



Promoting fair and  
effective criminal justice

## UN Human Rights Committee General Comment No. 36 – Article 6: Right to life Written submission from Penal Reform International

### Introduction

This submission focuses on the death penalty. Penal Reform International believes that the death penalty is inherently a violation of the right to life (as well as of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment) and should be abolished worldwide. We would strongly support a General Comment that came to that conclusion.

However, in the interests of non-duplication of effort, we focus here on issues that we believe are less thoroughly covered by other NGO submissions.

In structure, this submission focuses on various issues that relate to each sub-paragraph of Article 6. At the end of each issue there are suggestions for outcomes that could be included in the General Comment. The issues covered are:

Article 6(1)	Standard of proof Military and special courts
Article 6(2)	Exemptions in times of war Right of appeal
Article 6(3)	[No issues]
Article 6(4)	Pardons and commutations
Article 6(5)	Pregnant women and mothers of small children Persons with mental ill health Elderly prisoners
Article 6(6)	Expansion or reintroduction of the death penalty Applicability of abolition to previously convicted persons Obligations on abolitionist states with regard to retentionist states

This submission draws substantially on Penal Reform International's publication *Strengthening Death Penalty Standards*, which is available at: <http://www.penalreform.org/resource/strengthening-death-penalty-standards/>. The publication also considers other human rights impacts of capital punishment beyond those clearly linked to ICCPR Article 6.

### Article 6(1)

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

NB. For reasons of brevity and non-repetition of other submissions, we have excluded a section on preventing discrimination against particular groups in relation to the death penalty. If the Committee wishes to receive information on this, we can provide it.

### Standard of proof

Non-arbitrariness in criminal justice procedures requires a high degree of certainty regarding guilt (commonly that guilt be proved beyond reasonable doubt). Safeguard 4 of the 1984 ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty requires that 'Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts'. This is arguably a higher threshold than 'proof beyond reasonable doubt' and reflects the seriousness and irreversibility of a death sentence. Our reading of the relevant Safeguard is that this higher threshold does not affect the conviction, only the sentence that can be imposed following conviction.

### Recommended General Comment outcome

- 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.

### Military and special courts

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. However, there have been repeated reports over many years and world regions of shortcomings in fair trial standards in these tribunals.\* The similarities in the way they often operate mean that they will be considered together.

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);<sup>1</sup>
- Limits to *habeas corpus* ;
- 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;<sup>2</sup>
- Trials held in private or secretly;<sup>3</sup>
- 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.<sup>4</sup>

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'.<sup>5</sup> The Fourth

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\* 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.

Geneva Convention provides, in case of occupation, for 'properly constituted, non-political military courts'<sup>6</sup> to hear cases involving civilians 'on condition that the said courts sit in the occupied country'.<sup>7</sup> 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 ICCPR (Article 4(2) provides a list, which includes Article 6 on the death penalty). Additionally, the UN Human Rights Committee in 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'.<sup>8</sup> 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]'.<sup>9</sup>

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.'<sup>10</sup> 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'.<sup>11</sup>

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.'<sup>12</sup> 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.*<sup>13</sup>

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'.<sup>14</sup> 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). The 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa includes as Guideline L a specific right of civilians not to be tried by military courts.

A 2014 expert consultation on 'the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations', held under the auspices of the OHCHR, did not directly make recommendations relating to the death penalty and right to life, but did echo many earlier concerns about the independence, impartiality and competence of military tribunals, fair trial concerns and issues around competence of military tribunals to try civilians.<sup>15</sup>

Special courts may operate under a number of names, including 'State Security Courts, revolutionary tribunals, special courts martial and military tribunals'.<sup>16</sup> 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;<sup>17</sup>
- Trials held in secret;
- Inability to appeal decisions or refusal of permission to appeal.<sup>18</sup>

Special courts exist in countries including Afghanistan,<sup>19</sup> the Democratic Republic of the Congo,<sup>20</sup> Gabon<sup>21</sup> and Jordan,<sup>22</sup> 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'.<sup>23</sup> Death sentences and executions imposed or carried out by special courts or tribunals are at high

risk of being summary or arbitrary,<sup>24</sup> because the procedures they follow so often fall short of fair trial standards that are necessary to avoid arbitrariness. Perhaps recognising this, the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa includes as Guideline L(c) a requirement that ‘Special Tribunals should not try offences which fall within the jurisdiction of regular courts’.

