**Observations of New Zealand on the Human Rights Committee’s draft General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life**

**5 October 2017**

1. New Zealand thanks the Committee for its work on General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life and appreciates the opportunity to submit comments on paragraph 55 of the draft.

2. New Zealand considers that the death penalty is contrary to article 7 of the Covenant under all circumstances, we regard the imposition of a death sentence or the use of the death penalty as *per se* running afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. We support the view of the Committee expressed in the draft General Comment that under Article 31(3)(b) of the Vienna Convention on the Law of Treaties that:

“subsequent practice establishing such agreements, may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances” … “… considerable progress has been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment”.

3. In this regard, New Zealand would like to draw the Committee’s attention to the Report of the United Nations High Commissioner for Human Rights on the High-level panel discussion on the question of the death penalty (A/HRC/36/27), in which paragraph 48 notes that:

“The emerging international consensus that the death penalty was a form of torture or other cruel, inhuman or degrading treatment or punishment was highlighted, as was the fact that a significant number of States already held that to be the case.”

5. We note also that Human Rights Council resolution A/HRC/36/17 (adopted on 29 September 2017) on ‘The question of the death penalty’ refers to the aforementioned report in preambular paragraph 17, which says:

*“Acknowledging* the report of the United Nations High Commissioner for Human Rights on the high-level panel discussion on the question of the death penalty, during which it was concluded that a significant number of States hold that the death penalty is a form of torture or other cruel, inhuman or degrading treatment or punishment”

4. For the Committee’s consideration we attach recent statements on the issue of the death penalty that may be relevant to paragraph 55 of the draft General Comment. The statements were delivered at the 33rd and 34th Human Rights Council sessions, either by New Zealand in a national capacity (annex 1) or jointly with other States (annex 2). The statements are available on the Human Rights Council extranet.

**Annex 1: New Zealand’s statement at the 34th session of the Human Rights Council High-level panel on the human rights violations related to the use of the death penalty particular with respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment**

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| Description: Description: Description: Description: C:\Users\amessent\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.Outlook\MN1HAVZZ\Brand NZ-no agency High Res.jpg | **34th session of the Human Rights Council****High-level panel on the human rights violations related to the use of the death penalty, in particular with respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment****Delivered by Chargé d’afffaires a.i. Jarrod Clyne** **1 March 2017** |

Mr President,

We recognise and welcome the emerging customary norm that considers the death penalty as *per se* running afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

In terms of physical pain and suffering: there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and ill-treatment in every case.

In addition, the imposition of a sentence of death inevitably and unavoidably causes severe mental pain and suffering, regardless of the length of time spent on death-row. Death row prisoners face constant degradation of the human spirit, unimaginable anxiety, and intense psychological suffering due to foreknowledge of their death at the hands of the State.

We anticipate that, in light of evolving standards, international human rights treaty bodies will in due course take the step of holding the death penalty to *per se* run afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

We note that the Committee against Torture has not yet has explicitly stated that it considers the imposition of capital punishment itself to be inconsistent with the Convention every instance. It has, however, indicated that the use of lethal injections should be reviewed due to its potential to cause severe pain and suffering; and the Committee has not yet considered a case regarding the death row phenomenon.

We hope the Human Rights Committee will, in the near future, state the obvious truth: that capital punishment has become an inhuman and degrading punishment *per se*; and hope also that draft General Comment 36 on the right to life will take an unambiguously abolitionist stance on the death penalty, and reflect the growing consensus that the death penalty is not a valid exception to the right to life. This approach is supported by Article 6(6) of the ICCPR, which provides that ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment’.

Sovereignty, culture, or religion cannot justify torture, and nor can they justify the use of the death penalty.

We would like to ask the panellists: considering the severe mental suffering caused by the imposition of the death penalty in every case, can the death penalty ever be regarded as compatible with international human rights law?

Thank you Mr President.

**Annex 2: Joint statements in the Human Rights Council that New Zealand has supported**

**Human Rights Council’s 33rd session**

**General debate item 3, 16 September 2016**

**Delivered by Permanent Representative of Namibia**

Mr. President,

This statement is made on behalf of a group of States. The list will be published on the extranet along with the full version of this statement.

We share a common objective, which is: to achieve a universal and comprehensive moratorium on execution of the death penalty with a view to universal abolition thereof. We remain strongly opposed to capital punishment in all circumstances and for all cases and we condemn the death penalty as a cruel, inhuman and degrading treatment or punishment.

By its very nature, the execution of the death penalty means that any miscarriage of justice or failure in its application cannot be reversed. No legal system is immune from error, nor is there any reliable evidence to support the argument that the death penalty is a deterrent to serious crime.

We are deeply concerned that the worldwide number of executions has, since 1989, reached a peak in 2015, and that several countries in recent years have resumed executions after long-standing moratoria.

This is indeed counter to the global trend towards abolition: the majority of States worldwide have now abolished the death penalty and more than two thirds observe a moratorium. This is also counter to a growing international standard which considers the imposition and use of the death penalty to be fundamentally incompatible with respect for human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

Mr President,

Punishment in the form of the death penalty often aggravates destructive behaviour and does not contribute constructively to a world where criminal justice systems are progressively moving from retribution to reform and rehabilitation. The death penalty is an inhumane, unjust and inefficient sentence, and no circumstances can be used as an excuse to retain it. We recall the Human Rights Council has deplored that the use of the death penalty leads to violations of the human rights of the persons facing the death penalty and of other affected persons.

