

**General Discussion on the preparation for a General Comment on Article 6 (Right to Life)
of the International Covenant on Civil and Political Rights,
Palais des Nations, Room XIX – 14 July 2015**

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Introduction

This submission aims to provide concise observations on the interpretation and application of Article 6 that have not been covered by other NGOs or experts. In particular, I fully endorse the report prepared by the Advocates for Human Rights, FIACAT, and the World Coalition to Abolish the Death Penalty. As their report observes, international human rights law has evolved substantially since the Committee's last general comment was issued in 1982.

Article 6, paragraph 1: Meaning of “arbitrary deprivation”

As many have previously observed, capital punishment is frequently imposed after proceedings that fail to respect essential guarantees of due process, as set forth in Article 14 of the ICCPR. Moreover, in some states the death penalty is disproportionately imposed on racial or ethnic minorities, or foreign nationals. In all of these cases, the execution of the death sentence results in an arbitrary deprivation of life.¹ This conclusion draws support from the language of Article 6, paragraph 2, which explicitly states that the death penalty may not be imposed “contrary to the provisions of the present Covenant.”

In its jurisprudence, this Committee's definition of “arbitrary” depends somewhat on the clause referred to. For instance, the Committee held that even “lawful” killings of citizens by Colombian police constituted arbitrary deprivation of life on the grounds that the killings were “disproportionate to the requirements of law enforcement in the circumstances of the case.”² In evaluating “arbitrary arrest and detention” (barred by Art. 9(1) of the ICCPR), the Committee, relying on drafting history, concluded that “‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.”³ The HRC has directly addressed the issue of arbitrariness in the application of an otherwise legal capital sentence only in relation to the mandatory death penalty,⁴ and without examining the concept in depth. Its discussion of arbitrariness in a General Comment

¹ See Daniel Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 248 (Bertrand Ramcharan, ed., 1985) (deprivation of life is arbitrary if it is done in conflict with international human rights standards or international humanitarian law).

² *Suarez de Guerrero v. Colombia* Communication No. 45/79), ¶13.3, *reprinted in part in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 110 (2000).

³ *Van Alphen v. The Netherlands* Communication No. 305/1988, U.N. Doc. A/45/40, Vol. II, p. 108, ¶ 5.8.

⁴ See, e.g., *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998.

on Article 6 would provide needed clarity on the concept and its application in cases of discrimination in the application of the death penalty.

Article 6, paragraph 2: Meaning of “Most Serious Crimes”

There is an emerging consensus that the term “most serious crimes” must be defined as international homicide. This conclusion is based on the Committee’s own jurisprudence as well as reports of the Special Rapporteur on Extrajudicial and Arbitrary Executions, all of which are well known to the Committee and need no citation here.

The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty define “most serious crimes” as “intentional crimes with lethal or other extremely grave consequences.” This definition lacks precision, and allows states that continue to impose the death penalty for drug offences, economic crimes, and crimes of “moral turpitude” to defend their practices by arguing that these crimes have “extremely grave consequences” within their societies.

The laws of many retentionist states allow for the imposition of the death penalty on accomplices who neither participate in a killing, nor intend to cause the victim’s death. This doctrine is known by various names, including the “felony murder rule,” the “law of parties,” or the “law of common purpose.” In all circumstances, however, these doctrines violate the “most serious crimes” definition when they permit the imposition of the death sentence on an individual who—although he may have participated in an underlying felony—did not participate in the assault that caused the victim’s death.

Consistent with this principle, courts in some common law jurisdictions have vacated death sentences imposed on accomplice defendants who did not conclusively act with lethal intent.⁵ These examples of state practice add support to an argument that the limitation of the death penalty to intentional crimes with lethal consequences is now part of customary international law. In its General Comment, the Committee should reiterate its previous conclusion that the only offenses that satisfy the “most serious crimes” standard are those that involve the intentional taking of human life. The Committee should also note that the imposition of the death penalty on individuals who neither participated in the killing of another person, nor intended for another person to be killed, is inconsistent with Article 6, paragraph 2.