### **Recommended General Comment outcomes**

- 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.

### **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.*

NB. For reasons of brevity and non-repetition of other submissions, we have excluded a section on most serious offences. If the Committee wishes to receive information on this, we can provide it.

### **Exemptions in times of war**

While there is no international treaty that introduces or requires the imposition of the death penalty, a number of international 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 ICCPR (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), 44 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'.<sup>25</sup> 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 open place by 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);<sup>26</sup>
- Cowardice (Eritrea); and
- Voluntary self-mutilation aimed at making oneself unfit for service in time of war (Madagascar).<sup>27</sup>

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.

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'.<sup>28</sup> Even then, such offences must have already been punishable by death 'under the law of the occupied territory in force before the occupation began'.<sup>29</sup>

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.\*

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\* 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.

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.<sup>30</sup> 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 General Comment outcome**

- 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.

### **Right of appeal**

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, crimes against humanity and crimes of aggression 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. 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.<sup>31</sup> 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. Safeguard 6 of the 1984 ECOSOC Safeguards requires that 'steps be taken to ensure that such appeals [against a death sentence] shall become mandatory'; this strongly implies 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'.<sup>32</sup> 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'.<sup>33</sup> As with other proceedings, where the defendant does not 'sufficiently understand the language used in court'<sup>34</sup> interpretation and translation should be provided, as stated in the Legal Aid Principles and Guidelines:<sup>35</sup> 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.<sup>36</sup> A substantive review is necessary to ensure that the decisions and reasoning of the earlier court are sound and legitimate.

#### **Recommended General Comment outcomes**

- 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.
- Executions should be automatically stayed whenever an appeal or other judicial or clemency/pardon process is pending.
- 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.

#### **Article 6(4)**

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

#### **Pardons and commutations**

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 General Comment outcomes**

- 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.

## Article 6(5)

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

NB. While only referring to juveniles and pregnant women, paragraph 6(5) can reasonably be defined as relating to groups excluded from death sentences and executions, and therefore we include in this section issues related to other often-excluded groups: persons with mental ill-health and elderly prisoners.

### Pregnant women and mothers of small children

Since the adoption of the ICCPR, many other international and regional standards (binding and non-binding) have covered the issue of pregnant women, and in addition mothers of small children. While the various standards use wording identical to the ICCPR in relation to pregnant women, there is significant variation in how the second part is formulated. ECOSOC Safeguard 3 of 1984 states that a death sentence shall not be *carried out* on 'new mothers' (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);\* 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',<sup>37</sup> with 'new mothers' being considered ones who are still breastfeeding.<sup>38</sup>

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'.<sup>†</sup> 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 limited ability to care for itself (especially in infancy) 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';<sup>39</sup> 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.<sup>40</sup> The World Health Organization recommends exclusive breastfeeding from birth to 6 months, then continued breastfeeding alongside complementary foods up to two years or beyond;<sup>41</sup> 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

\* 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.

† This echoes Article 3 of the 1989 Convention on the Rights of the Child.

growth.<sup>42</sup> 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.

Finally, the impact on the child of a father's death sentence should also be considered. Research from 2012 found that children can be as affected by the imprisonment of a father as they can of a mother,<sup>43</sup> 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 Article 30 of the African Charter on the Rights and Welfare of the Child, which concerns 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'.<sup>44</sup> 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;<sup>45</sup> the UN Human Rights Council has addressed the issue through its Universal Periodic Review process and resolutions on the rights of the child.<sup>46</sup>

### **Recommended General Comment outcomes**

- 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.
- Breastfeeding mothers should be supported in exclusive and non-exclusive breastfeeding of any nursing children.

### **Persons with mental ill health**

The prohibition on the execution of prisoners who are 'insane' has been stated as part of customary international law,<sup>47</sup> 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'.<sup>48</sup>

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 deprived of life through execution. The UN Human Rights Committee has found that execution (or continued incarceration) of persons with mental ill health constitutes cruel, inhuman and degrading punishment.<sup>49</sup>

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\* 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.

