance of an interpreter if the defendant cannot understand or speak the language used in court.	Article 14(3)(f) ICCPR
The right not to be compelled to testify against yourself or to confess guilt.	Article 14(3)(g) ICCPR
The right to have the sentence reviewed by a higher tribunal.	Article 14 (5) ICCPR and Safeguard 6
All judgements rendered in a criminal case shall be made public.	Article 14(1) ICCPR

The ICCPR is the primary international treaty which sets forth standards for fair trial guarantees, and in particular its article 14. Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁷⁶ also makes provisions for fair trial standards in a capital case.

Other applicable international instruments relating to fair trial standards include the UN Basic Principles on the Independence of the Judiciary⁷⁷; the UN Basic Principles on the Role of Lawyers⁷⁸; the UN Guidelines on the Role of Prosecutors⁷⁹; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁸⁰; and the UN Standard Minimum Rules for the Treatment of Prisoners⁸¹.

Fallibility of judicial systems

Even where all administrative safeguards are respected, there is still a risk of the death penalty being inflicted on the innocent. Criminal justice systems are not infallible. They are open to error and discrimination. Therefore proceedings leading to the imposition of capital punishment must conform to the highest possible standards of independence, competence, objectivity and impartiality in accordance with the pertinent international standards and norms.

National attempts to improve fair trial safeguards: in the US

The US has implemented a number of rules and regulations in capital cases in order to remove risks of error or discrimination. In 1972, the US Supreme Court in *Furman v. Georgia*⁸² found that capital punishment was being applied arbitrarily and often selectively. Following this decision new death penalty laws were enacted in the US to attempt to deal with the arbitrary imposition of the death penalty.⁸³ The American Bar Association has developed guidelines for lawyers in death penalty cases and guidelines for the appointment and performance of defence lawyers in such cases. Sentencing guidelines have also been developed for judges and juries.

However, since 1973, 138 death penalty defendants in the US have had their conviction overturned or been given an absolute pardon based on new evidence of innocence (the last exoneree was released in 2010).⁸⁴ This suggests that even in an advanced criminal justice system which has safeguards in place to guarantee the rights of those facing the death penalty, innocent people may continue to be sentenced and executed. Arbitrary factors like the race of the defendant and the victim, the adequacy of the legal defence, the jurisdiction where the defendant is sentenced, or politicised

⁷⁶ Adopted by UN ECOSOC resolution 1984/50 of 25 May 1984. ⁷⁷ Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN GA resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985). ⁷⁸ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. ⁷⁹ *Ibid.* ⁸⁰ Adopted by UN GA resolution 43/173 (9 December 1988). ⁸¹ Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by UN ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. ⁸² *Furman v. Georgia* 408 U.S. 238 (1972). ⁸³ To address the unconstitutionality of unguided jury discretion, some US states removed all discretion by mandating capital punishment for those convicted of capital crimes. However, this practice was held unconstitutional by the Supreme Court in *Woodson v. North Carolina* (428 U.S. 280 (1976)). Other states sought to limit that discretion by providing sentencing guidelines for the judge and jury when deciding whether to impose death. The guidelines allowed for the introduction of aggravating and mitigating factors in determining sentencing. These guided discretion statutes were approved in 1976 by the Supreme Court in *Gregg v. Georgia* (428 U.S. 153). In addition to sentencing guidelines, three other procedural reforms were approved by the Court in *Gregg v. Georgia*. The first was bifurcated trials, in which there are separate deliberations for the guilt and sentencing phases of the trial. Only after the jury has determined that the defendant is guilty of capital murder does it decide in a second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time. Another reform was the practice of automatic appellate review of convictions and sentence. The final procedural reform from *Gregg v. Georgia* was proportionality review, a practice that helps the state to identify and eliminate sentencing disparities. Through this process, the state appellate court can compare the sentence in the case being reviewed with other cases within the state, to see if it is disproportionate. ⁸⁴ *The Innocence List*, Death Penalty Information Centre <<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>> (accessed 10 November 2010).

factors such as an election year, can impact on the imposition of the death penalty. Justice Harry Blackmun, in the 1994 US Supreme Court ruling, *Callins v. Collins*, determined that, despite the Court's efforts over two decades to ensure its fairness and reliability, the death penalty remained irretrievably flawed:

*"It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."*⁸⁵

Progress in China on fair trials in death penalty cases

In 2007, China re-introduced the power of the Supreme People's Court to review all death penalty verdicts from the provincial High Courts. This decision signalled the introduction of measures, including the development of guidelines, aimed to ensure more consistency in sentencing.⁸⁶

Inadequate legal representation

Many retentionist countries have been criticised for their lack of respect toward fair trial rights, often expressed in failure to guarantee adequate legal representation and legal aid. This includes countries like Yemen⁸⁷ and Uganda.

In Uganda⁸⁸, inadequate legal representation is a serious issue of concern in capital cases. While the right to a lawyer is enshrined in the constitution, the vast majority of Ugandans are poor and unable to afford adequate legal representation. The

services provided by state lawyers have numerous flaws. These range from failure by the lawyers to exercise due diligence in undertaking the necessary investigations and research, failure to employ expert witnesses and failure to disclose evidence that may exculpate their clients.

An overwhelming number of defendants in Uganda report that they do not meet their lawyers until just before trial and are therefore unable to consult and give specific instructions to their counsel. This absence of pre-trial communication directly impacts on counsel's ability to assemble witnesses and generally conduct a good defence, to the risk of the client and others. The situation is exacerbated by the lack of a comprehensive legal aid scheme in Uganda.

Adequate time between sentence and execution

In Equatorial Guinea, four men were executed in 2010 within one hour of being sentenced to death. Their trial did not meet international fair trial standards and the speed of execution denied them their rights of appeal.⁸⁹

To reduce the risk of the innocent, or those subjected to an unfair trial, being executed, states that retain the death penalty should allow adequate time between sentence and execution to ensure that all appeals and petitions for clemency⁹⁰, and any related legal procedures at the international level⁹¹, have been carried out.