Article 6, paragraph 2: Death Penalty Not to be Imposed “Contrary to the Provisions of the Present Covenant

This clause is one of the most important limitations on the imposition of the death penalty. As the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty make clear, it requires that states rigorously observe the fair trial rights contained in Article 14, including the

⁵ See, e.g., *Ram Anup Singh & Ors. v. State of Bihar*, 2002(3) RCR Criminal 7856 (Supreme Court of India); *Haroon Khan v. the State*, (Trinidad and Tobago) Privy Council Appeal No. 28 of 2003, Judgment of 20 November 2003, UKPC (2003) (vacating death sentence imposed under a statute not requiring determination of intent to kill); *R. v Martineau* [1990] 2 SCR 633, 646-647 (Canadian felony murder statute not requiring establishment of requisite intent inconsistent with principles of fundamental justice).

right to “adequate legal assistance at all stages of the proceedings.”⁶ This Committee has accordingly held that when a state violates an individual’s due process rights under the ICCPR, it may not carry out his execution.⁷ Yet there is not a single retentionist state that observes this principle at all times.

In its 1989 resolution on the implementation of the Safeguards, ECOSOC made clear that states have an obligation to “provide special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, *including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.*”⁸ In addition, states must take measures to ensure that counsel is minimally qualified and competent to represent the accused.⁹ This rule is largely neglected in many states. In South Sudan, prisoners have been convicted and sentenced to death with no legal representation whatsoever.¹⁰ Severe shortages of lawyers have been reported in Afghanistan, Guinea, Malawi, Chad, Benin, Burkina Faso, Malawi, Mali, Sierra Leone, Republic of Congo, Eritrea, Gambia, South Sudan, Sudan, and Tanzania.¹¹ Even where lawyers are available, they are often inexperienced and ill-prepared to defend an individual facing capital

⁶ “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.”

⁷ See, e.g., *Johnson v. Jamaica*, No. 588/1994, H.R. Comm. para. 8.9 (1996); *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 (“[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of article 6 of the Covenant.”); *McLawrence v. Jamaica*, No. 702/1996, H.R. Comm. para. 5.13 (1997) (same); Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990) (“in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative”). See also OC-16/99, para. 135, Inter-Am. Ct. H.R. (October 1, 1999) (“[s]tates that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases”); G.A. Res. 35/172, Dec. 15, 1980 (member states must “review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases”).

⁸ ECSOC Resolution 1989/64, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 24 May 1989.

⁹ See *Artico v. Italy* App No 6694/74 (ECHR, 13 May 1980) [33].

¹⁰ See Human Rights Watch ‘South Sudan: Place Moratorium on Death Penalty’ (2012) <<http://www.hrw.org/news/2012/11/04/south-sudan-place-moratorium-death-penalty>> accessed 19 February 2015).

¹¹ See Death Penalty Worldwide <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?98-0chk=on>> accessed 30 January 2015.

charges.¹² In Equatorial Guinea, Guinea, Malawi, Uganda, and Zimbabwe, defense attorneys sometimes meet their clients for the first time on the day of trial.¹³

As a matter of law, indigent defendants facing capital trials are entitled to legal aid in many of these states. In practice, however, “state budget allocations to legal aid are minimal.”¹⁴ In Sierra Leone, lawyers receive US\$150 to represent the accused in capital cases.¹⁵ The UN Office on Drugs and Crime reported in 2011 that governments typically allocated few resources to legal aid.¹⁶ Governmental neglect in the provision of legal aid to indigent defendants has dire consequences in capital cases.

Given the importance of legal representation to guaranteeing the due process rights contained in Article 14, and in light of states’ widespread failure to provide even minimally trained and competent counsel in capital cases, the Committee should consider including a discussion of this issue in its General Comment. In particular, it should emphasize states’ obligations to remunerate legal counsel and to ensure counsel is qualified and competent to represent the accused.