We recognise and welcome the emerging customary norm that considers the death penalty as *per se* running afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. We have observedthe evolution of state practice and *opinio juris* in a manner that increasingly views the death penalty as a practice *per se* incompatible with the prohibition of torture and other ill-treatment. This norm is consistent with the pro-abolitionist spirit of the ICCPR, made clear by Article 6(6).

We consider that the death penalty is contrary to the prohibition of torture and cruel, inhuman or degrading treatment or punishment, in relation both to the method of execution and the combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death (the death row phenomenon).

The obligations flowing from the absolute prohibition of torture under international law require that states use all measures to forestall its occurrence.

Mr President,

We are strongly encouraged by the steady positive trend towards abolition of the death penalty worldwide and we commend States that have recently announced moratoriums and abolition through law reform processes.

We welcome recent regional developments on this topic, in particular the November 2015 adoption of General Comment No. 3 on the right to life (Article 4) under the African Charter on Human and Peoples’ Rights, para 22. We further look forward to the finalisation of the draft general comment 36 on the right to life by the Human Rights Committee and we hope it will reflect the growing consensus that the death penalty is not a valid exception to the right to life, and will take an unambiguously abolitionist stance on the death penalty.

Whilst we acknowledge that each State needs to follow its own abolition path; we consider that the imposition of *de facto* followed by *de jure* moratorium will assist in the phasing out of the death penalty in criminal justice systems where it is still applied and we encourage States to follow this path. We also encourage all States that are not yet party to the Second Optional Protocol to the ICCPR to consider acceding thereto.

Mr President,

We will steadfastly continue our efforts towards universal abolition of the death penalty; and we look forward to the March 2017 high-level panel in the Human Rights Council on the human rights violations related to the use of the death penalty, in particular with respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

Thank you Mr President.

**LIST OF SUPPORTERS OF JOINT-STATEMENT ON THE DEATH PENALTY AT THE HUMAN RIGHTS COUNCIL 33RD SESSION**

ANDORRA

ANGOLA

ARGENTINA

AUSTRALIA

AUSTRIA

BELGIUM

BENIN

BOSNIA AND HERZEGOVINA

BRAZIL

COLOMBIA

COSTA RICA

EAST TIMOR

ECUADOR

EL SALVADOR

FIJI

FRANCE

GABON

GEORGIA

GERMANY

GREECE

ITALY

LIECHTENSTEIN

LUXEMBOURG

MADAGASCAR

MEXICO

MONACO

MONGOLIA

MONTENEGRO

MOZAMBIQUE

NAMIBIA

NETHERLANDS

NEW ZEALAND

NORWAY

PANAMA

PORTUGAL

RWANDA

SAN MARINO

SPAIN

SWITZERLAND

UKRAINE

URUGUAY

**1 March 2017**

**Human Rights Council 34th session**

**Delivered by Permanent Representative of Brazil**

**High-level panel in the Human Rights Council on the human rights violations related to the use of the death penalty, in particular with respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment**

Mr. President,

This statement is made on behalf of a group of States, with the list to be published on the extranet.

We remain strongly opposed to capital punishment in all circumstances and for all cases and we condemn the death penalty as a cruel, inhuman and degrading punishment.

The majority of States worldwide have now abolished the death penalty and more than two thirds of all States observe a moratorium. We welcome this global trend towards a universal and comprehensive moratorium on the use of the death penalty with a view to universal abolition thereof.

The Human Rights Council has deplored the fact that the use of the death penalty leads to violations of the human rights of the persons facing the death penalty and of other affected persons.

Moreover, we have observedthe evolution of state practice according to which the death penalty is increasingly viewed as a practice *per se* incompatible with the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

The Human Rights Council has recognised that all methods of execution can inflict inordinate pain and suffering. Besides, the foreknowledge of death at the hands of the State must inevitably give rise to severe mental pain or suffering.

We consider that there is an emerging consensus that the death penalty is a cruel, inhuman or degrading punishment, in relation to the method of execution and the combination of circumstances that produce severe mental pain or suffering in prisoners under sentence of death.

We acknowledge and welcome the emerging consensus that the imposition and use of the death penalty is incompatible with respect for human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

We urge the international community to continue its efforts and initiatives that support death penalty abolition in different countries and regions, with the view of achieving the objective of universalization of the abolition of the death penalty.

Thank you Mr President

List of supporting countries:

Albania

Andorra

Argentina

Armenia

Australia

Austria

Belgium

Benin

Bosnia and Herzegovina

Bulgaria

Brazil

Chile

Colombia

Croatia

Cyprus

Czechia

Denmark

Ecuador

Estonia

Fiji

Finland

France

Georgia

Germany

Greece

Haiti

Honduras

Hungary

Iceland

Ireland

Italy

Latvia

Liechtenstein

Lithuania

Luxembourg

Macedonia (FYROM)

Malta

Mexico

Monaco

Mongolia

Montenegro

Namibia

Netherlands

New Zealand

Norway

Panama

Paraguay

Poland

Portugal

Romania

Rwanda

San Marino

Serbia

Slovakia

Slovenia

Spain

Sweden

Switzerland

Timor-Leste

Ukraine

Uruguay