



Strengthening death penalty standards



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This document was written by Oliver Robertson, with expert input from Jelena Pejic, Peter Green, Lida Lhotska, Camille Selleger, Asunta Vivó Cavaller, Chiara Sangiorgio, Rachel Brett and Andrea Huber.

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Penal Reform International

Head Office

60-62 Commercial Street
London E1 6LT
United Kingdom

Telephone: +44 (0) 20 7247 6515

Email: publications@penalreform.org

Twitter: @PenalReformInt

www.penalreform.org

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Introduction

Where the death penalty is applied, international law, jurisprudence and practice require that certain minimum standards are applied. The standards include international and regional treaties that are legally binding on states that have ratified them, customary international law that is binding on all states without exception, and non-binding standards and resolutions that nonetheless command the support of the majority of states. International understanding of these minimum standards has continued to evolve in the years since they were drafted, but the documents themselves do not always keep pace.

This paper brings together international, regional and national standards, the most recent understandings of relevant experts and appropriate insights from other connected disciplines. It explores possible ways in which international minimum standards could be further strengthened at this time, whether through ECOSOC, the UN Human Rights Council, the UN Commission on Crime Prevention and Criminal Justice, regional bodies or national amendments to laws and policies. In each section, the issue and current practice is described, followed by examples of good practice or suggestions for improvement, finishing with a short list of recommendations for strengthening existing standards. These issues and recommendations are not final, but are intended to provide a point from which discussion can begin.

The main focus of this paper is on international standards, but the issues and recommendations may also be of use to countries looking to take steps towards abolition. This paper is not intended as a theoretical study, but a source of guidance and ideas for national and international lawmakers wanting to find ways to limit capital punishment or deal with issues they had not previously considered. While Penal Reform International opposes the death penalty as a matter of principle and so would always advocate for complete abolition, we nonetheless believe that steps to restrict the use of the death penalty and some of its worst aspects are steps in the right direction.

Issues related to existing minimum standards

ECOSOC resolution 1984/50 is the most detailed international standard dealing with the use and application of the death penalty. However, in the thirty years since its adoption there have been substantial developments regarding the death penalty, both new understandings of the issues covered by the resolution and recognition of other relevant issues.

Issues are covered in this paper in the same order as they appear in resolution 1984/50. The part of each standard that is particularly relevant is highlighted in bold. Where equivalent legally binding standards also apply to an issue, these will also be mentioned. Issues which are not covered in the ECOSOC resolution are covered subsequently.

Offences carrying the death penalty

Relevant UN Standards

→ ECOSOC Safeguard 1

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.**

→ ICCPR Article 6(2)

In countries which have not abolished the death penalty, **sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.** This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Issue

International standards state that the death penalty may only apply to the most serious offences. The understanding of 'most serious' has been refined over the decades, both by general reinterpretations of the phrase by UN experts and bodies, and by explicitly excluding specific offences from the 'most serious' category. Offences including drug use and trafficking, economic offences (including forgery and smuggling or circulating forged currency or bonds), homosexual acts, practice or expression of religion, corruption and treason/espionage have all been found not to constitute the most serious offences.¹ The 1984 ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states that 'most serious' offence refers to 'intentional crimes with lethal or other extremely grave consequences'. This has subsequently been revised further, to apply only to intentional killing resulting in loss of life.² Such a limitation is connected with the general principle of justice that sentences should be proportionate to the seriousness of the offence and to the core and central importance of the right to life, as well as the irrevocable nature of killing.

Various states in domestic law now restrict the death penalty further still, to apply only in 'rarest of the rare' (or 'worst of the worst') cases. This means that even for a death penalty-applicable offence, there have to be exceptional circumstances that justify the use of capital punishment. States with such provisions include India, Bangladesh, Uganda and a number of Caribbean states. Some of these jurisdictions interpret this provision to require that there is no prospect of reform of the offender (St Vincent and the Grenadines), that there is 'no other means of achieving the object of the punishment' (Bahamas)³ or 'that life imprisonment would serve no purpose in order to justify imposition of the death penalty' (India).⁴ Some, such as Uganda, provide a detailed list of aggravating and mitigating factors to consider when considering a death sentence.⁵

The importance of considering the possibility of reform of the offender is especially great as Article 10(3) of the International Covenant on Civil and Political Rights states: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'

There is extensive jurisprudence from international and regional human rights bodies that any expansion of the range of offences carrying the death penalty is incompatible with Article 6 of the ICCPR, as is reintroduction of the death penalty following abolition. These issues are dealt with in a separate section below.

Recommended strengthening of standards

- The 'most serious crimes' definition should be explicitly stated to apply only to acts involving an intention to kill which result in loss of life.
- Use of the death penalty should be further restricted to apply only in the 'rarest of the rare' cases.

Applicability of abolition to previously convicted persons

Relevant UN Standards

→ ECOSOC Safeguard 2

Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that **if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.**

→ ICCPR Article 15(1)

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. **If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.**

Issue

The requirement that those under sentence of death can benefit from subsequent lighter penalties means that when the death penalty is abolished, those currently under sentence of death should have their sentences commuted. This is an essential part of abolition. When a state removes the death penalty from its books, it asserts that killing people is no longer an appropriate response to offending, and should therefore not engage in further executions. The argument that offenders should receive the sentence that was originally given does not hold: it is a longstanding principle of human rights law (see for example ICCPR Article 15(1)) that reductions in sentences should benefit serving

prisoners.* This is even more relevant in death penalty cases, where abolition means the form of punishment changes, rather than just the length of the sentence.

When a moratorium on executions, or on sentencing and executions, is imposed, existing death sentences may be commuted, and/or future death sentences may be automatically commuted because the death penalty is not available. In all cases, but especially where future death sentences are commuted, those currently awaiting execution should have their sentences commuted in order to ensure parity of treatment and reduce the uncertainty and ‘limbo’ state they will otherwise be in (for more on issues related to moratoriums, see *Moratoriums on the use of the death penalty* on page 36).

Recommended strengthening of standards

- When the death penalty is abolished, those currently on death row should have their sentences commuted.
- When a moratorium on the death penalty is announced, those currently on death row should have their sentences commuted.

Non-execution of pregnant women or those with small children†

Relevant UN Standards

→ ECOSOC Safeguard 3

Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, **nor shall the death sentence be carried out on pregnant women, or on new mothers**, or on persons who have become insane.

Issue

While the part of this standard related to pregnant women is reflected identically in different texts, the second part varies significantly in formulation. The 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1969 American Convention on Human Rights speak only of pregnant women; ECOSOC Safeguard 3 (above) states that a death sentence shall not be *carried out* on ‘new mothers’

* This is part of the principle *nullum crimen, nulla poena sine lege*, which includes the prohibition of retroactive application of criminal laws and criminal sanctions (with the exception of an act that was criminal according to the general principles of law recognised by the community of nations – crimes against humanity etc). The principle also means that offenders must benefit from retroactive lighter sentences: if a lighter penalty is provided for after the offence occurs, that lighter penalty shall apply retroactively.

† There is no section here dealing with the non-execution or sentencing to death of persons for crimes committed below 18 years of age. This is because the international standards in this area do not need strengthening, although implementation is still inadequate in some jurisdictions.