The UN Special Rapporteur on extrajudicial,

⁸⁵ *Callins v. Collins*, 510 U.S. 1141 (1994), Blackmun, J., dissenting, p. 1145. ⁸⁶ Xie Chuanjiao, *Graft war yields success, challenges*, China Daily (3 November 2008). ⁸⁷ Chamass, *supra* at note 47, p.26. ⁸⁸ *FHRI* research into the application of the death penalty (2010). ⁸⁹ *Death sentences and executions 2010*, *supra* at note 8, p. 12. ⁹⁰ Safeguard 8. ⁹¹ UN Commission on Human Rights resolution 2005/59 (20 April 2005).

summary or arbitrary executions has recommended:

"that States establish in their internal legislation a period of at least six months before a death sentence imposed by a court of first instance can be carried out, so as to allow adequate time for the preparation of appeals to a court of higher jurisdiction and petitions for clemency.⁹² ... Such a measure would prevent hasty executions while affording defendants the opportunity to exercise all their rights.⁹³"

In 1996, the UN ECOSOC called upon retentionist states "to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question."⁹⁴

Secret executions following unfair trials

Before Tajikistan implemented an official moratorium, secret executions following unfair trials was a notorious practice.⁹⁵

Belarus carried out two executions in total secrecy in March 2010. Andrei Zhuk and Vasily Yuzepchuk were executed while their cases were still being examined by the UN Human Rights Committee.⁹⁶

In December 2006, the ACHPR called upon Egypt to stay the execution of three men (Muhammed Gayiz Sabbah, Usama 'Abd al-Ghani al-Nakhlawi and Yunis Muhammed

Abu Gareer) convicted of terrorist offences in order to examine complaints that the trial was grossly unfair. However, reports were received that the Egyptian Government's delegation indicated to the African Commission that the legal adviser in the office of the President had advised the President to ratify the death sentences.⁹⁷ It is unknown if the sentences were carried out.

⁹² UN document E/CN.4/1996/4, 25 January 1996, para. 553. ⁹³ UN document E/CN.4/1998/68, 23 December 1997, para. 118. ⁹⁴ UN ECOSOC resolution 1996/15 (23 July 1996), para. 6. ⁹⁵ One such example involved a case referred to the UN Human Rights Committee, where the Tajikistan authorities did not inform the family or the individual under sentence of death of the date of execution. The Human Rights Committee held that the secrecy surrounding the date of execution, as well as the failure to inform the family of the place of burial, as well as the refusal to hand over the body for burial, is in violation of article 7 of the ICCPR (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment). See, *UN Human Rights Committee Communication No. 985/2001: Tajikistan* (16/11/2005) para. 6.7. ⁹⁶ PACE document 12223 on the situation in Belarus (27 April 2010). ⁹⁷ UN document A/HRC/8/4/Add.1, 28 May 2008, para. 119.

Mandatory death penalty

In some national legislation, judges have no option but to impose the death penalty for certain crimes or in certain circumstances. This removes the opportunity to have mitigating evidence taken into account, such as the nature and circumstances of the offence, the defendant's own individual history, their mental and social characteristics and their capacity for reform.

International norms

In relation to the automatic and mandatory imposition of the death penalty, the UN Human Rights Committee has stated that it:

*“constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the [International] Covenant [on Civil and Political Rights], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence”.*⁹⁸

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the death penalty should under no circumstances be mandatory by law, regardless of the charges involved⁹⁹, and that:

“[t]he 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”.*¹⁰⁰

National developments

Recent years have seen a worldwide trend in abolishing the mandatory death penalty.

The US ruled the mandatory death penalty unconstitutional in 1976¹⁰¹ for three reasons: first, the law “depart[ed] markedly from contemporary standards” concerning death sentences. Second, the law provided no standards to guide juries in their exercise of “the power to determine which first-degree murderers shall live and which shall die.” Third, the sentence failed to allow consideration of the character and record of individual defendants before inflicting the death penalty. The Court noted that “the fundamental respect for humanity” required such considerations.

More recent examples of abolition of the mandatory death penalty include Guyana in 2010¹⁰², Kenya in 2010¹⁰³, Uganda in 2009¹⁰⁴, Malawi in 2007¹⁰⁵ and the Bahamas in 2005¹⁰⁶. In March 2002, the UK Privy Council's Judicial Committee (which is the highest court of appeal for several independent Commonwealth countries) unanimously ruled that mandatory death penalty laws were unconstitutional. This ruling extended to Belize¹⁰⁷ and the Eastern Caribbean countries of St. Christopher and Nevis¹⁰⁸, Antigua and Barbuda, St. Lucia¹⁰⁹, St. Vincent¹¹⁰, Grenada, and Dominica.

⁹⁸ *Pagdayawon Rolando v. Philippines*, views of the UN Human Rights Committee, Communication No. 1110/2002, UN document C/PR/C/82/D/1110/2002, 8 December 2004, para. 5.2. ⁹⁹ UN document E/CN.4/1999/39, 6 January 1999, para. 63. ¹⁰⁰ UN document E/CN.4/2005/7, 22 December 2004, para. 80. ¹⁰¹ *Woodson v. North Carolina* 428 U.S. 280 (1976). ¹⁰² In October 2010, Guyana's parliament voted to abolish the mandatory death penalty for people convicted of murder unless they have killed members of the security forces or the judiciary. ¹⁰³ *Godfrey Ngotho Mutiso v. the Republic* (Criminal Appeal No. 17 of 2008), ruling passed in 2010. ¹⁰⁴ *Attorney General v. Susan Kigula and 417 Others* No. 03 of 2006, Uganda Supreme Court, 21 January 2009. ¹⁰⁵ *Francis Kafantayeni and others v. The Attorney General of Malawi*, Constitutional Case No. 12 of 2005 [2007] MWHC 1 (27 April 2007). ¹⁰⁶ *Bowe & Davis v. The Queen (The Bahamas)* [2006] UKPC 10. ¹⁰⁷ *Reyes v. The Queen (Belize)* [2002] 2 AC 235. ¹⁰⁸ *Fox v. The Queen (St Christopher & Nevis)* [2002] 2 AC 284. ¹⁰⁹ *The Queen v. Hughes (St Lucia)* [2002] 2 AC 259. ¹¹⁰ *Spence & Hughes v. The Queen (St Vincent and the Grenadines and St Lucia)* Crim. App. Nos. 20 [1998] & 14 [1997], (judgment given 2 April 2001) (E. Carib.).

However, many states still retain the death penalty as a mandatory sentence. Singapore retains the mandatory death penalty for ordinary crimes, including murder, kidnapping, treason and drug-related offences. In 2004, Trinidad and Tobago overturned a successful challenge to the constitutionality of the mandatory death penalty.¹¹¹ In India, murder by a convict serving a life sentence is punishable by a mandatory death sentence. In Japan, inciting foreign aggression is punishable by a mandatory death sentence.

The need for discretion and sentencing guidelines

Abolition of the mandatory death penalty has subsequently seen a trend towards developing sentencing guidelines aimed at guiding judges and juries in deciding whether this exceptional form of punishment is appropriate.

These guidelines provide a set of uniform policies for the application of the discretionary sentence of death. This helps to avoid sentencing disparities and reduce the risk of the death penalty being applied arbitrarily.