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 context. 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 necessary to cope with the requirements of everyday life';<sup>50</sup> 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 (and therefore who should be exempted from execution).

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'.<sup>51</sup> 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 General Comment outcomes**

- 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.

### **Elderly prisoners**

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',<sup>52</sup> while Kazakhstan prohibits the execution of anyone aged 65 at the point of sentencing. In its resolution on implementing the Safeguards (Resolution 1989/64, No. 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'. This concept of a maximum age (usually tied to time of offence or sentencing) is established in certain world regions (particularly the Americas and former member states of the Soviet Union); the Committee may wish to consider whether this is applicable worldwide.

### **Recommended General Comment outcome**

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\* 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.

- Consider whether there should be an upper age limit after which a death sentence cannot be imposed or applied.

## Article 6(6)

*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

NB. The issues covered here relate to actions that should or should not be taken as part of abolition, on the way to abolition or ongoing responsibilities following abolition.

### Expansion or reintroduction of the death penalty

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'.<sup>53</sup> 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'.<sup>54</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated: 'The scope of application of the death penalty should never be extended'<sup>55</sup> 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'.<sup>56</sup>

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'.<sup>57</sup>

### Recommended General Comment outcomes

- Retentionist jurisdictions should be prohibited from introducing or reintroducing the death penalty for an offence for which it has been abolished or did not previously apply.
- Jurisdictions that have abolished the death penalty should be prohibited from re-establishing it.

### Applicability of abolition to previously convicted persons

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

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\* 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

death penalty cases, where abolition means the form of punishment changes, rather than just the length of the sentence.

#### **Recommended General Comment outcome**

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

#### **Obligations on abolitionist states with regard to retentionist states**

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.<sup>58</sup> 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;<sup>59</sup>
- Not exporting to retentionist states goods that can be used in the imposition of the death penalty, such as drugs used for lethal injection;<sup>60</sup>
- 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.

#### **Recommended General Comment outcomes**

- 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.

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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.