(without further explanation of that term); Article 30(e) of the 1990 African Charter on the Rights and Welfare of the Child requires states to prohibit the *passing* of a death sentence on ‘mothers of infants and young children’ (without specifying an age);⁶ Article 4(2)(j) of the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa forbids the execution of ‘nursing women’ (without further explanation); and Article 7(2) of the 2004 Arab Charter on Human Rights bars execution of ‘a nursing mother within two years from the date of her delivery’. The EU Guidelines on the Death Penalty state that ‘Capital punishment may not be imposed on: [...] new mothers’,⁶ with ‘new mothers’ being considered ones who are still breastfeeding.⁷

In all cases, there appears to be a concern not to execute a mother when a child is heavily dependent on her for its survival. However, the key consideration should be, as stated in Article 7(2) of the Arab Charter, that ‘in all cases, the best interests of the infant shall be the primary consideration’. It is likely that at no stage is it in the best interests of the child to have a mother executed, both because of the child’s inability to care for itself and because of the strong and often unique relationship they have with the mother. This may be even more likely if the mother is the sole available carer for the child. The UN Committee on the Rights of the Child has defined early childhood as ‘the period below the age of 8 years’;⁸ this may be a helpful indicator when deciding what constitutes ‘young children’, though is likely older than what the framers of existing treaties intended.

Breastfeeding is recognised as a crucial intervention to provide infants and young children a healthy start in life.⁹ The World Health Organization recommends exclusive breastfeeding from birth to 6 months, then continued breastfeeding alongside complementary foods up to two years or beyond;¹⁰ therefore, all nursing mothers should be protected against execution, even when breastfeeding non-exclusively, so that the child’s nutritional needs can continue to be met. Long-term continued breastfeeding (i.e. beyond two years), when associated with adequate complementary feeding, can allow children to receive key nutrients for healthy growth.¹¹ However, breastfeeding is not and should not be considered as the only criterion of maternal caring or infant need. In particular, mothers who do not breastfeed for whatever reason[†] should also receive protection from execution.

* The 2013 General Comment on this Article by the African Committee of Experts on the Rights and Welfare of the Child does not elaborate on this issue either.

† While mothers who do not breastfeed for whatever reason should receive protection from execution, this is especially important in cases where actions or omissions by the authorities, or the prison conditions, have resulted in her stopping or not starting lactating. Examples may include where the mother is prohibited from seeing or feeding her infant for a number of days or where the prison diet is so poor that she is unable to produce breast milk.

Another issue is the conditions in which a mother and her child live during any period in which a death sentence is suspended. Death row conditions are usually more restrictive than other parts of prisons, meaning it is likely that they will be even less suitable for children than prison accommodation in general. Alterations may therefore be necessary to ensure that the child is growing up in the most appropriate conditions possible.

Finally, the impact on the child of a father's death sentence should also be considered. Recent research has found that children can be as affected by the imprisonment of a father as they can of a mother,¹² and in any case the best interests of the child will very likely be affected having a father sentenced to death and/or executed. The African Committee of Experts on the Rights and Welfare of the Child devoted its General Comment 1 to the issue of children of imprisoned mothers; it stated that it 'takes the view that Article 30 can be extended to apply to children affected by the incarceration of their sole or primary caregiver'.¹³ The UN Committee on the Rights of the Child has begun requesting information from states about mechanisms to consider the best interests of the child when sentencing parents to death, rather than just mothers;¹⁴ the UN Human Rights Council has addressed the issue through its Universal Periodic Review process and resolutions on the rights of the child.¹⁵

Recommended strengthening of standards

- The best interests of any children of a person sentenced to death should be a primary consideration at the point of sentencing, during any post-sentencing appeals and at the point when a decision to execute is made. Such considerations should be made regardless of whether a mother or father is affected.
- If a death sentence is not imposed or is later repealed, the best interests of the child should be a primary consideration when deciding on alternative sentences or measures, including the length of any prison sentence.
- The best interests of the child should be a primary consideration when deciding on the extent of direct and indirect communication between the child and the parent.

- When it is decided that a parent sentenced to death should care for a child, decisions about where they should be imprisoned, the conditions in which they live and any restrictions placed on them should involve an individualised assessment of the parent's situation and the risk they pose, and have the best interests of the child as a primary consideration.*
- When it is decided that a child should live in prison with a parent sentenced to death, prison conditions should be as suitable as possible for their healthy development and should meet their best interests.
- Breastfeeding mothers should be supported in exclusive and non-exclusive breastfeeding of any nursing children.

Non-execution of persons with mental ill health

Relevant UN Standards

→ ECOSOC Safeguard 3

Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, **or on persons who have become insane.**

→ ECOSOC Resolution 1989/64, paragraph 1(d)

Recommends that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by: [...] (d) **Eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.**

Issue

The prohibition on the execution of prisoners who are 'insane' has been stated as part of customary international law,¹⁶ meaning it is binding on all states at all times without exception and regardless of whether states have signed relevant international instruments. This principle has been expressed in case law including *Pitman v The State* in Trinidad & Tobago, which 'affirmed the long-held principle that the State may not execute or condemn to death any person with significant mental impairment or mental illness, and the need to obtain medical evidence to determine such impairment/illness'.¹⁷

* Similar exercises should also take place when considering whether children should live with imprisoned parents who have not been sentenced to death. Note that the rights of the child should be a not *the* primary consideration, and that the child's best interests will need to be weighed against other factors.

Developments in the understanding of mental health mean that changes are needed in both the language used and actions taken. The mental health needs of an offender should be treated in the same way as other health needs. It should be recognised that some people enter prison with mental ill health and others develop mental health problems while in prison (including through ‘death row phenomenon’, the mental trauma caused by long and often solitary imprisonment in harsh conditions on death row, combined with the knowledge of forthcoming execution). Neither group should be executed. The UN Human Rights Committee has found that execution or continued incarceration of persons with mental ill health constitutes cruel, inhuman and degrading punishment.¹⁸ Where someone’s mental ill health is caused by the awareness of the execution or conditions of imprisonment *and cannot be remedied while retaining the imprisonment or threat of execution*, to keep them in such a situation could constitute torture.*

Against this, some may argue that the UN Convention Against Torture includes, in Article 1(1), an assertion that ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’ does not constitute torture. However, the UN Special Rapporteur on Torture in his 2012 interim report stated that sanctions need to be lawful under both national and international law and that ‘practices which might initially be considered lawful might become outlawed and viewed as the most serious violations of human rights’.¹⁹ He cited the example of corporal punishment and referred to extensive treaty body findings that corporal punishment was a violation of human rights despite being permitted by a state’s laws. The same may well be true of mental health issues. To make someone well in order to kill them is ethically and medically unsound.

Regarding the language used to describe mental ill health, ‘persons who have become insane’ is now considered discriminatory and disrespectful, may be too restrictive to cover the full range of mental ill health cases that affect competence and is a phrase commonly used in legal rather than medical contexts.

Parallel to this is the issue of intellectual disability, sometimes (particularly in older texts) formulated as ‘mental retardation’. Intellectual disability has been defined as involving ‘inherent deficiencies in intellectual functioning from birth and limitations in adaptive skill areas

* Article 1(1) of the UN Convention Against Torture states (sections **in bold** especially relevant):
*For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, **whether physical or mental, is intentionally inflicted on a person** for such purposes as obtaining from him or a third person information or a confession, **punishing him for an act he or a third person has committed or is suspected of having committed**, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

necessary to cope with the requirements of everyday life’;²⁰ someone may have an intellectual disability without being mentally ill. Such persons are protected under the Convention on the Rights of Persons with Disabilities. Intellectual disabilities are often unrecognised in criminal justice proceedings and states may take too narrow a view of what constitutes an intellectual disability.

Separately, persons who were suffering from mental ill health at the time of the offence should be exempt from criminal liability, if they ‘could not have avoided committing the alleged crime, through no fault of their own’.²¹ Where mental ill health does not fully exempt someone from criminal liability, it may nonetheless diminish their responsibility and mean a non-capital sentence should be imposed. Persons who were not responsible for their actions for a physical reason (such as sleepwalking* or epilepsy) should benefit from similar consideration of reduced liability.