While it is neither possible nor desirable to compile an exhaustive list of relevant aggravating and mitigating factors, courts should retain the discretion to allow consideration of all relevant factors. The following aggravating and mitigating factors could be taken into consideration in sentencing in capital cases:¹¹²

- Type and gravity of the offence.
- Nature and circumstances in which the offence was committed.
- Mental state of the defendant, including any degrees of diminished responsibility.
- Provocation, "undue influence", "battered wife syndrome" etc.
- Lack of premeditation.
- Character of the defendant – including criminal record.
- Remorse.
- Capacity for defendant to reform and their continuing dangerousness.
- Views of the victim's family.
- Delay up until time of sentence.
- Guilty pleas.
- Prison conditions.

¹¹¹ *Matthew v. The State (Trinidad & Tobago)* [2004] 64 WLR 412 overturned the previously successful challenge to the constitutionality of the mandatory death penalty in *Roodal v. The State (Trinidad & Tobago)* [2004] 2 WLR 652. ¹¹² For further information on sentencing guidelines, see Edward Fitzgerald QC and Keir Starmer QC, *A Guide to Sentencing in Capital Cases*, Death Penalty Project (2007), <http://www.deathpenaltyproject.org/content_pages/27> (accessed 6 October 2010).

Conditions of imprisonment for those under sentence of death

Although they should enjoy the same rights as other prisoners under international human rights standards and norms, prisoners on death row are often detained in conditions that are far worse than those for the rest of the prison population. They suffer isolation for long and indeterminate periods of time, inactivity, inadequate basic physical provisions, have limited links and contacts with their relatives and lawyers, and are sometimes treated violently and without respect for human dignity.

Prisoners are often held on death row for many years while they go through lengthy appeal procedures, or when a state has suspended executions but has not abolished the death penalty or commuted existing sentences. As a result of these conditions, as well as the stress of facing a death sentence, death row prisoners are vulnerable to mental strain, legal frustrations, and physical and emotional neglect for months, years, and even decades.

Such conditions often amount to cruel, inhuman or degrading treatment or punishment, as prohibited in article 7 of the ICCPR.

Conditions contrary to international human rights standards and norms

The UN Human Rights Committee has expressed concern about poor living conditions of death row inmates, including undue restrictions on visits and correspondence,¹¹³ small cell size and lack

of proper food and exercise,¹¹⁴ extreme temperatures, lack of ventilation, cells infested with insects, and inadequate time spent outside cells,¹¹⁵ and has called on states to improve these conditions in line with the requirements of the provisions of the ICCPR, including article 7 (prohibition of torture and cruel, inhuman or degrading treatment) and article 10(1) (respect for the human dignity of persons deprived of their liberty).

In 1989 the ECtHR found the “death-row phenomenon” constituted inhuman and degrading punishment.¹¹⁶ The Court found that:

*“having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, ... the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3”*¹¹⁷ [of the European Convention on Human Rights].”

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment declared the overcrowding, extreme temperatures, inadequate nutrition and isolation typical of the experience of death row prisoners may amount to cruel treatment.¹¹⁸

The Special Rapporteur also identified the practice of handcuffing and shackling with leg irons of death row inmates 24 hours per day and in all circumstances (i.e. including

¹¹³ UN document CCPR/CO/79/Add.102, 19 November 1998, para. 21. ¹¹⁴ UN document CCPR/CO/71/UZB, 26 April 2001, para. 10. ¹¹⁵ *Safarino Kurbanova v. Tajikistan*, views of the Human Rights Committee, Communication No. 1096/2002, UN document CCPR/C/79/D/1096/2002, 12 November 2003, para. 7.8. ¹¹⁶ *Soering v. UK*, Series A, No. 161, 7 July 1989, para. 111. ¹¹⁷ Article 3 of the ECHR prohibits torture, and inhuman or degrading treatment or punishment. ¹¹⁸ UN document E/CN.4/2006/6/Add.4, 20 December 2005.

during meals, visits to the toilet, etc.) as inhuman and degrading, and serving only as an additional form of punishment of someone already subjected to the stress associated with having been sentenced to death.¹¹⁹

Death row prisoners are entitled to the same basic conditions as other categories of prisoners, as set out in the UN Standard Minimum Rules for the Treatment of Prisoners¹²⁰, and elsewhere. Their treatment and care in prison should be determined by individual need rather than the type of sentence they are serving, which may indeed require them to receive a higher standard of treatment. In resolution 1996/15¹²¹, the UN ECOSOC urged UN member states to apply the Standard Minimum Rules for the Treatment of Prisoners “in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering”.

Uganda as an example of death row conditions

In 2009, research conducted by Ugandan-based FHRI found that death row prisoners reported poor living conditions, particularly overcrowding, with little space between bodies during sleep. Other prisoners reported that the food available was not suitable for their health needs, and difficulty in accessing health facilities, especially where the health facilities were outside the prison and where the condition required a specialist. There was a shortage of medicines e.g. antiretroviral drugs for HIV inmates. Mental health problems were

common. Although the prison system had a hospital referral system, there were only 12 psychiatrists in the country, so only the severe cases got treatment and only a few were transferred to the psychiatric hospital.

In the 2009 landmark ruling of *Attorney General v. Susan Kigula*¹²², the Ugandan Supreme Court ruled that holding prisoners on death row for more than three years amounts to excessive delay, making the death penalty inappropriately severe as it then amounts to double punishment. More than three-quarters of the death row population will benefit from this judgement, having their sentences commuted to life imprisonment (20 years).

For further information of international standards and norms related to prison conditions, see Penal Reform International’s information pack on *Alternative Sanctions to the Death Penalty*.

¹¹⁹ UN document E/CN.4/2006/6/Add.6 (10 March 2006), para. 68. ¹²⁰ Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the UN ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹²¹ Adopted by the UN ECOSOC on 23 July 1996. ¹²² *Attorney General v. Susan Kigula and 417 Others* No. 03 of 2006, Uganda Supreme Court, 21 January 2009.

Clemency and pardon procedures

Clemency and pardon procedures play an important part in death penalty cases. They present the state with a final, deliberative opportunity to reassess this irrevocable punishment. Under article 6(4) of the ICCPR all individuals sentenced to death have the right to seek pardon or commutation of the sentence. However, while a defendant has the right to seek pardon or commutation, it is often only granted in extreme circumstances.

Access to clemency procedures

In most retentionist states, pardon or clemency can be sought both while the various appeals and confirmation procedures are pending as well as after a final judgment has been announced. However some jurisdictions require that all appeal processes be exhausted before pardon or clemency petitions are submitted.