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- <sup>1</sup> UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, 7 June 2012, A/HRC/20/19, accessed 26 March 2014 via <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.
- <sup>2</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3.
- <sup>3</sup> UN Commission on Human Rights, 62<sup>nd</sup> Session, *Issue of the administration of justice through military tribunals - Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, Emmanuel Decaux, 13 January 2006, E/CN.4/2006/58, para. 21 (*Decaux Principles*), Principle 14.
- <sup>4</sup> UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Leonardo Despouy, 18 January 2007, A/HRC/4/25, accessed 26 March 2014 via <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.
- <sup>5</sup> Third Geneva Convention relative to the treatment of prisoners of war, 12 August 1949, Article 84.
- <sup>6</sup> Fourth Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, Article 66.
- <sup>7</sup> Fourth Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, Article 66.
- <sup>8</sup> UN Human Rights Committee, *General Comment No. 29: States of emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.
- <sup>9</sup> UN Human Rights Committee, *General Comment No. 29: States of emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 15.
- <sup>10</sup> UN Human Rights Committee, 21<sup>st</sup> Session, *General Comment No. 13: Article 14 (Administration of justice)*, 1 January 1984, para. 4.
- <sup>11</sup> UN Human Rights Committee, 90<sup>th</sup> Session, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, para. 22.
- <sup>12</sup> UN Human Rights Council, 27<sup>th</sup> Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, paras. 66-67.
- <sup>13</sup> UN Human Rights Council, 27<sup>th</sup> Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, para. 69.
- <sup>14</sup> Federico Andreu-Guzmán, *Military jurisdiction and international law: Military courts and gross human rights violations* (vol. 1), International Commission of Jurists, Geneva, 2004, p. 76 (*Military jurisdiction and international law*).
- <sup>15</sup> Human Rights Council, 28<sup>th</sup> Session, *Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations*, 29 January 2015, A/HRC/28/32.
- <sup>16</sup> *Military jurisdiction and international law*, p. 75.
- <sup>17</sup> *Military jurisdiction and international law*, pp. 74-5.
- <sup>18</sup> UN Human Rights Council, 13<sup>th</sup> Session, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin: *Mission to Egypt*, A/HRC/13/37/Add.2, para. 33.
- <sup>19</sup> The World Factbook (undated), *CIA website*, accessed 10 July 2014 at <https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html>.
- <sup>20</sup> 'The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview', December 2007, *GlobaLex website*, accessed 10 July 2014 at [http://www.nyulawglobal.org/globalex/democratic\\_republic\\_congo.htm#\\_Toc182803286](http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm#_Toc182803286).
- <sup>21</sup> The World Factbook (undated), *CIA website*, accessed 10 July 2014 at <https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html>; 'Gabon – Judicial system- 2014, *Encyclopedia of the Nations*, accessed 10 July 2014 at <http://www.nationsencyclopedia.com/Africa/Gabon-JUDICIAL-SYSTEM.html>.
- <sup>22</sup> King Hussein website (undated), *Government: The Judicial Branch*, accessed 12 June 2014 at: [http://www.google.jo/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDUQFjAD&url=http%3A%2F%2Fwww.kinghussein.gov.jo%2Fgovernment4.html&ei=PqeZU\\_n7ENGv7AaC8oH4Dw&usq=AFQjCNFFOxR7HKsS2O8Olz2iBeMyj00lag&bvm=bv.68911936,d.ZGU](http://www.google.jo/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDUQFjAD&url=http%3A%2F%2Fwww.kinghussein.gov.jo%2Fgovernment4.html&ei=PqeZU_n7ENGv7AaC8oH4Dw&usq=AFQjCNFFOxR7HKsS2O8Olz2iBeMyj00lag&bvm=bv.68911936,d.ZGU).
- <sup>23</sup> *Military jurisdiction and international law*, p. 73.
- <sup>24</sup> *Military jurisdiction and international law*, p. 74.
- <sup>25</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 29 January 2007, A/HRC/4/20, accessed 11 December 2013 at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/4/20&Lang=E>.
- <sup>26</sup> Bangladesh Army Act 1951, accessed 26 March 2014 at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=248](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=248).
- <sup>27</sup> Death Penalty Worldwide database, accessed 26 March 2014 at <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Madagascar>.
- <sup>28</sup> Fourth Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, Article 68, para. 2.
- <sup>29</sup> Fourth Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, Article 68, para. 2.