Another example of a practice that violates the implicit mandate of Article 6 to respect the due process safeguards contained in Article 14 is found in the United States’ disregard of the *Avena* judgment of the International Court of Justice.¹⁷ In its March 2004 judgment, the ICJ found that the United States had violated Article 36 of the Vienna Convention on Consular Relations in the cases of 51 Mexican nationals. As a remedy, the ICJ held that each national was entitled to judicial review and reconsideration of his conviction and sentence to ascertain whether, and how, he was prejudiced by the violation of his consular rights.¹⁸ In essence, the remedy ordered by the ICJ was procedural in nature: it required, at a minimum, that the courts examine the nature of the violation and its effects on the capital prosecution of each Mexican national.

In the 2008 case of *Medellin v. Texas*,¹⁹ the United States Supreme Court acknowledged that the ICJ judgment was binding as a matter of international law, but found that it was non-self-executing.

¹² See Int’l Federation for Human Rights & The Botswana Centre for Human Rights, ‘The Death Penalty in Botswana Hasty and Secretive Hangings: International Fact-Finding Mission’ no 473/2 (2007) p. 21; Amnesty International, ‘Nigeria: Waiting for the Hangman’ AFR 44/020/2008 (2008) p. 17; International Federation for Human Rights, ‘The Death Penalty in Thailand,’ no 411/2 (2005).

¹³ Amnesty International, ‘Equatorial Guinea: Submission to the UN Universal Periodic Review’ AFR 24/002/2009 (2009); Human Rights Watch, ‘We Have Lived in Darkness: A Human Rights Agenda for Guinea’s New Government’ (2011) <<http://www.hrw.org/reports/2011/05/24/we-have-lived-darkness-0>> accessed 19 February 2015; Graeme L. Hall, ‘Death Row in Uganda’ Counsel Magazine (2012) <[http://www.doughtystreet.co.uk/documents/uploaded-documents/Counsel_2012_08_Int_Hall_\(Final\).pdf](http://www.doughtystreet.co.uk/documents/uploaded-documents/Counsel_2012_08_Int_Hall_(Final).pdf)> accessed 19 February 2015; Death Penalty Worldwide, ‘Malawi’ <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?98-0chk=on>> accessed 30 January 2015; Brian Hungwe, ‘On Zimbabwe’s Death Row Without a Lawyer’ *BBC News* (2 May 2010), <<http://news.bbc.co.uk/2/hi/8675062.stm>> accessed 19 February 2015.

¹⁴ United Nations Office on Drugs and Crime, ‘Access to Legal Aid in Criminal Justice Systems in Africa’ (2011), p. vii.

¹⁵ *Ibid.* at 11.

¹⁶ *Ibid.* at 18-19.

¹⁷ *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Merits) [2004] ICJ Rep 12 (Avena Judgment)

¹⁸ *Avena Judgment*, ICJ Rep 70-73.

¹⁹ *Medellin v. Texas* [2008] 552 U.S. 491, 499

On that basis, the Court determined that the President of the United States could not enforce the judgment in the absence of national legislation implementing the ICJ's decision.²⁰ Since the 2008 decision, the U.S. Congress has failed to pass legislation that would allow the individual Mexican nationals affected by the judgment to vindicate their rights to review and reconsideration. Four have been executed in violation of the ICJ's mandate.²¹

This situation represents a threat to the legitimacy of the international legal regime. Although compliance with the Vienna Convention on Consular Relations is not addressed by Article 6 or the Safeguards, the Inter-American Court on Human Rights has characterized the right to consular notification and access as a fundamental component of due process.²² Moreover, multiple resolutions have called upon states to comply with their Article 36 obligations in capital cases involving foreign nationals—including the most recent moratorium resolution of the United Nations General Assembly.²³ Consequently, the Committee should consider adopting language in its General Comment that compliance with Article 36 is necessary to vindicate the due process rights of foreign nationals facing the death penalty. Moreover, where a state has violated Article 36 in the case of a foreign national facing the death penalty, to carry out the national's execution would constitute an arbitrary deprivation of life where there is evidence that the violation prejudiced the accused. Finally, a state that executes a foreign national whose Article 36 rights were violated without providing review and reconsideration of his conviction and sentence pursuant to the *Avena* and *LaGrand* judgments of the International Court of Justice, violates its obligations under Article 6 to refrain from arbitrary deprivations of life.