Sometimes petitions are prepared without the knowledge of the prisoner, who may not even sign the document, and therefore they and/or their representatives will have no opportunity to play an active part in the process. In other jurisdictions, a pardon or clemency review will have to be requested by the person under sentence of death or by the person's attorney or relatives acting with the person's written and signed authorisation. Therefore it is essential that the prisoner's representatives have full notice of all deadlines.

Decision making and due process

In almost all retentionist countries, pardons and clemency are decided through the executive branch of government on a discretionary basis.

The executive can follow the recommendations for pardon or clemency issued by a government minister (usually the minister of justice), a pardons or clemency board, a judge or advisory committee. However the executive often has the discretionary power to make a decision without such a recommendation.

The wide discretionary power of the executive to issue pardons or clemency is considered controversial. It has often been applied inconsistently, selectively, arbitrarily, or without strict, publicly accessible guidelines.

Some states have begun to apply due process protection to clemency and pardon proceedings, and to develop criteria for assessing such applications. Where this applies, lawyers must be ready to present a persuasive argument to the decision-maker. Such arguments can include legal or factual claims, be based on mitigating factors or changes at the national level of the use of the death penalty.

Reasons for granting a pardon or clemency can be based on:

- Doubts about the defendant's guilt or reliability of the trial, forgiveness of the crime, to mitigate a penalty.
- The defendant demonstrating remorse or forgiveness by the victim/s, payment of reparations to the victim/s, the offender's own good conduct

subsequent to his conviction and after, demonstration that the offender has fulfilled their debt to society.

- Issues related to changing government policy.
- Widespread public attention because of the nature of the offence or the identity of the applicant.
- Reasons completely unrelated to the crime, for example, prison conditions, or to celebrate a national day.

Suspension of executions during pardon procedure

International law provides that while a pardon or commutation procedure is pending, executions should not be carried out.¹²³ Cases of executions going ahead before all avenues of appeal or clemency or pardon procedures have been completed demonstrate the importance of a full and transparent notice of any deadlines and/or dates of execution to both the prisoner and his representative (this should include both family and legal representatives where relevant). In 1996, the UN ECOSOC called upon retentionist states “to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question.”¹²⁴

Clemency and pardons in national practice

Since 1976, 252 death row inmates in the US have been granted clemency for “humanitarian reasons” in the US (including five commutations in 2010).

Humanitarian reasons include doubts about the defendant's guilt or conclusions of the governor regarding the death penalty process. The clemency process varies from state to state, but typically involves the governor (executive power) or board of advisors or both.¹²⁵

In Morocco, the King regularly grants clemency to death row inmates. In July 2009, Moroccan King Mohammed VI pardoned approximately 24,000 prisoners to mark the 10th anniversary of his coronation. Many people on death row had their sentences commuted to life imprisonment.¹²⁶

The Kenyan President commuted the sentences of the country's 4,000 death row inmates to life imprisonment in August 2003.¹²⁷ In December 2010, Cuba's Supreme Court commuted the last person on death row to 30 years in prison.¹²⁸

In Belarus, clemency comes under the power of the President, but has not been granted since 1994.

¹²³ *Safeguard 8*, ¹²⁴ UN ECOSOC resolution 1996/15, 23 July 1996, para. 6. ¹²⁵ *Clemency*, Death Penalty Information Center, <<http://www.deathpenaltyinfo.org/clemency>> (accessed 13 January 2011). ¹²⁶ *Morocco: King Pardons Prisoners, Hands Off Cain* (30 July, 2009), <http://www.handsoffcain.info/archivio_news/200907.php> (accessed 12 January 2011). ¹²⁷ Thomas Hubert, *4,000 death sentences commuted in Kenya*, World Coalition Against the Death Penalty (8 August 2009), <<http://www.worldcoalition.org/modules/smartsection/item.php?itemid=359>> (accessed 11 January 2011). ¹²⁸ Andrea Rodriguez, *Cuba commutes death sentence against US man*, Associated Press (28 December 2010), <http://news.yahoo.com/ap/20101229/ap_on_re_la_am_ca/cb_cuba_death_sentence> (accessed 10 January 2011).

Execution

All executions constitute cruel, inhuman and degrading punishment. While states continue to defend their right to execute, international standards and norms can only seek to mitigate the suffering involved, both physical and mental. Accordingly, the UN ECOSOC has stated that where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.¹²⁹

Methods of execution

Current methods of execution around the world include: hanging, shooting, beheading, stoning, gas asphyxiation, electrocution and lethal injection.

The UN Human Rights Committee has called for the abolition in law of the penalty of death by stoning.¹³⁰ According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment “certain methods, such as stoning to death, which intentionally prolong pain and suffering, amount to cruel, inhuman or degrading punishment.”¹³¹ Iran continues to execute people by stoning in 2010, and death sentences by stoning were reportedly imposed in Nigeria and Pakistan.¹³²

Execution by gas asphyxiation has also been addressed by the UN Human Rights Committee in *Ng v. Canada*, in 1993, where it found that execution by gas amounted to cruel and inhuman treatment.¹³³

In Tanzania, the High Court found that the death penalty was unconstitutional on the grounds that execution by hanging violates the right to be treated with dignity and constitutes an inherently cruel, inhuman and degrading treatment.¹³⁴

In the US, where the primary method of execution is by lethal injection, there have been examples of failed execution attempts. In 2009 in the state of Ohio, the execution of Romell Broom was halted on the grounds that the prisoner was suffering cruel and unusual punishment.¹³⁵ The technical team spent almost two hours trying to locate a usable vein in which to inject the lethal drugs. Even with the assistance of the condemned prisoner, they failed to locate a vein.

The "tools" of execution

In 2006, the EU introduced groundbreaking controls to prohibit and restrict the international trade in equipment that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, through Council Regulation (EC) No. 1236/2005. The prohibition on the export of goods used for capital punishment reflects the EU's political and legal commitment to the abolition of the death penalty.