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- <sup>30</sup> See *Minimisation of suffering* section, above, for more on this argument.
- <sup>31</sup> For an example of a state where 'requests of retrial or pardon do not have the effect of staying the execution', see UN Human Rights Committee, 111<sup>th</sup> Session, *Advanced Unedited Version: Concluding observations on the sixth periodic report of Japan*, CCPR/C/JPN/CO/6, para. 13.
- <sup>32</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3.
- <sup>33</sup> UN Basic Principles on the Role of Lawyers, Principle 8.
- <sup>34</sup> ECOSOC, 45<sup>th</sup> Plenary Meeting, 1996/15: *Safeguards guaranteeing protection of the rights of those facing the death penalty*, 23 July 1996, OP4.
- <sup>35</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 3(f).
- <sup>36</sup> See for example: Amnesty International, *Iraq: A decade of abuses*, 11 March 2013, London, p. 49; UN Human Rights Council, 13<sup>th</sup> Session, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Mission to Egypt*, A/HRC/13/37/Add.2, para. 33.
- <sup>37</sup> EU, *EU Guidelines on the Death Penalty: revised and updated version*, 16 June 2008.
- <sup>38</sup> Information from EU official, May 2014.
- <sup>39</sup> UN Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood*, 20 September 2006, CRC/C/GC/7/Rev.1
- <sup>40</sup> UNICEF, *Pneumonia and diarrhoea: How to tackle the deadliest diseases for world's poorest children*, June 2012; The Lancet, 'The world's forgotten children', *The Lancet*, Vol 361, No 9351, 2003, p. 1.
- <sup>41</sup> 'Breastfeeding', 2014, *World Health Organization website*, accessed 26 March 2014 at <http://www.who.int/topics/breastfeeding/en/>.
- <sup>42</sup> International Baby Food Action Network, direct communication.
- <sup>43</sup> Adele D. Jones and Agnieszka E. Wainaina-Wozna (eds.), *Children of Prisoners: Interventions and mitigations to strengthen mental health*, University of Huddersfield, 2012
- <sup>44</sup> African Committee of Experts on the Rights and Welfare of the Child, *General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children Of Incarcerated And Imprisoned Parents And Primary Caregivers" 2013*, African Committee of Experts on the Rights and Welfare of the Child, Addis Ababa, 2013.
- <sup>45</sup> See for example: UN Committee on the Rights of the Child, 64<sup>th</sup> Session, *Concluding observations on the second periodic report of Kuwait*, CRC/C/KWT/CO/2, para. 32; UN Committee on the Rights of the Child, 64<sup>th</sup> Session, *Summary record of the 1833rd meeting*, CRC/C/SR.1833, para. 21; UN Committee on the Rights of the Child, 66<sup>th</sup> Session, *List of issues in relation to the combined third and fourth periodic reports of India*, CRC/C/IND/Q/3-4, para. 4.
- <sup>46</sup> UN Human Rights Council, 27<sup>th</sup> Session, *Question of the death penalty: Report of the Secretary-General*, A/HRC/27/23, paras. 65-68.
- <sup>47</sup> Death Penalty Worldwide, 'Mental Illness', *Death Penalty Worldwide website*, 20 December 2011, accessed 13 August 2014 at <http://www.deathpenaltyworldwide.org/mental-illness.cfm>.
- <sup>48</sup> Death Penalty Project, 'Trinidad & Tobago', *Death Penalty Project website*, undated, accessed 27 October 2014 at <http://www.deathpenaltyproject.org/where-we-operate/caribbean/trinidad-and-tobago/>.
- <sup>49</sup> UN Human Rights Committee, 54<sup>th</sup> Session, *Francis v. Jamaica: Communication No. 606/1994*, 3 August 1995, CCPR/C/54/D/606/1994; UN Human Rights Committee, 74<sup>th</sup> Session, *Sahadath v. Trinidad and Tobago: Communication No. 684/1996*, 15 April 2002, CCPR/C/74/D/684/1996.
- <sup>50</sup> Death Penalty Worldwide, 'Mental Illness', *Death Penalty Worldwide website*, 20 December 2011, accessed 13 August 2014 at <http://www.deathpenaltyworldwide.org/mental-illness.cfm>.
- <sup>51</sup> Law Commission, *Criminal Liability: Insanity and Automatism: A Discussion Paper*, London, 23 July 2013, p. 4.
- <sup>52</sup> 'China exempts 13 crimes from death penalty', 25 February 2011, *Chinese Government's Official Web Portal*, accessed 10 July 2014 at [http://english.gov.cn/2011-02/25/content\\_1810870.htm](http://english.gov.cn/2011-02/25/content_1810870.htm).
- <sup>53</sup> UN Human Rights Committee, 79<sup>th</sup> Session, *Concluding observations: Peru*, 25 July 1996, CCPR/C/79/Add.67, para.15.
- <sup>54</sup> UN Commission on Human Rights, 61<sup>st</sup> Session, *The question of the death penalty*, 20 April 2005, E/CN.4/RES/2005/59.
- <sup>55</sup> UN Commission on Human Rights, 50<sup>th</sup> Session, *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, 7 December 1993, E/CN.4/1994/7, para. 677.
- <sup>56</sup> UN Commission on Human Rights, 52<sup>nd</sup> Session, *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, 25 January 1996, E/CN.4/1996/4, para. 544.
- <sup>57</sup> ECOSOC, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General*, 18 December 2009, E/2010/10, para. 54, accessed 30 April 2014 at [http://www.unodc.org/documents/commissions/CCPCJ\\_session19/E2010\\_10eV0989256.pdf](http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf).
- <sup>58</sup> See for example: International Bar Association, May 2008, *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty*, International Bar Association, London.
- <sup>59</sup> See for example: *Case of Bader and Kanbor v. Sweden*, App. no. 13284/04 (ECtHR, 8 February 2006) and *Case of Soering v. The United Kingdom*, App. no. 14038/88 (ECtHR, 7 July 1989).
- <sup>60</sup> See for example: European Union, *Council Regulation (EU) No 1352/2011*, 20 December 2011.