Recommended strengthening of standards

- Language in standards referring to mental ill health and intellectual disabilities should be respectful of the rights of persons with disabilities. In particular, terminology such as ‘insane’ and ‘retarded’ should be replaced, for example by terms like ‘mental illness’ and ‘special needs’ respectively. Persons suffering from mental ill health while awaiting execution should not be executed, whether their ill health began before or during their imprisonment. Where their ill health cannot be remedied without changes to the conditions of imprisonment or threat of execution, the conditions or sentence should be changed.
- Persons who were not responsible for their actions at the time of the offence, whether for mental or physical reasons, should have their liability exempted or diminished in accordance with the degree of their lack of responsibility.

* One demonstrative case was the UK (England & Wales) case of ‘Brian Thomas, who was charged with murder of his wife. His defence was that he killed her when he was in the throes of “night terror violence” (akin to sleepwalking). The prosecution decided not to proceed with the case.’ Quote from Law Commission, *Criminal Liability: Insanity and Automatism: A Discussion Paper*, London, 23 July 2013, p. 10.

Non-execution of elderly prisoners

Relevant UN Standards

→ Most closely related to Safeguard 3 (no direct ECOSOC Safeguard):

Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

→ ECOSOC Resolution 1989/64, paragraph 1(c)

Recommends that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by: [...] (c) **Establishing a maximum age beyond which a person may not be sentenced to death or executed.**

Issue

Certain national and regional standards have an upper age limit at which the death penalty can be applied. The American Convention on Human Rights prohibits execution of those over 70 when the offence was committed. China does not impose the death penalty 'on people aged 75 or older at the time of trial, except if they had committed a murder with exceptional cruelty',²² while Kazakhstan prohibits the execution of anyone aged 65 at the point of sentencing. In its resolution on implementing the Safeguards (Resolution 1989/64, paragraph 1(c)) the ECOSOC urged all member states to establish 'a maximum age beyond which a person may not be sentenced to death or executed'.

For elderly prisoners, there are (at least) two groups of issues. One is about the necessity of execution: as a person becomes older, they may no longer be considered a threat to society; this may be due, for example, to changed attitudes after years spent in detention, or to worsening physical health making them unable to commit future offences. The other issue relates to the specific needs of elderly prisoners, including the greater physical and mental health problems that generally develop with age. Such needs may exist when they enter death row or may develop subsequently as prisoners age; in both cases, these needs need to be met.*

All of the described healthcare needs may arise with non-elderly prisoners; however, they are more likely to occur with older persons. What is needed is an individual assessment of whether an execution is still considered necessary, taking into account such factors as predicted future risk, length of time already spent on death row, current

* Many international standards on prisons and prisoners, most notably the UN Standard Minimum Rules for the Treatment of Prisoners, include a section on the treatment of prisoners' medical needs.

health situation and the ability of the prison to meet the prisoner's often increasing medical needs. The outcome of this determination could be an alternative sentence, release on compassionate grounds (for example, because the prisoner is expected to die shortly from natural causes) or release on the grounds that detention is no longer necessary (for example, because the prisoner has demonstrably been rehabilitated).

Recommended strengthening of standards

- All persons sentenced to death should have their situation and sentence periodically reassessed to determine whether execution is still considered necessary and justifiable. This assessment should include the physical and mental health factors that affect likelihood of reoffending, and the extent to which a person is considered to have been rehabilitated and does not pose a risk of future offending.
- Death rows should be equipped to meet the needs, including physical and mental health needs, of those imprisoned there; this applies especially for older prisoners.

Standard of proof

Relevant UN Standards

→ ECOSOC Safeguard 4

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.

Issue

The ECOSOC Guidelines require guilt to be 'based upon clear and convincing evidence leaving no room for an alternative explanation of the facts'. This is a higher threshold than the 'proof beyond reasonable doubt' that is required for guilt and reflects the seriousness and irreversibility of the sentence. Note that this higher threshold does not affect the conviction, only the sentence that can be imposed following conviction.

Recommended strengthening of standards

- States should ensure in domestic law that the death penalty may only be imposed when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

Foreign nationals facing the death penalty

Relevant UN Standards

→ Most closely related to Safeguard 5 (no direct ECOSOC Safeguard):

Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, **including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.**

→ Vienna Convention on Consular Relations, Article 36

(b) **if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;**

(c) **consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement.** Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

→ UN Standard Minimum Rules for the Treatment of Prisoners, Rule 38

(1) **Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.**

(2) **Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.**

→ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16

(2) **If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law** or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

Issue

Persons who face the death penalty abroad are often disadvantaged compared to nationals of the prosecuting/punishing state. They can be unfamiliar with the laws and procedures in the prosecuting state, may be unable to understand the language in which proceedings are conducted, and may be less likely to have a support network of family and friends.

Support from the country of which they are nationals, through its consulates, can therefore be vital. Under a number of standards, including the Vienna Convention on Consular Relations, foreign national suspects and prisoners can inform and communicate with the consulate post, and need to be informed of their right to do so. International or regional bodies such as the EU may also intervene or make representations in individual cases.²³ Consulates may be able to provide or arrange legal representation or support, either on an *ad hoc* basis or as part of an ongoing programme.* They may also be able to transmit communications between the person facing the death penalty and any children and other family members living in the home country.

The necessity of informing consulates of the detention of their nationals was confirmed in the 2004 ruling by the International Court of Justice in the case of *Avena and Other Mexican Nationals*. The ruling stated that the United States of America breached its obligations under the Vienna Convention on Consular Relations when it failed to notify the appropriate Mexican consular post of the detention of Mexican nationals. This resulted in the consular authorities being unable to provide legal assistance to the nationals in a timely manner and to convictions or sentences that should have been reviewed and reconsidered in the light of the breaches.²⁴

* For example, Mexico has a programme of legal assistance for its nationals facing the death penalty in the USA.

Sometimes support may come from the country in which the person is being prosecuted, such as when they are eligible for free legal aid. China has, since 2013, had a law in place requiring the provision of free legal aid to foreigners facing a potential life sentence or death penalty.²⁵

For foreign nationals resident in the country of imprisonment, particularly when they have been based there for many years and/or have most of their connections there, the situation is different. They may have greater familiarity with the country, its language and procedures, and their friends and relatives may well be based there too. However, they still maintain the same rights as non-resident foreign nationals, including to consular support. They also retain the same rights as all defendants, such as to interpretation and translation if required.

Recommended strengthening of standards

- Foreign nationals should be informed of their rights to, and given access to, consular assistance, including legal support and representation if needed. Where the detaining authority does not ensure that such information and access is provided, this should be regarded as failing to provide the necessary safeguards to ensure a fair trial and mean that the death penalty cannot be imposed or applied; it may additionally justify a retrial or reconsideration of the case.
- Consular staff should receive training in providing legal and other support to nationals facing a (potential) death sentence.
- Consular staff should receive training in informing and supporting the children and other family members of nationals facing a (potential) death sentence. Information to children should be provided in an age-appropriate manner and in consultation with their parents and carers. Support should be provided by the government in the country of citizenship, regardless of where the family members live.
- Foreign national defendants should receive legal aid on the same basis as citizens of the prosecuting country, and should be provided with legal aid at all stages of the criminal justice process.

Right of appeal

Relevant UN Standards

→ ECOSOC Safeguard 6

Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

→ ICCPR Article 14(5)

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Issue

The implications of violations of fair trial rights, including the right of appeal, for those sentenced to death is even more significant than for other offenders, because of the severe and irreversible nature of the punishment. Appeals should always be permitted, something demonstrated internationally by the fact that even those convicted at the International Criminal Court of the most heinous offences of genocide, war crimes and crimes against humanity are allowed to appeal.