The EC Regulation, which is directly binding on all 27 EU member states and has the status of national law in all these states, bans the export of ‘goods designed for the execution of human beings’. This includes gallows,

¹²⁹ UN ECOSOC resolution 1984/50 (25 May 1984). ¹³⁰ UN document CCRP/CO/84/YEM, 9 August 2005, para. 15. ¹³¹ UN document A/HRC/10/44 (14 January 2009), para. 39. ¹³² *Death sentences and executions 2010*, supra at note 8, p. 6. ¹³³ *Ng v. Canada*, communication No. 469/1991, 5 November 1993, para 16.4. ¹³⁴ *R v. Mbushuu alias Dominic Mnyaroro and Kalai Sangula*, (1994) TLR 154. ¹³⁵ *New Revelations of Inmate's Struggles During Ohio Execution Attempt*, Death Penalty Information Center, <<http://www.deathpenaltyinfo.org/new-revelations-inmates-struggles-during-ohio-execution-attempt>> (accessed 10 December 2010).

guillotines, electric chairs, gas chambers and 'automatic drug injection systems for the purpose of execution of human beings by the administration of a lethal chemical substance'. It does not, however, control the trade in drugs used in the lethal injection protocol: sodium thiopental, pancuronium bromide (Pavulon), potassium chloride and pentobarbital. This legal loophole has recently been exploited by an UK company, which exported sodium thiopental to the state of Arizona, in the US, to be used in the execution of Jeffery Landrigan on 26 October 2010.¹³⁶ International death penalty coalitions and local civil society groups are urging the European Commission to close this loophole at their earliest opportunity. This would send a strong message to retentionist states: if those states wish to carry out executions, they should not receive assistance – either directly or indirectly – from Europe.

Significantly, the US has recently introduced comparable export controls. In July 2010, the US Commerce Department added 'equipment designed for the execution of human beings'¹³⁷ to its Commerce Control List. This means that any company seeking to export electric chairs, lethal injection equipment or other execution equipment to any foreign country must first obtain a US export licence. These new controls were implemented 'because equipment designed for the execution of human beings has a clear nexus to crime control and an obvious potential use in repressing human rights'.¹³⁸

Notification of date of execution

The failure to notify the family and lawyers of the prisoners on death row of their execution has been found by the UN Human Rights Committee to be incompatible with the ICCPR.¹³⁹ The Special Rapporteur on extrajudicial, summary or arbitrary executions has submitted that the practice of informing death row prisoners of their impending execution only moments before they die, and their families only later, is "inhuman and degrading".¹⁴⁰

Incompatibility of this practice with the provisions of the ICCPR was upheld in the case of *Staselovich v. Belarus*, where the UN Human Rights Committee found the failure by Belarusian authorities to notify a mother of the scheduled date for execution of her son, and persistent failure to notify her of the location of her son's grave amounted to inhuman treatment vis-à-vis the mother.¹⁴¹

Before Tajikistan implemented an official moratorium, secret executions was a notorious practice, and again the UN Human Rights Committee found the failure of Tajik authorities to inform the family of the place of burial, as well as the refusal to hand over the body for burial, was in violation of article 7 of the ICCPR (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).¹⁴²

¹³⁶Submission to the European Commission on amending Council Regulation (EC) No. 1236/2005 to include drugs used in the 'automatic drug injection systems for the purpose of execution of human beings by the administration of a lethal chemical substance', (5 January 2011), <<http://www.penalreform.org/news/review-council-regulation-ec-no-12362005-include-drugs-used-lethal-injection-protocol>> (accessed 13 January 2011). ¹³⁷Rule ECCN 0A981.

¹³⁸Revisions to the Commerce Control List To Update and Clarify Crime Control License Requirements: A Rule by the Industry and Security Bureau, Federal Register (15 July 2010), <<http://www.federalregister.gov/articles/2010/07/15/2010-17338/revisions-to-the-commerce-control-list-to-update-and-clarify-crime-control-license-requirements#p-31>> (accessed 8 December 2010). ¹³⁹UN document CCRP/CO/79/Add.102, 19 November 1998, para. 21. ¹⁴⁰UN document E/CN.4/2006/53/Add.3, 24 March 2006, para. 32. ¹⁴¹Mariya Staselovich (and Igor Lyashkevich) v. Belarus, communication No. 887/199, decision of 3 April 2003, para. 9.2. ¹⁴²See, UN Human Rights Committee Communication No. 985/2001: Tajikistan (16 November 2005) para. 6.7.

Unfortunately other retentionist countries continue this practice. In Uganda, prisoners are given 72 hours' notice before execution. Relatives are never informed and the body is "disposed off" by the state, not handed to the relatives.¹⁴³

In Belarus, Botswana, Egypt and Japan, prisoners are not informed of the date of their execution, and their families and lawyers are only told afterwards.¹⁴⁴

Condemnation of public executions

The UN Human Rights Committee has stated that public executions are incompatible with human dignity.¹⁴⁵ In resolution 2005/59¹⁴⁶, the UN Commission on Human Rights urged all states that still maintain the death penalty "to ensure that, where capital punishment occurs, it... shall not be carried out in public or in any other degrading manner". This means that all humiliations and parading of prisoners before execution should be prohibited.

Public executions were known to have been carried out in Iran (14 executions), North Korea and Saudi Arabia during 2010.¹⁴⁷

¹⁴³ Information provided by FHRI (Kampala, Uganda), 2010. ¹⁴⁴ *Death sentences and executions in 2010*, supra at note 8, p. 6. ¹⁴⁵ UN document CCPR/C/79/Add.65, 24 July 1996, para. 282. ¹⁴⁶ Adopted by UN Human Rights Committee on 20 April 2005. ¹⁴⁷ *Death sentences and executions 2010*, supra at note 8, p. 6.

Transparency

Transparency as to the procedures surrounding death penalty cases can prevent errors or abuses and safeguard fairness at all stages. Without it the rights of those facing the death penalty are undermined. Accordingly, the UN Secretary General has stated that:

“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.”¹⁴⁸

A lack of transparency also 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. Moreover, secrecy prevents open and informed public debate about the death penalty, and undermines reform efforts. It contradicts the claim that capital punishment is a legitimate act of government. Transparency is a fundamental requirement in death penalty cases, and retentionist states that justify the death penalty on the basis of alleged public support should be prepared to provide that public with information on state practice in relation to the death penalty.

Inter-governmental support for transparency

The UN ECOSOC urged, in 1989, all states that retain the death penalty 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”.¹⁴⁹

The 2007 and 2008 UN GA moratorium resolutions called upon states to “provide the [UN] Secretary-General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty”. The 2010 UN GA moratorium resolution calls upon all states to “make available relevant information with regard to their use of the death penalty, which can contribute to possible informed and transparent national debates.”