A final question worth considering in the context of fair trial guarantees relates to the right to appeal. The Safeguards provide that any person sentenced to death shall have the right to appeal to a court of higher jurisdiction. They further call upon states to make such appeals mandatory in death penalty cases. Yet the right to appeal remains illusory in many states, largely because lawyers are not routinely appointed to handle death penalty appeals. In a study of 190 death-sentenced prisoners in Malawi, Death Penalty Worldwide found that at least two-thirds had never had the opportunity to file an appeal. Even though Malawi's constitution provides for the right to appeal, the right is illusory as many death row inmates are illiterate and have no means of filing a *pro se* appeal. The Committee should consider adopting language in its General Comment emphasizing the need for mandatory appeals where the death penalty is imposed in order to protect against wrongful convictions and ensure that individuals have a meaningful opportunity to vindicate their fair trial rights.

²⁰ Although the Court did not rule out "other means" of enforcing the judgment, it failed to identify any other measures that would not require congressional approval.

²¹ José Ernesto Medellín Rojas, Humberto Leal García, Edgar Tamayo Arias, and Ramiro Hernández Llanas.

²² OC 16/99, CITE. *See also* Inter-American Commission on Human Rights, Report No. 53/13, Case 12.864, para. 84.

²³ UNGA Res 69/186 (18 December 2014).

Article 6, paragraph 5: Execution of Juvenile Offenders

While most states prohibit the execution of juvenile offenders as a matter of law, individuals continue to be sentenced to death for crimes committed before the age of eighteen. In recent years, juvenile offenders have been sentenced to death in several states, including India, Iraq, Iran, Maldives, Malawi, Myanmar, Nigeria, Pakistan, Saudi Arabia, South Sudan, Sudan, Uganda, United Arab Emirates, and Yemen.²⁴

Some of these states prohibit the application of the death penalty to juvenile offenders as a matter of law. But in practice—particularly in countries lacking a national birth registry—there is still a risk that individuals can be sentenced to death for crimes committed when they were children. Without a birth certificate, many children in conflict with the law are unable to prove that they are under the age of eighteen. Juvenile offenders may not even know when they were born. Where there is a dispute about the offender's age, courts in some countries may order a physical examination in which a medical practitioner estimates the age of the accused based on the circumference of her wrist or the condition of her teeth (among other things). Such evaluations are notoriously unreliable.

For example, while India prohibits the sentencing to death of juveniles, this law has not always been followed in practice because of the difficulty of determining the precise age of individuals who were not registered at birth and thus lack birth certificates. Only about 50% of India's population has been registered at birth. Additionally, incompetence and inexperience among defense attorneys leads to failures to bring offenders' ages to the attention of courts.

Ramdeo Chauhan was convicted and sentenced in March 1998 for the 1992 murder of four members of a family for whom he worked as a domestic servant. According to Amnesty International, there was strong evidence that Chauhan was 15 years old at the time of the crime, and as such, his conviction and sentencing were “unsound.”²⁵ In January 2002, the Governor of Assam commuted Chauhan's sentence to life imprisonment in clemency proceedings. However, the Supreme Court struck down his decision in May 2009. In November 2010, the Supreme Court reversed its 2009 ruling, thus reinstating the Governor's previous decision to award life imprisonment to Chauhan.²⁶

The Gauhati High Court ruled in August 2011 that Chauhan was indeed a juvenile aged 15 to 16 years of age at the time of the offense.²⁷ After spending almost two decades behind bars, Chauhan is now a 34-year-old free man.

²⁴ See Death Penalty Worldwide <http://www.deathpenaltyworldwide.org/country-search-post.cfm?94-0chk=on> accessed June 5, 2015.