In practice, however, appeals may be restricted, with prisoners denied access to one or more higher courts and/or to regional or international judicial or quasi-judicial bodies (such as the Inter-American Court of Human Rights, the European Court of Human Rights and the UN Human Rights Committee). They may be executed while appeals or court proceedings related to other (alleged) offences are still ongoing. Given the irreversibility of a death sentence, it is even more important than usual that the sentence is not carried out while any form of appeal, other legal proceeding (such as a clemency request) or complaint procedure to an international body (such as a UN human rights treaty body) is ongoing.²⁶ There are particular concerns that those tried by military or special courts may have reduced rights of appeal compared to those in other courts, and that appeals may not be heard by an independent court. In the interests of equal treatment, and also because of the lack of appeal courts in many military or special justice systems, these appeals should be heard by civilian courts.

Even when prisoners are allowed an appeal, it is essential that it conforms to international standards. The mandatory nature of appeals referred to in the ECOSOC Safeguards above means that appeals should be made automatically. All defendants should be able to access legal representation: the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that 'States should ensure that anyone who is detained, arrested, suspected of, or charged

with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process'.²⁷ It is important that they have sufficient time to prepare and are permitted access to their lawyers in a manner that complies with the UN Basic Principles on the Role of Lawyers. In particular, they should be 'provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality'.²⁸

As with other proceedings, where the defendant does not 'sufficiently understand the language used in court'²⁹ interpretation and translation should be provided, as stated in the Legal Aid Principles and Guidelines:³⁰ this may be a particular issue for foreign national defendants, but also for those speaking a minority language or a national language not used in court.

Especially given the seriousness and irreversibility of a death sentence, it is essential that appeals are substantive. In some jurisdictions, appeals can be merely procedural exercises that only look at whether court processes have been followed: they may be purely paper-based reviews without any oral hearings or a review of the substantive facts, evidence and issues of the case.³¹ A substantive review is necessary to ensure that the decisions and reasoning of the earlier court are sound and legitimate.

Recommended strengthening of standards

- Appeals should be permitted to all courts of higher jurisdiction, as well as any regional or international judicial or quasi-judicial bodies of which the state is a member. All such appeals should be mandatory and should be exhausted prior to execution.
- All defendants must be permitted legal representation, including during appeals; legal aid must be provided in accordance with the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.
- Those issuing the appeal should have sufficient time to prepare their case and to have unrestricted and confidential access to their lawyers, in line with the UN Basic Principles on the Role of Lawyers.
- Appeal processes should include the ability to review and reassess the substance of the case, not merely the procedure.
- Where defendants do not sufficiently understand the language used in court, interpretation should be provided free of charge to the defendant.

Possibility of pardon and commutation

Relevant UN Standards

→ ECOSOC Safeguard 7

Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

Issue

After all appeals have been exhausted, persons sentenced to death may have their conviction pardoned or sentence commuted. This may be considered automatically, may be granted automatically (usually in jurisdictions that are preparing for abolition of the death penalty), or may have to be applied for. Pardons and commutations are ordinarily awarded by the head of state, the government or a specialist pardons board. Such decisions are ordinarily an act of mercy and are not necessarily linked to doubts about the person's guilt.

Where pardons or commutations need to be requested, doing so can be difficult and confusing, including for lawyers. It is important that prisoners and their lawyers have information about the process of application and the type of information that will be considered, so that they can make a timely and relevant request.

Recommended strengthening of standards

- All persons sentenced to death should be automatically considered for pardon and for commutation. Consideration of such requests should be meaningful and transparent, including reasons as to why the pardon or commutation has or has not been granted.
- Where this does not yet happen, all persons sentenced to death, and their lawyers, should be informed about how and when to make an application for pardon or commutation.
- All persons sentenced to death, and their lawyers, should be informed about the type of information that will be considered by the pardoning and commuting authorities, to enable them to make a relevant request. Where this does not happen, this should be regarded as failing to provide the necessary safeguards and mean that the death penalty cannot be imposed or applied.

Preventing discrimination

Relevant UN Standards

→ Most closely related to Safeguard 5 (no direct ECOSOC Safeguard):

Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives **all possible safeguards to ensure a fair trial**, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

Issue

Non-discrimination is a key feature of human rights: it constitutes a common (though not identical) Article 2 to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. In the Conventions on the Elimination of Racial Discrimination and on the Elimination of All Forms of Discrimination Against Women it is enshrined in Article 1, and in Article 3 (among others) in the Convention on the Rights of Persons with Disabilities. It is also a key feature of judicial processes and fair trial standards worldwide.

However, disadvantaged and minority groups in many countries are arrested, convicted, imprisoned and sentenced to death at higher rates than the general population. They can include racial³² or religious minorities³³ or foreign nationals. Efforts to counteract such discrimination include support for foreign nationals by their country of citizenship (see *Foreign nationals facing the death penalty*, above) and the passing of laws that permit the challenging of a death sentence on grounds of demonstrable racial or ethnic bias, including statistical evidence of bias (as was permitted under the 2009 Racial Justice Act in North Carolina, USA).

Recommended strengthening of standards

- International standards should explicitly prohibit discrimination against particular groups when sentencing to death or executing, and require states to implement measures to prevent and remedy cases of discrimination.

Minimisation of suffering/prevention of torture

Relevant UN Standards

→ ECOSOC Safeguard 9

Where capital punishment occurs, it shall be carried out so as to **inflict the minimum possible suffering**.

Issue

Different methods of execution cause different degrees of suffering prior to death. Some (including stoning and gas asphyxiation) have been found by regional courts and UN quasi-judicial bodies to constitute cruel, inhuman and degrading treatment due to the fact that they do not impose the least possible physical and mental suffering.³⁴ Other methods (including hanging and lethal injection) have been argued to constitute cruel, inhuman or degrading punishment, either inherently or due to the way they are implemented. The UN Special Rapporteur on Torture has stated that ‘there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and cruel, inhuman or degrading treatment in every case. Even if the required safeguards (Economic and Social Council resolution 1984/50, annex) are in place, all methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution.’³⁵

It is not only the methods used to kill that can make execution cruel, inhuman or degrading; it is also the setting in which it happens. Both public executions (where anyone can watch) and secret executions (where the fact and details of the execution are hidden or denied) have been condemned by the UN Special Rapporteur on Torture. In 2012, he stated that ‘executions conducted in public often expose convicts to undignified and shameful displays of contempt and hatred. Conversely, secret executions violate the rights of the convict and family members to prepare for death.’³⁶ The UN Human Rights Committee has also condemned public executions³⁷ and secret executions.³⁸

The minimisation of suffering is also essential while on death row. ‘Death row phenomenon’ has been identified as a combination of the following circumstances:

1. The very long period of time spent on death row.
2. The extreme harsh conditions of death row.
3. The ever present and mounting anguish of awaiting execution.³⁹

Death row phenomenon has been recognised by medical and legal professionals, UN experts and national and regional courts. Some judicial bodies have stated that the length of time spent awaiting execution is in and of itself cruel or inhuman punishment: these include the UK-based Judicial Committee of the Privy Council, which has created ‘a presumption that spending more than five years on death row meets the criteria necessary for a finding of death row phenomenon’,^{*} and the Ugandan Constitutional and Supreme Courts, which ruled in the case of *Kigula & 416 Others v. Attorney General* that ‘any prisoners who had been on death row more than three years were entitled to have their death sentences commuted to life imprisonment’.⁴⁰ Other bodies, such as the European Court of Human Rights and the UN Human Rights Committee, consider time detained as well as conditions of detention when considering whether those awaiting execution are experiencing cruel, inhuman or degrading treatment. This has led to less clear-cut lines on when death row detention becomes unacceptable, but (at least in theory) permits a sliding scale whereby a period of detention becomes less justifiable as conditions become harsher.