However, the UN Secretary General has expressed concern that there has been a “lack of transparency on the part of many governments in relation to the number and characteristics of individuals sentenced to

¹⁴⁸Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN document E/CN.4/2005/7, 22 December 2004, para. 87. ¹⁴⁹UN ECOSOC resolution 1989/64, adopted on 24 May 1989, para. 5.

death and executed. In some countries, this information is treated as a state secret.”¹⁵⁰

At the regional level, the PACE condemned the practice of carrying out executions “in conditions of total secrecy”.¹⁵¹

The OSCE has also undertaken a commitment¹⁵² to exchange information on the abolition of the death penalty and to make available to the public information regarding the use of the death penalty. Annual reports are prepared on the application of the death penalty covering all states in the OSCE.¹⁵³ In particular, this includes information on the legal framework, the method of execution, statistics on death sentences and executions, and the implementation of international safeguards such as fair trial guarantees, execution of minors and the granting of pardons or commutations.

Lack of transparency at the national level

China is estimated to be the world’s biggest executor, however there remains a serious lack of transparency over the use of the death penalty,¹⁵⁴ which can still be applied for 55 crimes. The Chinese government maintains that the details of national court rulings and punishments are a state secret and individuals disclosing state secrets can be held criminally responsible.¹⁵⁵

The execution process in Japan has also been shrouded in secrecy, with Japanese citizens remaining uninformed about conditions on death row and the judicial process.¹⁵⁶

The death penalty remains classified as a “state secret” in Belarus, Mongolia and Vietnam.¹⁵⁷

¹⁵⁰ UN document A/HRC/15/19 (16 July 2010), para. 18. ¹⁵¹ PACE resolution 1727, 29 April 2010, <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/tat10/ERES1727.htm>> (accessed 25 October 2010). ¹⁵² Document of the Copenhagen Meeting of the Conference on the Human Dimension of the (Conference on Security and Co-operation in Europe), June 1990, para. 17.7 ¹⁵³ *The Death Penalty in the OSCE Area: Background Paper 2010*, 29 September 2010, <http://www.osce.org/odhr/item_11_46371.html> (accessed 25 October 2010). ¹⁵⁴ *Report of the Working Group on the Universal Periodic Review: China*, UN document A/HRC/11/25, 5 October 2009, para. 42. ¹⁵⁵ *Death sentences and executions 2009*, Amnesty International (30 March 2010), AI Index ACT50/001/2010, p. 12. ¹⁵⁶ Committee on Legal Affairs and Human Rights, *The death penalty in Council of Europe member and observer states: a violation of human rights*, PACE document 12456 (3 January 2011). ¹⁵⁷ *Death sentences and executions 2010*, supra at note 8, p. 6.

Does the death penalty deter crime?

The argument that the death penalty has a strong deterrent effect on serious violent crime plays an important role in the debate in retentionist states. It can often be seen as one of the primary reasons why both the public and politicians shy away from abolition.

The argument assumes that would-be criminals consider the full range of consequences of committing a criminal act, anticipate getting caught, and decide not to undertake the criminal act because they have a strong belief that if caught, they will be sentenced to death rather than to a long-term prison sentence.

The argument is seriously flawed in a number of respects.

Empirical evidence does not support the death penalty

First, there is no substantial empirical data that proves the death penalty deters criminal behaviour more effectively than any other punishment.

Many crimes often happen on the spur of the moment during times of great stress or under the influence of drugs or alcohol. This undermines the argument that the perpetrator did consider the potential range of penalties or consequences for their act before it was committed.

In relation to “terrorist” acts, it should be noted that many terrorists act under the presumption that they themselves will be killed. Punishment by the death penalty not only does not deter such criminal acts, but

is often welcomed as it provides welcome publicity, and creates martyrs around which further support may be rallied for their cause.

In Mexico, prior to the abolition of the death penalty in 2005, officials began to understand that killers linked to drug cartels often had the mentality of ‘live fast, die young’, preferring to continue their criminal activities even with the knowledge that their life may be short.

Evidence from the US, Canada and other countries demonstrates that violent crime does not decrease where the death penalty is in place. In fact there is evidence to suggest that those states without the death penalty have a lower murder rate, indicating that the death penalty is less effective than life or long-term imprisonment in deterring murder. In 2009 in the US, the average murder rate for states that used the death penalty was 5.26 per 100,000 of the population, but in states without capital punishment the murder rate was 3.90 per 100,000.¹⁵⁸ In Canada, in 2003 – 27 years after the abolition of the death penalty – the murder rate had fallen by 44 percent since 1975 (before the death penalty was abolished).¹⁵⁹

According to the PACE, the European experience of abolishing the death penalty across the whole region has shown conclusively that the death penalty is not needed to check violent crime.¹⁶⁰

Justice Marshall, in the 1972 US Supreme Court ruling, *Furman v. Georgia*, stated:

¹⁵⁸ *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, Death Penalty Information Centre, <<http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>> (accessed 21 October 2010). ¹⁵⁹ *Japan: “Will this day be my last?” The death penalty in Japan*, Amnesty International (6 July 2006), AI Index ASA 22/006/2006, p. 21. ¹⁶⁰ PACE document 12456 (3 January 2011).

“In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.”

Not only could this increase the number of violent criminals arrested and prosecuted, thereby making communities safer, it could address impunity in justice systems that fail to convict the majority of their criminals.

Expert opinion on the deterrent effect

A 2009 report by the Death Penalty Information Center showed that US police chiefs rank the death penalty last in their priorities for effective crime reduction, that they do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime.¹⁶¹

A 2008 study¹⁶² of leading US criminologists came to a similar conclusion, with 88 percent believing that the death penalty is not an effective deterrent to crime. The study concluded, “[t]here is overwhelming consensus among America’s top criminologists¹⁶³ that the empirical research conducted on the deterrence question fails to support the threat or use of the death penalty.”

Alternatives to deterring criminal behaviour

The death penalty uses valuable and finite resources through protracted legal battles. Those resources could be better spent on tackling causes of crime, through crime prevention programmes, or by improving law enforcement capabilities, which would increase the rate of solving serious crimes. This may include improved DNA capabilities or increased police resources.

¹⁶¹ *Smart on Crime: Reconsidering the death penalty in a time of economic crisis*, Death Penalty Information Center, October 2009. ¹⁶² Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, *Journal of Criminal Law and Criminology*, Vol. 99, No. 2 (2009), p. 489-508. ¹⁶³ Among those surveyed included representatives of the American Society of Criminology.

Public opinion and the death penalty

Governments in retentionist states often invoke the argument that public opinion favours the death penalty, and therefore they cannot abolish it. However, the right to life is fundamental, and should not held hostage to public opinion. It is also important to note that the death penalty enjoyed popular support in all current abolitionist states at the time of abolition.¹⁶⁴

Public opinion is often subjective and linked to religious, cultural, economic or political attitudes or contexts. It can be dependent on how the media portrays the death penalty, and may ebb and flow depending upon what high profile case has the media's attention.