²⁵ Amnesty International, India: Death penalty/Fear of Execution, Ram Deo Cahuhan (Alias Raj Nath Chauhan), ASA 20/032/2011, May 24, 2001.

²⁶ Amnesty International, India: Amnesty International Welcomes Commutation of Death Sentence of a Child, ASA 20/033/2010, Nov. 25, 2010.

²⁷ Vishwajoy Mukherjee, A Long Wait for Freedom, Tehelka, http://www.tehelka.com/story_main50.asp?filename=Ws120911Law.asp, Sept. 12, 2011.

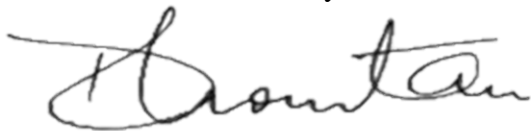
Although Chauhan's case had a happy ending, others are not so fortunate. The main problem is that courts do not routinely apply the rule that where a young person's age is in dispute, he should be given the benefit of the doubt. In its 10th General Comment, "Children's Rights in Juvenile Justice," the Committee on the Rights of the Child spoke at length about the importance of accurate determinations of juvenile status in the criminal justice system. It emphasized that a young person whose age is in dispute should be given the benefit of the doubt in the context of punishment, stating: "The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt." The Special Representative of the Secretary-General on Violence against Children has likewise recommended that, where it is not possible to conclusively determine the age of the child at the time of offence, she or he should be presumed to be below 18.²⁸

To ensure that states rigorously enforce the prohibition against the execution of child offenders, the Committee should adopt the view expressed by Special Representative on Violence Against Children. Where there is conflicting evidence that a young person was under the age of 18 at the time of the crime, and he is facing the possible imposition of the death penalty, he should be presumed to be below the age of 18. This principle carries even more weight where the absence of definitive proof is attributable to the state's failure to maintain a comprehensive national birth registry pursuant to Article 24 of the ICCPR.

Respectfully submitted,



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²⁸ Question of the Death Penalty: Report of the Secretary General, A/HRC/24/18, 1 July 2013, para. 65.

Court cases of *Sanchez-Llamas v. Oregon* and *Medellin v. Texas*. She is the founder and editor of *Death Penalty Worldwide*, a website and database that provide comprehensive information on the application of the death penalty around the world. She has published several articles, including *The Mandatory Death Penalty in Malawi: The Unrealized Promise of Kafantayeni*, with Ellen Wight, in Peter Hodgkinson and Kerry Ann Akers, *THE LIBRARY OF ESSAYS ON CAPITAL PUNISHMENT* (Ashgate 2013); *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 *Syracuse L. Rev.* 183 (2012); *International Standards on the Death Penalty*, 28 *Thomas M. Cooley L. Rev.* 103 (2011); *Human Rights Advocacy in United States Capital Cases*, in *The Contemporary Human Rights Movement in the United States* (2007); *The Global Debate on the Death Penalty*, in American Bar Association, *Human Rights*, Spring 2007; and *The Growing Influence of International Tribunals, Foreign Governments and Human Rights Perspectives in United States Death Penalty Cases*, in *Center for Capital Punishment Studies, Occasional Papers vol. 2* (August 2005). In 2003, the Government of Mexico awarded her the *Aguila Azteca* for legal assistance she has provided to Mexican nationals facing the death penalty in the United States. She received her B.A. in International Relations from Johns Hopkins University in 1986, and her J.D. from Harvard Law School in 1991.

Delphine Lourtau is the Research Director of *Death Penalty Worldwide*, which she joined in 2011. She has lectured widely on international law and the death penalty, and has been consulted by numerous media outlets for her expertise regarding the practical application of the death penalty in selected countries. Her concern for fundamental rights in the criminal justice process was cemented by early experiences at the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and capital criminal defense work. She has also practiced as a civil rights lawyer in the United States, representing victims of police misconduct in the war on drugs. Following her graduation from McGill University in Montreal with degrees in common law and civil law, she clerked for Chief Justice Beverley McLachlin of the Supreme Court of Canada, and completed an LLM at New York University School of Law.