In reality, the conditions on death row are often considerably worse than those experienced by the rest of the prison population and may include:

- Solitary confinement for up to 23 hours a day in small, cramped, airless cells, often under extreme temperatures.
- Inadequate nutrition and sanitation arrangements.
- Limited contact with family members and/or lawyers.
- Excessive use of handcuffing or other types of shackles or restraints.
- Physical or verbal abuse.
- Lack of appropriate health care (physical and mental).
- Denial of access to books, newspapers, exercise, education, employment, or any other type of prison activities.⁴¹

Of these, solitary confinement is especially common among those suffering from death row phenomenon. Its use for death row and life sentenced prisoners was condemned by the *Istanbul statement on the use and effects of solitary confinement*, which emerged from a meeting of ‘24 international experts, including doctors, academics, civil society and the [then] UN Special Rapporteur on torture and other cruel,

^{*} The case that created this presumption was *Pratt and Morgan v. Attorney General of Jamaica and Superintendent of Prisons* [1994] 2 AC 1, PC. Further cases have refined (at least in individual situations) the acceptable length of time, including *Guerra v. Baptiste* [1996] AC 397, PC and *Henfield v. Attorney General of the Bahamas* [1997] AC 413, PC. These cases are all referred to in *Death row phenomenon 2012*.

inhuman or degrading treatment or punishment, Manfred Nowak'.⁴² The Istanbul statement also defined solitary confinement as 'the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day'.⁴³ Impacts of prolonged solitary confinement include 'paranoia, self-mutilation, suicidal thoughts, depression, and loss of a sense of reality'; the UN Special Rapporteur on Torture has defined prolonged solitary confinement as any period above 15 days and has called for its prohibition.⁴⁴

It has been argued that there is an emerging principle of customary international law that the death penalty itself breaches the prohibition on torture and cruel, inhuman or degrading treatment. Evidence for this comes from the increasing number of courts and governments that have described the death penalty in such terms and from the growing empirical evidence of the impacts of the death penalty. If this emerging principle were shown, it would be binding on all states and in all situations regardless of treaty signature or ratification and mean the death penalty would be comprehensively outlawed.

Recommended strengthening of standards

- Methods of execution known to be especially cruel, inhuman or degrading should be specifically prohibited. Retentionist states should regularly review their execution procedures with reference to latest international research and findings on the degree of suffering caused by different methods of execution.
- Both public and secret executions should be prohibited.
- Efforts should be made to prevent, or failing that to minimise, the occurrence and severity of death row phenomenon and other mental or physical health conditions arising from imprisonment prior to execution. In particular, conditions of imprisonment on death row should be commensurate with each individual prisoner's risk, as identified by an individual risk assessment.
- Prolonged solitary confinement, whether as punishment or as an ordinary part of imprisonment prior to execution, should be prohibited.

Issues not directly related to existing minimum standards

The issues below relate to problems with the imposition or use of the death penalty that are not clearly related to any of the current ECOSOC standards. They examine the relevant issues and make recommendations for future strengthening of national and international standards.

Exemptions in times of war

Issue

While there is no international treaty that introduces or requires the imposition of the death penalty, a number of international agreements allow the retention of capital punishment in times of war or imminent threat of war. The 1983 Protocol No. 6 to the European Convention on Human Rights states: 'A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions'. Optional Protocol 2 to the International Covenant on Civil and Political Rights (ICCPR OP2) (1989) permits 'a reservation made **at the time of ratification or accession** [emphasis added] that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime'. The 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty allows that '**at the time of ratification or accession** [emphasis added], the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature'.

A large majority of states that have signed up to these treaties have not made such a reservation: just five of the 81 states party to ICCPR OP2 (three earlier reservations have been withdrawn) and two of 13 states party to the Protocol to the American Convention. Of the 46 states party to the ECHR Protocol No. 6 (which does not have the

‘at time of ratification or accession’ restriction on reservations), 43 have also ratified ECHR Protocol No. 13, which forbids the use of the death penalty in all circumstances.

However, there is no agreement about which offences fall under the category of ‘most/extremely serious crimes in wartime’. While the more recent treaties in this area have limited the death penalty to the ‘most serious’ or ‘extremely serious crimes of a military nature’, there is no definition of what these constitute. The phrase ‘most serious crimes’, when applied to the use of the death penalty more generally, has in recent expert opinion been understood to constitute only those cases ‘where it can be shown that there was an intention to kill which resulted in the loss of life’.⁴⁵ However, in wartime the application of ‘intentional loss of life’ as a threshold for death penalty-applicable crimes is not logical; there is a legal concept of ‘lawful killing’, which extends to intentional killings which fall within the scope of lawful acts of war. What is clear is that many of the permitted military offences in various national jurisdictions fall far short of this standard, as they can include:

- Capitulation in an open place by an officer in command (Cyprus);
- Disobedience or other non-performance of an order (in a combat situation) (Kazakhstan);
- Any act calculated to imperil the success of military operations, with the aim of aiding the enemy (Antigua and Barbuda);
- Wilful destruction or damage to (among other things) public utilities, supplies, medicines or other items that are intended for or may be used for defending the country, if committed in wartime (Bahrain);
- Through cowardice sending a flag of truce to the enemy (Bangladesh);⁴⁶
- Cowardice (Eritrea); and
- Voluntary self-mutilation aimed at making oneself unfit for service in time of war (Madagascar).⁴⁷

In effect, the laws of some states appear to permit severe punishments, including the death penalty, for almost any action that damages or intends to damage military operations, effectiveness or authority. This is considerably beyond the scope of ‘most serious offences’, as currently understood by UN and other experts.’

* See *Offences carrying the death penalty* section, above, for a discussion of the breadth of ‘most serious offences’.

The Third and Fourth Geneva Conventions 1949, dealing with prisoners of war and civilian persons in time of war respectively, both include provisions relevant to the death penalty. The Third Geneva Convention requires that sentences (including death sentences) for an offence must also be permitted for military personnel of the detaining state (Articles 87 and 102), that sentences for prisoners of war may be reduced (even beyond the normal legal minimum sentence) because they are not bound to the detaining state by any duty of allegiance (Articles 87 and 100), that the detaining state follows the judicial proceedings laid out in the Convention (Articles 99-107), and that any sentence of death be delayed by at least six months (Article 101). The Fourth Geneva Convention has similar requirements (it does not require offences to also apply to occupying military personnel); it additionally restricts the imposition of the death penalty only to cases of 'espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons'.⁴⁸ Even then, such offences must have already been punishable by death 'under the law of the occupied territory in force before the occupation began'.⁴⁹

Since this time, international standards have developed. The Rome Statute of the International Criminal Court, which covers crimes including genocide, war crimes and the crime of aggression (all of which primarily or exclusively take place in times of war) does not include the death penalty as an available punishment.*

While the use of the death penalty was still perceived permissible at a time of 'imminent threat of war' when ECHR Protocol 6 was adopted in 1983, it has not been included in more recent standards on this issue, which indicates that this exception is no longer deemed appropriate.

Furthermore, it has been suggested that the death penalty itself constitutes torture, and that this understanding may be an emerging norm of customary international law.† Were this understanding to gain general acceptance, then the absolute nature of the prohibition on torture, which permits no derogation even in times of war, would mean that the death penalty is prohibited at all times, including wartime.

Recommended strengthening of standards

- Where the death penalty is permitted for wartime offences, it should be limited to the most serious offences only, those involving an intention to kill resulting in the loss of life outside the scope of lawful acts of war.

* The Rome Statute also includes the offence of crimes against humanity, which can be committed outside of times of war. It also does not have the death penalty as an available punishment.

† See *Minimisation of suffering* section, above, for more on this argument.