While decisions on abolition should not wait upon public opinion, it is important to educate the public and raise awareness of the effect and efficiency of the death penalty, so that they have a better understanding of the arguments for abolition. It is important to demonstrate that the death penalty is not a proven answer to violent crime, and to identify what measures are effective, including tackling the root causes of criminal behaviour.

Public opinion polls

Public opinion polls can be used to gauge and demonstrate public support for or opposition to the death penalty. However, the results often depend on what question is asked or how a poll is conducted.

In the US, support for the death penalty was at 65 percent in 2009 – a trend that has shown little change over the last six years. However, Gallup research has found that support for the death penalty is lower if Americans are offered an explicit alternative to the death penalty. In May 2006, for example, 48 percent of Americans favoured “life imprisonment, with absolutely no possibility of parole” when given that choice.¹⁶⁵

In Uganda, according to the Steadman Group baseline survey report of 2008, 90 percent of the surveyed population had some awareness about the death penalty, with 58 percent in support of the death penalty. However 82 percent of those polled would accept life imprisonment as an alternative to the death penalty.¹⁶⁶

Russia has had a moratorium in place since 1999¹⁶⁷, however officials show a reluctance to proceed to full abolition in law, citing continuing widespread support for the death penalty. However, a 2007 survey, conducted on behalf of PRI, found that the number of people in favour of abolition is growing. The number of people supporting a moratorium increased from 23 percent in 2006 to 31 percent in 2007. Up to 11 percent of Russian citizens say they cannot justify or condone the death penalty at all. Interestingly, the 2007 survey identified ineffective law-enforcement agencies as the main cause of insecurity, as well as “an ineffective judiciary that regularly commits errors”.¹⁶⁸

¹⁶⁴ Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 Or. L. Rev. 97 (2002), p. 97. ¹⁶⁵ Gallup, *In U.S., Two-Thirds Continue to Support Death Penalty* (13 October 2009), <<http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx>> (accessed 21 October 2010). ¹⁶⁶ FHRI, *Baseline Survey* (10 December 2008), prepared by the Steadman Group. ¹⁶⁷ Decision of the Constitutional Court of the Russian Federation (2 February 1999), although the last execution happened in 1996. ¹⁶⁸ *Russian Citizens Opinion on Crime, Justice and the Death Penalty*, the Yuri Levada Analytical Centre, 2007.

Belarus is the only country in Europe still conducting executions. One of the justifications given for not implementing a moratorium or abolishing the death penalty has been that the public still overtly support it. In a 1996 national referendum, 80.44 percent of Belarusians voted against the abolition of the death penalty.¹⁶⁹ However no further national poll has been taken since 1996, and politicians and the media continue to rely on a statistic that is over 14 years out of date. Mikalay Samaseyka, Chairman of the House of Representatives' standing Committee on Legislation and Judicial and Legal Matters, has noted that "events that have happened in the 13 years [since the referendum] have drastically influenced public opinion... Legislative and legal circumstances have changed. In particular, the Criminal Code has been amended to declare that the use of the death penalty is of a temporary nature. The number of death sentences decreased from 47 in 1998 to two in 2008 and in 2009."¹⁷⁰

The Belarusian government has begun to demonstrate some leadership in progressing to a moratorium. In July 2009, Belarus told an OSCE Permanent Council Meeting that "the Belarusian authorities and, in particular, the national parliament are continuing to give this subject the attention it deserves in order to gradually pave the way for an examination of the possibility of introducing a moratorium on the death penalty."¹⁷¹ A working group on the penalty was created in February 2010, comprising members of both chambers of the Belarusian parliament. Unfortunately, Belarus went on to execute two prisoners in March 2010, and sentence two people to death in May 2010 and another in February 2011.

Politicians as leaders

While it is important in a democracy that the government listens to the views of the electorate, they are also expected to lead. This may require governments taking unpopular decisions that are for the greater good of society. Therefore, it is important that politicians gather evidence, act on the basis of evidence and along with other high-profile individuals, institutional groups and the media, provide appropriate forums for public debate at the national level, provide information, and take efforts to educate the public towards abolition.

According to the PACE, the European experience has shown conclusively that "political leaders who led the way towards abolition did not suffer any backlash from public opinion."¹⁷²

¹⁶⁹Ending executions in Europe: Towards Abolition of the Death Penalty in Belarus, Amnesty International (2009), AI Index: EUR 49/001/2009, p.15.

¹⁷⁰Reasons are ripe for discussing possibility of abolishing death penalty, lawmaker says, Naviny.by Belarus News, 3 March 2010. ¹⁷¹OSCE Permanent Council Meeting, Statement by the Republic of Belarus, PC.DEL/656/09, Vienna, 30 July 2009. ¹⁷²PACE document 12456, supra at note 156, para. A.2.

Victims' rights

Proponents of the death penalty frequently do so in the name of the victims. They argue that victims of violent crime and their loved ones have a right to see justice carried out through the execution of the perpetrator. However, not only does this argument undermine the voices of those victims who oppose the death penalty, it also perpetuates the myth that justice is focused solely upon the idea of revenge rather than the principles of deterrence, rehabilitation and public safety.

Discriminatory treatment for victims who oppose the death penalty

While PRI recognises the suffering of victims of violent crime and their loved ones, it believes that all victims, including those who openly oppose the death penalty, should be treated with sympathy, respect and equality throughout the criminal process. Unfortunately, victims who oppose the death penalty are often marginalised and discriminated against. This includes not receiving full access to relevant victims' assistance funds, not being fully informed of relevant court proceedings by prosecutors or even being excluded from giving testimony.

In the US state of New Hampshire, a *Crime Victims Equality Act* was passed in 2009. This Act – the first of its kind in the US – provides “the right to all federal and state constitutional rights guaranteed to all victims of crime on an equal basis, and notwithstanding the provisions of any laws on capital punishment, the right not to be discriminated against or have their rights as a victim denied, diminished, expanded,

or enhanced on the basis of the victim's support for, opposition to, or neutrality on the death penalty.”¹⁷³ The goal of this law is equitable treatment for all victims. According to Renny Cushing, Executive Director of Murder Victims' Families for Human Rights and a former New Hampshire State Representative (whose father was murdered in 1988):

*“It is unacceptable to have hierarchies of victims within the criminal justice system, with those who favor the death penalty receiving more favourable treatment than those who oppose it. The legislation is about the right of everybody to hold their own position on the death penalty and not be denied victims' rights because of it.”*¹⁷⁴

Giving a voice to victims of violent crime

In the US, groups such as Murder Victims' Families for Human Rights, Murder Victims' Families for Reconciliation, and Journey of Hope have done groundbreaking work in this area, bringing national and international awareness to the needs and voices of victims while fighting against the death penalty. One such voice includes Marie Deans, whose mother-in-law was murdered in 1972, states that:

“After a murder, victims' families face two things: a death and a crime. At these times, families need help to cope with their grief and loss, and support to heal their hearts and rebuild their lives. From experience, we know that revenge is not the answer. The answer lies in reducing violence, not causing more

¹⁷³New Hampshire's Crime Victims Bill of Rights HB 370 (approved 7 August 2009). ¹⁷⁴Renny Cushing, *Twice a victim: Pro-death penalty bias in US criminal justice*, Inter Press Service Column Service (28 December 2010).

death. The answer lies in supporting those who grieve for their lost loved ones, not creating more grieving families [by executing their relative]. It is time we break the cycle of violence.”