Military and special courts*

Issue

Military courts in many countries have the ability to try suspects (sometimes civilians as well as military personnel) and impose penalties including the death penalty. Similarly, special courts (those set up to try national security- or terrorism-related cases and which often report to the executive not the judiciary) frequently have the power to sentence people to death after following a judicial procedure that differs from that in ordinary courts. The similarities in the way they often operate mean that military and special courts will both be considered in the same section.

Due to the severity and irreversibility of a death sentence, it is especially important that fair trial standards[†] are upheld in death penalty cases.⁵⁰ However, there have been repeated reports over many years and world regions of shortcomings in trials in military courts.[‡]

Concerns about military justice include:

- Non-independence of judges or prosecutors (especially where the judges or prosecutors are subordinate to the Ministry of Defence and/or physically located at military bases);⁵¹
- Limits to *habeas corpus* (the right to access justice and the courts);
- Limits on defendants freely choosing their legal representation;
- Lack of legal aid: the UN Legal Aid Principles and Guidelines require that those charged with a criminal offence punishable by the death penalty are entitled to legal aid at all stages of the criminal justice process;⁵²

* At time of writing, the UN Office of the High Commissioner on Human Rights was undertaking an Expert Consultation on the Administration of Justice Through Military Tribunals, a summary of which would be presented to the UN Human Rights Council in March 2015. That process may provide additional relevant information for this topic.

† A complete list (produced by the UN Special Rapporteur on the independence of judges and lawyers in her 2007 report) includes:

- (a) the right to be informed promptly of the reasons for arrest;
- (b) the right to the necessary means of defence;
- (c) the right to be present during the trial;
- (d) the presumption of innocence;
- (e) the right to remain silent;
- (f) the right to an independent and impartial tribunal;
- (g) the right to appeal;
- (h) the non-retroactivity of criminal laws;
- (i) the right to present witnesses;
- (k) the principle of *non bis in idem*;
- (l) the right to have the lawyer of one's choosing;
- (m) the right to legal aid;
- (n) the right to have the judgement pronounced publicly.

‡ See for example the various reports of the UN Special Rapporteur on the independence of judges and lawyers and the UN Working Group on Arbitrary Detention, which detail multiple cases of arbitrariness in military justice settings.

- Trials held in private or secretly;⁵³
- Information relevant to or used in the trial being withheld from the defendant and/or their lawyers;
- The degree of influence that military authorities can apply over military courts; and
- Limited possibility of appeal to an independent court.⁵⁴

The rules governing military courts are different in times of war and at other times. During times of war, the Third Geneva Convention allows for prisoners of war to be tried only by military courts ‘unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war’.⁵⁵ The Fourth Geneva Convention provides, in case of occupation, for ‘properly constituted, non-political military courts’⁵⁶ to hear cases involving civilians ‘on condition that the said courts sit in the occupied country’.⁵⁷ At other times, the scope of military justice would be limited by domestic law and international or regional human rights law, which includes requirements for fair trial guarantees and limits on use of the death penalty.

States of emergency form a ‘grey area’: they often involve increased activity by the military and (separately) permit states to legally, unilaterally and temporarily derogate from some of their human rights obligations. States of emergency may, in practice, also result in the replacement of ordinary courts by (less independent) military courts. However, it is important to remember that not all human rights can be suspended: some standards related to fair trials are considered non-derogable under the International Covenant on Civil and Political Rights (Article 4(2) provides a list, which includes Article 6 on the death penalty). Additionally, the UN Human Rights Committee in its General Comment 29, dealing with states of emergency, has stated: ‘States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance [...] through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence’.⁵⁸ Additionally, ‘as article 6 of the Covenant [which relates to the death penalty] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [administration of justice] and 15 [no retrospective prosecutions or penalties]’.⁵⁹

International and regional bodies and experts have recommended limits on the authority of military courts to impose and apply death sentences, due to the way that military courts have operated in practice. In 1984, the UN Human Rights Committee said in relation to military (or special) courts which try civilians: 'This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.'⁶⁰ It continued this analysis in its General Comment 32, adopted in 2007: 'Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials'.⁶¹

The UN Working Group on Arbitrary Detention stated in June 2014 its concerns that the importance for military officials to be obedient to their superiors is at odds with the centrality of a judge's independence and that 'military tribunals are often used to deal with political opposition groups, journalists and human rights defenders. The trial of civilians or decisions placing civilians in preventive detention by military courts are in violation of the International Covenant and customary international law as confirmed by the constant jurisprudence of the Working Group.'⁶² It set out a list of minimum principles that military justice must follow:

- (a) Military tribunals should only be competent to try military personnel for military offences;
- (b) If civilians have also been indicted in a case, military tribunals should not try military personnel;
- (c) Military courts should not try military personnel if any of the victims are civilians;
- (d) Military tribunals should not be competent to consider cases of rebellion, the sedition or attacks against a democratic regime, since in those cases the victims are all citizens of the country concerned;
- (e) Military tribunals should never be competent to impose the death penalty.⁶³

The 1994 Inter-American Convention on Forced Disappearance of Persons, Article IX stated: 'Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, **to the exclusion of all other special jurisdictions, particularly**

military jurisdictions' (emphasis added). In the same year, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions reported that the use of military jurisdiction in relation to human rights violations 'almost always results in impunity for the security forces'.⁶⁴ The 1985 Basic Principles on the Independence of the Judiciary state that 'Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals' (Principle 5).

A draft set of principles was presented in 2006 to the UN Commission on Human Rights on the administration of justice through military tribunals. These so-called 'Decaux Principles' draw on the findings of other UN bodies to recommend limited jurisdiction for military courts and tribunals: 'The Human Rights Committee's practice over the past 20 years, particularly in its views concerning individual communications or its concluding observations on national reports, has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel. Many thematic or country rapporteurs have also taken a very strong position in favour of military tribunals' lack of authority to try civilians.'⁶⁵ The jurisdiction of military courts 'should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status' (Principle 8). This echoes a substantively identical recommendation from the UN Special Rapporteur on the independence of judges and lawyers in 2003.⁶⁶ Related to this, the UN Working Group on Arbitrary Detention has stated that 'Military courts should not try military personnel if any of the victims are civilians'.⁶⁷

The Decaux Principles also call for a guarantee of *habeas corpus* (Principle 12) and that defendants are heard by a competent, independent and impartial tribunal (Principle 13). They deal directly with the death penalty in Principle 19, which states (in part): 'Sub-Commission resolution 2004/25 recommends that the death penalty should not be imposed on civilians tried by military tribunals or by courts in which one or more of the judges is a member of the armed forces. The same should apply to conscientious objectors on trial for desertion before military tribunals.'⁶⁸ The same conclusion was reached by the UN Working Group on Arbitrary Detention, which in 1998 stated that persistent shortcomings in military courts' administration of justice, in particular the lack of transparency and existence of arbitrariness and impunity in military courts, meant that they should be prohibited from imposing the death penalty in all circumstances.⁶⁹

Special courts may operate under a number of names, including ‘State Security Courts, revolutionary tribunals, special courts martial and military tribunals’.⁷⁰ They often try cases related to specific offences (such as terrorism, organised crime or offences against state security). The rules of procedure, openness to public scrutiny and independence of such courts are frequently worse than in ordinary courts: among other things, they may have discretion to hold trials in secret and judges may be responsible to or influenced by the executive. Due to the nature of the offences tried and/or the weaker due process obligations they may have, special courts may impose the death penalty more frequently than ordinary courts. They often include a mixed panel of civilian and military judges. Special courts may be successor bodies to previously (purely) military courts, for example where a country is moving from military to civilian rule.

Concerns about special courts include:

- Inability to cross-examine prosecution witnesses;
- Undue influence of political or military authorities over decisions of guilt or of sentencing;
- Lack of independence of judges or magistrates;
- Failure to follow fair trial norms;
- Failure to inform defendants of charges against them ahead of the trial, so defendants unable to prepare a proper defence;
- Inability of defendants to have legal representation of their choosing, or any legal representation at all;⁷¹
- Trials held in secret;
- Inability to appeal decisions or refusal of permission to appeal.⁷²

Special courts exist in countries including Afghanistan,⁷³ the Democratic Republic of the Congo,⁷⁴ Gabon⁷⁵ and Jordan,⁷⁶ and formerly in Turkey and many Latin American states.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated in 1983 that ‘death sentences were almost always passed by a special tribunal, special military tribunal or revolutionary tribunal which did not comply with procedural norms.’⁷⁷ Death sentences and executions imposed or carried out by special courts or tribunals are at high risk of being summary or arbitrary,⁷⁸ because the procedures they follow so often fall short of the fair trial standards that are necessary to avoid arbitrariness.

Recommended strengthening of standards

- Military, special and security courts (including other-named courts operating in a similar manner) should be prohibited from passing death sentences in any situation.
- With the exception of situations covered by Article 66 of the Fourth Geneva Convention 1949, civilians should not be tried in military courts.
- Military courts should be prohibited from trying military personnel if the victims include civilians.
- The death penalty should not be available in cases involving intentional killings which fall within the scope of lawful acts of war.
- Military and special courts should at all times respect and adhere to international fair trial standards.
- Those tried in military or special courts should have the same rights of appeal as those tried in ordinary courts, and should have their appeals heard in the civilian courts of appeal.

Expansion or reintroduction of the death penalty

Issue

There is extensive jurisprudence from international and regional human rights bodies that any expansion of the range of offences carrying the death penalty is incompatible with Article 6 of the ICCPR. Article 4(2) of the American Convention on Human Rights states that the application of the death penalty 'shall not be extended to crimes to which it does not presently apply'. The UN Human Rights Committee has stated that 'Extension of the scope of application of the death penalty raises questions as to the compatibility with article 6 of the International Covenant on Civil and Political Rights'.⁷⁹ The former UN Commission on Human Rights in 2005 called upon all states that still maintain the death penalty 'not to extend its application to crimes to which it does not at present apply'.⁸⁰ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated: 'The scope of application of the death penalty should never be extended'⁸¹ and has held that expansions of the scope of the death penalty 'are in clear violation of the international trend towards abolishing the death penalty.'⁸²

Some international standards that prohibit the death penalty also forbid its reintroduction, most notably the American Convention on Human Rights, which states in Article 4(3): 'The death penalty shall not be reestablished in states that have abolished it'. Furthermore, the UN Secretary General in his 2009 report on the death penalty asserted

that a state ‘that has already abolished the death penalty may not contribute in any manner to its imposition’ and that this ‘appears to have, as a logical corollary, the prohibition of reinstatement of capital punishment’.⁸³

Recommended strengthening of standards

- There should be a prohibition on retentionist jurisdictions introducing or reintroducing the death penalty for an offence for which it has been abolished or did not previously apply.
- There should be a prohibition on re-establishing the death penalty in jurisdictions that have abolished it.

Obligations on abolitionist states with regard to retentionist states

Issue

For states that have abolished the death penalty, there are moral, legal and political obligations on them not to assist, by action or omission, use of the death penalty in other states.⁸⁴ This means that abolitionist states should not engage with retentionist states in ways that can or do cause the use of the death penalty. These include:

- Not extraditing or deporting persons at risk of facing the death penalty, whether they are suspected or convicted of capital offences;⁸⁵
- Not exporting to retentionist states goods that can be used in the imposition of the death penalty, such as drugs used for lethal injection;⁸⁶
- Not providing financial, technical, legislative or other support for law enforcement programmes (such as drug enforcement programmes), where the offences targeted can receive the death penalty. Drug-related offences have been found by UN human rights bodies not to constitute ‘most serious offences’.⁸⁷

Recommended strengthening of standards

Standards should state that countries which have abolished the death penalty should not, through act or omission, assist or facilitate the imposition or use of the death penalty in other countries. In particular, there should be:

- A prohibition on extradition or deportation of persons at risk of being sentenced to death or executed, unless effective and legally binding guarantees can be provided that they will not face capital punishment.

- A prohibition on the export of goods for use in the imposition of the death penalty. For dual-use goods, which have uses related and unrelated to the death penalty (for example, ropes), at least end-user catch-all provisions should be included to highlight the risk of diversion to uses related to capital punishment.
- A prohibition on the use of financial, technical, legislative or other support for any part of law-enforcement programmes that facilitate the use of capital punishment.

Moratoriums on the use of the death penalty

Issue

Many countries that have abolished the death penalty stopped using it years prior to abolition; a number of states currently impose a legal or *de facto* moratorium on the use of the death penalty. Yet there are currently no international standards on what constitutes a moratorium or what actions are appropriate once a moratorium is declared or in place.

Moratoriums can be imposed through a legal or legislative process (by parliamentary votes or court rulings), by decree (from the head of state, government or relevant department) or *de facto* (where no death sentences are imposed and/or carried out but without any public directive that this should happen). Some moratoriums prohibit executions, others cover both executions and death sentences.

Particularly where moratoriums exist *de facto* or by decree, they create uncertainty for offenders and are vulnerable to sudden and unexpected reversals. Changes of government, and a desire among politicians to act in response to (real or perceived) concerns of the public about crime, resulted in the lifting of moratoriums in 2013 and 2014. A requirement that a moratorium, once declared, can only be lifted following a legislative or judicial decision-making process, could help to provide some certainty and protection against sudden or arbitrary changes of policy.

Many moratoriums only apply to executions, not sentences. This means that people can still be sentenced to death and imprisoned on death row, and that all those sentenced to death live in a limbo, with no execution date but also no way of leaving death row. This uncertainty can be intensely agonising for prisoners and their families, particularly if there is a risk that the moratorium may be lifted and executions resume. In cases where a moratorium includes sentences, those who were sentenced before the moratorium will be in the same limbo and situation, unless the moratorium also includes a commutation of existing death sentences.

Recommended strengthening of standards

- Moratoriums on the death penalty should cover both sentencing and executions.
- Moratoriums, however they are imposed, should not be able to be lifted without a legislative or judicial process.
- Existing death sentences should be commuted as part of the moratorium.

Pre-execution period

Issue

Once all appeals and pardon/commutation requests have been exhausted, persons sentenced to death may be executed. This may happen without warning (as in Japan) or with dates announced in advance (as in the USA).

Both approaches can have traumatising implications for prisoners and their families. When prisoners know about the execution date, they (and children/family members) may become increasingly anxious as the date approaches: this is the stated reason for not informing prisoners in advance in Japan,⁸⁸ though this has been stated by the UN Human Rights Committee to amount to cruel, inhuman or degrading treatment or punishment.⁸⁹ Prisoners who have no execution date can also be distressed by living in a state of perpetual anxiety; this uncertainty extends to their children and other relatives, who will also be denied the opportunity for a final visit prior to execution and are unable to prepare for the execution/loss.

Recent reports have documented the extreme distress that can be caused to children seeing their parent for the last time; however, children who had visited their parents prior to execution did not regret it, difficult as it was, and those who did not meet their parent wished they had.⁹⁰ When final visits require travelling over extended distances (such as from abroad or the other end of a large country) additional time may be required so the visits can take place. It is important that sufficient advance notice is given of the execution to enable final visits to take place: short periods such as 72 hours' notice may well be insufficient to permit adequate preparation and travel time.⁹¹

There have been reported cases of final visits being cancelled for disciplinary reasons (a prisoner refusing to move from their cell to the execution suite and having the final visit with family members cancelled as punishment). Given the importance of visits to the family and prisoner, the benefits that family members may gain from seeing

the prisoner before execution and the family's lack of culpability, such cancellations should never happen; moreover, family members should be assisted practically, emotionally and financially in making these visits.