The lengthy death penalty trial, appeals and clemency procedures, which are necessary for protecting the fair trial rights where a life is at stake, often further prolong the tragedy and traumatise victims who relive their pain and suffering for many years.¹⁷⁵ This can divide grieving families where family members hold disparate views of the death penalty. An alternative penalty, such as life imprisonment, can spare victims years of being linked to the perpetrator through seemingly endless trials and appeals.

Creation of additional victims

The death penalty also creates additional victims who are often forgotten, marginalised or stigmatised in their communities – the family members of those who have been executed. When an individual is executed, little thought is given to the suffering of or support for their families.

“People don’t understand that the death penalty has an impact on families that is so far reaching, ... My mother has never gotten over it [the execution of her son]. She has changed so much since it happened. All of the kids have a hard time understanding it. The death penalty creates so many more victims.”
Jonnie Waner (her brother, Larry Griffin, was executed in Missouri, US, in 1995)

The death penalty and victims in Islamic law

Islamic law makes specific provisions for victim forgiveness through a system that allows relatives of the murder victim’s family to pardon the murderer in return for financial compensation or forfeited rights of inheritance – otherwise known as *diyya* or “blood money”. Such a system continues to exist in countries such as Iran, Pakistan, Saudi Arabia and Yemen.

There are many rules that control the *diyya* system in Islam, which was initially created as a means of avoiding the death penalty in *Qesas* crimes¹⁷⁶. *Diya* is an ancient form of restitution for the victim or family, and has been compared to the financial compensation which exists in many states’ criminal and civil laws. The Quran appeals for such forgiveness from the victim’s family, preferring this option to the punishment of death.¹⁷⁷

According to many Islamic scholars, the amount of money for *diyya* is fixed, which aims to guarantee equality between victims.

However, the UN Human Rights Committee has stated that the “preponderant role of the victim’s family in deciding whether or not the penalty is carried out on the basis of financial compensation (“blood money”) is also contrary to the Covenant [ICCPR].”¹⁷⁸

The system of *diyya* can be seen to make the administration of the death penalty arbitrary and discriminatory. Punishment is

¹⁷⁵Death Penalty Can Prolong Suffering for Victims’ Families, Death Penalty Focus, <<https://death.rdsecure.org/article.php?id=56>> (accessed 19 January 2011). ¹⁷⁶A *Qesas* crime is one of retaliation. The damage that was inflicted on the victim is inflicted on the accused. It is based on the biblical phenomenon of “an eye for an eye and a tooth for a tooth”. The victim has a right to seek retribution and retaliation. The exact punishment for each *Qesas* crime is set forth in the Qur’an. Traditional *Qesas* crimes include: murder (premeditated and non-premeditated); premeditated offences against human life, short of murder; murder by error; offences by error against humanity, short of murder. ¹⁷⁷See for example, Roger Hood, *The Death Penalty: A Worldwide Perspective* (third edition), p. 37; Peter Hodgkinson and William A. Schabas, *Capital Punishment: Strategies for Abolition* (2004), p. 182. ¹⁷⁸UN document CCPR/CO/84/YEM, 9 August 2005, para. 15.

not only dependent upon how forgiving a victim's family is but also on the economic status of the perpetrator, because those with money are able to pay the families of the victims.

Where *diyya* exists in Saudi Arabia, it has been pointed out that this procedure much better protects Saudi nationals than it does foreign workers sentenced to death, many of whom do not have the family, tribal base or monetary resources to save them from execution.¹⁷⁹

¹⁷⁹ *Affront to justice: Death penalty in Saudi Arabia*, Amnesty International, AI Index: MDE 23-027-2008, pp. 31-32.

12 steps to abolition of the death penalty in law for all crimes

1

Narrow the provisions for the use of the death penalty. This means:

- Reduce the number of death penalty applicable crimes to only the “most serious”.
- Abolish the mandatory death penalty.
- Prohibit the execution of juveniles, pregnant women, mothers with young children, those suffering from mental or intellectual disabilities or extremely limited mental competence and the elderly.

2

Introduce, and/or ensure access to, fair trial safeguards for all those accused of “the most serious crimes”, at all stages of trial, appeal and clemency or pardon proceedings.

3

Review practices to ensure that death sentences are not being applied in a discriminatory or arbitrary fashion.

4

Where executions do occur, put in place measures to ensure that it is carried out so as to inflict the minimum possible suffering. For example, ensure death row conditions comply with international human rights standards, abolish death penalty by stoning, abolish public executions, and ensure executions are not carried out in secrecy.

5

Take real steps towards abolition, such as strengthening law enforcement agencies, undertaking necessary judicial reforms, reviewing prison practice with regard to those convicted of the most serious crimes, and undertaking legislative and constitutional reforms to bring about abolition.

6

Uphold the strongest principles of transparency and accountability in the death penalty process, including publishing full information on the application of the death penalty.

7

Pending full and final abolition, establish an official moratorium on executions and death sentences.

8

Engage in a public debate on the effect and efficiency of the death penalty, and instil confidence that abolition will not undermine justice or public safety. Actively involve the media, NGOs, religious leaders, politicians, judges, and the police etc. to educate the public.

9

Establish a humane alternative sanctions-regime to replace the death penalty. This should respect international human rights standards and norms.

10

Commute death sentences for those already on death row, or at least ensure humane conditions for those under sentence of death in line with international standards and norms for the treatment of prisoners.

11

Sign and ratify binding international and regional instruments that commit them to abolish the death penalty. This should include the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR, the Convention on the Rights of the Child, the Convention Against Torture, and Protocols 6 and 13 to the European Convention on Human Rights or the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, where applicable.

12

Abolish the death penalty for all crimes in law, and ensure that it cannot be legally reinstated.

For more information on PRI's work on the abolition of the death penalty and alternative sanctions that respect international human rights standards please contact:

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