There are also cases of execution dates being brought forward, which can disrupt or prevent final visits and other preparations for execution from taking place (including last-minute appeals and mental preparation for execution by all concerned). Due to the negative impacts, bringing forward execution dates should be prohibited.

Recommended strengthening of standards

- Execution dates should be announced sufficiently far in advance to organise and hold one or more final visits, at no cost to the prisoner or their visitors. Additional time should be provided if visitors are coming from far away, such as another country.
- Final visits should be private and permit physical contact, and should be of sufficient length to enable participants to say whatever they need to. This is particularly important in cases where there has been little or no communication between those participating in the visit for an extended period, as they may have to overcome awkwardness and other barriers to communication. Subsequent support should be made available to help children and other visitors to cope with the situation.
- Final visits should never be cancelled for disciplinary or other reasons.
- Announced execution dates should never be brought forward.

Burial and effects of the deceased

Issue

Following execution, the body of the deceased may be given to the family, or buried or otherwise disposed of by the prison authorities. In some jurisdictions, the burial and location of the remains are kept secret, even from the deceased's family members; this harms their grieving process and may also violate the family members' right to freedom of religion and belief if they are unable to perform funeral rites.⁹² Speedy return of the body is especially important when the family's beliefs require funerals or burial to take place within a certain time. It may be that bodies are buried in prison or other restricted areas; in such cases, the family should be given special dispensation to visit on a regular basis.

In some jurisdictions, inquests are required following executions (this may be because all deaths in prison require inquests or because all non-natural deaths do so). Both the time an inquest takes and the

issues it covers may be distressing to family members of the deceased, and in this situation generally seems unnecessary because the cause and circumstances of death are known.

The items and personal effects of the deceased are likely to have a strong emotional value for their family. In many countries that apply the death penalty, however, such items are not given to family members. There are accounts of personal effects being left by the side of the road following an execution, for the family to pick up themselves.⁹³ Such practices are deeply and unnecessarily upsetting for family members and should be discontinued.

Recommended strengthening of standards

- The body and personal effects of the deceased should be transferred to next of kin as promptly as is reasonable and without cost following execution, should they wish to receive them. Where necessary, it should be transferred at a speed and in a manner that would allow the next of kin to conduct funeral rites in accordance with their religion or belief.
- The body and personal effects of the deceased should at all times be treated with respect and dignity.
- Inquests should not be routinely required following execution; where they are deemed necessary they should be carried out at a speed and in a manner that respects the family's grief.
- Remains of deceased persons should not be disposed of in secret.
- In cases where a body has previously been secretly disposed of, family members should be informed of the location of the body. Should access to the burial place be restricted in any way, family members must be permitted to visit regularly.

Information and transparency

Issue

The full and clear provision of information about the death penalty is important for many reasons. It helps guarantee due process and can prevent unfair procedures or outcomes. It allows persons facing the death penalty to know about their situation and the options available to them (such as the possibility of appeal, commutation or pardon). It might help reduce the fear and uncertainty of those facing death. It can help the general public form an informed opinion about the death penalty (the need for this can be shown by, for example, a 2013 opinion survey in Belarus which found that one in three people had inaccurate beliefs about the existence of the death penalty in their country⁹⁴).

ECOSOC resolution 1989/64 of 24 May 1989, paragraph 5:
Urges Member States to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law.

The OSCE requires its member states to provide information about the death penalty and to make this information public, which it publishes in the form of an annual publication on the subject. The EU Guidelines on the Death Penalty reiterate the Union's commitment to providing this information.*

Yet despite this, in some states 'data on the use of the death penalty is classified as a State secret, the disclosure of which constitutes a criminal offence'.⁹⁵

A related issue is when states do not provide information about the fact of the execution or details of where a body is buried. This can inhibit public awareness about the reality of the death penalty. Moreover, not having information about the fate or remains of their loved ones can prevent family members, including children, being able to grieve. It can also prevent them from having 'closure' on the execution, as they may still be searching for information about what has happened, who was responsible and where the remains of their loved one are. This remains an issue even after the death penalty is abolished or a moratorium put in place. Authorities should provide this information to families as part of a process of dealing with the past and moving away from the death penalty; giving information will also acknowledge the negative effect of the execution on the families.

Recommended strengthening of standards

- States should make publicly available, in a timely manner, full and transparent information about the number of persons charged with an offence carrying a (discretionary or mandatory) death sentence, the number sentenced to death and the status of any appeals or clemency/pardon applications that have been made. Information should also be provided about the number of children affected by having a parent sentenced to death.

* In section 1(vi).

- Information about the death penalty should be distributed in paper and electronic formats, in all official languages of the state in question.
- Information about the execution and burial should be provided, in particular to families whose relatives have been executed. This obligation remains even after abolition or imposition of a moratorium.

Children of parents sentenced to death

Issue

Children are impacted in many ways when a parent is at risk of, or is subjected to, the death penalty. Their mental and physical health and wellbeing, behaviour, school attendance and achievement, relationships with those around them (including the parent sentenced to death), home and carers can all be affected. They may face stigma due to their relationship with their parent, and trauma caused by the expectation (and sometimes the reality) of a parent's execution.

While this is likely true of all those close to the person sentenced to death or executed, children have particular rights under international law* that need to be respected. In particular, their right to a relationship with their parents (Article 9), their right not to be discriminated against because of the status or activities of their parent (Article 2) and the right to have their best interests be a primary consideration in all matters that affect them (Article 3) need to be respected.

This issue has been identified by various UN bodies and experts in recent years, including the UN General Assembly,⁹⁶ the UN Human Rights Council (through its Universal Periodic Review system, resolutions on the rights of the child and a panel discussion on the rights of children of parents sentenced to the death penalty or executed) and the Special Representative of the Secretary-General on Violence against Children.⁹⁷ The issue was also raised by the Committee on the Rights of the Child in 2011, when it devoted a Day of Discussion to the issue of children of incarcerated parents: recommendation 16 from the Day speaks of the need for 'further detailed consideration and research on the specific difficulties impacting children of parents accused of a capital crime, on death row or executed vis-a-vis the best interests of the children'.⁹⁸ This recognition by so many UN human rights and political mechanisms in a short time (around three years) shows that the rights and needs of these children have been clearly recognised.

* Furthermore, their rights as expounded in the UN Convention on the Rights of the Child enjoy almost universal agreement, the Convention having been ratified by (at time of writing) 194 UN member and non-member states.

Recommended strengthening of standards

- The impact of death sentences (and alternative sentences) on the best interests of any children should be a primary consideration when sentencing a parent.
- Children should be able to have regular direct (in-person) and indirect communication with their parent(s) facing the death penalty, unless this is not in their best interests.
- Guidance should be provided to criminal justice professionals and others on how to appropriately interact with children of parents facing the death penalty.

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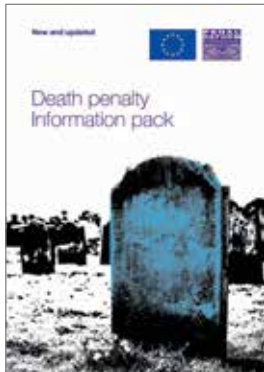
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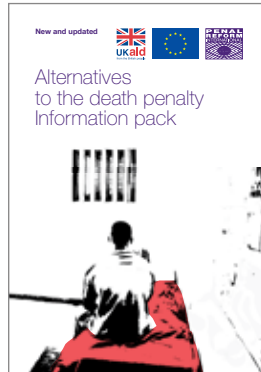
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Penal Reform International

60–62 Commercial Street
London E1 6LT
United Kingdom

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